Ehrlich Resurrected: Do *Nollan/ Dolan/ Koontz* And The First Amendment Apply To Public Art Ordinances. . . And Other Ordinances?

League of California Cities
City Attorneys' Spring Conference
May 8, 2019

Presented by:
Thomas B. Brown
Burke, Williams & Sorensen, LLP

INTRODUCTION:

- In 1996, *Ehrlich v. City of Culver City* ("*Ehrlich*"), rejected takings challenge to Culver City's "art in public places" ordinance.
- Specified % of construction costs on publicly-accessible art.
- Challenge not subject to *Nollan* and *Dolan* "heightened scrutiny."

INTRODUCTION (cont.)

- Cities have relied on *Ehrlich*, and have adopted similar ordinances.
- Building Industry Association--Bay Area ("BIABA") new challenge to City of Oakland's newly-enacted public art ordinance.
- BIABA resurrects *Nollan/Dolan* challenge, post *Lingle* and *Koontz*.

INTRODUCTION (cont.)

- BIABA also contends that art in public places ordinances constitute "compelled speech" in violation of First Amendment.
- District Court rejected claims; BIABA appealed to Ninth Circuit.
- This presentation addresses takings and First Amendment issues that could have widespread implications for cities.

BACKGROUND: *Ehrlich v. City of Culver City* and *Nollan/ Dolan* Heightened Scrutiny.

Ehrlich involved two requirements:

(1) $280,000 recreational mitigation fee to replace lost facilities

(2) a $33,200 "art in public places" fee -- commercial projects of $500,000 to provide art for project of 1% of value of building or pay equal amount to City art fund.

BACKGROUND: *Ehrlich v. City of Culver City* and *Nollan/ Dolan* Heightened Scrutiny. (cont.)

- Court: Heightened scrutiny applies to payment of money and recreational fee did **not** satisfy *Nollan/ Dolan* scrutiny.
- Public Art requirement "**is not development exaction under *Nollan–Dolan***"
  - Rather, ordinance constituted regulation on use, i.e. zoning
  - Devoted less than one page upholding art in public places.
- Same: *California Bldg. Indus. Assn. v. City of San Jose* (cert denied).

Oakland Relies On Ehrlich In Adopting "Public Art Requirements for Private Development" Ordinance.

Ordinance's recitals include:

1. "public art enhances quality of life for citizens, residents, visitors and businesses ...."

2. "legislative requirement to provide either art or an in lieu [that] generally applies to all developers ... is permissible land use regulation and valid exercise of City's police powers."

Oakland Relies On Ehrlich In Adopting "Public Art Requirements for Private Development" Ordinance. (cont.)

3. "City has broad authority, under general police power, to regulate development and use of real property … to promote public welfare."

4. "through inclusion of public art or payment of an in lieu fee, developers of benefitting land uses will address at least a portion of impact of their developments on aesthetics."

PRACTICE TIP: *California Bldg. Indus. Assn. v. City of San Jose*, holds that regulations need only advance community's general welfare, and need not mitigate project-specific impacts. Public art ordinances should recognize that standard. Nevertheless, some communities also adopt findings that explain how ordinance does mitigate project-related impacts.

Oakland Relies On Ehrlich In Adopting "Public Art Requirements for Private Development" Ordinance. (cont.)

- Ordinance requires developments subject to design review to use portion of development costs for acquisition/installation of accessible art on site or on right of way adjacent to site.

- (1) Nonresidential developments of 2,000 or more square feet must devote 1% of development costs to art, and (2) residential projects involving 20 or more dwellings must devote 0.5% of costs to art.

PRACTICE TIP: To avoid claim that ordinance authorizes third persons onto otherwise private property in violation of *Loretto v. Teleprompter Manhattan CATV Corp.*, art ordinances should be clear that art need only be visible from areas that owner otherwise keeps open to the public.

Oakland Relies On Ehrlich In Adopting "Public Art Requirements for Private Development" Ordinance. (Cont.)

- Developers may opt to pay an in-lieu fee.

- Ordinance includes appeal procedure, by which City Administrator may reduce or eliminate the contribution requirement.

PRACTICE TIP: Providing administrative appeal makes it difficult to state viable facial claim. *Home Builders Association of Northern California v. City of Napa*.

BIABA's New Challenge To Public Art Requirements: *Building Industry Association-Bay Area v. City of Oakland*.

- BIABA challenges Ordinance:
  - (1) Ordinance constitutes taking under "*Nollan/ Dolan/ Koontz*".
  - (2) Ordinance compels speech under *Wooley v. Maynard*.
- District Court granted City's motion to dismiss, and BIABA's appeal is pending before Ninth Circuit.

The City's Public Art Ordinance Does Not Constitute A Taking Or An Unconstitutional Condition Because It Does Not Impose An Exaction.

- As in *Ehrlich*, BIABA asserts *Nollan/ Dolan* taking.
- BIABA's theory that ordinance imposes an exaction:
  - Public art is exaction because developers must install and maintain City-approved art on publicly accessible properties.
  - "Textbook physical-occupation taking" of wall, courtyard, etc. per *Loretto v. Teleprompter Manhattan CATV Corp*.

The City's Public Art Ordinance Does Not Constitute A Taking Or An Unconstitutional Condition Because It Does Not Impose An Exaction. (cont.)

- NO! *Nollan/Dolan* only address **exactions**, i.e., demands for transfer of property interests or money in exchange for approvals.
- Art requirement is like landscaping, lighting and building materials zoning requirement for design/aesthetic reasons.
- Public art requirements require only that owners install and maintain art they own, for viewing from publicly-accessible areas.

Heightened Scrutiny Under *Nollan/Dolan /Koontz* Applies Only To Ad Hoc, Adjudicative Decisions, Not To Facial Claims To Legislation.

- Even if exaction, *Nollan/ Dolan/ Koontz* limited to discretionary, ad hoc, adjudicative land use decisions regarding individual properties. See, e.g., *Lingle v. Chevron U.S.A. Inc.*; *McClung v. City of Sumner*

- Do not apply to exactions imposed legislatively on all projects.

Heightened Scrutiny Under *Nollan/Dolan /Koontz* Applies Only To Ad Hoc, Adjudicative Decisions, Not To Facial Claims To Legislation. (cont.)

- Supreme Court in *San Remo Hotel L.P. v. City and County of San Francisco* explained:
  - City council that charged extortionate fees for all property development …would likely face widespread and well-financed opposition at next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.

Heightened Scrutiny Under *Nollan/Dolan/Koontz* Applies Only To Ad Hoc, Adjudicative Decisions, Not To Facial Claims To Legislation. (cont.)

- Majority and concurring opinions in *Ehrlich* make the same point:
  - [W]hen fee is ad hoc, enacted at time development was approved, there is greater likelihood that it is motivated by desire to extract maximum revenue from property owner seeking development permit, rather than on legislative policy of mitigating public impacts of development or reasonably distributing burdens of achieving legitimate government objectives.

Heightened Scrutiny Under *Nollan/Dolan /Koontz* Applies Only To Ad Hoc, Adjudicative Decisions, Not To Facial Claims To Legislation. (cont.)

- Supreme Court in *Penn Central* says same thing: In contrast to individualized, ad hoc exactions, when ordinance applies to "large number of parcels," there are "assurances against arbitrariness." *Penn Central Transportation Co. v. City of New York*.

Heightened Scrutiny Under *Nollan/Dolan /Koontz* Applies Only To Ad Hoc, Adjudicative Decisions, Not To Facial Claims To Legislation. (cont.)

- At hearing on City's motion to dismiss, Judge Chhabria noted that he had written ordinance that *Levin* invalidated and, tongue well in cheek, characterized ordinance as "well-drafted."

- Court decision:
  - rejected BIABA's reliance on *Levin v. City and County of San Francisco*, which applied doctrine in facial challenge.
  - Ordinance satisfied *Penn Central* regulatory takings standard.

Heightened Scrutiny Under *Nollan/Dolan /Koontz* Applies Only To Ad Hoc, Adjudicative Decisions, Not To Facial Claims To Legislation. (cont.)

- Corollary: Ninth Circuit has ruled that a plaintiff cannot present facial claim under the *Nollan/ Dolan/ Koontz*.

- *Garneau v. City of Seattle*: "*Dolan* applies only to as-applied takings challenges, not to facial takings challenges," because whether exaction is roughly proportionate to impacts of development necessarily requires consideration of particular facts regarding a project, and because a take by an exaction can only occur when the legislation is applied.

Heightened Scrutiny Under *Nollan/Dolan /Koontz* Applies Only To Ad Hoc, Adjudicative Decisions, Not To Facial Claims To Legislation. (cont.)

- *Mead v. City of Cotati*: facial takings challenge to inclusionary ordinance not permitted under *Nollan/ Dolan* ; whether ordinance violates Takings Clause requires fact-specific inquiry only made in as-applied challenge.

- *Tahoe-Sierra Pres. Council*: *Nollan/ Dolan* only applies to regulatory takings claims predicated on approval conditions requiring dedication of property to public use.

Heightened Scrutiny Under *Nollan/Dolan /Koontz* Applies Only To Ad Hoc, Adjudicative Decisions, Not To Facial Claims To Legislation. (cont.)

- *Nollan*, *Dolan* and *Koontz* themselves establish that fact-specific inquiry is necessary to determine nexus/rough proportionality.

- BIABA argues *Commercial Builders of N. Cal. v. City of Sacramento* allows facial *Nollan/Dolan* challenge to legislation but only assumed and many cases since *Commercial Builders* unequivocally hold *Nollan/ Dolan* does not allow facial challenges to legislation.

- Facial challenge to legislation not OK under *Nollan/ Dolan/ Koontz*.

BIABA's New Theory: Public Art Requirements Constitute Compelled Speech In Violation Of The First Amendment.

- BIABA: Because all art is protected, Ordinance compels speech.

- First step in analysis is whether Ordinance regulates conduct or speech at all

BIABA's New Theory: Public Art Requirements Constitute Compelled Speech In Violation Of The First Amendment. (cont.)

- Where ordinance only regulates conduct, protection does not apply unless conduct "inherently expressive."
- *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* ("*FAIR*"): Conduct inherently expressive if "intended to be communicative and ...would reasonably be understood to be communicative."
- E.g.: Burning American flag and wearing unauthorized military medal are expressive conduct within scope of First Amendment.

BIABA's New Theory: Public Art Requirements Constitute Compelled Speech In Violation Of The First Amendment. (cont.)

- Regulations on non-expressive conduct will not implicate First Amendment even if conduct was in part initiated or carried out by means of language, whether spoken, written, or printed.

- E.g. Congress can prohibit employers discriminating in hiring on basis of race, but employer taking down sign reading "White Applicants Only" does not mean law regulates speech rather than conduct.

BIABA's New Theory: Public Art Requirements Constitute Compelled Speech In Violation Of The First Amendment. (cont.)

- Ordinance requires developers to include art in accessible areas, or off-site, or pay in-lieu fee so City can choose/display art.
- Does not prohibit anyone from speaking about any issue.
- To extent Ordinance requires projects to include speech, in the form of art, it reserves choice solely to developer.
- Developing property is not inherently expressive

BIABA's New Theory: Public Art Requirements Constitute Compelled Speech In Violation Of The First Amendment. (cont.)

- *Committee for Responsible Regulation of Lake Tahoe v. Tahoe Regional Planning Agency* ("*CFRR*"): Facial challenge to design regulations, Court assumed no intent to convey message in project's architecture/design.
- As in *CFRR*, BIABA does not allege that development projects are inherently expressive, but functional in nature.
- Ordinance not regulate speech, and conduct is not expressive.

If BIABA's First Amendment Challenge Warrants Some First Amendment Scrutiny, The Relaxed Relational Basis Standard Applies.

- Court disagreed that Ordinance does not implicate First Amendment at all because requires developers to purchase and display art, protected by First Amendment
- Court applied deferential rational basis
- Ordinance meets rational basis because advances aesthetics and increasing property values and mitigates adverse effects.

If BIABA's First Amendment Challenge Warrants Some First Amendment Scrutiny, The Relaxed Relational Basis Standard Applies. (cont.)

- *Janus v. AFSCME* does not support BIABA.
- *Janus* was compelled subsidy case: non-union public employees objected to "agency fee" to union whose positions they opposed.
- Even if *Janus* used exacting scrutiny, it was explicitly based on conclusion that fee was "significant impingement" on First Amendment right not to subsidize political views.
- BIABA shows no such significant impingement with Ordinance.

The Oakland Ordinance Does Not Compel Speech.

- BIABA: Ordinance compels speech under *Wooley v. Maynard*.
- Ordinance's requirement compels neither speech nor expression.
- "Right protected by First Amendment includes right to speak freely and right to refrain from speaking at all." *Wooley*.
- Government may not select factual or ideological message and force person to speak or host it. *FAIR*; *Riley*.

The Oakland Ordinance Does Not Compel Speech. (cont.)

- Test "is whether individual forced to be instrument for fostering public adherence to ideological point of view he finds unacceptable." *Frudden v. Pilling*.
- Ordinance compels no message.
- Requires developers/owners to either provide art on or off project sites or pay in-lieu fee: no different from design and zoning standards. *Ehrlich*, *CFRR*.

The Oakland Ordinance Does Not Compel Speech. (cont.)

- *FAIR*: "compelled speech to which law schools point is plainly incidental to Solomon Amendment's regulation of conduct …" and "[c]ompelling law school that sends scheduling e-mails for other recruiters to send one for military recruiter is simply not same as forcing student to pledge allegiance, or forcing Jehovah's Witness to display motto 'Live Free or Die,' and **trivializes** freedom protected in *Board of Education v. Barnette* and *Wooley* to suggest it is."

- "Trivialize:" Not every law implicating speech violates Constitution.

The Oakland Ordinance Does Not Compel Speech. (cont.)

- Many laws implicate speech; only laws that force one to support, profess, or adhere to specific belief will violate compelled speech.
- BIABA: Ordinance compels speech by requiring owners to allow artists' work to occupy their property.
- Regulation does not compel speech by requiring owner to allow another person onto owner's property to express speech, because owner may disassociate from those views and "not compelled to affirm belief in prescribed position or view." *FAIR*, *citing PruneYard Shopping Center v. Robins.*

The Oakland Ordinance Does Not Compel Speech. (cont.)

- *FAIR* and *PruneYard*: No compelled speech even though owners and others held negative views of speech they hosted.
- Ordinance compels no speech at all, much less specific speech.
- Owners have power to post or spread own "anti-art" messages.

The Oakland Ordinance Does Not Compel Speech. (cont.)

- BIABA: Ordinance's in-lieu fee forces them to subsidize message.
- In-lieu fee is available as alternative which owners can select.
- Through in-lieu fee, owners need not provide any art.

The Oakland Ordinance Does Not Compel Speech. (cont.)

- Even if compulsory, under government speech doctrine, compelled subsidies permissible when used to fund government speech.
- Subsidies OK where government exercises "effective control" over speech. *Delano Farms Co. v. Cal. Table Grape Comm'n*.
- Under Ordinance City exercises not just "effective control," but complete control over in lieu fees and art it funds.

Conclusion

- Cities have relied on *Ehrlich* with respect to art in public places ordinances, and more broadly for all similar land use regulations.
- Such ordinances impose costs on developers that advance public's interests in community's aesthetics and safety.
- That alone neither "takes" property nor compels speech.