Tulsa Law Review

Volume 31 | Number 1

Fall 1995

Dolan v. City of Tigard: Judicial Panacea to the Takings Clause

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DOLAN v. CITY OF TIGARD: JUDICIAL PANACEA TO THE TAKINGS CLAUSE?

I. INTRODUCTION

Local governments, faced with shrinking budgets and a public opposed to higher taxes, have increasingly turned to developers for exactions to support development. These exactions have supplied the financial answer for many public services. Developers have generally viewed these exactions as a cost of doing business. However, developers also realize that the denial of a permit could mean the end of their project. The result of these exactions, apart from new streets, street lights, and parks, has been the shifting of the government's responsibility to provide for these things onto private developers.

Under previous law, the Takings Clause of the Fifth Amendment was basically a non-factor as virtually any land-use exaction could pass muster. In *Dolan v. City of Tigard*,[1] the United States Supreme Court announced a new federal takings standard. This new standard, which the Court termed "rough proportionality," requires that exactions must be in rough proportionality to the impact of the proposed development. Thus, the message of the *Dolan* decision is clear. From now on, exactions, particularly ones which require land dedication, must clearly solve the problems generated by the landowner upon whom they are levied. Additionally, these exactions must be in proportion to the impact the proposed development is likely to have. The Court's decision has ended the days when a city could determine that constructing a new golf course creates a need for low income housing, then condition the building permit on the developer contributing to the construction of such housing.

In addition to developing the "rough proportionality" test, the Court did something else in the process. The Court elevated the Takings Clause of the Fifth Amendment from the status of "poor relation" in the Bill of Rights.[2] As a result of this holding, property owners are now given the same measure of protection given under the First Amendment.

1. 114 S. Ct. 2309 (1994).
2. *Id.* at 2320.

II. REGULATORY TAKINGS LAW PRIOR *DOLAN*

Any discussion of what constitutes a taking begins with the Fifth Amendment to the United States Constitution.[3] The Federal government is bound by the Fifth Amendment and cannot take private property without paying just compensation for it. Although some have argued otherwise,[4] the Supreme Court has repeatedly held that the Fifth and Fourteenth Amendments prevent state governments from taking private property without paying just compensation as well.[5]

Problems arise, however, when one tries to determine whether certain government regulations constitute a taking. The Supreme Court first addressed this question early in this century in *Pennsylvania Coal v. Mahon.*[6] In that case Justice Holmes pronounced "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[7] The Court then, however, took a 56 year break from addressing the issue.

In 1978 the Court picked up where it left off 56 years earlier. In deciding *Penn Central Transp. Co. v. City of New York,*[8] the Court recognized that they had not yet developed a "set formula" to aid in determining what constituted a taking.[9] The Court then analyzed the several cases it had decided and constructed a three tiered test to determine whether a given regulation equaled a taking.[10] The *Penn Central* Court examined "[1] the economic impact of the regulation, . . . [2] the extent to which the regulation has interfered with distinct investment-backed expectations, . . . [and 3] the character of the governmental action."[11]

Two years later the Court developed another test, further refining the test developed in *Penn Central.* In *Agins v. City of Tiburon,*[12] the Court stated that a government regulation effects a taking when it

3. The Fifth Amendment provides that private property shall not be taken without just compensation. U.S. CONST. amend. V.

4. Generally, the Fifth Amendment has been applied to the States through the Fourteenth Amendment. Chicago Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 239 (1897).

5. DeSalvo v. Arkansas La. Gas Co., 239 F. Supp. 312, 316 (E.D. Ark. 1965); 20th Century Ins. Co. v. Garamendi, 878 P.2d 566, 614 (Cal. 1994); Mid-Way Cabinet Fixture Mfg. v. County of San Joaquin, 65 Cal. Rptr. 37, 40 (Cal. Ct. App. 1967).

6. 260 U.S. 393 (1922).

7. *Id.* at 415.

8. 438 U.S. 104 (1978).

9. *Id.* at 124.

10. *Id.*

11. *Id.*

12. 447 U.S. 255 (1980).

"does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land."[13]

Most of the cases following *Agins* applied or used only one of these two aforementioned tests. In doing so, these cases added to and further developed the takings doctrine. Prior to *Dolan*, the Supreme Court avoided developing a standard test for determining when a regulation equaled a taking. Rather, the Court usually decided these issues on a case by case basis.[14] The Court has stated:

> our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements.[15]

The rest of this section examines four areas in which the Court has established guidelines as to whether a given regulation equals a taking. These four types of regulatory takings can be classified as: (a) physical occupation; (b) noxious harm; (c) deprivation of economic use; and (d) development exactions.

A. *Physical Occupation or Use*

If a government makes or authorizes a permanent physical occupation of property, this occupation will be found to constitute a taking. This is so no matter how small the interference is and no matter how significant the government interest may be. The main case in this area is *Loretto v. Teleprompter Manhattan CATV Corp.*[16]

In *Loretto*, Jean Loretto purchased an apartment building.[17] The previous owner had given Teleprompter permission to install cables and cable boxes on the roof of the building.[18] Furthermore, a New York statute allowed cable companies to install cable equipment on buildings, provided they pay the landowner a one-time reasonable fee.[19] The legislature had set this fee at one dollar, unless the landowner could demonstrate greater damage.[20] Loretto brought a class

13. *Id.* at 260 (citation omitted).
14. Dolan v. City of Tigard, 854 P.2d 437, 441 n.7 (Or. 1993) (quoting Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992)).
15. Nolan v. California Coastal Comm'n, 483 U.S. 825, 834-35 (1987).
16. 458 U.S. 419 (1982).
17. *Id.* at 421.
18. *Id.*
19. *Id.* at 423.
20. *Id.* at 424.

action suit alleging the cable companies' actions were a trespass, and that the New York statute constituted a taking without just compensation.[21]

The Supreme Court held that a taking occurs when there is a permanent physical occupation authorized by the government.[22] This is so, the Court held, regardless of the public interest the occupation may serve.[23] The Court further held that Constitutional protection for private property rights cannot be made to depend on the size of the area permanently occupied.[24] Thus, any permanent, physical invasion of property, no matter how large or small, will give rise to a taking.[25]

B. *Total Deprivation of All Economically Viable Use of Land*

The Supreme Court has established a flat rule that a taking occurs when a regulation denies an owner of "all economically beneficial use of his land."[26] A recent case following this rule is *Lucas v. South Carolina Coastal Council.*[27]

Lucas paid close to one million dollars for two tracts of land on a barrier island in South Carolina.[28] At the time of the purchase a property owner was allowed to, and Lucas planned on, building houses on such lots.[29] South Carolina, in order to protect its coastline from erosion, enacted the Beachfront Management Act, which barred property owners in a critical area from building any structure.[30] The lots Lucas had purchased were located in a critical area, and he was therefore prevented from going forward with his construction plans.[31]

Justice Scalia held a total denial of all use of one's land is a taking even if the purpose of the regulation is to prevent a harm rather than confer a public benefit.[32] The Court then remanded the case to the state court to determine whether Lucas had indeed been deprived of all economically viable use of his land.[33]

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21. *Id.*
22. *Id.* at 426.
23. *Id.*
24. *Id.*
25. *Id.*
26. DANIEL R. MANDELKER, LAND USE LAW, § 2.07 (3d ed. 1993).
27. 112 S. Ct. 2886 (1992).
28. *Id.* at 2889.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 2899.
33. *Id.* at 2901-02.

C. *Prevention of Harm or Noxious Use*

A regulation rather than a taking is likely to occur when a government prevents property use which is harmful or noxious to others.[34] *Hadacheck v. Sebastian*[35] typifies such a "noxious use" determination. Hadacheck challenged the validity of a Los Angeles ordinance that made it unlawful to operate a brickyard or brick kiln within certain areas of the city.[36] Hadacheck's land, purchased before the ordinance was passed, was worth about $800,000 as a brickyard and about $60,000 when used for any other purpose.[37] When Hadacheck bought the land it was isolated outside of the Los Angeles city limits.[38]

The Supreme Court upheld the ordinance under the Fourteenth Amendment as a reasonable exercise of the police power.[39] In doing so the Court held that a city may, under its police power, prohibit certain land use if such prohibition promotes the health, safety, and general welfare of the public.[40] This police power was validly exercised even though the prohibition detrimentally affected the value of Hadacheck's land.[41] The Court agreed with the California Supreme Court that the Hadachecks could not avoid compliance with the ordinance because the property had not initially fallen within the city limits.[42] "To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community."[43]

D. *Development Exactions*

The most recent area of takings doctrine the Court has examined involves exactions.[44] Development exactions occur when a city demands, as a condition for receiving a building permit, that a developer

34. *See generally* Bruce W. Burton, *Regulatory Takings and the Shape of Things to Come: Harbingers of a Takings Clause Reconstellation*, 72 OR. L. REV. 603 (1993) (discussing the evolution of judicial interpretation of the Takings Clause).
35. 239 U.S. 394 (1915).
36. *Id.* at 396, 404.
37. *Id.* at 405.
38. *Id.*
39. *Id.* at 410-14.
40. *Id.* at 410-11.
41. *Id.* at 408.
42. *Id.* at 410.
43. *Id.*
44. For a complete overview of additional areas and cases the Court has decided concerning takings, see MANDELKER, *supra* note 26.

"give" something to the city or locality.[45] In most cases, the "gift" is a land dedication or a financial contribution, most commonly known as an impact or development fee.[46] However, municipalities sometimes require the landowner's gift consist of an agreement that limits the use of the landowner's land.[47]

Prior to *Dolan*, the leading case in this area was *Nollan v. California Coastal Comm'n.*[48] In *Nollan*, the land use regulation at issue prevented the Nollans from rebuilding a house on their beachfront property unless they first gave a public easement across the part of their property adjacent to the ocean.[49] The California Coastal Commission required the access dedication because the new house would block the view of the ocean from the street running in front of the Nollan's property.[50] Additionally, the Commission believed the house would prevent public beachgoers from walking along the beach while, in the process, it would increase the private landowner's use of the beachfront.[51] Finally, the Commission held that building the new house would block the public's view of the beach and prevent the public from realizing a stretch of coastline open to the public existed nearby.[52]

The Court held this condition constituted a taking of property.[53] In doing so the Court stated the taking of a permanent, public-access easement without compensation violates the Takings Clause.[54] The Court then decided if its above stated holding should change when the municipality demands an easement in exchange for a land-use permit.[55] The Court held conditioning the Nollans' building permit on their granting an easement would be lawful if doing so "substantially advance[s] legitimate state interests" and "does not 'den[y] an owner economically viable use of his land.'"[56] Thus the Court reaffirmed the

45. Nicholas V. Morosoff, Note, *"'Take' my Beach, Please!"*: Nollan v. California Coastal Comm'n *and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. REV. 823, 823 (1989).

46. *Id. See also* ALAN A. ALTSHULER & JOSE A. GOMEZ-IBANEZ, REGULATION FOR REVENUE 3 (1993).

47. *Id.*

48. 483 U.S. 825 (1987).

49. *Id.* at 828.

50. *Id.*

51. *Id.* at 829.

52. *Id.* at 828.

53. *Id.* at 841-42.

54. *Id.* at 831.

55. *Id.* at 834.

56. *Id.* (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (alteration in original).

two part test derived from *Agins v. City of Tiburon.*[57] The Court, however, then extended *Agins* and determined what standards are to be used in determining when a regulation substantially advances a legitimate state interest. The Court stated:

> our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, . . . not that 'the State 'could rationally have decided' that the measure adopted might achieve the State's objective.'[58]

This holding modified previous takings doctrine in that courts now had to apply a heightened standard of judicial review when considering whether government interests are advanced by a land use regulation. The Court did not state how closely the imposed condition should meet the state's objective because in *Nollan* the nexus between the exaction and the condition imposed did not meet the loosest standard.[59] Thus the Court left for a different case the issue of what the required "fit" between the condition and the burden required must be. That next case just happened to be *Dolan.*

III. STATEMENT OF THE CASE

A. *The Statement of the Facts*

In 1973, the State of Oregon passed a statute requiring cities to adopt extensive land use plans which complied with statewide land use goals.[60] The city of Tigard thereafter adopted a comprehensive

57. *Id.*

58. *Id.* at 835 n.3 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980) and Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981)).

59. *Id.* at 838.

60. OR. REV. STAT. §§ 197.005-197.860 (1991). The substance of section 197.005, entitled General Provisions-Legislative findings, is as follows:

> The Legislative Assembly finds that:
> (1) Uncoordinated use of lands within this state threaten the orderly development, the environment of this state and the health, safety, order, convenience, prosperity and welfare of the people of this state.
> (2) To promote coordinated administration of land uses consistent with comprehensive plans adopted throughout the state, it is necessary to establish a process for the review of state agency, city, county and special district land conservation and development plans for compliance with goals.
> (3) Except as otherwise provided in subsection (4) of this section, cities and counties should remain as the agencies to consider, promote and manage the local aspects of land conservation and development for the best interests of the people within their jurisdictions.
> (4) The promotion of coordinated statewide land conservation and development requires the creation of a statewide planning agency to prescribe planning goals and

land use plan.[61] This extensive plan was codified in Tigard's Community Development Code ("CDC").[62] The CDC set forth various restrictions and requirements for property owners whose property was located within the Central Business District ("CBD").[63] The CDC limited the amount of land which could be built upon to 85% of the total area of a given plot, thus requiring a landowner to keep 15% clear of all structures. This requirement limited total coverage of the site, including all buildings and paved parking, to 85 percent of the tract of land.[64] Furthermore, after a study showed the CBD had a traffic problem, the city decided to build a bike path in the hopes of alleviating some of the congestion.[65] This bike path was to designed to encourage the use of alternative means of transportation.[66] The

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objectives to be applied by state agencies, cities, counties and special districts throughout the state.

(5) City and county governments are responsible for the development of local comprehensive plans. The purpose of ORS 195.065 to 195.075 and 197.185 is to enhance coordination among cities, counties, and special districts to assure effectiveness and efficiency in the delivery of urban services required under those local comprehensive plans.

61. Dolan v. City of Tigard, 114 S. Ct. 2309, 2313 (1994). The two most important land use goals, for purposes of the *Dolan* decision are: Land Use Goal Number 5 and Land Use Goal Number 12. The purposes of goal number 5 are to conserve open space and protect natural and scenic resources. This goal defines "Open Space" as consisting of land

> used for agriculture or forest uses, and any land area that would if preserved and continued in its present use: (a) Conserve and enhance natural or scenic resources; (b) Protect air or streams or water supply; (c) *Promote conservation of soils, wetlands, beaches or tidal marshes*; (d) Conserve landscaped areas, such as public or private golf courses, that reduce air pollution and enhance the value of abutting or neighboring property; (e) Enhance the value to the public of abutting or neighboring parks, forests, wildlife preserves, nature reservations or sanctuaries or other open space; (f) Enhance recreation opportunities; (g) Preserve historic sites; (h) Promote orderly urban development.

OR. ADMIN R. 660-15-000 (5) (1975).

Interestingly, subsection B, entitled Implementation, of this goal provides that: "(7) Local, regional, and state governments should be encouraged to investigate *and utilize* fee acquisition, easements, cluster developments, preferential assessment, development rights acquisition and similar techniques to implement this goal." *Id.* (emphasis added). The city of Tigard did not attempt to use any of the methods listed that involved compensating the Dolan's in some manner. Land Use Goal number 12 involves transportation and was the stimulus for the city of Tigard's bicycle/pedestrian pathway. The goal is set out as follows:

> The purpose of Goal 12 is: [t]o provide and encourage a safe, convenient and economic transportation system. A transportation plan shall (1) consider all modes of transportation including mass transit, air, water, pipeline, rail, highway, bicycle and pedestrian; (2) be based upon an inventory of local, regional and state transportation needs . . . (9) conform with local and regional comprehensive land use plans.

OR. ADMIN. R. 660-15-000 (12) (1975).

62. *Dolan*, 114 S. Ct. at 2313.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

CDC stated the developers were going to help construct these bike paths by requiring them to dedicate the land needed for the paths.[67]

Additionally, Tigard had adopted a Master Drainage Plan.[68] This plan indicated that flooding often occurred along Fanno Creek, near the Dolans' property.[69] Concerned that further development would increase the amount of water runoff, the city included a number of recommendations designed to combat the runoff in the Master Drainage Plan.[70] Among these recommendations was one ensuring the floodplain surrounding the development remain as greenways free from any sort of development.[71]

John and Florence Dolan owned 1.67 acres of land located within the CBD[72] of Tigard,[73] on which they owned and operated a plumbing and electrical supply store.[74] The Dolans applied to the city of Tigard

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67. CDC, § 18.86.040.A.1.b provides: "The development shall facilitate pedestrian/bicycle circulation if the site is located on a street with designated bikepaths or adjacent to a designated greenway/open space/park . . . ." *Id., reprinted in Dolan*, 114 S. Ct. at 2313 n.1. Furthermore, § 18.120.180.A.8 provides:

> [w]here landfill and/or development is allowed within and adjacent to the 100-year floodplain, the city shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.

Id., reprinted in Dolan, 114 S. Ct. at 2314.

68. *Dolan*, 114 S. Ct. at 2313.

69. *Id.*

> The major drainage problem in Tigard is the storm water runoff throughout the area. This problem results from the increase in impervious land surfaces that can alter the quantity and quality of runoff from the land. Much of the deficiencies that currently exist within the Tigard area are due to the lack of adequate storm drainage facilities in many areas and stream bank overflow along the Fanno Creek Basin.

City of Tigard's Comprehensive Storm Drainage and Wastewater Management, § I-192(III), *reprinted in* Brief for the Respondent, Appendix A at 1a-2a , Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (No. 93-518).

70. *Id.*

> For example it is stated that numerous bridges, i.e. the Tigard Street and North Dakota Street bridges, are currently below flood elevation and these bridges substantially decrease the flow of water along Fanno Creek. It is suggested in the study that raising the bridge deck would alleviate much requirements and costs for development of an effective drainage management system.

City of Tigard's Comprehensive Storm Drainage and Wastewater Management, § I-192(III), *reprinted in* Brief for the Respondent, Appendix A at 2a, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (No. 93-518).

71. *Dolan*, 114 S. Ct. at 2313.

72. Permitted uses of property within the Central Business District include eating and drinking establishments, community recreation and various other uses. CDC, § 18.66.030, *reprinted in* Brief for the Respondent, Appendix B at 12b-14b, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (No. 93-518). The Dolan's retail store qualified as a "permitted" use within the Central Business District. Dolan v. City of Tigard, 854 P.2d 437, 438 (Or. 1993).

73. *Id.* Mr. Dolan has since died and his widow carried the case to the Supreme Court.

74. *Id.*

for a permit to remove their existing 9,700 square foot store.[75] In its place they planned to build a new 17,600 square foot store and to expand their parking lot.[76] The Dolans eventually planned to provide even more parking space as well as build a strip mall on their land.[77] The city conditionally granted the Dolans' application provided they surrender part of their land located in the floodplain for future development of the storm drainage system.[78] In addition to the floodplain grant, Tigard further required the Dolans to dedicate a 15 foot strip of land to be used for the bike path.[79] Thus, in order for the Dolans to obtain their building permit they were required to give Tigard 7000 square feet of land or roughly 10% of their property.[80]

B. *Procedure and Lower Court Decisions*

The Dolans requested a variance from these conditions, which the City Planning Commission denied.[81] In denying the Dolans' variance request, the Planning Commission found the required relationship existed between the condition imposed by the city and the impact of the Dolans' proposed development.[82] In supporting the bicycle path dedication, the Commission stated that employers and customers of the Dolans' store might use the bike path.[83] The Commission then stated that use of the bike path by patrons of the Dolans could offset some of the increased traffic created by the larger store.[84] Furthermore, the Commission found the condition requiring the Dolans to dedicate part of their land to be reasonably related to the impact their increased development would have on the surrounding area.[85]

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75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 439.

79. *Id.*

80. *Id.* at 439 n.3.:

> [The c]ity's decision includes the following relevant conditions: '1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] . . . and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area.'

Id.

81. *Id.* at 439.

82. *Id.*

83. Dolan v. City of Tigard, 832 P.2d 853, 855 (Or. Ct. App. 1992).

84. *Id.*

85. *Id.*

The Dolans appealed the decision of the Planning Commission to the Land Use Board of Appeals, (LUBA).[86] In upholding the dedication requirements, LUBA also found Tigard's demands to be "reasonably related" to the impacts the new development would create.[87] In dealing with the bike path, the Board again found a "reasonable relationship between reducing the increased traffic caused by the development and implementing the bicycle path as an alternative means of transportation."[88]

Likewise, the Oregon Court of Appeals affirmed LUBA's decision. In doing so, they rejected the Dolans' contention the conditions be examined using the more stringent "essential nexus" test rather than the lower threshold "reasonable relationship" test.[89]

On review, the Oregon Supreme Court affirmed the decisions of LUBA and the Oregon Court of Appeals.[90] The Oregon Supreme Court stated the city's dedication requirements were not a taking because the impacts from the Dolans' new, larger store were reasonably related to the requirement that the Dolans dedicate their land for a bicycle path and greenway.[91] The court rejected the Dolans' contention that the "cause and effect" relationship or "essential nexus" of *Nollan* required it to use heightened scrutiny subject in evaluating the city's decision.[92]

V. THE MAJORITY OPINION

A. *Dolan Decision Limited to Exactions, not Regulation*

Justice Rehnquist, delivering the opinion for a 5-4 majority, began the *Dolan* opinion much the same way the *Nollan* opinion was written.[93] Framing the dilemma before the Court, Rehnquist began by making an argument for the Dolans: "[H]ad the city simply required petitioner to dedicate a strip of land along Fanno Creek for

86. *Dolan*, 114 S. Ct. at 2315.
87. *Id.*
88. *Id.*
89. Dolan v. City of Tigard, 832 P.2d 853, 855 (Or. Ct. App. 1994).
90. Dolan v. City of Tigard, 854 P.2d 437, 444 (Or. 1993).
91. *Id.* at 443.
92. *Id.*
93. *Dolan*, 114 S. Ct. at 2316. Rehnquist begins the opinion by firmly asserting this case is rooted in the Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment. Justice Stevens, in dissent, argues that the case is actually grounded in the substantive Due Process clause. *Id.* at 2327 (Stevens, J., dissenting). This is an important distinction because the "essential nexus" under Justice Stevens' approach has a much lower threshold than the newly created "rough proportionality" standard Rehnquist develops.

public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred."[94] "Such public access would deprive petitioner of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[95]

Rehnquist then proffered an argument for the city of Tigard.[96] He stated land use planning had been upheld as constitutional,[97] that government could hardly function if it had to pay for every diminution in the value of property,[98] and that the regulation of land use would not be a taking if it "substantially advance[d] legitimate state interests" and did not "den[y] an owner economically viable use of his land."[99]

The majority rejected this analysis as the cases on which it was based were regulatory cases and *Dolan* was an exaction case. These regulatory cases differed from *Dolan*, the Court stated, for two reasons. First, the regulatory opinions were government decisions which classified large areas of the city, whereas here Tigard had made an adjudicative decision which conditioned approval of the Dolan's building permit on a single tract of land.[100] Second, the conditions demanded by Tigard were not simply land-use restrictions, but a requirement that the Dolans deed part of their land to the city.[101]

The ability of a city to zone or regulate land is not threatened by the *Dolan* decision.[102] The Court merely eliminated an exaction which catered to the wishes of the city rather than address the problems created by the proposed development.[103] The Court's limitation of its opinion to exactions becomes more apparent when the majority, in dicta, states that land use regulation generally did not trouble them.[104] What troubled the majority was not the regulation but the requirement that the Dolans deed a portion of their property to the city. Had Tigard merely demanded the Dolans not build in the

94. *Dolan*, 114 S. Ct. at 2316 (quoting Nollan v. California Coastal Comm'n, 438 U.S. 825, 831 (1987)).
95. *Id.* (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).
96. *Id.*
97. *Id.* (citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).
98. *Id.* (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).
99. *Id.* (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)) (alteration in original).
100. *Id.*
101. *Id.*
102. Eric Damian Kelly, *Supreme Court Strikes Middle Ground on Exactions Test*, LAND USE L. & ZONING DIG., July 1994, at 6,7.
103. *Id.*
104. *Dolan*, 114 S. Ct. at 2317-18, 2320.

floodplain, the majority would not have struck the regulation. However, the Court felt Tigard's demands for the Dolans' property along Fanno Creek went too far.[105]

Additional elements limiting the Court's holding to land dedication exaction cases are found in the majority opinion. Many of the state court decisions used by the majority are not zoning cases, rather they are land dedication cases.[106] Furthermore, the majority is consistent with its terminology, always referring to the "proposed dedication" or "proposed exaction" rather than the "proposed regulation."[107]

B. *The Dolan Two Step Test*

1. Essential Nexus

In evaluating the Dolans' claim, the majority developed a test to determine whether the exaction in question amounted to an uncompensated taking. Relying on the test developed in *Nollan*, the majority began by stating the first part of the test involved determining "whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city."[108] Thus, in order to satisfy the first part of the test two elements must be present. There must be a legitimate state interest and there must be an essential nexus between that legitimate state interest and the permit condition exacted by the city.

2. "Rough Proportionality"

If the Court finds a nexus exists, it "must then decide the required degree of connection between the exactions and the projected impact of the proposed development."[109] This constitutes the second part of the *Dolan* test. The Court did not have to answer this question in *Nollan* because the Court held the "connection" in that case "did not

105. "The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control." "The difference to petitioner . . . is the loss of her ability to exclude others . . . [and] [a]s we have noted, this right to exclude others is 'one of the essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* (quoting Kaiser Aetna v. United States, 444 U.S. 167, 176 (1979)).

106. David Callies, *Nexus Redux on Required Land Dedications*, LAND USE L. & ZONING DIG., July 1994, at 3,4.

107. *Id.*; *see also Dolan*, 114 S. Ct. 2309.

108. *Dolan*, 114 S. Ct at 2317. Some have commented that the *Dolan* test can be seen as a three part test. Callies, *supra* note 106.

109. *Dolan*, 114 S. Ct. at 2317.

meet even the loosest standard."[110] As the situation in *Dolan* was different, the Court had to break new ground and develop a standard by which courts could measure the connection required. Since the Court was charting new waters, they deferred to state court decisions in this area because they had been addressing this issue longer than the Supreme Court had.[111]

Some states utilize a relaxed standard for the connection needed between the required dedication and the planned development.[112] The majority quickly disposed of this standard claiming it would not sufficiently protect the Dolans' right to be compensated if their property was unjustly taken.[113]

Other state courts had adopted a strict standard, called the "specific and uniquely attributable" test.[114] This test required the local government demonstrate that its requested exaction was proportional to the need created by the development.[115] If the exaction was not proportional it then "[became] a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations."[116] The majority did not think the Constitution "require[d] such exacting scrutiny."[117]

Finally, the majority settled on a standard. The majority selected a middle ground approach, adopted by many state courts, which required a "municipality to show a reasonable relationship between the required dedication and the impact the proposed development creates."[118] While this test had been adopted in many jurisdictions, and is referred by various names, "general agreement exists among the courts that the dedication should have some reasonable relationship

110. *Id.* (citing Nollan v. California Coastal Comm'n, 438 U.S. 825, 838 (1987)).

111. *Id.* at 2318.

112. *Id.* (citing Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964); Jenad Inc, v. Scarsdale, 218 N.E.2d 673 (N.Y. 1966)).

113. *Id.* at 2319.

114. *Id.* (quoting Pioneer Trust & Savings Bank v. Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961)).

115. *Id.*

116. *Id.* (quoting Pioneer Trust & Savings Bank v. Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961)).

117. *Id.*

118. *Id.* The majority cites Simpson v. North Platte, 292 N.W.2d 297 (Neb. 1980), as a representative opinion. That court stated: "The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit." *Simpson*, 292 N.W.2d at 301.

to the needs created by the [development]."[119] The majority decided that this test was the most constitutional option.[120]

The majority did not adopt the test verbatim from the state court decisions. Deeming the term "reasonable relationship" too similar to the term "rational basis", the majority renamed the test, instead calling it the "rough proportionality" test.[121] The majority felt this term best expressed what they felt the Fifth Amendment required.[122] The test developed by the majority does not require pin-point precision; however, the municipality must attempt to determine on a case-by-case basis the required land dedication is related to the impact of the planned development.[123]

C. *Shifting the Burden of Proof*

In holding the city must make some sort of individual determination that the required land dedication is related to the impact of the planned development, the majority shifted the burden of justifying the dedication to the city.[124] In his dissent Justice Stevens argued, and the majority admitted, when zoning regulations are scrutinized, the burden of justifying the regulations rests on the challenging party.[125] Additionally, Justice Stevens argued, zoning regulations are strongly presumed to be valid under the Constitution.[126]

The majority distinguished *Dolan* from a zoning regulation case. Here, Tigard demanded from the Dolans part of their land as a condition of using the rest of the parcel. In such a case, it is not Dolan who bears the burden of proving a lack of relationship between the required conditions and the effect of planned development; rather, the city of Tigard must quantify the connection between the required exactions and the effect of the planned development.[127]

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119. *Dolan*, 114 S. Ct. at 2319 (quoting Call v. West Jordan, 606 P.2d 217 (Utah 1979)). *See, e.g.*, Jordan v. Menomonee Falls, 137 N.W.2d 442 (Wis. 1965); Collis v. Bloomington, 246 N.W.2d 19 (Minn. 1976); College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984). *See generally* Morosoff, *supra* note 45; *See also* Parks v. Watson, 716 F.2d 646 (9th Cir. 1983).

120. *Dolan*, 114 S. Ct. at 2319.

121. *Id.* The significance of renaming the test was alluded to earlier in footnote one, *supra*. Under the Equal Protection/ substantive due process clause the test utilized is the rational basis test. This test involves a minimal level of scrutiny in determining whether there is the required relationship between the dedication and the needs created by the development.

122. *Id.*

123. *Id.* at 2319-20.

124. *Id.* at 2320 n.8.

125. *Id.*

126. *Id.* at 2325 (Stevens, J., dissenting).

127. *Id.* (Stevens, J., dissenting).

VI. THE DECISION

In the *Dolan* decision, the majority held the city of Tigard had not met its burden of proving that the connection between the exactions demanded and the effect of planned development were roughly proportional.[128]

The majority had little problem determining there were legitimate state interests involved in this case: "[t]he prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld."[129]

Likewise, the majority easily found the required nexus between Tigard's desire to prevent flooding near the Dolans' property and Tigard's requirement that the Dolans keep the floodplain free from development.[130] The Dolans planned to increase the size of their store and parking lot, in the process enlarging the amount of impervious surfaces on the property.[131] This increase of impervious surfaces would lead to less absorption by the surrounding floodplain and an increase in the amount of runoff which would enter Fanno Creek.[132] The majority also found the required nexus between Tigard's attempt to lessen traffic and their providing the bike path as an alternative to automobile transportation: "[i]n theory, a pedestrian/bicycle pathway provides a useful alterative means of transportation for workers and shoppers."[133]

It was when the majority applied the rough proportionality test the city of Tigard failed to meet its burden of proof. The majority axiomatically accepted the contention that the increased amount of impervious surfaces created by the new development would increase the amount storm-water flow from the Dolan's property.[134] Additionally, the majority agreed keeping the floodplain clear and free of development would probably limit the increased strains created by the new development.[135] However, the city of Tigard not only wanted to prevent development in the floodplain, it wanted the Dolans to give the city part of their land.[136] "The city has never said why a public

128. *Id.* at 2321.
129. *Id.* at 2317-18.
130. *Id.* at 2318.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 2320.
135. *Id.*
136. *Id.*

greenway, as opposed to a private one, was required in the interest of flood control . . . [t]he difference to petitioner . . . is the loss of her ability to exclude others. . . . [T]his right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[137] The majority did not find a satisfactory connection between the public rambling through the Dolans' floodplain on a bike path and Tigard's desire to reduce flooding along Fanno Creek.[138] Additionally, the majority held Tigard had failed to offer any proof of the need for such a dedication.[139]

As for the bike pathway, the majority agreed with the city's findings that the larger store the Dolans planned to build would increase traffic on the streets surrounding the store.[140] But the majority held Tigard did not prove that the increased traffic created by the Dolans' new store was reasonably related to its requirement that the Dolans give it part of their land for the construction of the bike path.[141] In a mere difference of semantics, Tigard declared the bike path "could" reduce the amount of traffic, not that the pathway "would" reduce some of the traffic.[142] The majority emphasized again that no precise formula is required.[143] However, the city needed to bolster its findings in support of the bicycle pathway dedication beyond merely stating that some of the traffic "could" be alleviated.[144] Thus, the Court commended the city's goals as "laudable", but stated that "there are outer limits to how this may be done."[145]

VII. THE DISSENTS

The decision in *Dolan v. City of Tigard* was five to four. Justice Stevens wrote a detailed dissent in which Justices Blackmun and Ginsburg joined. Justice Souter filed his own separate dissent. Justice Stevens opposed the majority opinion and insisted upon reading his dissenting opinion.[146] As most Supreme Court decisions are not read from the bench, Stevens' actions underscore the importance of this

137. *Id.* (quoting Kaiser Aetna v. United States, 444 U.S. 167, 176 (1979)).
138. *Id.*
139. *Id.* at 2320-21.
140. *Id.* at 2321.
141. *Id.*
142. *Id.* at 2321-22.
143. *Id.* at 2322.
144. *Id.*
145. *Id.*
146. Michael Berger, *Not Always Right to Try to Get As Much As You Can*, LAND USE L. & ZONING DIG., July 1994, at 4.

decision.[147] Justice Stevens began by criticizing the majority's use of state court decisions. Stevens was correct in his assertion that none of the state cases cited by the majority utilized the rough proportionality standard.[148] However, the majority did not consult the state courts for their application or opinion on the "rough proportionality" test. Rather, the majority had a very narrow focus in its use of the state court decisions. The majority consulted the state court decisions only to help determine what the proper relationship should be between the city's permit condition and the projected impact of petitioner's proposed development.

Stevens next attacked the Court's narrow focus on one strand in the property owner's bundle of rights: the power to exclude. Stevens asserted that restricting one's right to exclude others "[does] not alone constitute a taking, and [does] not do so in any event unless they unreasonably impair the value or use of the property."[149] As the majority pointed out, however, Tigard desired more than to merely restrict the Dolans' right to exclude. The city wanted to eradicate the Dolans' right to exclude others by demanding an easement across the Dolans' property.[150] Thus, the Dolans would lose their rights to regulate the time and manner in which the public entered their property.[151]

147. *Id.*

148. *Dolan,* 114 S. Ct. at 2323 (Stevens, J., dissenting). Stevens is also correct in a number of other assertions involving the state court decisions used by the majority. He is correct in asserting that "[i]n only one case upholding a land use regulation did the losing property owner petition the Court for certiorari" and only four of the twelve opinions mention the Federal Constitution. *Id.* Stevens correctly asserts that "it is quite obvious that neither the courts nor the litigants imagined they might be participating in the development of a new rule of federal law." *Id.* Additionally, Stevens is correct in asserting that the state court decisions are "willing [t]o consider what the property owner gains from the exchange in question." *Id.* at 2324. Likewise, Stevens correctly asserts that the state courts required that the entire parcel be given controlling effect and "the courts uniformly examined the character of the entire economic transaction." *Id.* And "[n]one of the decisions identified the surrender of the fee owner's power to exclude as having any special significance." *Id.*

The majority was not looking at the state court decisions to answer the questions or points asserted by Justice Stevens. The majority was merely consulting state court decisions to determine the necessary relationship between the dedication and the needs created by the development. With that narrow focus in mind, the majority held that "[d]espite any semantical differences, general agreement exists among the courts 'that the dedication should have some reasonable relationship to the needs created by the development.'" *Id.* at 2319 (quoting Call v. West Jordan, 606 P.2d 217, 220 (Utah 1929) (alteration in original). Thus the state court decisions adequately provided an answer to the narrow question that was posed by the majority.

149. *Id.* at 2325 (Stevens, J., dissenting) (quoting PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980)).

150. *Id.* at 2321.

151. *Id.*

Hence, "[h]er right to exclude would not be regulated, it would be eviscerated."[152]

Additionally, Stevens claimed the burden of proof should not be shifted to the city, particularly because development exactions have traditionally enjoyed a presumption of being constitutional.[153] The majority countered by stating if a city calls its exaction or proposal a "business regulation," it can still be challenged if it violates the Constitution.[154] The Court had previously struck down other statutes violating other provisions of the Bill of Rights.[155] The Court then gave the Takings Clause added stature by declaring: "[w]e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."[156] Further, the majority agreed one challenging a zoning *regulation* bears the burden of proving "that it constitutes an arbitrary regulation of property."[157] As the majority pointed out, however, in this situation the city bore the burden because they did not want to regulate land, rather they demanded that the Dolans give it part of their land as a condition of using the rest.[158]

Stevens accused the Court of making "a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof" on land use planners.[159] Under this new approach, the Court abandoned its traditional presumptions and held that it is the city who must now prove each individual condition it seeks from the developer is constitutional and meets the new "proportionality requirement" as set out in the majority opinion.[160] In Stevens' view, uncertainty dominates the determinations about the

152. *Id.*
153. *Id.* at 2325 (Stevens, J., dissenting).
154. *Id.* at 2320.
155. *Id.* The Court has "held that a statute authorizing a warrantless search of business premises in order to detect OSHA violations violated the Fourth Amendment." Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). Additionally, the Court also "held that an order of the New York Public Service Commission, designed to cut down the use of electricity because of a fuel shortage, violated the First Amendment insofar as it prohibited advertising by a utility company to promote the use of electricity." Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980).
156. *Dolan*, 114 S. Ct. at 2320.
157. *Id.* at 2320 n.8.
158. *Id.*
159. *Id.* at 2326 (Stevens, J., dissenting).
160. *Dolan*, 114 S. Ct. at 2323. This "individualized determination" is "[i]n addition to [first] showing a rational nexus to a public purpose that would justify an outright denial of the permit." "[T]he city must also demonstrate 'rough proportionality' between the harm caused by the new land use and the benefit obtained by the condition." *Id.*

effects of development projects on the environment.[161] "When there is doubt concerning the magnitude of those impacts, the public interest . . . must outweigh the private interest of the commercial entrepreneur." [162]

Justice Souter dissented separately. Souter stated that *Dolan* was not the appropriate case to take the law beyond the point of *Nollan*.[163] Souter stated this case required the same inquiry that *Nollan* did, and that the Court needed to evaluate whether there was a reasonable relationship between Tigard's land dedication requirements and the city's legitimate desire to combat the negative impacts the Dolan's development would create.[164] Souter stated if the conditions failed to pass under the *Nollan* test, "it is not because of [a] lack of proportionality between [the] permit condition[s] and adverse effects. [It is] because of a lack of any rational connection at all between exaction of a public recreational area and the governmental interest in providing for the effect of increased [storm]water runoff. That is merely an application of *Nollan's* nexus analysis."[165]

VIII. IMPLICATIONS OF THE *DOLAN* DECISION

The impact of the *Dolan* decision will become clearer as more and more cases are decided using the "rough proportionality" test. Because the Court did not provide a takings formula that has mathematical precision, future takings issues will be decided on a case by case basis. The *Dolan* decision will have far reaching effects on how municipalities impose conditions on development approvals. Because the standard of "rough proportionality" is a new rule of law, it must be applied in all states to conditional approvals of development, regardless of the state's determination of what degree of proportionality is required between the conditions demanded by the city and the proposed impacts of the development.[166] Already a California court has

161. *Id.* at 2329 (Stevens, J., dissenting).

162. *Id.* (Stevens, J., dissenting). Additionally, Stevens suggested that "if the government can demonstrate that the conditions it has imposed in a land-use permit are rational, impartial and conducive to fulfilling the aims of a valid land-use plan, a strong presumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action's constitutionality." *Id.* at 2329-30. (Stevens, J., dissenting).

163. *Id.* at 2331 (Souter, J., dissenting).

164. *Id.* at 2330 (Souter, J., dissenting).

165. *Id.* (Souter, J., dissenting).

166. Terry D. Morgan, *Exactions as Takings Tactics for Dealing with Dolan,* LAND USE L. & ZONING DIG., September 1994, at 3, 5.

reconsidered a decision which upheld a condition that a condominium developer pay close to $300,000 for public recreation and some $40,000 more for public art, based on the holding of *Dolan*.[167]

Some things, however, are clear from the decision. Municipalities must now impose exactions which are designed to address and alleviate the problems or concerns created by the proposed development. Further, these exactions must be proportional. A municipality can no longer demand too much from a developer and hope to get away with it. Municipalities will now have to re-examine their statutory procedure to make sure they are in line with the new procedure as set out in the *Dolan* decision.[168] Municipalities may be faced with more developers who will challenge an exaction they feel is overly burdensome.[169] Faced with the cost of litigation or, in the alternative, providing the exacted condition themselves, municipalities may abandon worthwhile projects.[170]

By assigning the burden of proof to cities in "adjudicative decisions involving development exactions," the Court's decision creates many questions.[171] How far must a city go to satisfy its burden of proof?[172] Based upon the *Dolan* decision, there now needs to be some minimal attempt by the municipality to establish the condition imposed by it will address the impacts the development will create.[173] Thus, it will be to the city's advantage to make their case outside of a courtroom and in a "quasi-judicial proceeding."[174] In order to avoid the fate of Tigard, many municipalities may impose the condition they feel is the least burdensome, or one which the developer will most likely agree to.[175]

IX. CONCLUSION

The *Dolan* decision will have a profound impact on land-use planning in many municipalities throughout the country. It imposes greater discipline on government decisions affecting private property and signifies significant upgrading in the status of property rights. The

167. Hensler v. City of Glendale, 876 P.2d 1043 (Cal. 1994).
168. Terry D. Morgan, *Exactions as Takings Tactics for Dealing with Dolan*, LAND USE L. & ZONING DIG., September 1994, at 3, 5.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 3.
175. *Id.*

Dolan decision will foster more sophisticated land-use planning when a municipality is imposing exaction as conditions for development approval. How communities will deal with the *Dolan* new takings standard in their planning and regulatory efforts promises to be as intriguing as how state and federal courts apply the standard in what is likely to be an increasing number of land use cases.

Linas Grikis