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Takings - Permits Conditioned on Property Dedication - Dolan v. City of Tigard

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Casenotes

TAKINGS—Permits Conditioned on Property Dedication. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

In 1973, the State of Oregon passed a land use management program requiring its cities to adopt comprehensive plans that comply with the State's planning objectives.¹ The objectives included reduction of flooding by implementing building restrictions in floodplain areas, and development of safe and convenient transportation systems in urban areas.² In response, the City of Tigard adopted a comprehensive land-use plan, that was codified in its Community Development Code. The code states:

Where land form alterations and/or development are allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area within and adjacent to the floodplain in accordance with the comprehensive plan. This area shall include portions of a suitable elevation for the construction of a pedestrian/bicycle pathway plan.³

The purpose of this section is to reduce flooding along Fanno Creek, and to reduce traffic congestion in the central business district caused by commercial development near the floodplain.⁴ The plan requires landowners along the creek to "dedicate the necessary right of way when they seek approval of land use permits."⁵

Florence Dolan owns a 1.67-acre commercial lot located within the central business district of the City of Tigard.⁶ The property abuts Fanno Creek, which runs along its western border. Part of the property lies

1. ORE. REV. STAT. §§ 197.005-197.860 (1973).

2. *Id.*

3. TIGARD, OR., COMMUNITY DEVELOPMENT CODE § 18.120.180 (1989).

4. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2313 (1994).

5. Brief for Petitioner at 6, *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (No. 93-518) [hereinafter Brief for Petitioner].

6. Brief for Petitioner at 5.

within Fanno Creek's one-hundred-year floodplain. On this lot is a 9700-square foot electrical supply and plumbing store.⁷ Dolan wanted to tear down the existing building and replace it with a larger 17,600-square foot building and pave the gravel parking lot.⁸ Dolan applied to the city planning commission for a permit.⁹

The city agreed to issue a permit if Dolan would dedicate to the city:

(1) all of the portions of the lot lying within the 100-year flood plain, for use by the city as a greenway; and (2) an additional 15 foot strip of property adjacent to and above the 100-year floodplain, for use for future reconstruction of a storm drainage channel and as a public pedestrian and bicycle pathway, and additionally to construct that pathway.¹⁰

The total required dedication amounted to approximately ten percent (7000 square feet) of the 1.67-acre parcel. 3600 square feet of the required dedicated property lies above the floodplain boundary.¹¹

Dolan applied for a variance through the Land Use Board of Appeals (LUBA).¹² Dolan challenged the constitutionality of the dedication requirement, claiming a violation of the Fifth Amendment's taking clause.¹³ LUBA found that since the improvements to the property could only add to the already strained creek system and increase traffic congestion, "there is a 'reasonable relationship' between the proposed development and the requirement to dedicate land along Fanno Creek for a greenway."¹⁴ LUBA denied the variance request.

Dolan appealed to the Oregon Court of Appeals, which affirmed LUBA's findings.¹⁵ Dolan argued that in *Nollan v. California Coastal Comm'n*,¹⁶ the U.S. Supreme Court abandoned the reasonable relationship test and adopted a more stringent "substantial relationship" or "essential

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 7.

11. *Id.*

12. Tigard, Or., COMMUNITY DEVELOPMENT CODE § 18.134.050 (1989). LUBA provides for a site-specific, case by case analysis of special circumstances and allows for modification of standards to address specific circumstances.

13. The Takings Clause of the Fifth Amendment to the Constitution of the United States provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

14. Brief for Petitioner at D-16.

15. *Dolan v. City of Tigard*, 832 P.2d 853 (Or. Ct. App. 1992) *aff'd*, 854 P.2d 437 (Or. 1993).

16. *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987).

nexus” test.¹⁷ The Oregon Appellate Court agreed with LUBA that “reasonable relationship” is the proper test, and the city had met its burden under the “reasonable relationship” standard.¹⁸

Dolan appealed to the Oregon Supreme Court¹⁹ which affirmed the appellate court in a split decision.²⁰ The United States Supreme Court granted certiorari “because of an alleged conflict between the Oregon Supreme Court’s decision and our decision in *Nollan*.”²¹

The Court raised the level of scrutiny it will apply when cities condition permits on property dedications. In deciding Dolan’s case, the United States Supreme Court applied, then expanded, the “essential nexus” test used in *Nollan*.²² Under *Nollan*, an “essential nexus” exists when “the permit condition serves the same governmental purpose as the development ban.”²³ The Court applied the “essential nexus” test separately to both the greenway and pedestrian/bicycle pathway dedication conditions, and found that both conditions satisfied the test.²⁴ The Court then formulated and applied the second part of the test which required the Court “to determine whether the degree of the exactions demanded by the city’s permit conditions bear [sic] the required relationship to the projected impact of petitioner’s proposed development.”²⁵ The Court determined that “rough proportionality” is the required degree of relationship between the impact of proposed construction and permit conditions imposed by the municipality.²⁶ The Court held that the permit conditions did not

17. *Dolan*, 832 P.2d at 854. The *Nollan* Court required a close fit between the condition imposed on the property owner and the government’s purpose. “In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’” *Id.* (quoting *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)). *Nollan*, 483 U.S. at 837.

18. *Nollan*, 483 U.S. at 837. The Oregon Court of Appeals stated, “LUBA concluded, and we agree, that those findings demonstrate a direct and reasonable relationship between the conditions that the city attached to its approval of the intensifies use and the impacts and public needs to which the use will give rise.” *Dolan*, 832 P.2d at 854.

19. *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993), *rev’d and remanded*, 114 S. Ct. 2309 (1994).

20. *Dolan*, 854 P.2d at 443. “We are persuaded that the transportation needs of petitioners’ employees and customers and the increased traffic congestion that will result from the development of petitioners’ land do have an essential nexus to the development of the site, and that this condition, therefore, is reasonably related to the impact of the expansion of their business.” *Id.*

21. *Dolan*, 114 S. Ct. at 2316.

22. *Nollan*, 483 U.S. at 837.

23. *Id.*

24. *Dolan*, 114 S. Ct. at 2318. The Court held that “a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek’s 100-year floodplain The same may be said for the city’s attempt to reduce traffic congestion by providing for alternative means of transportation.” *Id.*

25. *Id.*

26. *Id.* at 2319.

meet the rough proportionality requirement and remanded the case to the Oregon Supreme Court.²⁷

Cities now have a new jurisprudential hurdle to cross when they condition permits upon land dedications. The *Dolan* decision marks a significant step in raising constitutional protection of property rights to a level near that of individual rights. This casenote focuses on the rough proportionality test expounded by the Supreme Court, its application in *Dolan*, and the impact this test may have on city planners.

BACKGROUND

The government can use its power as the sovereign to take private property for public use.²⁸ The Fifth Amendment conditions the exercise of this power upon just compensation.²⁹ The government can take private property for public use either through its power of eminent domain or through land-use regulation. When asserting its power of eminent domain the government must use a condemnation action and compensate the owner for the value of the condemned property.³⁰ Local governments can also use their police powers to regulate the use of private property. However, there are limits to the extent a government can regulate the use of private property before the regulation becomes an uncompensated taking. As described in the following summary, the Court has struggled to determine at what point the regulation becomes a taking. The line of cases developing "takings" law follows no distinct patterns or lines of reasoning, and has been described as a "crazy quilt pattern" of decisions.³¹

In *Mugler v. Kansas*, the Court adopted the position that a regulation did not constitute a taking, therefore, mere regulation did not require compensation.³² In *Mugler*, the claimant owned and operated a brewery

27. *Id.* at 2322.

28. The Court in *Boom Co. v. Patterson*, 98 U.S. 403 (1879), stated: The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the Constitutions of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right.

Id. at 405.

29. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Fifth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Chicago B & Q Ry. v. Chicago*, 166 U.S. 226, 236 (1897).

30. *United States v. Clarke*, 445 U.S. 253, 254 (1980).

31. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 11.2, at 403-404 & n.15 (3rd ed. 1986) (quoting Allison Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63 [hereinafter Dunham]).

32. *Mugler v. Kansas*, 123 U.S. 623 (1887).

before it became illegal to do so. Mugler continued to produce and sell malt liquor after a Kansas alcohol prohibition went into effect. After his conviction on criminal charges, Mugler claimed the Kansas legislation resulted in an uncompensated taking of his property in violation of the Fifth Amendment.³³ Although the value of the property was severely reduced by the legislation, the Court ruled that the property could still be used for legal purposes.³⁴ The Court held that when the legislation protects the public's health and safety, the public's interest comes before the rights of a property owner.³⁵ Thus, the Court found that the regulation was not a taking of Mugler's property without just compensation, nor did it deprive him of property without due process.

The Court took a different view in *Pennsylvania Coal Co. v. Mahon*.³⁶ Justice Holmes took the position that regulation could effect a taking even when no property was physically taken.³⁷ Pennsylvania Coal Co. owned the mineral rights to the coal which lay beneath a private house.³⁸ A Pennsylvania statute banned coal mining under buildings. The Court held that application of the statute constituted an unconstitutional taking of property.³⁹ The statute made coal mining commercially impracticable, which effected a taking of the mineral owner's property rights.⁴⁰ Although the Court stated that there are limits to the extent to which a regulation could limit property use, it did not set out an identifiable test.

In *Miller v. Schoene*,⁴¹ the Court re-affirmed *Mugler* and its public-interest-over-private-interest stance in cases of noxious use of property. A Virginia entomologist ordered red cedar trees on the claimant's property cut down according to statute.⁴² The trees were infested with cedar rust,

33. *Id.*

34. *Id.* at 669. "Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests." *Id.*

35. *Id.* at 668-69. "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, on any just sense, be deemed a taking or an appropriation of property for the public benefit." *Id.*

36. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

37. *Id.* at 413.

38. *Id.* at 412.

39. *Id.* at 414. The Court stated:

[T]he implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain and compensation to sustain the act.

Id.

40. *Id.* at 414. "To make it commercially impracticable to mine certain coal has nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.*

41. *Miller v. Schoene*, 276 U.S. 272 (1928).

42. Cedar Rust Act of Virginia, 1914 Va. Acts ch. 36, repealed by 1966 Va. Acts, ch. 702.

which spread to neighboring apple orchards. The value of the cedars was small when compared to the value of the apple trees.⁴³ The Court ruled that, under these circumstances, there was a “preponderant public concern in the preservation of the one interest over the other.”⁴⁴ The Court characterized the police power as a legitimate means to advance the interests of the state over the property rights of an individual.⁴⁵ The Court continues to value public interests over private interests in cases involving noxious use of property.⁴⁶ However, the Court had not yet clarified when land use regulation effects a taking where the present use does not injure the public. Early zoning ordinances provided the Court with the opportunity to explore this issue.

The Supreme Court first examined the constitutionality of a comprehensive land-use regulation in *Euclid v. Ambler Realty Co.*⁴⁷ The Village Council of Euclid adopted a zoning ordinance which restricted many land uses, including the location of businesses, apartment buildings, and single-family and two-family houses. The ordinance diminished the landowner’s property value. The landowner challenged the ordinance, claiming that it unconstitutionally deprived him of property by an unreasonable use of the police power.⁴⁸ The Court stated that in order to find such an ordinance unconstitutional, the petitioner must show “[t]hat such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”⁴⁹ The Court found the ordinance constitutional because the public interest in maintaining un-congested residential neighborhoods outweighed the diminution in the property value.⁵⁰ The *Euclid* decision began a long history of deference to zoning regulations, with few exceptions.

One of those exceptions was *Nectow v. Cambridge*.⁵¹ Here, the Court found a Cambridge zoning ordinance an unconstitutional taking of

43. *Miller*, 276 U.S. at 279. “When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.” *Id.*

44. *Id.*

45. *Id.* at 279-80. “And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.” *Id.*

46. The main cases following this reasoning are *Hardicheck v. Sebastian*, 239 U.S. 394 (1915); *Miller v. Schoene*, 276 U.S. 272 (1928); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); and *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1986).

47. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

48. *Id.* at 386.

49. *Id.* at 395.

50. *Id.* at 394.

51. *Nectow v. Cambridge*, 277 U.S. 183 (1928).

property without due process.⁵² The claimant's land was located in an industrialized area of the city. The city adopted a zoning ordinance limiting a portion of his land to use as housing, hotels and clubs.⁵³ The claimant entered into a contract to sell the property before the ordinance was passed.⁵⁴ After the ordinance took effect, the other party refused to comply with the contract because of the zoning ordinance.⁵⁵ The Court struck down the ordinance because it was not necessary to promote the general welfare of the citizens, and because the classification of claimant's land was arbitrary.⁵⁶ Nevertheless, the Court continued its deference to non-arbitrary municipal zoning for the next fifty years.

In a 1978 case, *Penn Central Transportation Co. v. New York City*,⁵⁷ the Court faced the issue of whether an ordinance is unconstitutional when it limits the economic use of the property. The City of New York enacted the Landmarks Preservation Law (Landmarks Law) to protect historic landmarks and neighborhoods from alteration or destruction.⁵⁸ The Landmarks Law allowed the Landmarks Preservation Commission to declare a building a protected landmark.⁵⁹ The owner of a building designated as a landmark was required to obtain permission from the Commission before altering the building.⁶⁰ The Landmarks Preservation Commission designated the Grand Central Terminal a landmark in 1967. Penn Central owned the station and sought a permit to build an office building over the station. The Commission denied the permit, and Penn Central claimed that the application of the Landmarks Law resulted in a taking of its property in violation of the Fifth Amendment. The Court admitted that "[t]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons . . . [I]t depends largely upon the particular circumstances [in that] case."⁶¹

52. *Id.* at 188.

53. *Id.* at 185.

54. *Id.* at 187.

55. *Id.*

56. *Id.* at 188-89. "That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained." *Id.*

57. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

58. NEW YORK CITY, N.Y., ADMIN. CODE ch. 8-A § 205-1.0 (1976).

59. *Id.*

60. *Id.*

61. *Penn Central*, 438 U.S. at 124.

The Court announced three factors it considered relevant in deciding whether the application of an ordinance constitutes a taking when it limits the economic use of property: "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations [S]o too, is the character of the governmental action."⁶² The Court refused to find an uncompensated taking because application of the ordinance did not interfere with the present uses of the terminal and the company could still get a "reasonable return" on its investment.⁶³ Thus, the Court found a possibility of an unconstitutional taking when an ordinance limits the economic use of property; however, Penn Central's loss did not rise to that level.

In *Agins v. City of Tiburon*,⁶⁴ the Court again deferred to a zoning ordinance and set out a clearly identifiable two-part test to determine whether the enactment of a zoning ordinance constitutes a taking. The claimant bought five acres of unimproved land in the city. The city then passed a zoning plan as required by state law⁶⁵ which contained a zoning ordinance limiting development of the claimant's property to single-family dwellings.⁶⁶ The Court applied the two-part test to determine if the ordinance was constitutional: First, the ordinance must advance a legitimate state interest, and second, it must not deny the owner all economically viable use of his property.⁶⁷ The Court found that the ordinance substantially advanced a legitimate state interest.⁶⁸ The Court also found that the ordinance did not deny the claimant all economically viable use of his land.⁶⁹ As a result of the *Agins* and *Penn Central* decisions the Court had two different tests available to determine the constitutionality of a zoning ordinance when it limited the economic use of property either by enactment or as applied.⁷⁰ Shortly before the *Agins* decision, the Court faced

62. *Id.*

63. *Id.* at 136. The Court did not define "reasonable return." "[W]e must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment." *Id.*

64. *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

65. CAL. GOVT. CODE §§ 65563, 65302 (a),(e) (West 1983).

66. TIBURON, CAL. ORDINANCES 123 N.S., 124 N.S. (June 28, 1973).

67. *Agins v. City of Tiburon*, 447 U.S. at 261-262.

68. *Id.* at 261. "The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization." *Id.*

69. *Id.* at 262. "Although the ordinances limit development, they neither prevent the best use of appellant's land, see *United States v. Causby*, [sic] 328 U.S. 256, 262, & n.7 (1946), nor extinguish a fundamental attribute of ownership, see *Kaiser Aetna v. United States*, [sic] supra, at 179-180." *Agins*, 447 U.S. at 262.

70. The Court has held in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1952), and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494-96

the issue of whether the abrogation of a single right inherent in property ownership constitutes a taking.

One of the most readily identifiable rights in the ownership of property is the right to exclude others. The Court addressed the ability of the government to limit the right to exclude in *Kaiser Aetna v. United States*.⁷¹ In *Kaiser Aetna*, the Court held that compensation was required when the government applied the federal navigational servitude⁷² to a pond in Hawaii. The lessor dug a channel across a sandbar which separated the pond from a bay of the Pacific Ocean. The channel allowed small ships to travel from the pond to the ocean. The lessor converted the pond into a small marina and charged an access fee for those entering the marina. The Court agreed with the government that the pond was navigable water, thus available for public use. However, the Court held that by applying the federal navigation servitude, the government took away the right to exclude, which turned private property into public property and required compensation.⁷³

The Court again faced the issue of whether the right to exclude others was unconstitutionally taken in *Pruneyard Shopping Center v. Robbins*.⁷⁴ In *Pruneyard*, the Court held that the state of California could require a shopping center to allow handbilling and petitioning on its property. Local students protesting United Nations activity congregated in appellant's shopping center to ask passersby to sign a petition against the activity. The shopping center removed the students who then sought an injunction to allow them to continue the peaceful activities.⁷⁵ The California Supreme Court enjoined Pruneyard from prohibiting this activity.⁷⁶ Pruneyard claimed the injunction was an unconstitutional taking of its right to exclude. The United States Supreme Court held that the nature of the property was such that limiting Pruneyard's right to exclude would not "unreasonably impair the value or use of their property as a shopping

(1987), that the *Penn Central* three-part test should apply to an "as applied" challenge, while the *Agins* "no economically viable use" test should apply to facial challenges.

For a critical commentary on the different treatment of "facial" and "as applied" challenges, see Andrea L. Peterson, *The Takings Clause; In Search of Underlying Principals Part I—Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1360-62 (1989).

71. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

72. The Federal Navigational Servitude requires public access to navigable waters of the United States. Rivers and Harbors Appropriation Act § 10, 33 U.S.C. § 403 (1988).

73. *Kaiser Aetna*, 444 U.S. at 177-80.

74. *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980).

75. *Id.* at 78.

76. *Robbins v. Pruneyard Shopping Center*, 592 P.2d 341, 347 (CA 1979) *aff'd*, 447 U.S. 74 (1980).

center.”⁷⁷ The shopping center could, however, limit the time, place, and manner of the students’ actions.⁷⁸ The Court distinguished this case from *Kaiser Aetna*, noting that in *Kaiser Aetna* the governmental regulation interfered with the petitioner’s investment-backed expectations.⁷⁹ In *Pruneyard*, however, the Court reasoned that handbilling did not substantially impair the value of the shopping center nor the investment-backed expectations of the property owners.⁸⁰

The right-to-exclude problem arose again in a noncommercial setting in *Nollan v. California Coastal Commission*.⁸¹ In *Nollan*, the claimants had sought a permit from the California Coastal Commission to tear down a small house on their beach-front property and replace it with a larger house.⁸² The lot fell between two public beaches. The Commission agreed to grant the permit on the condition that claimants allow the public an easement to pass across their beach.⁸³ The *Nollan* Court first concluded that, had the State simply required claimants to make their beach accessible to the public rather than making access a permit condition, the easement would constitute a “permanent physical occupation” which is an unconstitutional taking.⁸⁴ However, the Court agreed that “a permit condition that serves the same legitimate police power purpose as a refusal to issue the permit should not be found a taking if the refusal to issue the permit would not constitute a taking.”⁸⁵ The Coastal Commission contended that the purpose of the condition was to protect the public’s ability to see the beach.⁸⁶ The Court found that protecting the public’s ability to see the beach had an insufficient nexus with an easement across the beach.⁸⁷

77. *Pruneyard*, 447 U.S. at 83.

78. *Id.*

79. *Pruneyard*, 447 U.S. at 84.

80. *Id.*

81. *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987).

82. *Id.* at 828.

83. *Id.*

84. *Id.* at 832.

We think a ‘permanent physical occupation’ has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently on the premises.

Id. (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

85. *Nollan*, 483 U.S. at 837.

86. *Id.*

87. *Id.* The court explained the import of a nexus between the State’s interest and the condition: [T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of “legitimate state interests” in the takings and land-use contexts, this is not one of them.

Id.

Had the Commission merely placed a height or width restriction on the construction of the new house, the limitation would have been constitutional.⁸⁸ "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an 'out-and-out plan of extortion.'"⁸⁹ Thus, the condition amounted to a taking because it was not reasonably related to any of the state's interests.⁹⁰

Although the Court decided that a permit condition must be reasonably related to the state's interests, the Court did not indicate what degree of relationship is required between the permit condition and the impact of the proposed development. The Court answered this question in *Dolan v. City of Tigard*.⁹¹

PRINCIPAL CASE

The majority in *Dolan* held that the city's demand for a dedication of property as a condition for issuing a permit constituted an uncompensated taking of property.⁹² Justice Rehnquist, writing for the majority, stated that had the city required Dolan to dedicate this part of her land to the city for public use instead of conditioning a permit on the dedication, a taking would have occurred.⁹³ The Court explained that governments have long had the authority to engage in land-use planning.⁹⁴ However, the Court determined that the dedication requirements in *Dolan* distinguished it from land-use regulations previously held constitutional.⁹⁵ The Court distinguished *Dolan* in two ways. First, the land use legislation previously held constitutional classified entire areas of a city, whereas in *Dolan*, the city made an

88. *Id.* at 836. "[S]o long as the Commission could have exercised its police power (as we assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional." *Id.*

89. *Id.* at 837 (citing *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14 (N.H. 1981)).

90. *Nolan*, 483 U.S. at 837.

91. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

92. *Id.* at 2310.

93. *Id.* This was also the first step in the analysis of *Nolan*, 483 U.S. at 831.

94. *Dolan*, 114 S. Ct. at 2316. Justice Rehnquist stated:

[T]he authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in *Euclid v. Ambler Realty Co.* A land use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not deny[] an owner economically viable use of his land."

Id. (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (citations omitted)).

95. *Id.* at 2320 n.8.

adjudicative decision on an individual parcel.⁹⁶ Second, the dedication requirement was not a limitation on the use of the property, but a requirement that Dolan deed portions of the lot to the city.⁹⁷

The Court set out a two-step test to determine the constitutionality of the required dedication. "In evaluating petitioner's claim, we must first determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city."⁹⁸ "If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development."⁹⁹ The majority determined that since the city made an "adjudicative" decision it had the burden of proving that the required degree of connection existed.¹⁰⁰

The Court determined that the city's interests in flood control and preventing traffic congestion are common, legitimate interests that a city may pursue.¹⁰¹ The Court next determined that "a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100-year floodplain."¹⁰² Enlarging the store and paving the gravel parking lot would increase the impervious surface near the creek, resulting in more runoff into Fanno Creek.¹⁰³ The Court also noted that the city's requirement for a pedestrian/bicycle pathway "provides a useful means of transportation for workers and shoppers" ¹⁰⁴ Thus, the conditional permit passed the first

96. *Id.*

97. *Id.*

98. *Id.* at 2317 (quoting *Nollan*, 483 U.S. at 837).

99. *Id.* "We were not required to reach this question in *Nollan*, because we concluded that the connection did not meet even the loosest standard. Here, however, we must decide this question." *Id.*

100. *Id.* at 2320 n.8. In describing the "rough proportionality" test discussed later in the opinion, the court stated that "[t]he City must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.*

The court addressed Justice Stevens' dissenting opinion in which he criticized the shifting of the burden of proof to the city:

He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. *See, e.g.,* *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.

Dolan, 114 S. Ct. at 2320 n.8.

101. *Id.* at 2317-18. The Court stated that, "[u]ndoubtedly, the 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." *Id.* (citing *Agins*, 447 U.S. at 260-62).

102. *Id.* at 2318.

103. *Id.*

104. *Id.* "Pedestrians and bicyclists occupying dedicated spaces for walking and/or bicycling . . . remove potential vehicles from streets, resulting in an overall improvement in total transportation system flow." *Id.* (citing A. Nelson, *Public Provision of Pedestrian and Bicycle Access*

part of the test because an essential nexus existed between the city's interests and the conditions.¹⁰⁵

The Court then announced and applied the second part of the test.¹⁰⁶ "The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development."¹⁰⁷ Since the Court had not faced this issue before, it was a case of first impression.¹⁰⁸ Therefore, the Court turned to state law to determine the required degree of relationship.¹⁰⁹ The Court adopted a type of "reasonable relationship" test requiring the municipality to show a reasonable relationship between the required dedication and the impact of the proposed development.¹¹⁰ However, the Court did not adopt the reasonable relationship test as such because it is confusingly similar to the "rational relationship test describing the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment."¹¹¹ Instead, the Court called the new test "rough proportionality."¹¹² Under rough proportionality, "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."¹¹³ The Court then analyzed the city's findings to determine whether the "rough proportionality" test was satisfied.

Ways: Public Policy Rationale and the Nature of Private Benefits 11, Center for Planning Development, Georgia Institute of Technology, Working Paper Series (Jan. 1994)).

105. *Dolan*, 114 S. Ct. at 2318.

106. *Id.* at 2318-22.

107. *Id.* at 2318.

108. *See Nollan*, 483 U.S. at 838. The Court in *Nollan* held that the essential nexus requirement had not been met.

It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollan's property reduces any obstacles to viewing the beach created by the new house We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes.

Id.

109. *Dolan*, 114 S. Ct. at 2318-20.

110. *Id.* The Court rejected the "specific and uniquely attributable" test first developed in *Pioneer Trust & Savings Bank v. Mount Prospect*, 176 N.E.2d 799, 802 (1961), requiring the local government to show its exaction is directly proportional to the specifically created need. It also rejected the other extreme of "very generalized statements as to the necessary connection between the required dedication and the proposed development." *See, e.g., Billings Properties, Inc. v. Yellowstone County*, 394 P.2d 182 (Mont. 1964); *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673 (1966).

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

112. *Id.*

113. *Id.* at 2319-20.

The city had conditioned the permit upon the dedication “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 [the floodplain] boundary.”¹¹⁴ The city found that the desired improvements to the property would add to the flooding problem which “can only add to the public need to manage the [floodplain] for drainage purposes.”¹¹⁵ The city relied on this finding “to support its conclusion that the ‘requirement of dedication of the floodplain area on the site is related to the applicant’s plan to intensify development on the site.’”¹¹⁶

Although the open space requirement of the greenway was sufficiently related to flood control to establish an essential nexus, the required dedication did not pass the rough proportionality test.¹¹⁷ The city failed to show why it required a public easement.¹¹⁸ The Court focused on Dolan’s right to exclude as “one of the essential sticks in the bundle of rights that are commonly characterized as property,”¹¹⁹ and reasoned that a public easement would take away the right to exclude others from her property. The Court could find no reasonable relationship between preventing flooding and giving the public an easement across the greenway.¹²⁰ Thus, the required dedication of the property in the floodplain did not pass the rough proportionality test.

The Court next considered the required dedication of a pedestrian/bicycle pathway.¹²¹ The city found that the pedestrian/bicycle pathway “could” relieve some of the added traffic congestion caused by the improvements to the lot.¹²² However, the Court found the word “could” to

114. *Id.* at 2318. “In addition, the city demanded that the retail store be designed so as not to intrude into the greenway area.” *Id.*

115. *Id.*

116. *Id.* (citing City of Tigard Planning Commission Final Order No. 91-09 PC, *cited in* Brief for Petitioner at app. G-37).

117. *Dolan*, 114 S. Ct. at 2320.

118. *Id.*

[T]he city demanded more—it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner’s property along Fanno Creek for its Greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.

Id.

119. *Id.* (quoting *Kaiser Aetna*, 444 U.S. at 176).

120. *Dolan*, 114 S. Ct. at 2320.

121. *Id.* at 2321.

122. *Id.* at 2321-22.

In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen

be inadequate under rough proportionality:

Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use. But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicles and bicycle trips generated by the petitioner's development reasonably relates to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "could offset some of the traffic demand . . . and lessen the increase in traffic congestion."¹²³

Because the city failed to meet its burden of showing how much traffic, if any, the pathway would offset, the Court found the required dedication and construction of the pedestrian/bicycle pathway failed the rough proportionality test.¹²⁴ The Court reversed the Oregon Supreme Court and remanded the case for further proceedings consistent with the opinion.¹²⁵

In a dissenting opinion, Justice Stevens first argued that the impact of the proposed development, by itself, is enough to deny the permit application because the conditions satisfy *Nollan's* essential nexus test.¹²⁶ He asserted that the majority created a new "constitutional hurdle" beyond the essential nexus test based on state law.¹²⁷ However, "[n]ot one of the state cases cited by the Court announces anything akin to a 'rough proportionality' requirement."¹²⁸ Justice Stevens characterized the rough proportionality test as "remarkably inventive."¹²⁹

Justice Stevens argued that the majority ignored the benefits Dolan would receive from the dedication, and referred to the contention of the

the increase in traffic congestion.

City of Tigard Planning Commission Final Order No. 91-09 PC, cited in Brief of Petitioner, *supra* note 5, at app. G-37.

123. *Dolan*, 114 S.Ct. at 2321. Justice Peterson of the Supreme Court of Oregon explained in his dissenting opinion, "The findings of fact that the bicycle pathway system 'could offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system will, or is likely to, offset some of the traffic demand." *Dolan*, 854 P.2d, at 447.

124. *Dolan*, 114 S. Ct. at 2322.

125. Justice Stevens dissented along with Justices Blackmun and Ginsburg. Justice Souter filed a separate dissent. *Id.*

126. *Dolan*, 114 S. Ct. at 2322 (Stevens, J., dissenting). "The impact is sufficient to justify an outright denial of her application for approval of the expansion." *Id.*

127. *Id.* at 2324.

128. *Id.* at 2323.

129. *Id.* "Thus, although these state cases do lend support to the Court's reaffirmance of *Nollan's* essential nexus requirement, the role the Court accords them in the announcement of its newly minted second phase of the constitutional inquiry is remarkably inventive." *Id.*

United States at oral argument that “[t]he improvement that the City’s drainage plan contemplates would widen the channel and reinforce the slopes to increase the carrying capacity during serious floods.”¹³⁰ Dolan’s store would receive increased flood protection by the improved greenway.¹³¹ Other cases have found significant the fact that the landowner benefits from the dedication.¹³²

The Stevens dissent asserted that the majority incorrectly focused on the single right to exclude when it should have focused on the nature and extent of the interference with the rights attached to the parcel as a whole.¹³³ Also, the city’s land-use regulation concerning businesses should have a higher presumption of validity than regulations of residences.¹³⁴

Justice Stevens criticized the majority for nullifying the presumption of validity historically granted to municipal ordinances.¹³⁵ He argued that now the city must not only “quantify its findings [and make] individualized determination[s] with respect to the nature *and* the extent of the relationship between the conditions and the impact . . . but also demonstrate proportionality.”¹³⁶ Justice Stevens proposed that the Court should determine whether the required nexus is present, then shift the burden to the property owner to show that the condition is “so grossly disproportionate to the proposed development’s adverse effects” that it shows the city had improper motives.¹³⁷

According to Justice Stevens, the city’s failure to quantify the decreased traffic flow due to the pedestrian/bicycle pathway was only harmless error.¹³⁸

130. *Id.* at 2324 (quoting Tr. of Oral Arg. 41-42). The United States filed an amicus curiae brief. Brief For The United States As Amicus Curiae Supporting Respondent, *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (93-518).

131. *Id.*

132. *Id.* (citing *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442, 448 (Wis. 1965)).

133. *Dolan*, 114 S. Ct. at 2324 (Stevens, J., dissenting) (quoting *Andrus v. Allard*, 444 U.S. 51 (1979)).

134. *Dolan*, 114 S. Ct. at 2325. Justice Stevens quoted John D. Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for A Rationale*, 52 CORNELL L.Q. 871, 923 (1967).

The subdivider is a manufacturer, processor, and marketer of a product; land is but one of his raw materials. In subdivision control disputes, the developer is not defending hearth and home against the king’s intrusion, but simply attempting to maximize his profits from the sale of a finished product. As applied to him, subdivision control exactions are actually business regulations.

Id.

135. *Dolan*, 114 S. Ct. at 2326 (Stevens, J., dissenting). “The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan.” *Id.*

136. *Id.* at 2325.

137. *Id.*

138. *Id.* at 2326.

Justice Stevens also argued that Dolan showed no evidence that dedicating her property to the city would be any worse than the prohibition on building in the floodplain.¹³⁹ Justice Stevens asserted that Dolan would actually benefit from the public's presence in the dedicated area.¹⁴⁰

Justice Stevens asserted that the majority's emphasis that the bicycle/pedestrian pathway "could" rather than "would" offset some of the increased traffic was merely a "play on words."¹⁴¹ It is reasonable to assume that a pedestrian/bicycle pathway would offset traffic, and any predictions as to the exact amount of offset traffic must always be estimates.¹⁴² Justice Stevens argued that this decision will lead to federal judiciary micromanagement of municipal dedication requirements when state courts have done an adequate job.¹⁴³

In his separate dissenting opinion, Justice Souter urged that this case was not suitable for expanding takings law beyond *Nollan*.¹⁴⁴ Justice Souter argued that the Court announced a new test which it failed to apply.¹⁴⁵ The Court conceded an essential nexus existed between the easement for a greenway and the need for flood control, but held that an easement for public recreational use was not reasonably related to the interest of flood control.

139. *Id.*

140. *Id.* Justice Stevens listed some of the benefits Dolan would receive:

Given the commercial character of both the existing and the proposed use of the property as a retail store, it seems likely that potential customers 'trampling along petitioner's floodplain' . . . are more valuable than a useless parcel of vacant land. Moreover, the duty to pay taxes and the responsibility for potential tort liability may well make ownership of the fee interest in useless land a liability rather than an asset.

Id.

141. *Id.*

142. *Id.* "Certainly the assumption that there will be an offsetting benefit here is entirely reasonable and should suffice whether it amounts to 100 percent, 35 percent, or only 5 percent of the increase in automobile traffic that would otherwise occur." *Id.*

143. *Id.* The Stevens dissent criticizes the majority for continuing a substantive due process application of the Takings clause of the Fifth Amendment, which began in *Mugler v. Kansas*, 123 U.S. 623 (1887). Justice Stevens argues that the Court long ago abandoned substantive due process. Justice Stevens asserts that applying substantive due process to actual physical invasions of private property is appropriate. However, Justice Stevens argues that Federal Judicial scrutiny of physical invasion and regulatory takings are "potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair." *Dolan*, 114 S. Ct. at 2327.

144. *Dolan*, 114 S. Ct. at 2330 (Souter, J., dissenting).

145. *Id.* Justice Souter stated:

The Court treats this case as raising a further question, not about the nature, but about the degree, of connection required between such an exaction and the adverse effects of development. The Court's opinion announces a test to address this question, but as I read the opinion, the Court does not apply that test to these facts, which do not raise the question the Court addresses.

Id.

Thus, the Court's application of a rough proportionality test was unnecessary since *Nollan's* essential nexus analysis could have invalidated the condition.¹⁴⁶

Justice Souter asserted that the majority failed to apply rough proportionality to the pedestrian/bicycle pathway. Justice Souter pointed out that the Court found a reasonable relationship between the increased traffic caused by the improvements to the land and a pedestrian/bicycle pathway as an alternate means of transportation.¹⁴⁷ The majority's decision hinged on the city's finding that the path "could" rather than "would" offset traffic.¹⁴⁸ According to Justice Souter, this is merely an application of *Nollan's* essential nexus test, and not rough proportionality.¹⁴⁹ Thus, the Court unnecessarily created the rough proportionality test, which it then failed to apply.

ANALYSIS

The majority decision in *Dolan* is significant and may have far-reaching impacts on local zoning. Zoning bodies now must show a tighter fit between the impact of a proposed development and a condition imposed on a permit grant. This closer review of permit decisions raises property rights to a higher level.¹⁵⁰

The Court will now use a two-step analysis to determine the constitutionality of permits conditioned on required dedications. A city must first show an essential nexus between a legitimate state interest and the dedication.¹⁵¹ If the Court finds the essential nexus, the Fifth Amendment

146. *Id.* As to the greenway dedication, Justice Souter could find no nexus between the state interest and the permit condition:

[I]t is not because of any lack of proportionality between permit condition and adverse effect, but because of a lack of any rational connection at all between the exaction of a public recreational area and the governmental interest in providing for the effect of increased water runoff. This is merely an application of *Nollan's* nexus analysis.

Id.

147. *Id.*

148. *Id.*

149. *Id.* Justice Souter could find no nexus between traffic reduction and the pathway:

That again, as far as I can tell, is an application of *Nollan*, for the Court holds that the stated connection ("could offset") between traffic congestion and bicycle paths is too tenuous; only if the bicycle path "would" offset the increased traffic by some amount, could the bicycle path be said to be related to the city's legitimate interest in reducing traffic congestion.

Id.

150. *Id.* at 2320. The Court stated, "We 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 situations." *Id.*

151. *Nollan*, 483 U.S. at 837 (1987).

requires the dedication to meet the rough proportionality test.¹⁵² The rough proportionality test requires more than a generalized statement by a city that an improvement will cause damage, and that exactions "could" offset that damage.¹⁵³ Although "[n]o precise mathematical determination is required," a city must now show that an exaction "is related both in nature and extent to the impact of the proposed development."¹⁵⁴ The unfortunate vagueness of this test will require more judicial review in order to develop a consistent definition.

Although the Court's formulation is somewhat vague, rough proportionality is necessary to protect property rights. *Nollan's* essential nexus test alone is inadequate to protect the interests of property owners. Essential nexus requires only that the permit condition serve the same legitimate governmental purpose as the development ban.¹⁵⁵ The *Nollan* test has no proportionality requirement. Without a proportionality requirement, a city could condition a permit upon a disproportionate surrender of property rights by a mere showing of a legitimate state interest serving the same purpose as the development ban. Without the extent requirement of rough proportionality, limits on the degree to which a city could require a surrender of property rights are unclear.¹⁵⁶

Justice Stevens, in dissent, asserted that by raising the level of scrutiny in exaction cases from reasonable relationship to a heightened level, the majority improperly shifted the burden to the city to prove that its decision was not arbitrary.¹⁵⁷ Justice Stevens argued that regulation of business property has enjoyed a traditional presumption of validity.¹⁵⁸ This presumption of validity made it difficult for business owners to

152. *Dolan*, 114 S. Ct. at 2318.

153. *Id.* at 2321.

154. *Id.* at 2319-20.

155. *Nollan*, 483 U.S. at 837.

156. *See, e.g.*, *Agins v. City of Tiburon*, 447 U.S. 255 (1980), where the Court said that an ordinance cannot deny an owner "all economically viable use of his property." *Id.* at 261-62. The Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) stated several factors are considered to determine whether an ordinance constitutes a taking, including interference with investment-backed expectations and the economic impact of the regulation. *Id.* at 124. However, these cases deal only with regular zoning ordinances which do not concern a conditioned permit.

157. *Dolan*, 114 S. Ct. at 2320 n.8. The majority answered Justice Stevens' criticism of the burden shift:

Justice Stevens' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights . . . Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.

Id.

158. *See Johnston, supra* note 134, at 923.

oppose any zoning ordinance or dedication ruling by a municipality. While Justice Stevens' argument concerning a presumption of validity in business regulation may be correct, conditioning permits on land dedications seems to go beyond normal business regulation. Although the majority did not define normal business regulation, it concluded that the permit condition in *Dolan* was different than normal business regulation.¹⁵⁹ The distinction in *Dolan* was the "adjudicative decision to condition petitioner's application for a building permit on an individual parcel."¹⁶⁰

However, the Court did not say whether the burden shifted to the city because it made an adjudicative decision, because it conditioned a permit on an easement grant, because it was a decision on an individual parcel, or a combination of some or all of these factors. The majority's burden shift in *Dolan* seems to be based upon the city's focus on a single property, coupled with the conditional permit. This focus distinguished the city's actions in *Dolan* from "generally applicable zoning regulation" where the burden "properly rests on the party challenging the regulation"¹⁶¹ Unfortunately, city planners must await a judicial answer to this question.

Although Justice Stevens had legitimate concerns regarding a presumption of validity in business regulation, the requirement that the city show rough proportionality remains deferential to planning bodies. The Court analyzed state case law, ranging from a low standard requiring only "very generalized statements as to the necessary connection between the required dedication and the proposed development," to a very high standard requiring a city to show the exaction is "directly proportional to the specifically created need."¹⁶² The Court chose the middle ground, requiring only that a condition be related in "nature and extent" to the state interest.¹⁶³ The choice of the middle ground suggests at least a moderate degree of deference to the city. The test is fair to the zoning body since the Court will allow planners, upon a showing of rough proportionality, to take property under the guise of a permit condition when it could not constitutionally take it outright.¹⁶⁴ The Court did not deny the city's right to take property, without paying for it, by conditioning a permit on a land dedication. It only required that the city pass the nexus and rough proportionality tests when doing so.¹⁶⁵ The test is fair to

159. *Dolan*, 114 S. Ct. at 2320 n.8.

160. *Id.*

161. *Id.*

162. *Id.* at 2321.

163. *Id.* at 2321-22.

164. *Id.* at 2316. "Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred." *Id.*

165. *Id.* at 2317.

the property owner because the city now has the burden to show that the condition is not arbitrary.¹⁶⁶

The Court correctly applied the essential nexus and rough proportionality tests to the pedestrian/bicycle pathway. The Court found that an essential nexus existed between reducing the traffic created by the proposed development and the pathway.¹⁶⁷ However, the city's finding that the pathway could, rather than would offset the traffic demands created by the new store failed the rough proportionality test.¹⁶⁸ Although it may seem logical that such a pathway would offset some of the traffic created by the new store, a conclusory statement that the pathway could offset traffic is too tenuous. The city failed to put forth even a rough estimate of how many of the projected 435 additional trips per day the pathway would offset.¹⁶⁹ Further, the city failed to show how many people, if any, ride their bicycles or walk to plumbing supply stores.¹⁷⁰ Given the nature of the new store, a pedestrian/bicycle pathway probably is not conducive to the city's aim of traffic reduction.

Although correct in its application of the nexus and rough proportionality requirements concerning the pathway, the Court erred in its analysis of the greenway dedication. The Court found a nexus between the development ban in the floodplain and preventing flooding.¹⁷¹ However, the development ban was not at issue. Under *Nollan*, a nexus must exist between the permit condition and the purpose behind the development ban.¹⁷² In *Dolan*, the purpose of the development ban was flood prevention.¹⁷³ The permit condition was the dedication of a recreational easement.¹⁷⁴ Had the Court properly applied the essential nexus test to the greenway dedication requirement it would have found no nexus at all between the dedication of a recreational easement and flood prevention.¹⁷⁵

166. *Id.* at 2320 n.8.

167. *Id.* at 2321.

168. *Id.* at 2321-22.

169. *Id.* at 2321 n.9. "The city uses a weekday average trip rate of 53.21 trips per 1000 square feet. Additional Trips Generated = 53.21 X(17,600-9720)." *Id.*

170. Since plumbing supplies are generally bulky, it seems a stretch to say that a pedestrian/bicycle pathway would offset any of the increased traffic to the new store. However, with the vagueness of the rough proportionality test, one can only speculate as to the City's burden of proving how many trips the pathway must offset before the condition becomes roughly proportional. The Court also left unclear whether estimates of the traffic offset would suffice.

171. *Dolan*, 114 S. Ct. at 2317-18.

172. See *Nollan*, 483 U.S. at 837. "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an 'out-and-out plan of extortion.'" *Id.*

173. *Dolan*, 114 S. Ct. at 2317-18.

174. *Id.* at 2318.

175. *Id.* Justice Souter pointed out that had the Court correctly applied the essential nexus test, it would have discovered "a lack of any rational connection at all between exaction of a public recre-

The Court next made an awkward attempt to apply rough proportionality to the recreational easement.¹⁷⁶ The awkwardness is evidenced by the Court's over-reliance on Dolan's loss of her right to exclude.¹⁷⁷ The right to exclude is "one of the most essential sticks in the bundle of rights" that come with property ownership.¹⁷⁸ However, recent Supreme Court decisions have held that the Court must look at the effect of the loss of a property right on the parcel as a whole.¹⁷⁹ Regulation of property is based on the city's police power which is exercised to promote the public welfare.¹⁸⁰ Sometimes, the exercise of police power interferes with a single use or economic potential of property.¹⁸¹ "To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*."¹⁸² In light of these recent decisions, the Court's application of rough proportionality to Dolan's right to exclude seems misplaced.

The Court had an opportunity to add some clarity to the area of Takings law; however, the Court's decision may have contributed to its inconsistency. After detailing its new rough proportionality requirement, the Court does not refer to it in its analysis. Instead, the Court applies a reasonable relationship test.¹⁸³ Further, the Court's error in its application of *Nollan's* essential nexus test to the greenway dedication adds even more confusion.

ational area and the governmental interest in providing for the effect of increased water runoff. That is merely an application of *Nollan's* essential nexus analysis." *Id.*

176. *Dolan*, 114 S. Ct. at 2320-21.

177. *Id.* at 2320-21.

178. *See Kaiser Aetna*, 444 U.S. at 176.

179. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). "[T]aking jurisprudence does not divide a single parcel into discreet segments and attempt to determine whether rights in a particular segment have been entirely abrogated Instead, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Id.* at 130-31. *See also Andrus v. Allard*, 444 U.S. 51 (1979). "[T]he destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 66. *See also Concrete Pipe & Products, Inc. v. Construction Laborers pension Trust*, 508 U.S. ___, ___, 113 S. Ct. 2264 (1993). "[A] claimant's parcel of property [cannot] first be divided into what was taken and what was left to demonstrate a compensable taking." *Id.* at 2290.

180. *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887).

181. *Andrus*, 444 U.S. at 65.

182. *Id.*

183. *Dolan*, 114 S. Ct. at 2321. As to the greenway, the Court stated: "We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building." *Id.*

As to the pedestrian/bicycle pathway, the Court stated: "But on the record before us, the City has not met its burden of demonstrating that the additional number of vehicles and bicycle trips generated by the petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement." *Id.*

Rough proportionality is a fair requirement which can protect property owners from opportunistic city planners with ulterior motives. Rough proportionality provides added protection against a city that demands a dedication because it wants a certain piece of property for a municipal project, and not because the property will offset damage caused by a development. The new test requires a city to either make a constitutional showing that a required dedication is roughly proportional to the proposed impact,¹⁸⁴ or simply pay for the property taken.

However, the Court opened the door to more litigation in this area by failing to specifically define "rough proportionality." The "related in both nature and extent" requirement is unfortunately vague.¹⁸⁵ Although unfortunate, the decision is not surprising considering the confusing, "crazy quilt" development of takings law since its inception.¹⁸⁶

CONCLUSION

The *Dolan* Court has taken a significant step towards protecting property rights. The Court formulated a test which is both fair and necessary. Rough proportionality is fair because it requires a tighter fit between what the city's interests and the impact of a proposed development. It is necessary because *Nollan's* essential nexus test has no extent requirement. However, by applying *Nollan's* essential test to the wrong factors, and failing to particularly define rough proportionality, the Court added confusion to the already confused area of Takings law.

While rough proportionality requires the city to show a nature and extent relationship, the test seems to be fairly deferential to the zoning body. The Court could have chosen a direct proportionality requirement. Although the test is fairly deferential, city planners must engage in a two-step process when conditioning a permit on a required dedication. First, a city must consider whether an essential nexus exists between the conditions imposed on a permit grant and a legitimate state interest. This first requirement is satisfied if the permit condition serves the same governmental purpose as the development ban. Second, the city must show that the dedication is roughly proportional to the impact of the development. This second requirement is satisfied if the required dedication is related in both nature and extent to the proposed development.

184. *Id.* at 2319-20.

185. *Id.*

186. *See Dunham supra* note 31 and accompanying text.

City planners must now spend more time and money on planning, but exactly how much more will be uncertain until the parameters of rough proportionality are defined. When conditioning permits on land-use dedications, they will have to make more individualized determinations about the extent of impact of a proposed development and the conditions imposed on a property owner.

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