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Dolan v. City of Tigard: A Sequel to Nollan's Essential Nexus Test for Regulatory Takings

Recent efforts to articulate a clear doctrine for the analysis of Fifth Amendment regulatory takings claims began in 1987 when the United States Supreme Court decided a series of land-use cases.¹ In *Dolan v. City of Tigard*,² the Supreme Court again confronted the difficult issue, facing the question of when government regulation of private property through development exactions³ becomes a taking of private property for public use without just compensation.⁴ The

1. The 1987 takings trilogy is composed of *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (requiring compensation for temporary taking due to restrictive flood control ordinance later invalidated); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (upholding a statute prohibiting certain mining activity because the restrictions were reasonably related to the purpose of preventing environmental damage); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (holding that requiring a property owner to provide an easement across his beach in exchange for a rebuilding permit was a taking because the condition was not sufficiently related to the stated purpose of preserving public access to the shore). See, e.g., Charles H. Clarke, *Constitutional Property Rights and the Taking of Police Power: The Aftermath of Nollan and First English*, 20 SW. U. L. REV. 1, 12-26 (1991); Susan E. Looper-Friedman, *Constitutional Rights as Property?: The Supreme Court's Solution to the "Takings Issue,"* 15 COLUM. J. ENVTL. L. 31, 44-49 (1990); John Martinez, *A Critical Analysis of the 1987 Takings Trilogy: The Keystone, Nollan and First English Cases*, 1 HOFSTRA PROP. L.J. 39, 41-72 (1988).

2. 114 S. Ct. 2309 (1994).

3. A development exaction is a common land use regulation defined as "an internal subdivision improvement, a dedication of land for a public facility, or a fee in lieu of dedication that the municipality can use to provide a public facility." DANIEL R. MANDELKER, *LAND USE LAW* § 9.11, at 372 (2d ed. 1988). See, e.g., Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW & CONTEMP. PROBS. 51, 55-62 (1987); John J. Delaney et al., *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 LAW & CONTEMP. PROBS. 139, 147-56 (1987); William A. Fischel, *The Economics of Land Use Exactions: A Property Rights Analysis*, 50 LAW & CONTEMP. PROBS. 101, 110-13 (1987); see also Nicholas V. Morosoff, Note, " 'Take' My Beach Please!": *Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. REV. 823, 823 (1989) (defining exactions as when "a municipality requires a developer to give something"—usually a dedication of land or a cash payment—"to the community as condition of receiving permission to develop").

4. The Takings Clause in the Fifth Amendment of the United States Constitution states in part: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Supreme Court has incorporated the Fifth Amendment into the Fourteenth Amendment's Due Process provision so that it applies to the states. See *Chicago, B. & Q.R.R. v. Chicago*, 166 U.S. 226, 235-41 (1897). See, e.g., Richard A. Epstein, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 103-34 (1985); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1965 n.1 (1992). See generally William M. Treanor,

Dolan Court specifically addressed a question left unanswered in one of its landmark cases of 1987, *Nollan v. California Coastal Commission*.⁵ While *Nollan* held that there must be an "essential nexus" between permit conditions and the development's impact on the community,⁶ the *Dolan* Court considered what *degree* of an essential nexus must exist between the conditions and the proposed impact of the development for government takings to withstand constitutional scrutiny.⁷ Because lower courts applied the *Nollan* essential nexus requirement with varying levels of scrutiny, the *Dolan* Court refined the *Nollan* analysis by articulating a standard of rough proportionality that reflects the intermediate rational nexus test utilized by many lower courts prior to *Dolan*.⁸ To separate takings doctrine from equal protection analysis, the Court distinguished the new rough proportionality terminology from the phrase "rational nexus test."⁹

This Note focuses on the Court's latest development in the regulatory takings arena—the rough proportionality standard. First, the Note presents a brief summary of the Court's opinion in *Dolan*.¹⁰ Then the Note examines relevant Supreme Court takings law and lower court decisions that have interpreted and applied the *Nollan* essential nexus test.¹¹ The Note next argues that, while the test

Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708-16 (1985) (discussing the historical development of the Takings Clause).

The use and ownership of private property can generally be regulated by zoning restrictions to protect public welfare. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897 (1987) (describing the power of government to regulate property as the power to promote "health, safety, morals, or general welfare"); *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 395 (1926) (holding that zoning regulations are constitutionally valid unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare"). See generally JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 991, 1005 (3d ed. 1993) (explaining that municipalities act through their police power—the power to protect health, safety, welfare and morals—when they establish zoning regulations). However, when regulations substantially limit the owner's use and enjoyment of his property, a takings claim might arise. See *infra* notes 86-120 and accompanying text; see also Robert H. Freilich, *Solving the "Taking" Equation: Making the Whole Equal to the Sum of its Parts*, in *REGULATORY TAKINGS: THE LIMITS OF LAND USE CONTROL* 89, 96 (G. Richard Hill ed., 1993) (stating that even early zoning cases began to place significant limits on the scope of police power to act through regulatory zoning).

5. 483 U.S. 825 (1987).

6. *Id.* at 837.

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

8. *Id.* at 2319-20; see also *infra* notes 191-95 and accompanying text.

9. See *infra* notes 48-55 and accompanying text.

10. See *infra* notes 16-85 and accompanying text.

11. See *infra* notes 86-174 and accompanying text.

formulated in *Dolan* appears to be a new development, the rough proportionality standard logically follows from the previous takings doctrine the Court has articulated and lower courts have applied.¹² Finally, the Note suggests that, in addition to developing a constitutionally mandated level of scrutiny for regulatory takings,¹³ the most significant impact of *Dolan* appears to be a shift in the burden of proof.¹⁴ Following *Dolan*, government regulatory bodies will have the burden of proving that required development exactions are roughly proportional to a developer's impact.¹⁵

The petitioner in *Dolan* applied to the City of Tigard, Oregon for a building permit, proposing to double the size of her store and to pave and expand the parking lot.¹⁶ Dolan's property is located in the central business district of Tigard along the banks of Fanno Creek.¹⁷ The City Planning Commission approved Dolan's application, subject to conditions imposed by the Community Development Code (CDC), the comprehensive land use plan for the City of Tigard.¹⁸ First, the city required that Dolan dedicate the 7,000 square feet of her property lying within Fanno Creek's 100-year floodplain to the city for improvement of a storm drainage system.¹⁹ Second, the city required the dedication of an additional fifteen square feet located adjacent to the flood plain to be used as a pedestrian and bicycle pathway.²⁰

To justify these regulations, the city cited the objectives of the comprehensive land use management program adopted by the State of Oregon in 1973.²¹ Upon the completion of various studies

12. See *infra* notes 175-219 and accompanying text.

13. See *infra* notes 220-36 and accompanying text.

14. See *infra* notes 237-45 and accompanying text.

15. See *infra* notes 237-45 and accompanying text.

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

17. *Id.*

18. *Id.* at 2314; see also *infra* notes 21-35 (describing the CDC's comprehensive land use plan). In addition to the conditions at issue in the decision, the city also initially imposed three other conditions on the Dolans. First, the city required a \$14,256.02 traffic impact fee which was later eliminated as a specific condition of approval. Petitioner's Brief at 8 n.2, *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (No. 93-518). Second, "a fee in lieu of water quality" was required in order to offset the negative effects of increased storm water runoff from the Dolans' proposed larger lot. *Id.* Third, the city required the relocation of the "footprint of their building to the east in order to accommodate the future City-initiated relocation of the flood bank." *Id.*

19. *Dolan*, 114 S. Ct. at 2314.

20. *Id.*

21. OR. REV. STAT. §§ 197.005-197.860 (1991).

relating to open spaces,²² flood plains,²³ and transportation,²⁴ the City of Tigard developed its own land use plan in connection with the state's requirements, and the plan was codified in the Community Development Code (CDC).²⁵ The flood plain dedication requirement was based on findings from the Tigard Master Drainage Plan that "serves as the basis for the City's Comprehensive Plan policies and regulatory provisions relating to floodplain management."²⁶ The drainage plan determined that development within the Fanno Creek Basin would increase flooding problems because the proposed larger building and paved parking area would increase the amount of impervious surfaces, thereby increasing the amount of runoff into the creek.²⁷ The plan proposed to combat flooding risks by excavating the channel area next to Dolan's property along the creek.²⁸ Furthermore, the drainage plan recommended that the flood plains be kept free of structures and that areas within the flood plain be preserved as greenways.²⁹ The city argued that the flood plain dedication was reasonably related to the projected impact of the proposed development due to the anticipated increase in storm water flow from Dolan's property into the creek.³⁰

The CDC also required new development in the congested central business district to dedicate land for pedestrian and bicycle pathways to encourage alternatives to automobile travel.³¹ The city argued that Dolan's proposed development would generate additional

22. The Community Development Code "requires property owners in the area zoned Central Business District to comply with a 15% open space and landscaping requirement." *Dolan*, 114 S. Ct. at 2313.

23. The Master Drainage Plan suggested a series of improvements to the Fanno Creek Basin that would protect against the increased likelihood of flooding following development in the area. *Id.* at 2313.

24. A transportation study of the area "identified congestion in the Central Business District as a particular problem." *Id.*

25. *Id.*

26. Respondent's Brief at 6, *Dolan* (No. 93-518).

27. *Id.* at 7.

28. *Dolan*, 114 S. Ct. at 2313 ("The Drainage Plan concluded that the cost of these improvements should be shared based on both direct and indirect benefits, with property owners along the waterways paying more due to the direct benefit they would receive.")

29. *Id.* By keeping the flood plain free, the city also hoped to utilize the land as a public park. In their brief, the city argued that "[p]ursuant to the Tigard Park Plan, a specific Fanno Creek Park Plan has been adopted by the City. The concept of joint use of the floodplain for storm drainage, recreation and transportation is built into this plan through integration of the pedestrian/bikeway plan." Respondent's Brief at 9, *Dolan* (No. 93-518).

30. Respondent's Brief at 14-15, *Dolan* (No. 93-518).

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

vehicular traffic,³² and that the “creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation ‘could offset some of the traffic demand on (nearby) streets and lessen the increase in traffic.’”³³ The city reasoned that Dolan would obtain benefits from the construction of a pathway in the form of more business and also from a reduction in traffic congestion.³⁴ Overall, the city’s dedication requirements would restrict the use of ten percent of Dolan’s property.³⁵

When the City Planning Commission denied *Dolan’s* request for a variance, she appealed to the Land Use Board of Appeals (LUBA),³⁶ alleging that “the city’s dedication requirements were not related to the proposed development, and, therefore, those requirements constituted an uncompensated taking of property under the Fifth Amendment.”³⁷ LUBA rejected Dolan’s claim, and she appealed to the Oregon Court of Appeals³⁸ and the Oregon Supreme Court.³⁹ Both courts affirmed the opinions of the City Planning Commission and LUBA, concluding that the conditions were justified as *reasonably related* to the impact of the expansion of the petitioner’s business.⁴⁰ Apparently, these courts believed that the appropriate standard for reviewing development exactions was the reasonable relationship level of scrutiny, the least demanding

32. Respondent’s Brief at 17, *Dolan* (No. 93-518).

33. *Dolan*, 114 S. Ct. at 2315 (citations omitted).

34. Respondent’s Brief at 11-12, *Dolan* (No. 93-518). The city required only the dedication of an easement for the bicycle path, not the actual construction of the path because “[t]o impose a bikeway construction requirement, the City must conclude that the development will principally benefit from the improvement.” *Id.*

35. *Dolan*, 114 S. Ct. at 2314. One aspect of the CDC “requires property owners in the area zoned Central Business District to comply with a 15% open space and landscaping requirement, which limits total site coverage, including all structures and paved parking, to 85% of the parcel.” *Id.* at 2313. The city noted that Dolan could use the dedicated property to meet the 15% open space requirement. *Id.* at 2314.

36. *Dolan v. City of Tigard*, LUBA 91-161 (Jan. 7, 1992).

37. *Dolan*, 114 S. Ct. at 2315.

38. *Dolan v. City of Tigard*, 832 P.2d 853 (Or. Ct. App. 1992), *aff’d*, 854 P.2d 437 (Or. 1993), *rev’d*, 114 S. Ct. 2309 (1994).

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

40. *Dolan*, 854 P.2d at 443; *Dolan*, 832 P.2d at 856. The Commission noted that it is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. . . . [T]he required flood plain dedication would be reasonably related to the petitioner’s request to intensify the use of the site given the increase in the impervious surface.

Dolan, 114 S. Ct. at 2314-15.

standard.⁴¹ To define the correct standard, the United States Supreme Court granted certiorari, reversed, and remanded.

The majority opinion, written by Chief Justice Rehnquist, concluded that the Court must first determine whether an "essential nexus" exists between [a] 'legitimate state interest' and the permit condition exacted by the city.'⁴² The test established in *Nollan v. California Coastal Commission*⁴³ was employed as the question asked in the regulatory takings analysis: Is the exaction reasonably likely to achieve what it is meant to achieve?⁴⁴ Because the Court did not find an essential nexus in *Nollan*,⁴⁵ the *Dolan* majority was not required to articulate "the required degree of connection between the exactions and the projected impact of the proposed development."⁴⁶ In *Dolan*, however, the Court held that the permit conditions would substantially advance the legitimate state interests of preventing flooding along Fanno Creek and reducing downtown traffic congestion; therefore, the essential nexus did exist.⁴⁷

After establishing that the state interests met the essential nexus test, the Court proceeded to analyze the degree of connection required between the city's exactions and the proposed development's impact.⁴⁸ The Court reviewed a series of state court decisions for insight on what level of scrutiny to apply to takings cases,⁴⁹ and concluded:

We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No 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.⁵⁰

41. *Dolan*, 854 P.2d at 449; *Dolan*, 832 P.2d at 856; see also *infra* notes 182-85 and accompanying text.

42. *Dolan*, 114 S. Ct. at 2317 (quoting *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987)).

43. 483 U.S. 825 (1987); see also *infra* notes 121-31 and accompanying text (discussing *Nollan*).

44. See *Nollan*, 483 U.S. at 837.

45. *Id.*

46. *Dolan*, 114 S. Ct. at 2317; see also *infra* notes 175-76 and accompanying text (maintaining that the *Dolan* test is a logical step in the Court's takings doctrine).

47. *Dolan*, 114 S. Ct. 2317-18.

48. *Id.* at 2318.

49. *Id.* at 2318-19; see also *infra* notes 182-95 and accompanying text (discussing the various tests that states have applied and the *Dolan* Court's reaction to them).

50. *Dolan*, 114 S. Ct. at 2319-20.

The Court thus defined the necessary connection that must be shown between the development exactions and the projected impact of the project as a standard of rough proportionality.⁵¹ Although the Court actually adopted the intermediate test often referred to as the rational nexus standard,⁵² Chief Justice Rehnquist intentionally rephrased the standard to avoid confusion with the rational-relation standard often applied in equal protection analysis.⁵³ Although no precise calculation is necessary, the Court requires local government to demonstrate that the dedication requirement is related both in degree and nature to the impact of the project.⁵⁴ Therefore, under *Dolan*, local planning agencies must now show that permit conditions imposed on planned developments are roughly proportional to the projected impact of the development.⁵⁵

Based on this framework, the Court considered whether the city's findings were sufficient to justify the dedication conditions imposed on Dolan's building permit. The Court agreed that keeping the flood plain open and free of structures was a valid means of reducing the increased risk of flooding that would result from an increase in impervious surfaces.⁵⁶ However, the Court rejected the city's contention that a public greenway was needed to reduce flooding.⁵⁷ The Court found that the city made no individualized determination of why Dolan should have to forfeit her ability to exclude others from her property.⁵⁸ Noting that the right to exclude others from one's

51. *Id.* at 2319.

52. *See infra* notes 191-97 and accompanying text. The intermediate rough proportionality test strikes a middle ground between the rigorous "uniquely and specifically attributable" test and the less exacting "reasonable relationship" test. *See infra* notes 182-95 and accompanying text. Although the Court refers to this standard as the reasonable relationship test, most scholars writing on takings have called the intermediate level of scrutiny the rational nexus test. *See infra* note 191 and accompanying text.

53. *Dolan*, 114 S. Ct. at 2319. In the majority opinion, Chief Justice Rehnquist stated: We think the "reasonable relationship test" adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause.

Id. *See generally* JOHN E. NOWAK & RONALD S. ROTUNDA, CONSTITUTIONAL LAW 573-90 (4th ed. 1991) (describing standards of scrutiny under the Equal Protection Clause).

54. *Dolan*, 114 S. Ct. at 2319-20.

55. *Id.* at 2320.

56. *Id.* In addition, the Court noted that to comply with the 15% open spaces requirement, Dolan would have to keep the flood plain undeveloped. *Id.*

57. *Id.*

58. *Id.*

property has traditionally been safeguarded,⁵⁹ the Court refused to deprive Dolan of that property right when the state interest could similarly be achieved through a private greenway.⁶⁰ If the Court upheld the dedication, Dolan "would lose all rights to regulate the time in which the public entered onto the Greenway, regardless of any interference it might pose with her retail store. Her right to exclude would not be regulated, it would be eviscerated."⁶¹

The Court similarly rejected the pedestrian and bicycle pathway dedication as not roughly proportional to the impact of Dolan's new building.⁶² The Court acknowledged that in some instances a city may require a dedication of private property for streets and sidewalks to avoid excessive congestion.⁶³ In *Dolan*, however, the city failed to meet "its burden of demonstrating that the additional number of vehicle 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."⁶⁴ Instead of merely finding that the pathway "could" or "might" offset traffic, the Court explained that the city needed to demonstrate in some quantifiable way how its findings show the pathway "will" or "is likely to" offset congestion generated by the new building.⁶⁵ As a result, the Court

59. See *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (holding that " 'the right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation"); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (arguing that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights"); Richard A. Epstein, *Property and Necessity*, 13 HARV. J.L. & PUB. POL'Y 2, 3 (1990) (arguing that the right to exclude is an absolute private property right).

60. *Dolan*, 114 S. Ct. at 2321. The majority distinguished *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980), in which the Court held under the First Amendment that a private shopping center does not have the right to exclude people who wish to distribute political pamphlets to shoppers. *Id.* at 88. The Court noted that the shopping center could establish regulations restricting the time, place, and manner in which the pamphlets could be distributed. *Id.* at 83. In *Dolan*, however, the city's dedication requirement would permanently allow recreational visitors. See *Dolan*, 114 S. Ct. at 2320.

61. *Dolan*, 114 S. Ct. at 2321.

62. *Id.* at 2322.

63. *Id.* at 2321. Based on this decision, dedications can only be required if substantiated by empirical findings that describe how an individual project will contribute to the traffic congestion. See *id.* at 2322.

64. *Id.* at 2321.

65. *Id.* at 2322. The vagueness of the *Dolan* decision is quite evident in this section as the Court demanded that the city make a quantifiable showing but then added that "[n]o precise mathematical calculation is necessary." *Id.*

determined that the exactions failed to satisfy the required degree of connection to the projected impact of the development.⁶⁶

Justice Stevens's dissent, joined by Justice Blackmun and Justice Ginsburg, criticized the Court's erection of a "new constitutional hurdle in the path of [the city's] conditions."⁶⁷ First, Justice Stevens argued that in developing the rough proportionality requirement, the majority mistakenly relied on state cases, most of which were not decided with constitutional questions in mind.⁶⁸ Second, he argued that the Court merely acknowledged the rights taken away from the property owner and failed to consider the benefits that Dolan was also likely to gain from the conditions.⁶⁹ Dolan would receive added protection against the risk of flooding because the city's excavation of the flood plain area would widen the channel's capacity to carry water during storms.⁷⁰ Justice Stevens maintained that, instead of simply looking at the exaction's effect on one strand of property rights, the Court should have considered the effect on the whole bundle,⁷¹ which would include an assessment of the benefits derived from the conditions.⁷²

Criticizing the majority's rough proportionality test as too demanding upon the city's practice of land use planning, Justice Stevens argued that the proper inquiry for determining the validity of development exactions should be whether the required essential nexus was present.⁷³ According to Justice Stevens, the *Nollan* test should be expanded only in limited circumstances,⁷⁴ and the Court should "venture beyond considerations of a condition's nature or germaneness only if the developer establishes that a concededly germane condition is so grossly disproportionate to the proposed development's adverse effects that it manifests motives other than land use regulation on the part of the city."⁷⁵

66. See *supra* notes 48-55 and accompanying text.

67. *Dolan*, 114 S. Ct. at 2323 (Stevens, J., dissenting).

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

69. *Id.* at 2324 (Stevens, J., dissenting).

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

71. *Id.* (Stevens, J., dissenting) (citing *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979), which stated that "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety").

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

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

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

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

A key concern for Justice Stevens was the impact the *Dolan* test will have on the burden of proof in takings cases. The majority's test established a standard that local planning agencies must meet;⁷⁶ Justice Stevens, on the other hand, contended that property owners should have the burden of contesting development exactions.⁷⁷ Justice Stevens argued that, by placing the burden on local government, the majority severely hampered the city's effort to implement a zoning scheme to provide for public safety.⁷⁸ He contended that public interest in zoning has been adequately demonstrated such that "[i]f 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 presumptive validity should attach to those conditions."⁷⁹ If a private property owner wishes to challenge the constitutionality of a regulation the state has demonstrated to be rational, Justice Stevens argued, then she should have to prove that the condition unreasonably impairs her expectations as a private property owner.⁸⁰

In a separate dissenting opinion, Justice Souter argued that the case could have been decided under the essential nexus test of *Nollan*.⁸¹ Regarding the flood plain easement, Justice Souter contended that, in essence, the majority decided there was no nexus between the exaction of a public area and the government interest in protecting against flooding.⁸² With respect to the bicycle path, Justice Souter argued that the majority actually decided that the bicycle path was not related to the legitimate interest in reducing congestion because the city merely showed that the path could offset traffic.⁸³ Because the essential nexus test can be used to invalidate the dedication requirements, Justice Souter would have ended the inquiry there: "*Nollan*, therefore, is satisfied, and on that assumption the city's conditions should not be held to fail a further rough proportionality test or any other that might be devised to give meaning to the constitutional limits."⁸⁴ While the majority reasoned that *Dolan* simply sharpened the *Nollan* decision by defining the degree of

76. *See id.* at 2322.

77. *Id.* at 2330 (Stevens, J., dissenting).

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

79. *Id.* at 2329-30 (Stevens, J., dissenting).

80. *Id.* at 2330 (Stevens, J., dissenting).

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

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

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

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

connection that satisfied the essential nexus standard, Justice Souter maintained that *Dolan* inappropriately extended the doctrine of regulatory takings by establishing a new test.⁸⁵

Supreme Court analysis of regulatory takings⁸⁶ stems from the landmark opinion of *Pennsylvania Coal Co. v. Mahon*.⁸⁷ In *Pennsylvania Coal*, the Court recognized for the first time that the regulation of private property could constitute a taking requiring just compensation under the Fifth Amendment.⁸⁸ At issue in *Pennsylvania Coal* was the validity of a state coal mining regulation that forbade the mining of anthracite coal "to protect the lives and safety of the public."⁸⁹ The coal company owning the rights to mine anthracite coal challenged the regulation, arguing that its property had been taken.⁹⁰ In an opinion written by Justice Holmes, the Court acknowledged that government regulation of private property may be permissible in some circumstances; however, "if regulation goes too far it will be recognized as a taking."⁹¹ Under the facts of this case,

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

86. For a general overview of regulatory takings, see Robert H. Freilich & Elizabeth A. Garvin, *Takings After Lucas: Growth Management, Planning, and Regulatory Implementation Will Work Better Than Before*, in AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 53, 54-61 (David L. Callies ed., 1993). Freilich and Garvin categorize regulatory takings into three types: physical, economic, and title. Physical takings involve regulatory action that amounts to a literal physical invasion of private property. *Id.*; see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (holding that the permanent physical occupation of the cable lines in the owner's apartment building which was authorized by the government was a per se taking); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (holding that the government's attempt to require the owner of a privately owned pond to make the waters accessible to public use was an infringement on the owner's right to exclude others and therefore constituted a taking). Economic takings occur when a government regulation fails to advance a legitimate state interest and deprives the owner of all economic benefit of his property. Freilich & Garvin, *supra*, at 59; see also *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901-02 (1992) (finding that when a regulation deprives an owner of all economically viable uses of her property, just compensation is required—regardless of the public interest supporting the regulation—unless the proposed use is prohibited under nuisance law). A title taking "places a restriction on the use of the property that significantly interferes with the incidents of ownership. This situation is most common where local government seeks development exactions from the property owner, such as land dedications or exactions in lieu of dedication." Freilich & Garvin, *supra*, at 56. The type of taking at issue in *Dolan* would fit into Freilich & Garvin's "title taking" category.

87. 260 U.S. 393 (1922).

88. *Id.* at 415.

89. *Id.* at 397; see, e.g., Joseph F. DiMento, *Mining the Archives of Pennsylvania Coal: Heaps of Constitutional Mischief*, 11 J. LEGAL HIST. 396, 396-405 (1990).

90. *Pennsylvania Coal*, 260 U.S. at 395.

91. *Id.* at 415.

the Court held that the regulation went "too far" because it essentially destroyed the coal company's property rights, making it commercially impracticable for the coal to be mined.⁹²

Since the decision in *Pennsylvania Coal*, the Court has been plagued by the need to determine which government regulations placed on permits go too far and constitute takings. In 1928, the Court employed a due process analysis to invalidate a zoning ordinance in *Nectow v. City of Cambridge*.⁹³ In *Nectow*, a property owner challenged the constitutionality of a city zoning ordinance that had placed 100 feet of his property in a residential district, thereby prohibiting any business or industrial use on the remaining property that had been designated as "unrestricted."⁹⁴ The owner claimed that, under the Fourteenth Amendment's Due Process clause, the ordinance had deprived him of the use of his property.⁹⁵ The Court held that by including only 100 feet of the plaintiff's property in a residential district, the zoning ordinance did not bear a "substantial relation" to the objective of promoting the public welfare.⁹⁶ Because the property easily could have been rezoned to make the plaintiff's entire lot unrestricted with little or no impact on the surrounding community, the Court found that the zoning ordinance failed the substantial relation test and resulted in a "highly injurious" invasion of private property.⁹⁷

The Supreme Court's next major step occurred fifty years after the Court's decision in *Nectow*. In *Penn Central Transportation Co. v. New York City*,⁹⁸ the Court refined the standard of review for regulatory takings by providing specific guidelines based on the previous strands of takings law. At issue in *Penn Central* was New York City's Landmarks Preservation Law.⁹⁹ Under the law, owners of buildings or sites designated as landmarks must apply to the

92. *Id.* at 414.

93. 277 U.S. 183, 188-89 (1928). For a general discussion of *Nectow*, see James E. Brookshire, "Taking" the Time to Look Backward, 42 CATH. U. L. REV. 901, 921 (1993).

94. *Nectow*, 277 U.S. at 186.

95. *Id.* at 185.

96. *Id.* at 188. The Court held that the government may place regulations on the use of private property through zoning ordinances; however, "such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." *Id.*

97. *Id.* at 188-89.

98. 438 U.S. 104 (1978); see, e.g., Leslie Pickering Francis, Note, *Penn Central Transportation Company v. N.Y.C.: Easy Taking-Clause Cases Make Uncertain Law*, 1980 UTAH L. REV. 369, 379-80.

99. *Penn Central*, 438 U.S. at 109-11.

Landmark Preservation Commission in order to develop or renovate their property.¹⁰⁰ The plaintiff, owner of Grand Central Station, a designated landmark, applied to the Commission for permission to build offices above the terminal.¹⁰¹ When the Commission rejected the plaintiff's plans, finding them destructive of the terminal's historic and aesthetic features, Penn Central filed suit, claiming that government application of the Landmarks Law resulted in a taking of their property without just compensation.¹⁰²

In upholding the Landmarks Law, the Court stated that "[t]he restrictions imposed are substantially related to the promotion of the general welfare."¹⁰³ The Court articulated three factors to be considered within the takings framework: the economic impact of the regulation, the interference with the owner's reasonable investment-backed expectations, and the character of the government action.¹⁰⁴ The imposed restrictions in the Landmarks Law did not deny the owner all economic use of the property because use as a terminal guaranteed that Penn Central could realize its reasonable investment-backed expectations.¹⁰⁵ Furthermore, because the regulation was substantially related to advancing the public purpose of improving quality of life in the city, the Court rejected the plaintiff's taking claim.¹⁰⁶ In addition to supplying these factors, the *Penn Central* opinion recognized that "[i]n deciding whether a particular governmental action has effected a taking" the Court must look to both "the character of the action and . . . the nature and extent of the interference with rights in the parcel as a whole."¹⁰⁷ Following *Penn*

100. *Id.* at 111-12.

101. *Id.* at 116.

102. *Id.* at 119.

103. *Id.* at 138.

104. *Id.* at 124. The Court explained:

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. 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. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. (citation omitted).

105. *Id.* at 136-37.

106. *Id.* at 138.

107. *Id.* at 130-31.

Central, the Court began to specifically define these points in the regulatory takings framework.

The Court further developed its standard of review for regulatory takings in *Agins v. City of Tiburon*,¹⁰⁸ when it examined two city ordinances to discern if they “substantially advance[d] legitimate state interests.”¹⁰⁹ In *Agins*, the plaintiff property owners planned to build a residential development and purchased five acres of unimproved land.¹¹⁰ After the plaintiffs had purchased the property, the City of Tiburon, as required by state law, developed a general land-use plan relating to the development of open space¹¹¹ and “adopted two ordinances that modified existing zoning requirements.”¹¹² Under the new ordinances, the plaintiffs’ property was zoned “RPD-1,” which permitted only “one-family dwellings, accessory buildings, and open space” areas.¹¹³ Furthermore, a density restriction limited construction on the plaintiffs’ five acre tract to between “one and five single family residences.”¹¹⁴ The property owners filed suit, claiming that these regulations violated both the Fifth and Fourteenth Amendments.¹¹⁵

Holding in favor of the city, the Court, citing both *Nectow* and *Penn Central*, ruled that “[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.”¹¹⁶ Under the facts of *Agins*, the Court concluded that the open space zoning ordinance did substantially advance legitimate governmental goals since they were implemented to protect the city from over-development.¹¹⁷ In addition, the Court found that the plaintiffs had not been stripped of *all* economically viable use of their property because they could still build five houses on the property.¹¹⁸ The Court noted that the relevant inquiry for finding a taking of private property was a

108. 447 U.S. 255 (1980). For a general discussion of *Agins v. City of Tiburon*, see Brookshire, *supra* note 93, at 923-24; Patrick Sullivan, Note, *Regulatory Takings—the Weak & the Strong*, 1 MO. ENVTL. L. & POL’Y REV. 66, 69 (1993).

109. *Agins*, 447 U.S. at 260 (citing *Nestow v. Cambridge*, 277 U.S. 183, 188 (1928)).

110. *Id.* at 257.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 258.

116. *Id.* at 260 (citations omitted).

117. *Id.* at 261.

118. *Id.* at 262.

determination of whether a private person *alone* is being asked to bear "the burden of an exercise of state power in the public interest."¹¹⁹ Therefore, because the ordinances applied equally to all property holders in the city, no taking resulted from their implementation.¹²⁰

In *Nollan v. California Coastal Commission*,¹²¹ the Supreme Court developed a rule for applying the test articulated in *Agins* that a regulation "substantially advance legitimate state interests."¹²² The Nollans applied to the California Coastal Commission for a permit to demolish a small dilapidated bungalow on their beach-front property and replace it with a larger house.¹²³ The Commission approved the permit subject to the condition that the Nollans grant a lateral easement to the state that would allow the public to pass over their property located between their seawall and the ocean.¹²⁴ The rationale behind the condition, as articulated by the Commission, was that the new house would block the public's view of the ocean and prevent the public from realizing there was a strip of accessible coastline nearby.¹²⁵ Therefore, the Commission argued that the Nollans needed to alleviate the negative impact of their development by providing lateral access across their beach, allowing the public to walk between two public beaches on either side of the Nollans' lot.¹²⁶ The Nollans challenged the condition under the Fifth Amendment Takings Clause.¹²⁷

Holding for the Nollans, the Court ruled that an unconstitutional taking of property had occurred because the permit condition did not

119. *Id.* at 260.

120. *Id.* at 262.

121. 483 U.S. 825 (1987). For an analysis of *Nollan*, see Timothy A. Bittle, *Nollan v. California Coastal Commission: You Can't Always Get What You Want, But Sometimes You Get What You Need*, 15 PEPP. L. REV. 345 (1988); Mitchell F. Disney, *Fear and Loathing on the California Coastline: Are Coastal Commission Property Exactions Constitutional?* 14 PEPP. L. REV. 357 (1987); Jerold S. Kayden, *Land-Use Regulations, Rationality, and Judicial Review: The RSVP in the Nollan Invitation* (Part I), 23 URB. LAW 301 (1991); Nathaniel S. Lawrence, *Means, Motives, and Takings: The Nexus Test of Nollan v. California Coastal Commission*, 12 HARV. ENTL. L. REV. 231 (1988); Note, *Taking a Step Back: A Reconsideration of the Takings Test of Nollan v. California Coastal Commission*, 102 HARV. L. REV. 448 (1988).

122. See *Agins*, 447 U.S. at 260-62.

123. *Nollan*, 483 U.S. at 828.

124. *Id.*

125. *Id.*

126. *Id.* at 829.

127. *Id.*

substantially advance a legitimate state interest.¹²⁸ For the permit to substantially advance a legitimate state interest, the Court decided that there must be an "essential nexus"¹²⁹ between the state's public purpose for requiring the condition and the condition itself. The Court failed to find an essential nexus in *Nollan* because there was *no relationship* between the stated objective of ensuring visual access to the beach and "the requirement that people already on the public beaches be able to walk across the Nollans' property."¹³⁰ The Court noted that "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.'"¹³¹ Therefore, *Nollan* required an essential nexus but failed to state how tight that nexus should be or what type of relationship should be required between the permit condition and the governmental purpose.

Until *Dolan*, the Court's decision in *Nollan* had been the last word on regulatory title takings.¹³² Lower courts have had difficulty in consistently applying the essential nexus standard precisely because the *Nollan* decision did not state what degree of connection should be required to have an "essential nexus."¹³³ Some lower courts have reacted to *Nollan* by diligently examining whether the relationship between the condition and the stated purpose satisfies the essential nexus standard.¹³⁴ In a 1990 New York case, *Castle Properties Co. v. Ackerson*,¹³⁵ for example, a property owner challenged a decision of the town planning board that had imposed conditions on the

128. *Id.* at 837.

129. *Id.*

130. *Id.* at 838.

131. *Id.* at 837 (quoting *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)).

132. Since *Nollan* was handed down in 1987, the Court has ruled on only one other major takings case that dealt with an economic taking. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2889 (1992); see also *supra* note 86 (discussing *Lucas*).

133. See *Commercial Builders v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992), discussed *infra* notes 161-65; *William J. Jones Ins. Trust v. City of Fort Smith*, 731 F. Supp. 912, 914 (W.D. Ark. 1990), discussed *infra* notes 142-49; *Blue Jeans Equities W. v. City & County*, 4 Cal. Rptr. 2d 114, 117-18 (Cal. Ct. App.), *cert. denied*, 113 S. Ct. 191 (1992), discussed *infra* notes 166-74; *Castle Properties Co. v. Ackerson*, 558 N.Y.S.2d 334, 336 (N.Y. App. Div. 1990), discussed *infra* notes 135-41; *Board of Supervisors v. Fiechter*, 566 A.2d 370, 373 (Pa. Commw. 1989), discussed *infra* notes 150-59.

134. See *infra* notes 135-59 and accompanying text; see also *infra* *Cherry Hills Resort Dev. Co. v. City of Cherry Hills*, 790 P.2d 827, 832-33 (Colo. 1990) (en banc); *Frisella v. Town of Farmington*, 550 A.2d 102, 106 (N.H. 1988); *Unlimited v. Kitsap County*, 750 P.2d 651, 653-54 (Wash. App. 1988).

135. 558 N.Y.S.2d 334 (N.Y. App. Div. 1990).

approval of his final site plan for an office and warehouse building in a planned industry zoning district.¹³⁶ The Planning Board conditioned approval of the final site plan on the dedication of a fifteen-foot road-widening strip and the dedication of a thirty-foot easement along the rear of plaintiff's property to provide access for abutting property owners.¹³⁷ In support of the dedication conditions, the Planning Board relied on data compiled by a consultant indicating the need for alleviation of traffic congestion.¹³⁸ However, the board admitted that "there is no empirical data to support a finding that the proposed building will affect the flow of traffic."¹³⁹ Conceding that a town planning board can impose reasonable conditions meant to further the general public welfare, the New York appellate court ruled that in the absence of specific empirical data showing the relation between the projected impact of the building in terms of traffic and the condition imposed, the Planning Board's behavior was arbitrary and capricious.¹⁴⁰ The court noted that "there is no evidence to support a finding that [the dedication conditions] are *needed* other than the conclusion, based upon mere speculation, that traffic will be adversely affected by the project."¹⁴¹ Requiring empirical data, the New York appellate court interpreted the *Nollan* essential nexus test to require a tighter connection in order to validate regulatory conditions.

Similarly, in the case of *William J. Jones Insurance Trust v. City of Fort Smith*,¹⁴² a federal district court in Arkansas ruled that more specific data was required to uphold a right-of-way dedication requirement.¹⁴³ In *William J. Jones Insurance*, the property owner applied to the city for permission to build a convenience store near his gas station.¹⁴⁴ The city granted permission to build, on the condition that the property owner dedicate to the city an expanded right of way along the street so that the avenue could be widened in

136. *Id.* at 335-36.

137. *Id.* at 336. Other conditions included relocating telephone poles, paving a 15-foot road widening strip, delivering a covenant agreeing to gratuitously dedicate an additional 20-foot road-widening strip to the state if needed, and installing permanent fountains within drainage retention basins. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 336-37.

141. *Id.* at 336.

142. 731 F. Supp. 912 (W.D. Ark. 1990).

143. *Id.* at 914.

144. *Id.* at 913.

the future.¹⁴⁵ The property owner brought suit, alleging a taking of private property without just compensation.¹⁴⁶ Relying on *Nollan*, the court ruled that, to justify the dedication requirements, the city had to show how the plaintiff's business expansion would create additional burdens on the public street.¹⁴⁷ The plaintiff produced testimony showing that an increase in business on his property would not necessarily result in increased traffic because congestion might actually result from a redistribution of existing traffic.¹⁴⁸ Because the city failed to provide evidence showing "what incremental traffic change, if any, could reasonably be expected from plaintiff's change in land use," the court found the permit condition unconstitutional.¹⁴⁹

In *Board of Supervisors v. Fiechter*,¹⁵⁰ a Pennsylvania court relied on *Nollan* to rule that the township board of supervisors could not condition subdivision approval on the dedication of eight and one-half feet of road frontage property to the township.¹⁵¹ In *Fiechter*, the property owners sought approval from the township to divide their twenty-five and one-half acre lot into two equal parcels.¹⁵² The road abutting the lot had an existing right of way thirty-three feet wide; however, the township ordinance required a fifty-foot right of way.¹⁵³ The board conditioned approval on the dedication of private property to be used as a right of way.¹⁵⁴ The landowners refused and brought suit arguing that a regulatory taking had occurred.¹⁵⁵ The court agreed that the ordinance's street-width requirement applied to the property owners because their land bordered the street; however, the court found that the ordinance did not require that land be dedicated to the township.¹⁵⁶ In addition, even if the ordinance did authorize the dedication, the court realized

145. *Id.*

146. *Id.*

147. *Id.* at 914.

148. *Id.*

149. *Id.*; see also *Rohn v. City of Vasalia*, 263 Cal. Rptr. 319, 325-28 (Cal. Ct. App. 1989) (holding that conditioning the issuance of a building permit on the dedication of land for street alignment was unconstitutional because there was no nexus between the renovation and the dedication requirement).

150. 566 A.2d 370 (Pa. Commw. 1989).

151. *Id.* at 373.

152. *Id.* at 371.

153. *Id.*

154. *Id.*

155. *Id.* at 370-71.

156. *Id.* at 371.

that, based on *Nollan*, constitutional questions would have to be addressed.¹⁵⁷ Specifically, the board would have to show how the two-lot subdivision would impact the burden on the public so as to “provide a police power justification for demanding that the landowner make a special, uncompensated contribution to the adjacent local street.”¹⁵⁸ Because the township failed to make this showing, the court held that subdivision approval could not be conditioned on dedication of a public right of way.¹⁵⁹

In contrast to the decisions in *Castle Properties*, *William J. Jones Insurance*, and *Fiechter*, other lower courts have interpreted *Nollan*'s nexus standard to require a much looser connection.¹⁶⁰ In *Commercial Builders v. City of Sacramento*,¹⁶¹ the court upheld a city ordinance that conditioned nonresidential building permits on the payment of impact fees.¹⁶² These fees were intended to offset the increased need for low income housing that would be caused by development since low-income workers would be drawn to the area.¹⁶³ Agreeing that the need for low-income housing is a legitimate state interest, the developers argued that the city failed to determine accurately the need for low-income housing attributable to the new nonresidential development.¹⁶⁴ The court rejected the developers' takings argument, stating that “*Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question.”¹⁶⁵

157. *Id.* at 372.

158. *Id.* at 373.

159. *Id.*

160. See *infra* notes 161-74 and accompanying text; *accord* *Joint Ventures, Inc. v. Department of Transp.*, 563 So. 2d 622, 626-28 (Fla. 1990); *Orlando/Orange County Expressway Auth. v. W & F Agrigrowth-Fernfield Ltd.*, 582 So. 2d 790, 792 (Fla. Dist. Ct. App. 1991); *Gardner v. New Jersey Pinelands Comm'n*, 593 A.2d 251, 263-64 (N.J. 1991).

161. 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992); see, e.g., Philip S. Simmons, Note, *Commercial Builders Revisits Nollan: Constitutional Taking and the Limits of Regulatory Exceptions*, 13 WHITTIER L. REV. 937, 937-77 (1992); Timothy M. Tesluk, Comment, *Commercial Builders of N. California v. City of Sacramento: Commerce Creates Poverty*, 42 CASE W. RES. L. REV. 1339, 1339-69 (1992).

162. *Commercial Builders*, 941 F.2d at 876.

163. *Id.* at 873.

164. *Id.*

165. *Id.* at 875. The court held that “the nexus between the fee provision here at issue, designed to further the city's legitimate interest in housing, and the burdens caused by commercial development is sufficient to pass constitutional muster.” *Id.*

Similarly, in *Blue Jeans Equities West v. City and County*,¹⁶⁶ the court declined to extend the *Nollan* analysis to conditions that require the payment of impact fees, holding that the essential nexus showing applies only to exactions that require the actual dedication of private property.¹⁶⁷ In *Blue Jeans*, the owner and developer of an office, retail, and condominium plaza applied for a development permit.¹⁶⁸ The permit was approved subject to the payment of a transit impact development fee intended to offset anticipated increased traffic burdens that the development would generate.¹⁶⁹ The developer argued that because the plaza was located away from the traditional downtown area, the city failed to show how this particular development would adversely impact public transportation.¹⁷⁰ The court framed the issue as whether the *Nollan* nexus test should be applied to situations in which the government is requiring an impact fee rather than the dedication of property.¹⁷¹ Citing prior Supreme Court cases,¹⁷² the court wrote that "the high court appears to make a distinction between 'regulatory takings,' i.e., economic regulation, most forms of zoning, and other restrictions on land use, and 'possessory takings,' where the government, or an authorized third person physically intrudes upon or appropriates the property."¹⁷³ The court concluded that the *Nollan* essential nexus test was limited to development conditions and possessory takings rather than restrictions or regulations in the form of impact fees, and that the ordinance in *Blue Jeans* therefore should be upheld.¹⁷⁴

Based on this development of the law and the confusion that lower courts have met trying to apply the *Nollan* test consistently,¹⁷⁵

166. 4 Cal. Rptr. 2d 114 (Cal. Ct. App.), *cert. denied*, 113 S. Ct. 191 (1992).

167. *Id.* at 117.

168. *Id.* at 115-16.

169. *Id.* at 116.

170. *Id.*

171. *Id.* at 117.

172. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 823 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

173. *Blue Jeans*, 4 Cal. Rptr. 2d at 117.

174. *Id.* at 118.

175. See *supra* notes 135-74 and accompanying text. The courts in *Castle Properties*, *William J. Jones Insurance*, and *Fiechter* each applied a higher level of scrutiny to government regulations than the courts in *Commercial Builders* and *Blue Jeans*. For a discussion of levels of scrutiny applied in takings claims, see *infra* notes 182-95 and accompanying text.

Dolan is the next logical step in the doctrine of regulatory takings.¹⁷⁶ In *Nollan*, Justice Scalia acknowledged that “[o]ur cases have not elaborated on . . . what type of connection between the regulation and the state interest satisfies the requirement that the former ‘substantially advance’ the latter.”¹⁷⁷ By holding in *Dolan* that imposed conditions and the projected development impact must be *roughly proportional* to each other, the Court has finally explained to what degree an essential nexus is necessary to withstand constitutional scrutiny.¹⁷⁸ Under this standard, the government must determine that the required condition is related “both in nature and extent to the impact of the proposed development.”¹⁷⁹ The Court’s examination of a series of lower court decisions prior to *Nollan*¹⁸⁰ revealed that lower court standards for the required degree of connection have generally been one of three levels of scrutiny: reasonable relationship, uniquely and specifically attributable, and the intermediate rational nexus standard.¹⁸¹

Some states have required only a general, reasonable relationship between the dedication and the proposed development.¹⁸² Under

176. At least one commentator discussing *Nollan* has noted the Court’s failure to address the degree of connection required: “The Court thus properly disposed of the case before it, yet it failed to clearly set forth a standard for determining when the nexus between permit condition and public need is sufficiently close to satisfy the substantially advance test.” Peter F. Neronha, Note, *A Constitutional Standard of Review for Permit Conditions, Exactions and Linkage Programs: Nollan v. California Coastal Commission*, 30 B.C. L. REV. 903, 929 (1989); see also *supra* notes 43-46 and accompanying text.

177. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 (1987) (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

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

179. *Id.* at 2320.

180. *Id.* at 2318-19.

181. For a general discussion of the three basic levels of scrutiny that have been applied to takings claims, see David L. Callies, *Property Rights: Are There Any Left?*, in REGULATORY TAKINGS: THE LIMITS OF LAND USE CONTROLS 247, 283 (G. Richard Hill ed., 1993); R. Marlin Smith, *From Subdivision Requirements to Community Benefit Assessment and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 11-14 (1987).

182. For a discussion of the reasonable relationship standard, see William A. Falik & Anna C. Shimko, *The “Takings” Nexus—The Supreme Court Chooses a New Direction in Land Use Planning: A View From California*, 39 HASTINGS L.J. 359, 385 n.149 (1988); Julian C. Juergensmeyer & Robert M. Blake, *Impact Fees: An Answer to Local Governments’ Capital Financing Dilemma*, 9 FLA. ST. U. L. REV. 415, 427-33 (1988); Neronha, *supra* note 176, at 909; Theodore C. Taub, *Development Exactions and Impact Fees*, C872 ALL-ABA COURSE OF STUDY 269, 273 (1993). While commentators and scholars have referred to this least exacting level of scrutiny as the reasonable or rational relationship test, the *Dolan* court explained this level of scrutiny by simply stating, “[i]n some States, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice. We think this

this standard, a court will look at the development's size, the burdens on society that will be created by the development, and the effect the development will have on local government. The government has nearly unlimited discretion to impose conditions on development because the court does not require the local government to prove how a particular development will impact society.¹⁸³ Although rejected by most states, some California courts have applied this minimal standard in takings cases by simply requiring a showing that the development project will generally impact the public in the manner the condition or exaction addresses.¹⁸⁴ Arguing that this standard fails adequately to protect private property from unconstitutional government objectives, the *Dolan* Court, like most lower courts, rejected the reasonable relationship level of scrutiny.¹⁸⁵

A more exacting standard imposed by some states is the "uniquely and specifically attributable test."¹⁸⁶ To validate development exactions under this rigorous test, the government must show that the proposed development itself has created the specific and unique need that will be addressed by the condition.¹⁸⁷ Unlike the

standard is too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose." *Dolan*, 114 S. Ct. at 2318-19.

183. Taub, *supra* note 182, at 273.

184. *See* Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek, 484 P.2d 606, 610 (Cal. 1971) (upholding an exaction for recreational lands without requiring the state to explain how the development in question would directly cause a lack of recreational parks); *Grupe v. California Coastal Comm'n*, 212 Cal. Rptr. 578, 601-02 (Cal. App. 1985) (stating that only an indirect relationship between exaction and impact of the development was required to uphold constitutionality of easement condition). For examples of other states that have applied this standard, see *Billings Properties, Inc. v. Yellowstone County*, 394 P.2d 182, 188 (Mont. 1964) (holding that a rational statutory requirement for the dedication of land for parks and playgrounds is a valid exercise of police power); *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673, 676 (N.Y. 1966) (upholding as a reasonable form of village planning a requirement that subdivision pay a fee in lieu of dedication of recreational land).

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

186. For courts that have applied the "uniquely and specifically attributable test," see *Krughoff v. City of Naperville*, 369 N.E.2d 892, 895 (Ill. 1977) (upholding a dedication of land or fees because the development specifically and uniquely created the need for new schools and parks); *Pioneer Trust & Sav. Bank v. Mount Prospect*, 176 N.E.2d 799, 801-02 (Ill. 1961) (finding an unconstitutional taking where local government failed to show that the need for additional schools and parks was directly caused by the new development); *Frank Ansuini, Inc. v. Cranston*, 264 A.2d 910, 913 (R.I. 1970) (striking down an ordinance that required all developers to dedicate seven percent of their land for recreational purposes without apportioning dedication requirements based on need created by each particular development); *accord* *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n of Danbury*, 230 A.2d 45, 47 (Conn. 1967); *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 15 (N.H. 1981); *McKain v. Toledo City Plan Comm'n*, 270 N.E.2d 370, 374 (Ohio 1971).

187. Taub, *supra* note 182, at 273.

first level of scrutiny, under which the government had to show only that a general public need existed and was enhanced by the development, under the stricter scrutiny the government must demonstrate that the development created the need and that the exaction is directly related to that need.¹⁸⁸ The *Dolan* Court rejected this strict standard because exactions essentially could be imposed only to satisfy needs specifically and uniquely attributable to the particular development.¹⁸⁹ Therefore, exactions would be "takings" unless the municipality could demonstrate that the "exaction is directly proportional to the specifically created need"¹⁹⁰—a standard the Court found too demanding for Fifth Amendment analysis.

A third standard applied by a majority of courts is the rational nexus test.¹⁹¹ Under this level of scrutiny, courts require local governments to show a concrete connection between the required dedication and the development's projected impact.¹⁹² Unlike the strict scrutiny test, imposed exactions do not have to be based on needs uniquely and specifically attributable to the projected impact of a development.¹⁹³ Instead, the government must demonstrate that the development will contribute to the public need. Although less

188. Neronha, *supra* note 176, at 915.

189. *Dolan*, 114 S. Ct. at 2319. The Court noted that "[w]e do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved." *Id.*

190. *Id.*

191. For a discussion of the intermediate rational nexus test, see Falik & Shimko, *supra* note 182, at 385 n.149; Juergensmeyer & Blake, *supra* note 182, at 427-33; Neronha, *supra* note 176, at 914; Taub, *supra* note 182, at 274. Scholars generally refer to this intermediate level as the rational nexus test; however, in *Dolan* the Court articulated the standard as the reasonable relationship test. *Dolan*, 114 S. Ct. at 2319 ("A number of state courts have taken an intermediate position, requiring the municipality to show a 'reasonable relationship' between the required dedication and the impact of the proposed development.").

192. Taub, *supra* note 182, at 274. For cases applying the rational nexus standard, see *Wald Corp. v. Metropolitan Dade County*, 338 So. 2d 863, 868 (Fla. 1976) (upholding a subdivision exaction ordinance because evidence established that the exaction alleviated adverse impact of the development on the public); *Simpson v. North Platte*, 292 N.W.2d 297, 301 (Neb. 1980) (holding that an appropriate exercise of police power depends on the relationship between the government's exaction and the impact of the project); *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442, 447 (Wis. 1965) (upholding a dedication requirement for schools and recreational land because evidence established a rational connection between the exaction and needs created by development); *accord Collis v. City of Bloomington*, 246 N.W.2d 19, 26 (Minn. 1976); *Land/Vest Properties, Inc. v. Town of Plainfield*, 379 A.2d 200, 204-05 (N.H. 1977); *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 807 (Tex. 1984); *Call v. City of West Jordan*, 606 P.2d 217, 221 (Utah 1979).

193. See *supra* note 186 and accompanying text.

rigid than the uniquely and specifically attributable test, this standard does not allow exactions to be justified on any general need in the community regardless of whether the condition is proportionate to the impacts generated by the development.¹⁹⁴ Instead, this level of scrutiny strikes a middle ground by requiring that exactions only be imposed on a property owner in proportion to the additional needs or demands upon the municipality that the proposed development creates.¹⁹⁵

A majority of lower courts have applied the rational nexus standard—ultimately adopted in *Dolan* and rephrased as the rough proportionality test¹⁹⁶—in the following manner:

The first prong of the test requires that the need for the additional facility or service be created by the development being assessed, and that the assessment not exceed the cost of meeting the needs created by the new development. The second prong requires that the development being assessed derive some meaningful benefit from the use of the funds collected, although the benefit need not be exclusive to the development being assessed.¹⁹⁷

The *Dolan* Court's decision to adopt this intermediate standard is consistent with prior takings doctrine. In *Agins v. City of Tiburon*,¹⁹⁸ the Court first required that a condition "substantially advance legitimate state interests."¹⁹⁹ In *Agins*, the Court held that the state interest in preserving open space was advanced by the zoning ordinance applying density restrictions.²⁰⁰ The Court found the ordinances to be part of an overall scheme for residential development rationally applied to "protect . . . residents . . . from the ill effects of urbanization."²⁰¹ Finding that the property owner could still develop five homes on the five acre tract, the Court denied the taking claim.²⁰² Here, the Court required more than a reasonable or rational relationship but less than the exacting standard of the uniquely and specifically attributable test. In other words, although the zoning ordinances were required to "substantially advance a

194. Neronha, *supra* note 176, at 916.

195. Taub, *supra* note 182, at 274-75.

196. *Dolan*, 114 S. Ct. at 2319-20; *see supra* text accompanying note 50.

197. Taub, *supra* note 182, at 274.

198. 447 U.S. 255 (1980); *see supra* notes 108-20 and accompanying text.

199. *Agins*, 447 U.S. at 260.

200. *Id.* at 262.

201. *Id.* at 261-62.

202. *Id.* at 262-63.

legitimate state interest," the city did not have to show that the petitioner's development alone created the open space problem.²⁰³

Dolan also expanded upon the standard developed in *Nollan v. California Coastal Commission*.²⁰⁴ In *Nollan*, the "substantially advance" test applied by the Court could be satisfied by demonstrating an essential nexus between the permit condition and the additional needs created by the development that the condition seeks to mitigate.²⁰⁵ The Court ruled in *Nollan* that the permit condition requiring the Nollans to grant a public easement for lateral access across their beach did not substantially advance the legitimate state interest of enhancing the visibility of the beach for the general public.²⁰⁶ Therefore, the city was prevented from requiring a lateral easement because no nexus was found between the condition and the state's purpose in requiring the condition. With regard to degree of nexus required, the Court did not specifically adopt a particular standard to be applied in future cases; instead, the Court accepted the minimal reasonable relationship standard suggested by the Commission "for purposes of discussion."²⁰⁷ The Court then recognized that the conditions in *Nollan* did "not meet even the most untailed standards" because "[i]t is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house."²⁰⁸ Although the Court did not require a specific degree of connection in *Nollan*, Justice Scalia did recognize in a footnote that the Court has long required more than a rational, general connection.²⁰⁹ Therefore, the "rough proportionality" degree of connection the *Dolan* Court decided to apply to takings claims has some precedent in the *Nollan* opinion.

The Court's adoption of the intermediate standard in *Dolan* thus flows from the Court's decisions in *Agins*²¹⁰ and *Nollan*,²¹¹ and was even predicted by scholars writing on the subject of takings.²¹² As

203. *Id.* at 260-61.

204. 483 U.S. 825 (1987); *see also supra* notes 121-31 and accompanying text.

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

206. *Id.* at 838-39.

207. *Id.* at 838.

208. *Id.*

209. *Id.* at 834 n.3.

210. 447 U.S. 255 (1980); *see also supra* notes 108-20 and accompanying text.

211. 483 U.S. 825 (1987); *see also supra* notes 121-31 and accompanying text.

212. *See, e.g.,* Lawrence, *supra* note 121, at 259-64 (discussing the case's application in the future with respect to level of scrutiny); James L. Oakes, "Property Rights" in *Constitutional Analysis Today*, 56 WASH. L. REV. 583, 625-26 (1981) (acknowledging that

in *Agins* and *Nollan*, the Court first subjected the development exactions in *Dolan* to the essential nexus standard to determine whether the permit conditions would substantially advance a legitimate state interest.²¹³ After finding a sufficient relation between the imposed conditions and the public needs they sought to address, the *Dolan* Court needed to determine what degree of connection should be required. Although in *Nollan* the Court did not specifically adopt a level of scrutiny, it did require something more than a general reasonable connection, indicating that the Court in the future would be willing to require a standard more stringent than reasonable relation.²¹⁴

With the proper level of scrutiny now articulated in *Dolan*, a local government cannot identify a need in society—such as lack of visual access to the ocean or flood plain excavation—and then simply impose a permit condition to satisfy that need without demonstrating that the development will create the need or contribute to it.²¹⁵ However, unlike the requirements of the stricter standard,²¹⁶ the government does not have to show that the particular development in question is solely responsible for the burdens that the condition is attempting to address. Instead, the government must make an individual determination that the development has contributed to the problem.²¹⁷ *Dolan* makes clear that the government must prove that the condition is “roughly proportional” to the needs to which the development has contributed. In *Dolan*, for example, the Court agreed that the proposed project would contribute to the risk of flooding and increase in traffic.²¹⁸ However, the Court determined

a new judicial era will provide broader recognition of property rights); Craig A. Peterson, *Land Use Regulatory “Takings” Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335, 338 (1988) (noting that more than a rational relationship has been required by the Supreme Court); Michael G. Trachtman, Comment, *Subdivision Exactions: The Constitutional Issues, the Judicial Response, and the Pennsylvania Situation*, 19 VILL. L. REV. 782, 795-807 (1974) (predicting that the rational nexus standard would be adopted by a majority of courts).

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

214. *Nollan*, 483 U.S. at 837. The Commission was unable to demonstrate a sufficient nexus between imposed conditions and the public needs they sought to address; therefore, the Commission did not meet the essential nexus test and the inquiry ended. *Id.*

215. *Dolan*, 114 U.S. at 2319 (“[A] city may not require a property owner to dedicate private property for some future public use as a condition of obtaining a building permit when such future use is not ‘occasioned by the construction sought to be permitted.’” (citing *Simpson v. North Platte*, 292 N.W.2d 297, 302 (Neb. 1980))).

216. See *supra* notes 186-90 and accompanying text.

217. *Neronha*, *supra* note 176, at 930-31.

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

that the relatively harsh dedication requirement imposed by the city was not proportional to the degree of public burden that Dolan's development would impose on the city.²¹⁹

The *Dolan* rough proportionality standard is new to regulatory takings doctrine in that the Court did not identify a required nexus at all in prior cases.²²⁰ However, prior to *Dolan*, many jurisdictions already were requiring local governments to justify dedication requirements in terms of proportionality.²²¹ For example, in *William J. Jones Insurance v. City of Fort Smith*,²²² the Arkansas district court demanded that the city justify its request for a right of way dedication by showing how the traffic would change as a result of the property owner's development.²²³ The court was clearly holding the city to a standard similar to rough proportionality. Rather than simply accepting the city's testimony that convenience stores had a certain number of cars associated with them over time, the court required a determination specific to this development.²²⁴

Similarly, in *Castle Properties Co. v. Ackerson*,²²⁵ the New York appellate court ruled that the Planning Board had to justify its right of way dedication requirements by showing empirical evidence about how and to what degree the plaintiff's office and warehouse building would adversely affect traffic and safety in the area.²²⁶ In addition, the Pennsylvania court in *Board of Supervisors v. Fiechter*²²⁷ ruled that a dedication of private property for public use would be a taking requiring just compensation unless the proposed development created special needs that could be addressed only through the dedication of a public right of way.²²⁸

The courts in the above cases all required an individual showing of how a proposed project would contribute to problems in society. All three required the governmental body conditioning the permits to provide specific evidence, even empirical data, to demonstrate how the condition would offset the demands created by the new develop-

219. *Id.* at 2321-22.

220. *See supra* notes 46, 121-31 and accompanying text.

221. *See supra* notes 186, 191-92 and accompanying text.

222. 731 F. Supp. 912 (W.D. Ark. 1990); *see supra* notes 142-49 and accompanying text.

223. *William J. Jones Ins.*, 731 F. Supp. at 914.

224. *Id.*

225. 558 N.Y.S.2d 334 (N.Y. App. Div. 1990); *see supra* notes 135-41 and accompanying text.

226. *Castle Properties Co.*, 558 N.Y.S.2d at 336-37.

227. 566 A.2d 370 (Pa. Commw. 1989); *see supra* notes 150-59 and accompanying text.

228. *Fiechter*, 566 A.2d at 373.

ments. In this sense, *Dolan* merely elevates to a federal constitutional level a degree of scrutiny that these and other lower courts had already required. Thus, for those courts demanding an individual determination that dedications be proportionally related to the impact of a development, the *Dolan* decision adds nothing new to the inquiry. As Justice Souter contended, *Dolan* could have been decided by simply following *Nollan's* analysis, in which the Court implied that a rational nexus standard for judicial review was involved in regulatory title takings.²²⁹

The impact of *Dolan* will be most evident in courts that refused to elevate their requirements for judicial review of development conditions after *Nollan*. For example, in *Commercial Builders of Northern California v. City of Sacramento*,²³⁰ the city might now have to apportion the amount of the impact fee imposed on non-residential developers based on an individual finding that a particular development will increase the demand for low income housing.²³¹ Similarly, if *Blue Jeans Equities West v. City and County*²³² were to arise today, the court might have to conduct a study to determine how and to what degree the location of the property owner's plaza will affect the transit system.²³³ Were such a showing made, the city might then impose impact fees on the development, limited to the proportion of the proposed development's projected impact.

The definition of "rough proportionality" is still vague, however, and may not apply to cases that do not involve the dedication of private property to the government. The rough proportionality standard could be limited to situations in which the government is conditioning a building permit on the dedication of private property. Chief Justice Rehnquist's opinion did not broadly extend the rough

229. *Dolan*, 114 S. Ct. at 2331 (Souter, J., dissenting). In *Nollan*, the Court stated: [O]ur 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 have rationally decided that the measure adopted might achieve the State's objective."

Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 n.3 (1987) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)).

230. 941 F.2d 872 (9th Cir.), cert. denied, 112 S. Ct. 1997 (1991); see also *supra* notes 161-65 and accompanying text.

231. *Commercial Builders*, 941 F.2d at 877-78.

232. 4 Cal. Rptr. 2d 114 (Cal. Ct. App. 1992); see also *supra* notes 166-74 and accompanying text.

233. *Blue Jeans*, 4 Cal. Rptr. 2d at 119.

proportionality standard to all types of land use regulations. Instead, he stated that the standard of rough proportionality should be applied to determine whether the degree of *land dedication* exactions imposed on a property owner bear the required relationship to the impact of the development.²³⁴ However, the Court may later determine that the imposition of an impact fee can be, in certain circumstances, as unjustified and intrusive as dedication requirements. This form of land use regulation is widespread,²³⁵ and some scholars have argued that impact fees or non-title regulatory takings may impinge constitutional rights as much as possessory takings or what some have called regulatory title takings.²³⁶

In practical terms, *Dolan's* greatest immediate impact is that the rough proportionality standard is now constitutionally required. States can no longer apply varying standards when examining development conditions.²³⁷ *Dolan* also places the burden of proof on the government to justify the regulation.²³⁸ Generally, when a zoning ordinance is challenged, the burden of proof "rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights."²³⁹ By shifting the burden of proof, property owners will no longer bear the often insurmountable burden of proving that a regulation is unreasonable. Instead, the *Dolan* majority contended that requiring the municipality to demonstrate rough proportionality would provide a constitutional check on the government's police power.²⁴⁰ Another possible effect of the shift in burden of proof is the potential negative impact it may have on local governments' efforts to implement zoning requirements

234. *Dolan*, 114 S. Ct. at 2319-20.

235. As Justice Blackmun wrote: "The Court's recent Taking Clause decisions teach that *non-physical* government intrusions on private property, such as zoning ordinances and other land-use restrictions, have become the rule rather than the exception." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 447 (1982) (Blackmun, J., dissenting).

236. See, e.g., Michael M. Berger, *Happy Birthday Constitution: The Supreme Court Establishes New Ground Rules for Land Use Planning*, in *REGULATORY TAKING: THE LIMITS OF LAND USE CONTROL* 357, 405 (G. Richard Hill ed., 1993) (arguing that there is no principled reason why the law should distinguish between physical and regulatory takings).

237. *Dolan*, 114 S. Ct. at 2320. Chief Justice Rehnquist noted: "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 circumstances." *Id.*

238. *Id.* at 2323 (Stevens, J., dissenting).

239. *Id.* at 2320 n.8.

240. *Id.* at 2322.

to protect the public welfare.²⁴¹ As Justice Stevens argued, saddling a city with the heightened burden of a rough proportionality showing will make city planning much more difficult.²⁴² Yet, local governments can still wield the power to require property development concessions as long as they are proportional to the impact of the development at issue.

Dolan is yet another step toward the development of a categorical framework in which takings claims can be analyzed. For many lower courts, the rough proportionality analysis may simply rephrase standards they have already required.²⁴³ For other courts, however, the impact of *Dolan* is less clear.²⁴⁴ Some have hailed the decision as a significant victory for private property rights.²⁴⁵ However, *Dolan* may not apply beyond its facts to monetary exactions where the government demands a mitigation fee from the landowner in exchange for a permit.

Dolan is consistent with the Court's insistence on reasonableness in the implementation of land-use regulations, and most likely will result in only minimal immediate changes in the practice of local land use planning.²⁴⁶ Dedications will still be available to local planning boards; however, individual property owners will be entitled to an individualized examination under the heightened scrutiny of rough

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

242. Justice Stevens wrote:

In our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms. Where there is doubt concerning the magnitude of those impacts, the public interest in averting them must outweigh the private interest of the commercial entrepreneur.

Id. (Stevens, J., dissenting).

243. *See supra* notes 135-59 and accompanying text.

244. *See supra* notes 160-74 and accompanying text.

245. *See* Michael M. Berger, *Property Owners Have Rights, Too*, L.A. TIMES, July 3, 1994, at 5; Richard A. Epstein & William Mellor, *Reining in the Land-Use Planners*, CHI. TRIB., July 22, 1994, at 23 (arguing that "a presumption in favor of liberty—rather than in favor of government regulation—provides a strong weapon to individuals confronted by government infringement of their rights").

246. *See* Joan Biskupic, *Justices Broaden Property Rights; Land Use Requirements May Be Takings*, WASH. POST, June 25, 1994, at A1 (concluding that the Court's ruling may require planners to be more careful but will have little impact on the area); *Proportionality and Land Use*, SACRAMENTO BEE, July 3, 1994 at FO4 (stating that the rough proportionality standard "should not produce any radical changes in the daily conduct of local planning").

proportionality in an effort to guarantee that conditions are rationally and fairly administered.

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