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CITY OF TIGARD AND TAKINGS LAW

**Richard J. Lazarus
Professor of Law
Washington University School of Law**

**Regulatory Takings and Resources: What are the Constitutional Limits
Natural Resources Law Center
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Dolan v. City of Tigard and Takings Law

Richard J. Lazarus

I. INTRODUCTION

A. Summary

We should learn from the Court's decision in *Dolan v. City of Tigard* this Term whether the current Court is willing to continue down the Takings Clause path first charted out by Justice Scalia in his opinion for the Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). There are only five Justices now on the Court who were sitting on the bench at the time *Nollan* was decided -- three from the majority and two from the dissent -- and while the Court is generally more conservative in 1994 than it was in 1987, it is far from clear whether *Nollan* will be reaffirmed and expanded or, instead, sharply limited. The most interesting issue in the case concerns the extent to which the Court accepts the plaintiff's claim that the Takings Clause requires government to demonstrate a fairly close fit between the conditions the government would like to place on resource development and the actual, proven impacts of that development. Such permit conditions and exactions are a regular feature of government regulation in environmental and natural resource law.

The record in the case supporting the City's permit conditions is much stronger than the Court likely realized at the time that the Court granted certiorari, which makes affirmance of the state supreme court's rejection of the takings challenge possible, notwithstanding that the Court likely granted review expecting to reverse. At oral argument, however, several of the "swing" Justices still seemed somewhat skeptical of the fairness of the conditions and concerned about the possibility that the

plaintiff may have been singled out because of the City's desire for easements on her property rather than because of the City's general concern with flood hazards and traffic congestion.

B. References

Dolan v. City of Tigard, S. Ct. No. 93-518 (pending)

Nollan v. California Coastal Commission, 483 U.S. 825 (1987)

Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 Law & Contemp. Probs. 51 (1987)

Richard Epstein, *Bargaining with the State* (1993)

Richard Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 5 (1988)

Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L. J. 1119 (1964)

Jerold Kayden, *Land Use Regulation, Rationality, and Judicial Review: The RSVP in the Nollan Invitation (Part I)*, 23 Urb. Law. 301 (1991)

Daniel Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land Use Law*, 24 Urb. Law. 1 (1992)

Frank Michelman, *Takings 1987*, 88 Colum. L. Rev. 1600 (1988)

Stewart Sterk, *Nollan, Henry George, and Exactions*, 88 Colum. L. Rev. 1731 (1988)

R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 Law & Contemp. Probs. 5 (1988)

Kathleen Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415 (1989)

Glen Summers, *Private Property Without Lochner, Toward A Takings Jurisprudence Uncorrupted by Substantive Due Process*, 142 U. Pa. L. Rev. 837 (1993) (student comment)

II. NOLLAN TO DOLAN: PERMIT CONDITIONS AND THE TAKINGS CLAUSE

A. Why Permit Conditions/Exactions Are So Important To Regulators And The Potential For Their Abuse In Environmental And Natural Resources Law

Permit conditions and exactions are frequently the rule rather than the exception in environmental and natural resource law. Whether by statute or by regulation, centralized government tends to restrict private property rights in natural resources based on generalizations and rough categories. By contrast, the natural environment that is the object of these restrictions tends to resist easy application of the generalizations underlying those laws. Permit conditions and exactions provide a means for more finely tuning the regulatory process and for achieving a better accommodation between competing private and public interests in natural resource development, conservation, and preservation.

B. Why The Takings Clause Applies To Permit Conditions: *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)

While providing a means for fine tuning and accommodation, the permit condition process also invites the potential for government abuse and overreaching. Most simply put, government can use the threat of police power restrictions to exact transfers of wealth from private parties to the government. To prevent government from misusing its police power authority in this fashion, the Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), held that the Fifth Amendment Takings Clause limited the grounds on which government could decide to lift an otherwise permissible police power restriction. At issue in the case was a police power restriction on the height of residences along the California coast, which the California Coastal Commission agreed to lift in exchange for the homeowner agreeing to provide the public with an easement of lateral access along the beach in front of the house. The Court held that the permit condition amounted to an unconstitutional taking because the objectives served by the permit condition did not bear sufficient relation to the ends served by the police power restriction being lifted by that condition.

The Court's holding that the Takings Clause, rather than simply the Due Process Clause, limits the permissible scope of permit conditions and exactions is not irresistible, which is also why the case is significant. Left unsettled post-*Nollan* is whether the Court intends to invoke the Takings Clause to limit permit conditions other than the kind of easement at issue in *Nollan*, which implicated the Court's traditional Takings Clause concern with physical invasions. The *Nollan* majority also strongly intimated that the Takings Clause required a tighter means/ends fit -- substantially advancing -- than the "reasonable relationship" traditionally required in Due Process analysis. Finally, the *Nollan* Court raised, but did not decide, how closely related the permit condition must be to the restriction being lifted. The Court did not have to reach the issue, having concluded that there was no relationship at all in *Nollan*.

C. Why The Supreme Court Granted Review In *Dolan v. City Of Tigard*, S. Ct. No. 93-518 (pending)

The most likely reason that at least four Justices voted to grant review in *Dolan* was to reaffirm and underscore the Court's ruling in *Nollan*. The impact of *Nollan* in lower court litigation had been modest, at best. The petition for certiorari in *Dolan*, coupled with a strong dissent in the Oregon Supreme Court, created the distinct impression that the Oregon Supreme Court had given mere lip service to *Nollan*, and had required the challenged state law to do no more than pass muster under a mere "rational basis" standard. The dissent also strongly suggested that the permit condition at issue in that case -- which, as in *Nollan*, involved easements and public access -- was both wholly out of proportion to the character and degree of the government's legitimate interests in the plaintiff's proposed development and nothing more than an attempt by the City to obtain public parkland without paying just compensation to the landowner.

In *Dolan*, the plaintiff sought a permit to double the size of an existing hardware and plumbing store on a downtown lot in Tigard, Oregon. The lot is

adjacent to a creek that had flooded portions of the downtown in the past, and the City had previously designated part of the lot a floodplain and restricted development on that portion. Pursuant to City ordinance, the landowner's proposed development -- which did not involve constructing any portion of the building within the floodplain designation -- amounted to a "major development," requiring a City permit. The City agreed to issue the necessary permit, but only upon the landowner agreeing to dedicate two separate easements to the City: (1) an easement near the creek, on which the City would construct a drainage ditch; and (2) an easement on which the City would construct a bicycle/pedestrian pathway. The City asserted that the drainage easement was necessary because the proposed development would increase the amount of impervious surface area, thereby increasing flood risks, and that the pathway was necessary to alleviate existing traffic congestion problems that the proposed development would exacerbate. The City subsequently denied plaintiff's request for a variance from these restrictions.

III. THE STAKES IN *DOLAN*: WHAT TO LOOK FOR IN THE COURT'S OPINION -- WHITHER *NOLLAN*

Only five of the nine justices who originally decided *Nollan* are still on the Court: three from the majority (Rehnquist, O'Connor, and Scalia) and two from the dissent (Blackmun and Stevens). This case therefore provides the opportunity to see whether the current Court is interested in accepting *Nollan's* apparent invitation to subject land use regulations to heightened judicial Takings Clause scrutiny or is instead now ready to limit the *Nollan* ruling. The Court's perspective on *Nollan* can be gleaned from its treatment of a variety of issues, described below.

A. Due Process Or Takings

Although the City, the United States, and most of the other amici supporting the City shied away from suggesting to the Court that the Due Process Clause, rather than the Takings Clause, should govern these issues, it is possible that the Court might revisit *Nollan's* premise. But unlikely. Certainly the oral argument offered no hint of that occurring.

B. Presumptions, Burdens Of Proof, And Variance Procedures

Much of *Dolan* turns on who has the burden of proof to demonstrate what, when. The Court has long asserted that legislation is entitled to a presumption of constitutionality, but has left fairly muddled precisely how that presumption operates in a takings case. For instance, what is the significance of that presumption in terms of the initial showing that a property owner must make in order to place the onus back on the government to justify its action. The burden issue was a source of some dispute between the majority and dissent in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), and promises to be so again in *Dolan*, because of the uncertainty inevitably surrounding the impacts that the plaintiff's proposed development would actually have on flood hazards and traffic congestion. There is also necessarily uncertainty surrounding the extent to which the City's conditions will redress those impacts. Further complicating the inquiry in *Dolan* (likely in the City's favor) was the existence of a variance procedure that the plaintiff pursued, but without trying to refute the City's assumptions regarding the development's impact.

C. Levels Of Scrutiny: "Specifically And Uniquely Attributable," "Substantially Related," "Reasonably Related," "Rationally Related," and "Wholly Out Of Proportion"

The most significant part of the Court's ruling is likely to be how the Court characterizes the relationship that the Takings Clause requires between the permit condition and the police power restriction being lifted and, even more importantly, the degree to which the permit condition must be proportional to the burdens of the proposed development. For instance, to what extent must the City demonstrate the precise amount of flood hazards attributable to the plaintiff's proposed development and to what extent must the burdens imposed by the drainage easement be somehow considered proportional to those incremental hazards. Likewise, to what extent must the City demonstrate the impact on traffic congestion of the plaintiff's proposed development and to what extent must the burdens imposed by the easement for the bicycle/pedestrian be proportional to that impact. (Must, for instance, the pathway be

intended to serve the transportation needs of the plaintiff's store or is it sufficient that the pathway will generally reduce traffic congestion).

In *Nollan*, the Court addressed only the first matter -- the relationship between the initial police power restriction and the permit condition -- and concluded that there had to be some relationship without characterizing what the relationship must be. The Court did not address the second issue directly, because, having found no relationship, the Court did not have to define what the relationship must be. But the Court nonetheless strongly intimated that the Takings Clause required some proportionality inquiry. While the City and the plaintiff in this case sharply disagree on the question of what relationship the record establishes -- with the City claiming that it can, but should not have to, meet a heightened standard -- much of their respective briefs, and those of their supporting amici, focus on the proper characterization of the relationship test.

C. Fairness And Subterfuge

The Court's primary concern in *Nollan*, which will not disappear in *Dolan* is the possibility of government using police power restrictions and permit conditions to single out some property owners for excessive burdens. At oral argument in *Dolan*, several of the Justices were plainly concerned about the possibility that the plaintiff had been unfairly singled out. In particular, they were concerned that the City might not be requiring other developers to mitigate the flood hazard and traffic impacts of their development and had simply singled out those property owners, like Dolan, who happened to own property in an area where the government sought easements to further the City's desire to have greenways and a bicycle/pedestrian pathway. Whether the City persuaded the Justices that the plaintiff was not being singled out and that developers elsewhere had to abide by comparable (not identical) permit conditions is likely to be critical to the City's chances of obtaining a favorable ruling.

D. The Finer Points

1. Accounting for the Benefits of Regulation in Considering the Constitutionality of Its Burdens

Government lawyers have long argued that courts should not consider the burdens of regulations without simultaneously taking into consideration the benefits the regulation confer on private property. And there is some support in the case law for doing so. In *Dolan*, government lawyers (for both the City and the United States as *amicus curiae*) placed heavy emphasis on the disproportional benefits that the plaintiff would receive from the permit conditions, because of the proximity of her property to the creek and the commercial advantages to her business of reduced traffic congestion. At the oral argument, however, the Justices seemed divided regarding the significance of the benefit inquiry.

2. Distinguishing Between Governmental Objectives: Public Safety (Floodplains and Traffic Congestion) vs. Public Welfare (Bike Paths and Greenways)

Some lawyers involved in the case thought that the record supporting the easement condition for the drainage ditch was stronger than the record in favor of the easement for the bicycle/pedestrian pathway, partly because the Court might be more sympathetic to the purposes served by the former. Others thought, for similar reasons, that the greenway aspects of the City's plan were the most vulnerable. At oral argument, some of the Justices (including Kennedy) appeared interested in distinguishing between the two easements and the City's various objectives.

3. Assessing Expectations: Downtown Commercial vs. Residential Property

This case is potentially distinguishable from *Nollan*, by analogy to *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), on the theory that easements are less disruptive of the property owner's expectations when the

property at issue is downtown commercial property (as in *PruneYard*) rather than residential property (as in *Nollan*).

4. Allowing for Thresholds and Cumulative Impacts

The kind of strict proportionality analysis sought by the plaintiff in this case, if adopted by the Court, could limit government's ability to redress cumulative impacts, which are, by definition, not readily attributable to any one isolable regulated activity. It could also limit the government's ability to use "rules of thumb" and thresholds in devising police power regulations and permit conditions. These issues were themes within the briefs filed by the City and the United States.

III. SUPREME SPECULATION: COUNTING THE POSSIBLE VOTES (FOR THE GOVERNMENT)

A. The *Nollan* Dissenters: Relying on Stevens and Blackmun

B. The New Voices on the Court

1. Hoping for Souter and Ginsburg
2. Reaching for Kennedy

C. The *Nollan* Majority (minus 2 (Powell and White), plus 1 (Thomas))

1. Concerned About O'Connor
2. Dreaming of Rehnquist
3. Scalia (and Thomas) NOT!