Legal Limits on Development Exactions: Responding to *Nollan* and *Dolan*

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INTRODUCTION

Over the last thirty years local governments have increasingly relied on development exactions as a funding source for land use development.[1] Faced with shrinking budgets and the need to provide services attendant to growth, cities and counties have used the development approval process to require developers to provide both land and money to offset the perceived costs that development places on a community. These exactions might be required at any stage of development requiring government approval, but present the same choice to developers: make the required contribution if you want to proceed with development.

Although exactions might take a variety of forms and serve a number of functions,[2] they typically fall into three general categories: either dedication of land, money in lieu of land, or impact fees. At their best exactions reflect a sincere government effort to require developers to pay for the costs development places on the surrounding community.[3] At its worst

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1. *See, e.g.*, ALAN A. ALTSHULER & JOSE A. GOMEZ-IBANEZ, REGULATION FOR REVENUE 19-20, 35-39 (1994); Paul P. Downing & Thomas S. McCaleb, *The Economics of Development Exactions*, *in* DEVELOPMENT EXACTIONS, 43-45 (James E. Frank & Robert M. Rhodes eds., 1987); Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW & CONTEMP. PROBS. 51, 62 (Winter 1987). The literature on development exactions has also become voluminous in recent years. *See generally* ALTSHULER & GOMEZ-IBANEZ, DEVELOPMENT EXACTIONS (James E. Frank & Robert M. Rhodes eds., 1987).

2. For example, one commentator compiled a nonexhaustive list of fourteen forms that exactions might take including physical dedications, fees in lieu of dedication, provision of public improvements, lump sum payments, construction of public improvements outside the development area, provision of services and profit sharing with the jurisdiction. *See* LOUIS F. WESCHLER ET AL., *Politics and Administration of Development Exactions in* DEVELOPMENT EXACTIONS, 21-22 (James E. Frank & Robert M. Rhodes eds., 1987).

3. *See* Associated Home Builders v. City of Walnut Creek, 484 P.2d 606, 610-11 (Cal. 1970) (requiring dedication of land for park reasonable response to loss of open space

the system has been a means by which governments can use their monopoly power to extort from developers property interests often unrelated to the proposed development.[4]

Until recently judicial policing of exactions had been left entirely to the states, with courts reflecting a variety of approaches to how far government could reach in imposing exactions.[5] This changed eight years ago when the Supreme Court for the first time addressed the issue of development exactions in *Nollan v. California Coastal Commission*.[6] In that case the Court established that at a minimum there must be an "essential nexus" between any required dedication of land and the purposes that would have justified denial of a building permit.[7] In setting this standard, however, the Court did not address the required degree of connection between a required exaction and the projected impact of proposed development. Thus, even though *Nollan* established that exactions must be connected to the projected development impact, it left open the degree of required connection.

Seven years later the Court again addressed the issue of development exactions in *Dolan v. City of Tigard*,[8] where it addressed the question left open in *Nollan* concerning the required degree of connection between the exaction and development impact. In holding that a required greenway dedication and a required bikepath dedication were both invalid, the Court held that there must be "rough proportionality" between any required dedication and projected impacts of development.[9] Perhaps more significantly, the Court placed the burden of establishing "rough proportionality" on the city and indicated that the city had to quantify the extent of the proportionality.[10]

The full impact of *Dolan* is yet to be seen, but it will undoubtedly prove to be a significant decision in land use law. Although the Court suggested it was following what it identified as the middle position of states,[11] the requirements it imposed on local governments to justify exactions arguably go beyond those imposed by many of those middle states. This is particularly true concerning the need to quantify the

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and crowded recreational areas caused by residential development).

4. *See* J.E.D. Assocs., Inc. v. Town of Atkinsen, 432 A.2d 12, 14 (N.H. 1981) (holding that exaction in question constituted "an out-and-out plan of extortion").

5. *See infra*, part I.B.

6. 483 U.S. 825 (1987).

7. *Id.* at 837.

8. 114 S. Ct. 2309 (1994).

9. *Id.* at 2319-20.

10. *See id.* at 2322 ("No precision mathematical calculation is required, but the city must make some effort to quantify its findings . . .").

11. *See id.* at 2318.

connection between impact and exaction. Just as importantly, *Dolan* is the latest in a line of Supreme Court cases affirming the importance of property rights and indicating the Court's resolve to take such rights seriously.[12]

At the same time, the potential impact of *Dolan* should not be overemphasized. Though recognizing property rights, the Court clearly and repeatedly affirmed the right of local governments to engage in land use controls in general[13] and to impose reasonable development exactions in particular. Indeed, the Court clearly affirmed the right and even need of local governments to impose reasonable development exactions to pay for the cost of development.[14]

The basic message of *Dolan* is therefore quite simple: government may impose exactions to offset the impact of development, but the exactions must relate to and flow from the development itself. Government cannot use the land use approval process to capture an interest unrelated to the impact of development. As a practical matter, this provides governments with substantial room with which to work, although the burden will clearly be on the government to justify exactions that are imposed. Despite the clarity of this central message, the full reach of *Dolan* is still uncertain with regard to several important matters. First is whether the decision applies to exactions other than physical dedications of land. Second is the potential impact the decision has on state law standards. Although the Court suggested it was following the majority of jurisdictions that have adopted a middle position in reviewing exactions, the Court's analysis itself indicates that it might indeed have gone further.

This article will examine the impact of *Dolan* on exaction law. Part one will first examine the growth of exactions and state law standards in policing their use. Part two will then examine the Supreme Court's decision in *Nollan*. Part three will then examine the *Dolan* decision itself. Finally, the last three sections of the article will address three basic questions that remain after *Dolan*: (1) when does the *Dolan* test apply? (2) what impact

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12. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (holding land use regulation which deprives owner of all economic viability constitutes a taking); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (conditioning building permit on exaction unrelated to development impact constitutes a taking); First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987) (holding government must pay just compensation for temporary regulatory taking).

13. *See, e.g.*, 114 S. Ct. at 2316 (noting that the Court has long recognized authority of local government to engage in land use planning); *Id.* at 2322 ("cities have long engaged in the commendable task of land use planning . . .").

14. *Id.* at 2322. By establishing the "rough proportionality" standard and affirming the "reasonable relationship" standard adopted by many state courts, the *Dolan* majority clearly indicated that local governments could impose reasonable exaction requirements.

will *Dolan* have on state law standards? and (3) what exactions appear to be most at risk under the *Dolan* test?

I. BACKGROUND

A. DEVELOPMENT EXACTIONS

The term "development exaction" generally refers to the practice of requiring a developer to provide land or money in return for a needed development approval.[15] Development, while often beneficial to a community, also brings a variety of costs to a community in the form of required services. Development adds children to the schools, traffic to the streets, increased use of parks, burdens on sewers, and assorted other costs to a community.[16] In theory, exactions simply require a developer to pay for the increased costs of services that accompany development. In this sense they might be loosely described as user fees.[17]

Property law has long recognized the right of local governments to require payment for the costs created by development.[18] Special assessments, though distinct from exactions in several respects,[19] have long permitted government to assess landowners for the costs of improvements.[20] Similarly, dedication of internal subdivision improvements, such

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15. *See, e.g.*, ALTSHULER & GOMEZ-IBANEZ, *supra* note 1, at 3; James E. Frank & Robert M. Rhodes, *Introduction*, *in* DEVELOPMENT EXACTIONS, 1, 2-4 (James E. Frank & Robert M. Rhodes eds., 1987); Donald L. Connors & Michael E. High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 69, 70 (Winter 1987).

16. *See* ALTSHULER & GOMEZ-IBANEZ, *supra* note 1, at 77-96; *see also*, Downing & McCaleb, *supra* note 1, at 49-50 ("property taxes paid by new development unlikely to be sufficient to cover the costs of the public services provided").

17. *See, e.g.*, James C. Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, 50 LAW & CONTEMP. PROBS. 85, 88 (Winter 1987) ("Although exactions may or may not constitute user fees as such, exactions and user fees share a common heritage"); WESCHLER ET AL., *supra* note 2, at 33 (suggesting some communities view exactions as user fees).

18. For a general discussion of early exaction related practices, *see* Fred P. Bosselman & Nancy Stroud, *Legal Aspects of Development Exactions*, *in* DEVELOPMENT EXACTIONS 70-73 (James E. Frank & Robert M. Rhodes eds., 1987).

19. ALTSHULER & GOMEZ-IBANEZ, *supra* note 1, at 17. Special assessments differ from exactions in at least three ways: "First, special assessments fall on all property owners in a defined benefit zone, not merely those undertaking development. Second, they are imposed for the direct benefit of those assessed rather than of future customers or the community at large. In most cases, finally, special assessments are imposed at the explicit request of property owners in the affected benefit zone." *Id.*

20. *See id.*

as streets and sidewalks, have been common since the 1920s and with near universal practice by the middle of this century.[21] Requirement of such on-site improvements have been viewed as necessary to address a host of problems caused by unimproved lots.[22]

The years after World War II saw a surge in housing development and with it an expansion of the types of exactions communities sought to impose. In particular, communities began to require developers to dedicate land for schools, parks, and other public uses.[23] In the alternative, developers were frequently permitted to provide fees-in-lieu of dedication, especially where the land involved was too small to serve the intended purpose. These fees could then be pooled to acquire the necessary land.[24] Extending exactions to land dedications for parks and schools was a significant step beyond internal street dedications, since such new uses were generally not exclusively reserved for occupants of the subdivision.

Recent years have seen continued expansion of the types of uses for which exactions are sought, with municipalities frequently seeking exactions for a number of off-site facilities. Particularly significant has been use of impact fees as a form of development exaction. Impact fees are typically one-time fees imposed on a developer to offset a variety of potential impacts, on the theory that the cost of providing services for new developments can be determined in advance.[25] Although conceptually similar to land dedications and fees in lieu of land, impact fees provide greater flexibility in the type and scope of projects that might be funded. Impact fees today might be used for a number of off-site uses, such as sewage treatment plants, road development, drainage systems, water systems, parks, and schools.[26]

Recent studies have indicated that exaction use has grown to significant proportions, especially since 1970.[27] Several explanations have been

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21. *See* 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, 6 (Winter 1987); *see also* WESCHLER ET AL., *supra* note 2, at 17-18.

22. *See* Smith, *supra* note 21, at 6.

23. *See* Bosselman & Stroud, *supra* note 18, at 73; WESCHLER ET AL., *supra* note 2, at 17-18.

24. *See, e.g.*, WESCHLER ET AL., *supra* note 2, at 18.

25. *See* Smith, *supra* note 21, at 16.

26. *See* WESCHLER ET AL., *supra* note 2, at 19.

27. *See* ALTSHULER & GOMEZ-IBANEZ, *supra* note 1, at 35-39 (reviewing recent studies); Elizabeth D. Purdam & James E. Frank, *Community Use of Exactions: Results of a National Survey*, *in* DEVELOPMENT EXACTIONS (James E. Frank & Robert M. Rhodes eds., 1987) (discussing results of a 1985 national survey); Bauman & Ethier, *supra* note 1.

offered for this surge, foremost of which is the increasing financial restraints faced by local governments.[28] As federal and state revenue sharing has decreased, together with increased pressure to limit property taxes, local governments have resorted to exactions and impact fees as a means to finance services for new construction. Other rationales have also been given for the growth of exactions, including greater community ability to control growth and rise of the environmental movement.[29]

Whatever the reasons for the recent surge in exaction use, required dedication of property and/or payment of impact fees to gain development approval clearly implicates the property rights of landowners. The next section will briefly discuss state law standards in policing exactions.

B. STATE LAW STANDARDS

Judicial review of exaction requirements have traditionally fallen entirely on state courts. In struggling for a rationale to uphold the practice, several early decisions resorted to what became known as the "privilege" theory of exactions. These courts reasoned that subdivision development was a privilege that developers voluntarily applied for, and thus acquiesced to any conditions that might be imposed as part of the process.[30] The "privilege" theory thus avoided some of the difficult taking issues that accompany exaction practice, but granted almost unlimited discretion to local government in the type of exactions they might impose. As a practical matter, no courts currently follow the "privilege" theory.

In stark contrast to the "privilege" theory, several decisions from the early 1960s applied very exacting standards in reviewing development exactions.[31] Most significant was the Illinois Supreme Court decision in *Pioneer Trust & Savings Bank v. Mount Prospect*,[32] where in striking down

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28. A number of commentators have suggested that financial restraints have led to increased use of exactions. *See, e.g.*, ALTSHULER & GOMEZ-IBANEZ, *supra* note 1, at 23-26; Downing & McCaleb, *supra* note 1, at 44; Connors & High, *supra* note 15, at 69.

29. *See* ALTSHULER & GOMEZ-IBANEZ, *supra* note 1; WESCHLER ET AL., *supra* note 2, at 33.

30. *See, e.g.*, Newton v. American Security Co., 148 S.W.2d 311, 314 (Ark. 1941); Ridgefield Land Co. v. City of Detroit, 217 N.W. 58 (Mich. 1928); Brous v. Smith, 106 N.E.2d 503, 506-07 (N.Y. 1952); *see generally*, Bosselman & Stroud, *supra* note 18, at 71-72; Thomas M. Pavelko, Comment, *Subdivision Exactions: A Review of Judicial Standards*, 25 WASH. U. J. URB. & CONTEMP. L. 269, 283 (1983).

31. *See* Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961) (citing specifically and uniquely attributable test); Gules & Assocs. v. Town of Newburgh, 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (Sup. Ct. 1960); *aff'd*, 15 A.D.2d 815, 225 N.Y.S.2d 538 (1962) (citing direct need test).

32. 176 N.E.2d 799 (Ill. 1961).

a required land dedication for schools the court established what has become known as the "specific and uniquely attributable" test.[33] This test has generally been interpreted to require that "the exaction is directly proportional to a specifically created need," and to limit exactions to those that are specifically and uniquely attributable to the development. Since the town's school facilities were already utilized to capacity, the court noted the need for new schools were not uniquely attributable to the new development, making the exaction invalid.[34] Although primarily associated with Illinois, several other jurisdictions have at one time or another adopted the "specific and uniquely attributable" language in reviewing subdivision exactions.[35]

Although the Supreme Court and several commentators have suggested that the "specifically and uniquely attributable" test still commands a strong minority position,[36] its current viability is questionable.[37] Although the language is still used at times, several of the decisions that adopted it no longer follow it with rigor. Even the Illinois Supreme Court, though still characterizing its standard as the "specifically and uniquely attributable" test, arguably relaxed it in a 1977 decision.[38] The court indicated that the dedication did not need to uniquely benefit the development, but only that it provide a partial benefit to and be "fairly proportioned" to the required exaction,[39] a clear contrast to *Pioneer Trust*. Thus, although Illinois would still appear to apply a more rigorous review than most states, it no longer requires an exacting relationship between exaction and development.[40]

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33. *Id.* at 801.

34. *Id.* at 802.

35. *See* Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 273 A.2d 880 (Conn. 1970); McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370, 374 (Ohio 1971); Frank Ansuini, Inc. v. Cranston, 264 A.2d 910, 913 (R.I. 1970).

36. *See* Dolan v. City of Tigard, 114 S. Ct. 2309, 2319 n.7 (1995) (noting that "specifically and uniquely attributable" test minority position); Nicholas U. Morosoff, *"'Take' my Beach Please": Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. REV. 823, 868 (1989) (citing specifically and uniquely attributable" test strong minority position); Pavelko, *supra* note 30 at 25 (citing a strong minority position).

37. *See* Bosselman & Stroud, *supra* note 18, at 74 (suggesting no state still follows "specifically and uniquely attributable" test as originally established and that it "is now of historical interest only").

38. *See* Krughoff v. City of Naperville, 369 N.E.2d 892 (Ill. 1977).

39. *Id.* at 895.

40. In its most recent decision, Northern Ill. Home Builders Ass'n v. DuPage County, 649 N.E.2d 384 (Ill. 1995), announced after *Dolan*, the Illinois Supreme Court applied the "specifically and uniquely attributable" test to two state enabling statutes, which permitted counties to adopt transportation impact fees on new development. Although the legislature had repealed the first statute and replaced it with the second statute, local ordinances had

The vast majority of states today articulate one of two related standards in reviewing subdivision exactions: the "rational nexus" test or the "reasonable relationship" test. Although courts and commentators disagree on whether these are distinct tests or essentially the same,[41] this confusion

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been enacted under both ordinances and thus both required review. The court stated that its standard of review was the "specifically and uniquely attributable" test from *Pioneer Trust*, and that only the second of the two statutes met that test. The second statute met that standard largely because it explicitly incorporated the test, stating that road impact fees must be "specifically and uniquely attributable to the traffic demands generated by the new development paying the fee." 605 ILCS 5/5-906(a)(1). The statute defined "specifically and uniquely attributable" to mean that a new development creates the need, or an identifiable portion of the need, and that the development must receive a direct and material benefit from improvements made with the fee. The court found this comported with *Pioneer Trust*, since developers had to contribute to improvements required by their activity, but not for improvements caused by the community as a whole. 649 N.E.2d at 390.

Conversely, the first enabling act was invalid, largely because it failed to explicitly incorporate the "specifically and uniquely attributable" language into the act itself. *Id.* Further, the act did not limit fees to that portion of the improvements necessitated by the development, but instead stated that fees be set to fund all road improvements "needed to maintain a reasonable level of service." *Id.* at 390. Thus, the level of community need, rather than the portion of need contributed by the development, determined fees, which was impermissible.

This decision clearly shows a relatively rigorous review of exactions. Yet the statute that was upheld basically conforms to the Illinois Supreme Court's more relaxed standard articulated in *Krughoff*. In particular, the statute only required that fees be proportionate to need created by the development and was interpreted by the court not to require that improvements be used exclusively or overwhelmingly by the development paying the fee. *Id.* Although clearly requiring some scrutiny, such requirements are consistent with both the "rational nexus" test described *infra* notes 41-66 and even *Dolan's* "rough proportionality" standard.

41. Several courts and commentators clearly view the "rational nexus" test as a distinct and more rigorous standard than the "reasonable relationship" test, *see, e.g.*, Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863, 865-68 (Fla. Dist. Ct. App. 1976); Holmes v. Planning Bd. of New Castle, 433 N.Y.S.2d 587, 598-99 (A.D.N.Y. 1980); Batch v. Town of Chapel Hill, 376 S.E.2d 22, 31 (N.C. Ct. App. 1989); Rachel M. Janutis, Note, Nollan *and* Dolan: *"Taking" a Link Out of the Development Chain*, 1994 U. ILL. L. REV. 981, 989-993 (1994); Smith, *supra* note 21, at 13-14; 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, 148-54 (1987). While others have explicitly or implicitly viewed them as being essentially the same test, *see, e.g.*, Howard County v. JJM, Inc., 482 A.2d 908, 920 (Md. 1984); Simpson v. City of North Platte, 292 N.W.2d 297, 301 (Neb. 1980); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 807 (Tex. 1984); Jerold S. Kayden & Robert Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing*, 50 LAW & CONTEMP. PROBS. 126, 126-27 n. 3 (1987); Bosselman & Stroud, *supra* note 18, at 75-78 (implicitly suggesting same test); Pavelko, *supra* note 30, at 287-88 n.107.

More generally, courts and commentators differ significantly in how they organize

is largely a result of the manner in which the "reasonable relationship" test is applied. As a practical matter both tests reject the more extreme positions of the privilege theory and the "specific and uniquely attributable" tests, instead requiring some relationship between the required exaction and development impacts, but not total precision. As will be discussed below, however, courts have differed in the rigor given the "reasonable relation" test, with some in effect equating it with "rational nexus" and others applying it more deferentially.

The most commonly articulated state standard today is the "rational nexus" test, which requires that exactions "bear a rational nexus to the needs created by, and benefits conferred upon, the subdivision."[42] This test is usually traced to *Jordan v. Village of Menomomee Falls*,[43] where the Wisconsin Supreme Court rejected the more rigid "specific and uniquely attributable" test and instead required that there be a "reasonable connection" between the proposed subdivision and the required exaction.[44] The actual phrase "rational nexus" was first used several years later by the New Jersey Supreme Court,[45] and has since been adopted by a number of other courts.[46]

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the different state tests for reviewing exactions. Several state there are three distinct standards: (1) specifically and uniquely attributable; (2) rational nexus; and (3) reasonable relationship. *See, e.g.*, *Wald Corp.*, 338 So. 2d at 865-68; *Holmes*, 433 N.Y.S.2d at 598-99; *Batch*, 376 S.E.2d at 31; Delaney et al., *supra* at 148-54. Others suggest three distinct tests, but ones different in nature; *see* Conners & High, *supra* note 15, at 75-76 ((1) strict need test; (2) specifically and uniquely attributable test; (3) rational nexus test); Morosoff, *supra* note 36, at 864-70 (1) Judicial-deference test; (2) specifically and uniquely attributable test; (3) rational-nexus test); Pavelko, *supra* note 36, at 284-88 (same). Clifford B. Olshaker, Note, *Uncertainty in the Empire State: A Reevaluation of New York's Taxings Jurisprudence After* Dolan v. City of Tigard, 16 CARDOZO L. REV. 1849, 1863-66 (1995) (same). Finally, several have suggested there is just one current standard, either "rational-nexus" or "reasonable relationship," although it might be applied with varying degrees of scrutiny. *See* Bosselman & Stroud, *supra* note 18, at 75-78; Kayden & Pollard, *supra* at 126-27 n.3; Olshaker, *supra* at 1865 n.82.

42. Longridge Builders v. Planning Bd. of Princeton, 245 A.2d 336, 337 (N.J. 1969).

43. 137 N.W.2d 442 (Wis. 1965), *appeal dismissed* 385 U.S. 4 (1966). Most commentators discussing the "rational nexus" test attribute its beginning to *Jordan*, even though the phrase "rational nexus" was not used in that decision. *See, e.g.*, JULIAN C. JURGENSMEYER & DONALD G. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 7.8 (2d ed. 1986); Morosoff, *supra* note 36, at 869-70.

44. *See* 137 N.W.2d at 448.

45. Longridge Builders v. Planning Bd. of Princeton, 245 A.2d 336, 337 (N.J. 1969).

46. *See* Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. Dist. Ct. App. 1983); Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863, 868 (Fla. Dist. Ct. App. 1976); Howard County v. JJM, Inc., 482 A.2d 908, 920-21 (Md. 1984); Arrowhead Dev. Co. v. Livingston County Rd. Comm'n, 283 N.W.2d 865, 869 (Mich. 1979); Batch v. Town of Chapel Hill, 376 S.E.2d 22, 31 (N.C. 1989); Land/Vest Properties, Inc. v. Town of Plainfield,

As initially suggested in *Jordan* and commonly stated today, the "rational nexus" test has two components. First, there must be a rational nexus between the required exaction and the need generated by development.[47] Although not calling for precision, there must be some proportion or reasonable connection between what is being required of the developer and the burden imposed by the development.[48] Second, there must also be a nexus between the exaction and benefits accruing to the subdivision.[49] In essence this requires that the demanded exactions in fact are used to address the needs created by the development.[50] This can be met in several ways, such as clearly earmarking funds or by showing that expenditures for facilities exceed the value of required exactions.[51]

As noted above, a number of courts use a "reasonable relationship" standard instead of a "rational nexus" test.[52] This often appears quite similar to the "rational nexus" test and involves a similar analysis,[53] with courts at times citing to rational nexus cases. Importantly, both tests make clear that the required exaction must to some degree relate to the purported need created by development, and yet do not demand complete precision in the relationship. Thus, under both standards, the fact that exactions might benefit others than just those in the subdivision does not make it invalid.[54]

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379 A.2d 200, 204-05 (N.H. 1977); Robert Mueller Assocs. v. Zoning Hearing Bd. of Buffalo Twp., 373 A.2d 1173, 1174 n.1 (Pa. 1977).

47. *See, e.g.*, Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611 (Fla. Dist. Ct. App. 1983); Longridge Builders v. Planning Bd. of Princeton, 245 A.2d 336, 337 (N.J. 1969).

48. *See, e.g.*, Land/Vest Properties, Inc. v. Town of Plainfield, 379 A.2d 200, 204-05 (N.J. 1977); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 448 (Wis. 1965); JURGENSMEYER & HAGMAN, *supra* note 43, at 210-11.

49. *See* Hollywood, Inc. v. Broward Cnty, 431 So. 2d 606, 611-12 (Fla. Dist. Ct. App. 1983); JURGENSMEYER & HAGMAN, *supra* note 43, at 211-12; Bosselman & Stroud, *supra* note 18, at 80-81.

50. *See* Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976); Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611-12 (Fla. Dist. Ct. App. 1983); JURGENSMEYER & HAGMAN, *supra* note 43, at 211-12; Bosselman & Stroud, *supra* note 18, at 80-81.

51. *See* JURGENSMEYER & HAGMAN, *supra* note 43 at 211; Bosselman & Stroud, *supra* note 18, at 80-81.

52. *See, e.g.*, Ayres v. City Council of Los Angeles, 207 P.2d 1, 6 (Cal. 1949); Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976); Home Builders Ass'n v. City of Kansas City, 555 S.W.2d 832, 834-35 (Mo. 1977); Simpson v. City of North Platte, 292 N.W.2d 297, 301 (Neb. 1980); 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, 220 (Utah 1979).

53. *See, e.g.*, Simpson v. City of North Platte, 292 N.W.2d 297 (Neb. 1980); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 807 (Tex. 1984) (applying two prong need and benefit analysis).

54. *See, e.g.*, Collis v. City of Bloomington, 246 N.W.2d 19, 24-26 (Minn. 1976)

Despite the similarity of articulated standards used by most courts today, some significant differences emerge with regard to how those standards are actually applied, particularly regarding the required degree of relationship between exaction and development impact, and how that relationship is established. A number of courts under both the "rational nexus" and "reasonable relationship" tests appear to require some proportional or substantial degree of relationship. For example, the most commonly articulated version of the "rational nexus" test states that developers can be required to pay only that "portion of the cost that bears a "rational nexus" to their development,[55] which some courts have explicitly stated is a proportionality or apportionment standard.[56] Other courts have used language suggesting a proportionality requirement, such as permitting exactions "to the extent" of the created need[57] or interpreting rational as "substantial."[58] Although not calling for precise calculations, each of these suggest some generalized form of cost accounting, in which a developer can be required to provide exactions proportional to the burden imposed on society.

Other courts, however, have applied a more relaxed standard, often applying a standard of review similar to the rational basis level of review under constitutional analysis. This is particularly true with some decisions applying the "reasonable relationship" standard, which has been interpreted to require only some relationship. Under this more relaxed "reasonable relationship" approach, an exaction is valid if there is some connection between the required exaction and projected development impact[59] or if the "proposed development is a contributing factor to the problem sought to be

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(relying on rational nexus cases); Simpson v. City of North Platte, 292 N.W.2d 297, 301 (Neb. 1980) (applying rational nexus cases).

55. *See, e.g.*, Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 448 (Wis. 1965).

56. *See* Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976) ("reasonable portion"); Land/Vest Properties, Inc. v. Town of Plainfield, 379 A.2d 200, 204-05 (N.H. 1977) ("proportionality test"); Longridge Builders, Inc. v. Planning Bd. of Princeton, 245 A.2d 336, 338 (N.J. 1968) ("apportionment"); Batch v. Town of Chapel Hill, 376 S.E.2d 22, 32 (N.C. 1989) ("prorated portion").

57. *See* Home Builders Ass'n v. City of Kansas City, 555 S.W.2d 832, 835 (Mo. 1977).

58. *See* Simpson v. City of North Platte, 292 N.W.2d 297, 301 (Neb. 1980); 181 Inc. v. Salem County Planning Bd., 336 A.2d 501, 506 (N.J. Super. Ct. 1975).

59. *See* Ayres v. City Council of Los Angeles, 207 P.2d 1 (Cal. 1949); Associated Home Builders, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971), *appeal dismissed*, 404 U.S. 878 (1971); Grupe v. California Coastal Comm'n, 212 Cal. Rptr. 578 (Cal. Ct. App. 1985).

alleviated."[60] Moreover, some courts give substantial deference to the government's own assertion that the necessary relationship exists. This is perhaps most clearly seen in *Billings Properties, Inc. v. Yellowstone County*,[61] where the Montana Supreme Court upheld a required dedication of the land for subdivision approval. Although the court used language suggesting a rigorous standard of review, it proceeded to hold that it was sufficient that the municipality found that such a need existed.[62]

Several California and New York decisions in particular have applied the "reasonable relationship" test in a very deferential manner, in essence equating it with the police power. For example, in an early decision, *Ayres v. City Council*,[63] the California Supreme Court upheld the validity of an off-site dedication, stating that such a dedication would be valid as long as it was "reasonably related" to the proposed development. In applying this standard, though, the court readily accepted the asserted relationship offered by the city.[64] Later California[65] and New York[66] decisions have given a similar deferential review to exactions.

In sum, most state court decisions in recent years apply either a "rational nexus" test or "reasonable relationship" test when reviewing the validity of development exactions. Although these tests are at times used interchangeably, some courts have equated the "reasonable relationship" test with a very deferential review. Generally speaking, all recent decisions have recognized the need for some relationship between the required exaction and projected development impact, but usually do not demand a precise fit. The degree of relationship varies, however, with many decisions requiring some form of proportionality, while others would require only some connection. Courts also differ with regard to how the relationship is established, though most do not appear to require a clear quantification of the relationship.

Until recently the above state standards were the only developed law regarding development exactions. The next section will discuss *Nollan v. California Coastal Commission*, the Supreme Court's first foray into the

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60. Holmes v. Planning Bd. of New Castle, 433 N.Y.S.2d 587, 598 (N.Y. App. Div. 1980).

61. 394 P.2d 182 (Mont. 1964).

62. *Id.* at 187-88.

63. 207 P.2d 1 (Cal. 1949).

64. *Id.* at 5.

65. *See* Associated Homebuilders, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971), *appeal dismissed*, 404 U.S. 878 (1971); Nollan v. California Coastal Comm'n, 223 Cal. Rptr. 28 (Cal. Ct. App. 1986); Grupe v. California Coastal Comm'n, 212 Cal. Rptr. 578 (Cal. Ct. App. 1985).

66. *See* Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966); Holmes v. Planning Bd. of New Castle, 433 N.Y.S.2d 587, 598 (A.D.N.Y. 1980).

area of development exactions.

II. *NOLLAN V. CALIFORNIA COASTAL COMMISSION*

A. FACTS

In *Nollan v. California Coastal Commission*,[67] the Supreme Court for the first time examined the constitutionality of a development exaction requirement. In *Nollan* the plaintiffs applied to the California Coastal Commission for a permit to replace an existing bungalow with a three bedroom house. The Commission granted the permit subject to the condition that the Nollans dedicate a public easement across their property between the high-tide mark and a seawall on their property.[68] The easement was designed to connect two public beaches that were separated by the Nollans' property; indeed, forty-three of the Nollans' beachfront neighbors had already granted similar easements as a condition to acquire building permits.[69]

The Nollans challenged the imposition of the easement condition and were granted the right to a full evidentiary hearing on the validity of the permit condition.[70] After the hearing, the Coastal Commission affirmed imposition of the permit condition on the basis that the new house would increase blockage of the ocean view, thus contributing to a "psychological barrier" that would burden the public's ability to use the beach.[71] The easement was therefore justified to partially offset that burden. The Nollans successfully challenged the condition in the trial court,[72] but the California Court of Appeal reversed, holding that the permit condition was valid.[73] Citing to an earlier California decision,[74] the court stated that an access condition on development was sufficiently related to a development's impact as long as the project contributed to the need for access, even if the development was not solely responsible for the need and the relationship was only indirect.[75]

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67. 483 U.S. 825 (1987).
68. *Id.* at 827-28.
69. *Id.* at 829.
70. *Id.* at 828.
71. *Id.* at 828-29.
72. *Id.* at 829.
73. 223 Cal. Rptr. 28 (Cal. Ct. App. 1986).
74. *See* Grupe v. California Coastal Comm'n, 212 Cal. Rptr. 578 (Cal. Ct. App. 1985).
75. 223 Cal. Rptr. at 30-31.

B. SUPREME COURT ANALYSIS

The Supreme Court began its analysis by noting that if the Coastal Commission had simply made an outright demand for the easement it would constitute a taking, since it would involve a physical invasion of land.[76] The Court emphasized that it has long recognized the right to exclude others as "one of the most essential sticks in the bundle of rights,"[77] noting that physical invasions of property have consistently been considered takings no matter how minimal the economic impact of the action.[78] An easement would clearly constitute a physical invasion and thus a taking.[79]

The Court proceeded to note, however, that if the Commission had a valid basis to deny the permit altogether, then it certainly should have the power to grant the permit subject to a condition designed to serve the same purpose as an outright denial, even if the condition standing alone would constitute a taking.[80] The Court reasoned that if the prohibition would be valid under the police power, "it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose" would be invalid.[81] Thus, for example, a condition that required the Nollans to provide a viewing spot on their property to let passersby see the ocean would be valid if the Commission could have denied the permit because it would block the view of the ocean. Although such a viewing spot, standing alone, would constitute a taking, the power to forbid construction "surely include[s] the power to condition construction upon some concession of property rights that serves the same end."[82]

The key to such an analysis, however, is that there be an "essential nexus" between the grounds for denying the permit and the purposes served by the permit condition.[83] Without such a nexus, the permit condition is nothing more than an effort to use its monopoly power to obtain a property right without paying just compensation. As such, it amounts to extortion.[84]

Having established this "essential nexus" test, the Court proceeded to apply it to the easement condition before it. The Court assumed, without

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76. *Nollan*, 483 U.S. at 831.

77. *Id.* (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1983)).

78. *Id.* at 831-32.

79. *Id.*

80. *See id.* at 836.

81. *Id.* at 836-37.

82. *Id.* at 836.

83. *Id.* at 837.

84. *Id.*

deciding, that the Commission could have denied the permit altogether because of the blockage of view.[85] Nevertheless, the condition was invalid because there was no perceived nexus between the easement along the beach and the development impact that would have justified denial of the permit-blocking "visual access" to the beach from the street. In particular, the Court said that it was "impossible to understand" how requiring that people already on the beach be able to walk across the Nollans' property reduced the problem of blocked view which is the problem posed by the development.[86] The Court declined to address the issue of how much of a connection there had to be between the permit condition and the problems posed by development, noting that under even a loose "reasonable basis" standard the condition failed.[87] It suggested in dictum, however, that it might require a more substantial degree of connection.[88]

Because *Nollan* involved the unusual scenario where there is no connection between an exaction and development impact, the full import of the "essential nexus" standard was left undeveloped. The case clearly established two points, however. First, at a minimum there must be some nexus or connection between a required exaction and the projected impact of development.[89] In this sense the Court made clear that development rights were not just for sale, but that conditions had to be in response to projected impacts.

Second, though not specifying the degree of required connection, the Court indicated that it would take a hard look at any purported connections between exaction and development impact. The Court emphasized that the Fifth Amendment was "more than a pleading requirement" and that compliance was "more than an exercise in cleverness and imagination."[90] Thus, courts are to take a hard look at the reasons offered for the exaction,

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85. *Id.* at 836-37.

86. *Id.* at 838-39.

87. *Id.* at 838.

88. In response to Justice Brennan's dissent which stated that the Commission "should have little difficulty in the future" in demonstrating the required connection between access and burden, *see Nollan*, 483 U.S. at 862, the Court stated that the Fifth Amendment was "more than a pleading requirement, and compliance with it more than an exercise in cleverness and imagination." *Id.* at 841. It then emphasized that its earlier cases reviewing restrictions on property rights required a "'*substantial* advancing' of a legitimate state interest." *Id.* (emphasis in original). It stated that this choice of adjective was important where conveyance of a property interest (i.e. the easement) was a condition of development, "since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." *Id.*

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

90. *Id.* at 841.

suggesting a degree of scrutiny greater than found with some state decisions.[91]

Two important questions remained after *Nollan*, however. First was what type of development exactions the "essential nexus" test applied to. The Court's analysis was predicated on the fact that the easement standing alone would be a taking under the Court's physical invasion standard, suggesting that the "essential nexus" test might be limited to physical dedications of property.[92] Second, though establishing that some connection was required between the exaction and development impact, the Court left undecided the degree of required connection,[93] since the exaction failed even the loosest of constitutional standards of review.

Lower court decisions subsequent to *Nollan* were divided on both issues. Some decisions limited application of the "essential nexus" test to physical dedications of land,[94] while others indicated that the standard should apply to any development exaction including impact fees.[95] Similarly, courts differed in the degree of relationship that *Nollan* was perceived as requiring, with some indicating that a high degree was necessary,[96] while others held that a reasonable relationship was sufficient.[97] The growing difference in standards, especially with regard to the

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91. Ironically, and adding some uncertainty to the decision, was the Court's claim that its requirement of some nexus between the required exaction and projected development impact was consistent with every state position except California. It then cited to decisions from a number of states, *id.* at 839-40, including several that took highly deferential approaches arguably at odds with the scrutiny applied by *Nollan*; *see* Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964); Jenad, Inc. v. Scarsdale, 218 N.E.2d 673 (N.Y. 1966). The Court in *Nollan* was correct in stating that all state decisions, including those like *Billings Properties* and *Jenad*, required some relationship between exactions and projected development impact. But *Nollan* appeared to apply a degree of scrutiny beyond that found in some state cases applying highly deferential review.

92. *See* 483 U.S. at 831-34.

93. *See id.* at 838.

94. *See* Commercial Builders v. Sacramento, 941 F.2d 872, 874 (9th Cir. 1991); Blue Jeans Equities West v. City and County of San Francisco, 4 Cal. Rptr. 2d 114, 117-18 (Cal. Ct. App. 1992); *see also*, Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 925, 939 (1989).

95. *See* Weingarten v. Town of Lewisboro, 144 Misc.2d 849, 542 N.Y.S.2d 1012, 1015-18 (1989) (applying *Nollan* analysis to fee).

96. *See* William J. Jones Insurance Trust v. City of Fort Smith, 731 F.Supp. 912 (W.D. Ark. 1990) (stating that a city must justify dedication requirements); Castle Properties Co. v. Ackerson, 558 N.Y.S.2d 334 (N.Y.A.D. 1990); Weingarten v. Town of Lewisboro, 144 Misc. 2d 849, 542 N.Y.S.2d 1012, 1017 (1989) (suggesting "more exacting standard" than previous New York cases and requiring "substantial" relationship).

97. *See* Commercial Builders v. Sacramento, 941 F.2d 872 (9th Cir. 1991); Dolan v. City of Tigard, 854 P.2d 437, 442-43 (Or. 1993). For a general discussion of the different

required degree of connection, made the time ripe for further Supreme Court review of exactions standards, which the Court did in *Dolan*.

III. *DOLAN V. CITY OF TIGARD*[98]

A. FACTS

Florence Dolan owned a plumbing and electric supply store located in the central business district of Tigard and situated on Fanno Creek. She applied to the city for a building permit to replace her store with a larger store. Expansion was to take place in two phases, eventually increasing the size of the store from 9700 square feet to 17,600 square feet and adding a thirty-nine space paved parking lot. The proposed expansion and use were consistent with the applicable zoning provisions in the Central Business District in which she was located.[99]

The City Planning Commission granted her permit subject to two conditions. First, she was required to dedicate that portion of her property falling within the city's floodplain along Fanno Creek (an area that comprised about ten percent of her property). Second, she was required to dedicate a fifteen foot wide strip of land adjacent to the floodplain to permit continued development of a pedestrian/bike path.[100]

Both exactions were required under the city's Community Development Code (CDC), which stated that when development occurs within the floodplain, "the city shall require dedication of sufficient open land for a greenway" and also provide land for a pedestrian/bike path within the floodplain in accordance with an adopted pedestrian/bicycle plan.[101] As a practical matter, therefore, the CDC required that when owners of land along the floodplain applied for development requests, the Planning Commission use the approval process to acquire property already designated in the city's plan as set aside for the pedestrian/bike path and for the greenway.

Ms. Dolan applied for a variance, not on the basis of unnecessary hardship as provided for in the ordinance, but on the grounds that her

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ways in which lower courts interpreted *Nollan*, *see* Kristen P. Sosnosky, Note; Dolan v. City of Tigard: *A Sequel to* Nollan's *Essential Nexus Test for Regulatory Takings*, 73 N.C. L. REV. 1677, 1692-97 (1995); *see also*, Michael M. Berger, Nollan *Meets* Dolan *Rollin' Down the Bikepath*, 46 LAND USE L. & ZONING DIG., No. 2 at 3 (1994) (discussing lower court conflicts in applying *Nollan*).

98. 114 S. Ct. 2309 (1994).

99. *Id.* at 2313-14.

100. *Id.* at 2314 n.2.

101. *Id.*

proposed development would not conflict with the goals of the comprehensive plan.[102] In denying the variance, the Commission made several findings supporting the relationship of the required dedications and the projected impacts of her store expansion, which were in effect a series of assumptions regarding the relationship. For example, the Commission said it was "reasonable to assume that customers and employees" would use the bikepath for transportation and recreation needs and that creation of the pedestrian/bike path "could offset some of the traffic demand on nearby streets."[103] The Commission also stated that the flood plain dedication was related to the Dolans' development in that development would increase the amount of impervious surface, which in turn would cause additional storm water run off into Fanno Creek.[104]

The Dolans appealed to the Oregon Land Use Board of Appeals, which upheld the exactions under a "reasonable relationship" standard. It noted that there was a reasonable relationship between proposed development and a greenway dedication and also between a bike path dedication and the need to alleviate increased traffic from development.[105] The Oregon Court of Appeals affirmed on similar grounds, rejecting an argument that Nollan required more than a reasonable relationship.[106]

The Oregon Supreme Court also affirmed.[107] In doing so, it rejected the Dolans' argument that *Nollan* required a "substantial relationship," holding that *Nollan* only required a reasonable relationship, which was met "if the exaction serves the same purpose that a denial of the permit would serve."[108] Relying on the Commission's findings, the court found that an "essential nexus" existed, noting that a pedestrian/bike path "could offset" increased traffic and that the floodplain requirement was designed to improve storm water run off which would increase with expansion of the store.[109]

B. SUPREME COURT ANALYSIS

In a 5-4 decision, the Supreme Court reversed, ruling that the exactions constituted an uncompensated taking of property and were therefore

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102. 114 S. Ct. at 2314 n.2.
103. *Id.* at 2314-15.
104. *Id.* at 2315.
105. *Id.*
106. 832 P.2d 853 (Or. Ct. App. 1992).
107. 854 P.2d 437 (Or. 1993).
108. 854 P.2d at 443.
109. *Id.* at 443-44.

invalid.[110] In doing so, the Court specifically addressed the degree of required relationship, holding that "rough proportionality" must exist between the required exaction and projected development impact.[111] It also indicated that mere assumptions of a relationship might not be sufficient, but that government has the burden to quantify the relationship between the required exaction and development impact.[112]

The Court began its analysis by distinguishing in two respects the type of land use control before it from more typical land use restrictions which are subject to a more deferential review.[113] First, most land use restrictions are legislative in nature and classify large areas of land, whereas in the case before it the city made an adjudicative decision to place a condition on a requested building permit for an individual parcel of land.[114] Although the Court did not elaborate on this distinction, it presumably suggested that more scrutiny is required where an individual decision is made.

Second, the Court emphasized that this did not just involve a limitation on land use, but instead involved a physical dedication of property.[115] That constitutes a physical invasion of property, which would normally require just compensation to be valid. The Court then invoked the doctrine of "unconstitutional conditions," noting that "the government may not require a person to give up a constitutional right--here the right to just compensation when property is taken for public use--in exchange for a discretionary benefit where the property sought has little or no relationship to the benefit."[116] Thus, as in *Nollan*, the Court appeared to at least in part predicate its analysis on the fact that the condition involved a physical invasion of property.

Having distinguished the nature of the decision in these two respects, the Court then articulated a two part test for reviewing such decisions. First, under *Nollan*, there must be an "essential nexus" between the exaction and a legitimate state interest. Assuming such a nexus exists, the Court would then need to decide the required degree of connection between the required exaction and the projected impact of development, the question left open in

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

111. *Id.* at 2319-20.

112. *Id.* at 2320 n.8, 2321-22.

113. The Court noted that generally a land use restriction does not effect a taking if it 'substantially advance[s] legitimate state interests' and "does not 'den[y] an owner economically viable use of his land.'" *Id.* at 2316 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

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

115. *Id.* at 2316-17.

116. *Id.* at 2317.

Nollan.[117]

The Court then applied the "essential nexus" standard, finding such an essential nexus to exist. It distinguished the case before it from *Nollan*, noting that no "gimmicks" were used here as in *Nollan*.[118] Rather, the Court said it was "obvious" that a nexus exists between preventing flooding, a clearly legitimate interest, and limiting development along Fanno Creek.[119] Similarly, the Court stated that in "theory" a pedestrian/bike path would help reduce increased traffic that might result from development.[120] As a practical matter, the Court applied the "essential nexus" requirement with little rigor, suggesting that there simply be some reasonable relationship between the impact of development and the exaction. In doing so, it seemed willing to accept common sense judgments about any nexus that might exist. This relaxed "essential nexus" analysis undoubtedly occurred because of the greater scrutiny to be applied under the second prong of the test.

The Court then proceeded to the heart of the *Dolan* decision--the degree of required relationship between the required exaction and the projected development impact, the question left unanswered in *Nollan*. In answering this question, the Court first reviewed state court approaches to the issue, since states had been examining exaction practices for a long time. The Court divided states into three general groups. First were those states taking a very deferential approach, where even very generalized statements regarding the required connection were sufficient.[121] The Court rejected this standard as too lax to provide sufficient protection for property rights.[122] Second were those states following the "specifically and uniquely attributable" standard, which the Court described as "very exacting." The Court also rejected this standard, stating that it was too exacting "given the nature of the interests involved."[123]

The Court then aligned itself with what it called the intermediate and majority position, which the Court said requires that there be a "reasonable

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117. *Id.* at 2317.

118. *Id.* at 2317.

119. *Id.* at 2317-18. As suggested by the Court's later analysis, however, the condition in question did not just limit development along Fanno Creek, but it also required a physical dedication of land. There arguably is no "essential nexus" between having people walk on the property and flood control. *See also id.* at 2330 (Souter, J., concurring).

120. *Id.* at 2318.

121. *Id.* at 2318-19 (citing Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964); Jenad, Inc. v. Scarsdale, 218 N.E.2d 673 (N.Y. 1966)).

122. 114 S. Ct. at 2319.

123. *Id.*

relationship" between the required dedication and the development impact.[124] The Court noted that this standard was closer to what it perceived to be the required federal standard than the other two extremes, but was careful not to adopt it as such, partly because of the close similarity in language to the "rational basis" test under constitutional law.[125] The Court instead adopted a "rough proportionality" standard. In what is probably the most significant language from the opinion, the Court stated:

> 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.[126]

Finally, the Court proceeded to apply this new "rough proportionality" standard to the required dedication of a pedestrian/bike path and a greenway, finding that both dedications failed this new test. First, it acknowledged that restricting development in the floodplain would help confine the pressures on Fanno Creek created by the store expansion. However, the city failed to provide any reason why a public, as opposed to a private, greenway was necessary.[127] Both would equally serve to address the problem of increased storm water run off caused by the store expansion. Thus, the additional requirement of a physical dedication of the property, which would infringe on the Dolans' right to exclude others, was altogether unrelated to the problems posed by the development.[128]

The Court similarly found that the required land for a pedestrian/bike path failed to meet this new "rough proportionality" standard. The Court acknowledged that the larger store would undoubtedly increase traffic, noting that a formula used by the city estimated that it would generate an additional 435 trips a day.[129] But the city failed to meet its burden of establishing that the required bike path reasonably related to that impact.[130] In particular, the Court noted that simply asserting that the pathway "could offset some of the traffic" was insufficient; the city had to somehow

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124. *Id.*
125. *Id.*
126. *Id.* at 2318-19.
127. *Id.* at 2320.
128. *Id.* at 2320-21.
129. *Id.* at 2321.
130. *Id.* at 2321-22.

quantify the extent to which the pathway would offset increased traffic. The Court emphasized this by stating that "[n]o precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."[131]

C. SUMMARY OF DOLAN

Dolan clearly reflects the Court's growing resolve to take property rights seriously. Not only did it state that the takings clause should not be "relegated to the status of a poor relation" to the First and Fourth Amendments,[132] but the Court's analysis demonstrated a seriousness of review to protect unjustified intrusions on property interests. As such, the decision represents part of the Court's recent trend toward a greater recognition of property rights, a trend reflected in *Nollan*, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[133] and *Lucas v. South Carolina Coastal Commission*.[134]

At the same time, however, *Dolan* cannot be merely characterized as a pro-property/anti-regulation case. Throughout the opinion the Court affirmed the validity and even necessity of reasonable land use controls, including reasonable exaction requirements designed to offset the impact of development.[135] What *Dolan* opposes is using permit approvals to extort property interests without paying just compensation. In this context, the

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131. *Id.* at 2322.

132. *Id.* at 2320.

133. 482 U.S. 304 (1987) (holding that the government must pay just compensation for temporary regulatory taking).

134. 112 S. Ct. 2886 (1992) (holding that a land use regulation which deprives landowner of all economic viability constitutes a taking).

135. The Court strongly affirmed the validity and even necessity of reasonable land use controls at the beginning of its analysis, stating that they had long been sustained against constitutional challenge and stating that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law." 114 S. Ct. at 2316 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). It also concluded its analysis with a similar affirmation of land use planning, calling it "commendable" and "made necessary by increasing urbanization." It also stated that the city's goals in *Dolan* were "laudable," but that there are "outer limits" in how they can be accomplished, suggesting the validity of more normal controls. *Id.* at 2322.

Specifically, the validity of reasonable exactions was affirmed by the Court's own "rough proportionality" standard, which specifically provides for reasonable exactions and gives some leeway in pursuing them. Moreover, the Court also stated that "[d]edications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use." *Id.* at 2321.

central message of *Dolan* is quite simple: government may seek exactions to offset the impact from development, but the exactions must relate to and flow from the development. Government cannot use a land use approval process as an excuse to capture an interest unrelated to the impact of development.

The Court's new "rough proportionality" test is thus best viewed as attempting to assure that exactions relate to and flow from development impacts while not putting an unreasonable burden on government to establish the necessary relationships. Although the Court did not elaborate on what the phrase actually means, both the phrase itself and the Court's alignment with what it perceived to be the middle group of states suggests that exactions must be limited to those responding to development impacts, but that the Court will not require a high degree of precision in establishing that relationship.[136] Thus, the type and extent of an exaction must be justified by the need to address a development related impact. This proportionality, however, does not have to be shown with mathematical precision because of the type of interests involved. "Rough proportionality" therefore reflects a balance between avoiding legislative extortion on the one hand and permitting local government to engage in legitimate land use practices on the other.[137]

As further noted by the Court, this "rough proportionality" between exaction and harm must exist "both in nature and extent,"[138] suggesting several different relationships that might have to be reviewed. Indeed, in examining whether an exaction is proportionally connected to development impacts, there are three possible types of "relation" problems that might arise.[139] First is where government asks for an exaction that has no relationship or only a very tenuous one to development impacts. Both *Nollan* and *Dolan* are examples of this type of problem. Although the proposed development in both cases posed impact problems, the required exaction had no real relationship to those impacts.[140] Thus, the local

136. The Court further reinforced this when it rejected the "specifi[cally] & uniquely attributable" test. *See* 114 S. Ct. at 2319.

137. *See* Christopher J. St. Jeanos, Note, Dolan v. Tigard *and the Rough Proportionality Test: Roughly Speaking, Why Isn't a Nexus Enough?*, 63 FORDHAM L. REV. 1883, 1894 (1995).

138. *See Dolan*, 114 S. Ct. at 2319-20.

139. For a somewhat similar analysis, see St. Jeanos, *supra* note 137 at 1886-87.

140. In *Nollan*, the required easement in no way addressed the "blockage of view" from the street problem created by the development. Similarly, in *Dolan*, the public greenway requirement, as opposed to a private greenway, was unconnected to any development impact. Although the pedestrian/bike path was theoretically connected, the city failed to establish the extent of the connection.

governments were using the development as an excuse to capture an unrelated interest.

A second type of "relation" problem is where there is no evidence that the development in question contributed to the need to be addressed. Even where the required exaction clearly furthers the asserted need, the exaction is not justified because the development is unrelated to the need. For example, conditioning development approval upon a road dedication to minimize traffic crowding would be invalid if no evidence exists that the development would contribute to increased traffic.[141] Thus, even though the exaction relates to the need, the development impact is unrelated to the need.

The final type of "relation" problem is where the exaction is related in nature to the development impact, but the government asks for a disproportionate share that clearly exceeds the impact. Here the exaction is unrelated to development impacts, not because the type of exaction does not relate to the problem posed, but because the degree of requested exation exceeds any burden attributable to the development in question. Thus, if a development would require additional park space for one hundred people, the city cannot ask for land that would serve one thousand people. The space for the additional nine hundred people would, in essence, be unrelated to the development impact. Even though the development contributed to the problem to be addressed, and even though the exaction directly addresses that burden, that portion of the exaction that is disproportionate is unrelated to the impact and therefore invalid.[142]

Interestingly, although *Dolan* involved the first type of problem, the vast majority of state court decisions that have invalidated exactions involved the other two types of problems. Indeed, only one of the seven cases cited by the Court for representing the "intermediate" reasonable relationship position involved a *Dolan* type of problem;[143] the other cases all involved the second and third categories. Nevertheless, the essence of the "rough proportionality" standard applies to all three: there must be a

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141. *See, e.g.*, Howard County v. JJM, Inc., 482 A.2d 908, 921 (Md. 1984); Simpson v. City of North Platte, 292 N.W.2d 297 (Neb. 1980); Cupp v. Board of Supervisors, 318 S.E.2d 407, 414 (Va. 1984).

142. *See, e.g.*, Home Builders Ass'n v. City of Kansas City, 555 S.W.2d 832 (Mo. 1977); Land/Vest Property, Inc. v. Town of Plainfield, 379 A.2d 200, 204-05 (N.H. 1977); *see also* Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976) (noting potential problem that city could require exactions far out of proportion to the needs created by subdivision).

143. *See* Parks v. Watson, 716 F.2d 646, 651-53 (9th Cir. 1983) (stating that the required dedication of landowner's geothermal wells was unrelated to development impact).

reasonable, though not completely precise, relationship between the required exaction and projected development impact.

Beyond establishing the need for "rough proportionality" between exaction and impact, the Court also indicated how that standard is to be established and suggested several features of the new test. What is perhaps most significant about *Dolan* is not so much the required degree of connection, but rather the process of establishing that the connection is met. In this respect, *Dolan* appears to impose three important requirements for establishing "rough proportionality": (1) the burden of proof is on the state;[144] (2) there must be an individual determination of the relationship;[145] and (3) in most cases there must be an effort to quantify the relationship.[146] Although the Court clearly indicated that mathematical precision is not required,[147] it was equally clear that the state cannot merely assume a relationship exists; rather, there must be an effort to individually establish the degree of the relationship.

The Court did not spell out the type of calculations that would be required, and instead opted for a loosely defined and flexible standard. However, the emphasis on no mathematical precision, its use of the adjective "rough," its rejection of the "specifi[cally] and uniquely attributable" test,[148] and its alignment with the intermediate group of states all suggest a significant flexibility in the type of calculations that will suffice. Appropriate factors must be considered and applied in an individual manner to the exaction/development relationship, but less than a one-to-one relationship is sufficient.

It also appears that the relationship must be quantified in most instances. In finding the pedestrian/bike path dedication invalid, the Court stated that "the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."[149] Moreover, the concept of proportionality itself suggests the need for quantification in order to assure an appropriate comparison. At the same time, however, the Court accepted without question the city's assumption of development impact on flood control, stating that "[i]t is

144. *See* 114 S. Ct. at 2320 n.8.

145. *Id.* at 2319-20 ("[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

146. *Id.* at 2322.

147. *Id.* at 2319, 2322.

148. *Id.* at 2319.

149. *Id.* at 2322.

axiomatic that increasing the amount of impervious surface will increase the quantity and rate of storm-water flow from petitioner's property."[150] This suggests that the need to quantify in part turns on how obvious a particular impact or relationship is.

The rest of this article will address three major issues that remain after *Dolan*: (1) to what type of land use decisions does the *Dolan* test apply? (2) what impact will *Dolan* have on state law standards? and (3) what exactions are most at risk under *Dolan*?

IV. WHEN DOES THE *DOLAN* TEST APPLY?

The first general question emerging from *Dolan* concerns the scope of its application, and in particular whether the new "rough proportionality" standard applies to other than physical dedications of land. As noted earlier, the Court began its analysis in *Dolan* by noting that the regulation before it differed in two important respects from most land use restrictions. First, most land use restrictions involve legislative determinations classifying entire areas of a city, whereas the regulation before it involved an adjudicative decision affecting a single parcel of land. Second, the conditions imposed in *Dolan* were not just a restriction on land use, but involved an actual physical dedication of property.[151] It was in this context that the Court proceeded to analyze and establish its "rough proportionality" standard with its attending requirements.

At a minimum, in noting these distinctions the Court was clearly indicating that the new *Dolan* test does not apply to the majority of land use restrictions that involve restrictions on land pursuant to a broad legislative restriction.[152] Thus, typical zoning restrictions that regulate land use would not be subject to the more intense *Dolan* scrutiny.[153] Even floodplain restrictions, if applied to a class of landowners and merely restricting use, would not be subject to the new test. Although such legislative restrictions would still need to substantially advance legitimate state interests and not deprive the owner of economically viable use of the land,[154] they would not be subject to the stricter *Dolan* standard.

On the other hand, the *Dolan* standard would clearly apply to adjudicative decisions that involved a physical dedication of land. This

150. *Id.* at 2320.

151. *Id.* at 2316-17.

152. *Id.* at 2316.

153. *See id. See also* Harris v. City of Wichita, 862 F. Supp. 287 (D. Kan. 1994) (holding that *Dolan* did not apply to airport overlay zoning restrictions).

154. *See* 862 F. Supp. at 290 (citing Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

would include most types of development approvals, such as building permits, subdivision approval requirements, and site approval requirements, that require land dedication. Each of these decisions is adjudicative in the sense that they involve a condition imposed on a particular parcel of land as opposed to a more general classification, thus raising the Court's traditional concern for government decisions focusing on a few people. Moreover, the doctrine of "unconstitutional conditions" is triggered in such circumstances, since the applicant is potentially being asked to forego a constitutional right in exchange for a discretionary benefit.[155] As a practical matter, therefore, almost all types of development approval which focus on an individual parcel of property would qualify as adjudicative for purposes of the *Dolan* standard.

Within these parameters, however, two issues remain regarding the applicability of the new *Dolan* test. First is whether the *Dolan* test applies to legislative exaction requirements that are automatically imposed as part of an individual permit application. This would occur where the local legislative body passes a law that requires that certain exactions be required pursuant to certain permit processes. Post-*Dolan* decisions are split on this issue, with several suggesting that *Dolan* is not triggered when exactions are imposed pursuant to a legislative requirement.[156] The courts have reasoned that since the exaction decision was in effect made at the legislative level, the decision is legislative and not adjudicative. Two other courts, however, have held that such exactions are adjudicative and subject to *Dolan*.[157]

The better view is that *Dolan* should apply to permit conditions even when imposed pursuant to legislative requirements. Although the decision to require the exaction might have been legislative, the decision to which the condition is attached, the permit approval, would be adjudicative in that it concerns an individual parcel of land. Furthermore, it is at the individual permit stage that the landowner is forced to forego a property interest in order to get permit approval, thus potentially triggering the doctrine of "unconstitutional conditions." This analysis is further borne out by *Dolan* itself, where the conditions were of this type, since the city's development code required that for development within or adjacent to the floodplain "the city shall require dedication of sufficient open land area for [a] greenway"

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155. *See* 114 S. Ct. at 2317.

156. *See* Home Builders Ass'n of Central Arizona v. City of Scottsdale, 1995 Ariz. App. LEXIS 35 (1995); Waters Landing Ltd. Partnership v. Montgomery County, 650 A.2d 712, 724 (Md. 1994).

157. *See* J.C. Reeves Corp. v. Clackamas County, 887 P.2d 360, 363 (Or. App. 1994); Schultz v. City of Grants Pass, 884 P.2d 569, 573 (Or. App. 1994).

and a pedestrian/bike path.[158] The mandatory nature of the requirement indicates that the exaction requirement was made at the legislative level, yet the *Dolan* court treated it as adjudicative, presumably because it was imposed as part of a permit application on a single lot.[159]

A second and even more significant question regarding *Dolan's* applicability is whether it is limited to physical dedications or whether it also applies to other types of exactions, most notably impact fees. In both *Nollan* and *Dolan* the Court emphasized the fact that the required conditions involved a physical invasion of land, thus distinguishing them from general land use restrictions. In particular, both decisions noted the Court's traditional scrutiny of government actions that physically invade or occupy land, emphasizing that the "right to exclude others [is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[160]

The significance of a physical dedication is made apparent by its relationship to the doctrine of "unconstitutional conditions," arguably the trigger for the Court's analysis in both *Nollan*[161] and *Dolan*. Although government regulation of property will constitute a taking only in extreme instances,[162] the Court has consistently noted that any physical invasion, no matter how minor, will be a taking.[163] The government has the right to take property, of course, but the Constitution requires payment of just compensation.[164] Thus, when government requires physical dedication of land as a condition of permit approval, it is asking the landowner to forego the constitutional right to just compensation. According to the Court in *Dolan*, this triggers the doctrine of "unconstitutional conditions," which states that the person can be made to forego a constitutional right for a

158. *See* 114 S. Ct. at 2314 & n.2 (quoting CDC §§ 18.120 - 180.A.8, App. to Brief for Respondent).

159. *Id.* at 2316 ("here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel.").

160. *See* 114 S. Ct. at 2316 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)); *Nollan*, 483 U.S. at 831.

161. *See* Richard A. Epstein, *The Supreme Court, 1987 Term--Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 61 (1988) (stating that *Nollan* Court relied on doctrine "in all but name").

162. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992) (holding it as a taking if denies all economic viability); Agins v. Tiburon, 447 U.S. 255, 260 (1980).

163. *See, e.g.*, Loretto v. Teleprompter Manhattan (citing CATV Corp., 458 U.S. 419, 438-41 (1982) (holding that a state-required cable line across property constitutes a taking).

164. U.S. CONST. amend. V.

discretionary benefit only if the property interest is related to that benefit.[165]

The above analysis might well suggest that *Dolan's* "rough proportionality" test is limited to physical dedications. This would give it a clear constitutional ground in that line of cases finding any physical invasion a taking. Indeed, some courts and commentators have interpreted *Nollan* as only applying to physical dedications,[166] though others would apparently apply it to fees as well as dedications.[167] Early response to *Dolan* indicates a similar split among commentators.[168]

Despite the Court's emphasis on the physical nature of the restrictions in both *Nollan* and *Dolan*, there are several reasons that support expanding the test to impact fees as well as physical dedications of property.[169] First, three days after *Dolan* was announced, the Court vacated a California Court of Appeal decision in *Ehrlich v. City of Culver*[170] for reconsideration in light of its decision in *Dolan*. *Ehrlich* did not involve a physical dedication, however, but rather a $280,000 recreational facilities fee. The Court's

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165. *See* 114 S. Ct. at 2317.

166. *See, e.g.*, Commercial Builders v. City of Sacramento, 941 F.2d 872, 874 (9th Cir. 1991); Blue Jeans Equities West v. City & County of San Francisco, 4 Cal. Rptr. 2d 114, 118 (Cal. Ct. App. 1992); Manheim, *supra* note 94 at 950.

167. *See, e.g.*, Weingarten v. Town of Lewisboro, 542 N.Y.S.2d 1012, 1015-18 (N.Y. App. Div. 1989); *see generally* Berger, *supra* note 97 at 3.

168. *Compare, e.g.*, Robert H. Freilich & David W. Bushek, *Thou Shalt Not Take Title Without Adequate Planning: The Takings Equation After* Dolan v. City of Tigard, 27 URB. 187, 201-03 (1995) (applying the test only to physical dedications) *with* Terry D. Morgan, *Exactions as Takings: Tactics for Dealing with* Dolan, 46 LAND USE L. & ZONING DIG. 3, 5 (1994) (applying the test to impact fees as well as physical dedications).

169. It has been suggested that impact fees might be a physical dedication of the requested money itself and thus subject to *Nollan* on that basis. *See* Frank Michelman, *The Jurisprudence of Takings*, 88 COLUM. L. REV. 1600, 1614 n.63 (1988). That argument appears problematic, and seems to be precluded by the Supreme Court's decision in United States v. Sperry Corp., 493 U.S. 52 (1989). In *Sperry*, the Court reviewed a Fourth Circuit decision that had held that a federal government could not require claimants to pay a percentage of any award from the Iran Claims Commission, treating the fee as a physical taking of property (the money). The Supreme Court reversed, holding that taking a percentage of awards was a permissible means of reimbursing the costs of the Commission. In a footnote, the Court questioned the circuit court's treatment of the fee as a physical taking, stating that "[i]t is artificial to view deductions of a percentage of a monetary award as a physical appropriation of property. Unlike real or personal property, money is fungible." 493 U.S. at 62 n.9. The impact fee as physical taking argument has been rejected by at least one court. *See* Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872, 875 (9th Cir. 1991).

170. 19 Cal. Rptr. 2d 468 (Cal. Ct. App. 1993), *cert. granted and judgment vacated by* 114 S. Ct. 2731 (1994).

specific instruction to reconsider in light of *Dolan* suggests that it did not necessarily intend for its analysis to be limited to only physical dedications.[171]

Second, the primary concern behind the *Dolan* test--that local governments will use their monopoly power to seek exactions unrelated to the impact of development--applies equally to impact fees as well as to physical exactions. Although the Court in *Dolan* affirmed the right to seek exactions that correspond to development impacts, it emphasized that local governments could not use their power to extort conditions from developers.[172] This is especially true when you recognize that impact fees can be used to acquire property that might otherwise be sought through dedication. Thus, a local government could impose an impact fee for parks, the proceeds of which are used to acquire through eminent domain a portion of the applicant's land. It would make little sense to apply a lesser standard to impact fees in such situations and thereby allow cities to indirectly acquire title to property.

Third, state court decisions, to which the Supreme Court looked for some guidance in *Dolan*, have applied, in essence, the same standard to both physical dedications and to impact fees.[173] If anything, courts have perhaps more closely scrutinized impact fees because of their unique nature. In recent years, however, courts have generally applied a similar analysis to both types of exactions and usually expressed comparable concerns in assessing their legitimacy. Although this in no way binds the Court in its analysis, it provides additional support to the idea that *Dolan's* central thesis, which requires that exactions relate to development impacts, applies equally to physical dedications and impact fees.

Finally, the Court's emphasis on a physical dedication in *Dolan* was made in contrast to general use restrictions, with the Court stating "the conditions imposed were not simply a limitation on the use petitioner might make of her parcel, but a requirement that she deed portions of the property to the city."[174] Arguably, the Court's primary concern here was not necessarily to predicate its analysis on a physical dedication, but rather to

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171. *But see*, Freilich & Bushek, *supra* note 168 at 204 (stating that it is entirely plausible that on remand, the *Ehrlich* court will conclude that *Dolan* is limited to physical dedications and therefore the original decision was correct).

172. *See* 114 S. Ct. at 2317.

173. *See, e.g.*, Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965) (applied same analysis to both dedication and fee requirements); Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, 329 So. 2d 314, 320-21 (Fla. 1976); Divan Builders, Inc. v. Planning Bd. of Wayne, 334 A.2d 30, 38-40 (N.J. 1975); Bosselman & Stroud, *supra* note 18 at 75-76.

174. 114 S. Ct. at 2316.

distance it from run-of-the-mill use restrictions, which comprise the core of zoning regulations. In this regard, impact fees more closely resemble dedications than use restrictions. Both dedications and impact fees are typically made pursuant to an adjudicatory approval process and are affirmative obligations designed to offset the burdens caused by development; indeed, dedication requirements often include fee in lieu of alternatives. Thus the Court's opening distinctions can be seen as insulating traditional use restrictions from the new *Dolan* test, but not necessarily precluding its application to impact fees.

For these reasons, it makes sense to apply the *Dolan* "rough proportionality" analysis to the imposition of any exaction to an individual permit approval. To the extent that *Dolan* turns on the doctrine of unconstitutional conditions,[175] this might require that the Court recognize property interests other than the right to exclude as sufficient to trigger the doctrine.[176] Alternatively, the Court could ground its analysis in substantive due process, rather than the Takings Clause, and recognize exactions unrelated to development impacts as arbitrary.

Ostensibly, *Dolan* might be limited to physical dedications--the reading given *Nollan* by some lower court decisions. However, the better view is to apply it to any exaction imposed on an individual request for development, where development approval on a specific parcel of land is conditioned on the requested exaction. Such an interpretation corresponds better to the policy concerns underlying *Dolan*. Conversely, mere restrictions on land use applied in a legislative manner should not be subject to the *Dolan* standard.[177]

V. WHAT IMPACT WILL *DOLAN* HAVE ON STATE LAW STANDARDS?

One of the most important questions emerging from *Dolan* is what impact it will have on state law standards governing exaction requirements. To some extent the issue might appear circuitous, since *Dolan* looked to state cases for guidance and affirmed what it viewed as the intermediate and majority "reasonable relationship" test when it established its new "rough

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175. *See The Supreme Court, 1993 Term--Leading Cases*, 108 HARV. L. REV. 139, 296-97 (1994) (arguing that the doctrine of unconstitutional conditions is a poor basis on which to decide *Dolan* on); *see also* Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 39-41 (stating that Court did not need to resort to the "troublesome" doctrine of unconstitutional conditions in deciding *Nollan*).

176. *See* Merriam & Hyman, *Dealing with* Dolan, *Practically and Jurisprudentially, in* 1995 ZONING & PLAN. HANDBOOK 111, 125-26; Freilich & Bushek, *supra* note 168 at 204-05.

177. *See* 114 S. Ct. at 2316.

proportionality" standard.[178] Arguably, rather than examining *Dolan*'s impacts upon current state practices, those state practices should be examined to help interpret the ambiguities of *Dolan*. As suggested earlier, current state practices should be examined to help interpret *Dolan* to the extent they would not appear inconsistent with the standards set out in *Dolan*.

For several reasons, however, it is not correct to assume that *Dolan* merely adopted an intermediate level "reasonable relationship" test which the Court believed was adopted by a majority of states and that states adopting that standard will not be affected. First, a close reading of *Dolan* indicates that although the Court closely aligned itself with what it perceived to be the majority approach, it was careful in its language not to adopt it as such. Rather, the Court stated that the "reasonable relationship" test was "closer to the federal constitutional norm" than either of the other approaches.[179] Also, the Court indicated that it was not adopting the "reasonable relationship" test as such, "partly" because of its similarity to the "rational basis" standard in constitutional law.[180] This suggested that differences between the two tests might be more than just mere semantics.[181] Although too much should not be made of the Court's choice of words, the Court did seem to be careful to avoid adopting any particular state approach as such.

Second, as discussed in part I.B, state courts use the term "reasonable relationship" in diverse ways, at times resulting in rather deferential review.[182] Indeed, all three Oregon courts which reviewed the conditions in *Dolan* applied what they articulated as a "reasonable relationship" standard and found the conditions valid.[183] The meaning they gave to the term was obviously much different from that given by the Supreme Court. Other courts have, at times, used the "reasonable relationship" standard in a very differential manner.[184] For these reasons it cannot be assumed that the Court merely endorsed the "reasonable relationship" test, considering the variety of applications courts give it.

Any assessment of how *Dolan* affects state law standards must therefore look beyond the Court's general approval or rejection of broad approaches and assess the extent to which the test itself is consistent with

178. *Id.* at 2318-19.
179. *Id.* at 2319.
180. *Id.*
181. *Id.*
182. *See infra* text accompanying notes 30-66.
183. *See* 854 P.2d 437, 442-43 (Or. 1993); 832 P.2d 853 (Or. Ct. App. 1992).
184. *See, e.g.*, Ayres v. City Council of Los Angeles, 207 P.2d 1 (Cal. 1947); Holmes v. Planning Bd. of Town of New Castle, 433 N.Y.S.2d 587, 598 (N.Y. 1980).

state law practices. This is not to say that the Court's general approval of various cases and standards of review is not significant. Clearly in discussing cases the Court was giving guidance as to what it viewed to be an appropriate level of inquiry and the required degree of relationship between exactions and development impact. However, in other respects, particularly in how the relationship is established, *Dolan* arguably goes beyond many state cases.

Given the decision's ambiguities and the fluid nature of state law, assessing the impact of *Dolan* on state law is not easy. Nevertheless, *Dolan's* potential impact on state standards might be assessed in two general areas: first, the degree of relationship required between exactions and development impacts; and second, proof requirements in establishing the relationship. *Dolan's* first potential impact on state standards concerns the required degree of relationship between exactions and development impact. Here *Dolan's* impact appears to be limited, with most courts already requiring a standard comparable to "rough proportionality." As noted earlier, the "rough proportionality" test flows from *Dolan's* central thesis: that exactions are justified where they address development impacts, but they cannot be used simply as a means to capture desired property interests. As such, the proportionality standard arguably involves a loose form of cost accounting, where some attempt must be made to insure that the required exactions are proportionate to the development burden. Although the Court clearly rejected the need for any precise accounting as being unrealistic given the nature of the interests involved, it also made clear that an attempt must be made to relate the type and extent of exactions to development impacts.[185]

This same type of rough cost accounting is also required by many decisions applying the "rational nexus" and "reasonable relationship" tests. Although not requiring precise accounting, the rational nexus test is often interpreted as requiring some proportionate relationship between the exaction and development impact.[186] For example, the most frequently used articulation of the rational nexus test states that a developer can be required to pay only that "portion that bears a rational nexus,"[187] which courts have interpreted as being a proportionality[188] or apportionment[189] standard.

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185. *See* 114 S. Ct. at 2319-20.

186. *See generally*, Bosselman & Stroud, *supra* note 18; *see also* Robert H. Frielich, *The 1993-94 Supreme Court Review*, 26 URB. 685 n.569 (1994).

187. *See, e.g.*, Longridge Builders v. Planning Bd. of Township of Princeton, 245 A.2d 336, 337 (N.J. 1968); Batch v. Town of Chapel Hill, 376 S.E.2d 22, 30 (N.C. Ct. App. 1989).

188. *See* Land/Vest Properties, Inc. v. Town of Plainfield, 379 A.2d 200, 204-05 (N.J.

Other courts have used similar language suggesting proportionality, at times identifying various factors to be used in assessing the relationship.[190] Therefore, as suggested by *Dolan*,[191] the new "rough proportionality" standard is comparable to the degree of relationship already required in many state decisions; indeed, the similarity of standards suggests that in this area, resort should be made to state court decisions in understanding the dimensions of "rough proportionality."

Nevertheless, the "rough proportionality" standard is clearly inconsistent with those decisions which have applied the "reasonable relationship" test in a deferential fashion. As noted earlier, some state courts have applied the reasonable relationship standard as simply requiring "some" degree of relationship between exaction and development impact, a standard comparable to that used in minimal scrutiny constitutional analysis.[192] Although this assures that the exaction is not altogether unrelated to the development, it fails to address the concern that the amount or type of exaction might be largely unrelated to the development. As such, they permit municipalities to engage in the very practice condemned by *Dolan*: imposing exactions that are not required by the development impact.

Thus, the new "rough proportionality" standard will clearly impact those states that have traditionally required only some degree of relationship to support development exactions. This more relaxed approach is perhaps best illustrated by the lower courts in *Dolan*, which applied the reasonable relationship standard in such a manner so as to only require some relationship. Over the years, California[193] and New York[194] courts have applied

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1977).

189. *See* Longridge Builders v. Planning Bd. of Township of Princeton, 245 A.2d 336, 338 (N.J. 1968).

190. *See, e.g.*, Homebuilders Ass'n v. City of Kansas City, 555 S.W.2d 832, 835 (Mo. 1977) ("to the extent" of the created need); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 807 (Tex. 1984) (identifying factors to be used in assessing the relationship); Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976) (holding that a "reasonable portion" based on the created need); Hollywood, Inc. v. Broward County, 431 So. 2d 606, 610 (Fla. Dist. Ct. App. 1983) (utilizing a "pro rata share" test).

191. *See* 114 S. Ct. at 2319.

192. *See* Ayres v. City Council of Los Angeles, 207 P.2d 1 (Cal. 1947); Holmes v. Planning Bd. of New Castle, 433 N.Y.S.2d 587, 598 (N.Y. 1980).

193. *See* Associated Home Builders, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971); Ayres v. City Council of Los Angeles, 207 P.2d 1 (Cal. 1947); Grupe v. California Coastal Comm'n, 212 Cal. Rptr. 578 (Cal. Ct. App. 1985); Remmenga v. California Coastal Comm'n, 209 Cal. Rptr. 628 (Cal. Ct. App. 1985).

194. *See* Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966); Holmes v. Planning Bd. of New Castle, 433 N.Y.S.2d 587 (N.Y. 1980). *See also* Olshaker, *supra* note 41 at 1872 (suggesting New York courts deferential when reviewing exaction schemes

the reasonableness standard in a similar fashion, suggesting that any relationship that was within the police power would suffice to support development exactions. Such a relaxed analysis cannot be sustained under *Dolan*.

The second and more significant impact that *Dolan* will have on state standards is in the requirements for establishing that "rough proportionality" exists. In this respect, *Dolan* appears to impose three important requirements: (1) the burden of proof is on the state;[195] (2) there must be an individual determination of the required relationship;[196] and (3) there must be some effort to quantify the relationship.[197] Although the Court clearly indicated that mathematical precision was not required,[198] it was equally clear that the state cannot merely assume a relationship exists; rather, there must be an effort to quantify it.

As might be expected, state court decisions take a variety of positions on these issues. Some decisions appear to put the burden of proof on the state, at times requiring some degree of quantification. For example, in *181 Incorporated v. Salem*,[199] the court rejected the use of "a hypothetical, theoretical projection," instead stating that the exaction had to be justified on proven impacts flowing from the questioned development.[200] Since the city could establish only a limited traffic increase from the development in question, the court held that the required relationship had not been established.[201] Similarly, other courts have struck down exactions when the state had failed to establish clear evidence of the development impact.[202] Moreover, most courts applying the rational nexus test appear to require some type of individualized assessment of how the exaction relates to the development impact.[203]

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authorized by state statute).

195. 114 S. Ct. at 2320 n.8.

196. *Id.* at 2319-20.

197. *Id.* at 2321-22.

198. *Id.* at 2319, 2322.

199. 336 A.2d 501 (N.J. Super. Ct. 1975).

200. *Id.* at 506.

201. *Id.* at 507.

202. *See, e.g.*, Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611 (Fla. Dist. Ct. App. 1983) ("local government must demonstrate a . . . rational nexus"); Lafferty v. Payson City, 642 P.2d 376 (Utah 1982).

203. *See, e.g.*, Simpson v. City of North Platte, 292 N.W.2d 297, 301 (Neb. 1980) (finding no evidence that development would generate additional traffic to justify street dedication); State *ex rel.* Nuland v. St. Louis County, 478 S.W.2d 363, 367-68 (Mo. 1972) (finding no evidence that development would generate additional traffic to justify street dedication); Land/Vest Properties, Inc. v. Town of Plainfield, 379 A.2d 200, 205 (N.H. 1977) (holding that the rational nexus test requires consideration of a variety of factors applied to

At the same time, however, a number of decisions appear to have required a less demanding basis for establishing the relationship. First, some courts place the burden on the developer to establish that the relationship is not reasonable.[204] This is true for some decisions that appear to require a proportionality requirement.[205] Second, some courts have accepted more generalized statements of the required relationship. In extreme cases, courts have deferred to legislative findings that such a relationship exists.[206] Other courts have applied what might be termed a "common sense" approach, simply assuming that particular developments will have impacts and that exactions will obviously offset those impacts.[207]

Even decisions putting the burden of proof on the state and requiring some evidence of the exaction/development relationship often fall short of clearly requiring that the relationship be quantified. For example, in *Simpson v. City of North Platte*,[208] a decision cited approvingly several times in *Dolan*, the Nebraska Supreme Court applied a reasonable relationship test to strike down a required road dedication because there was no evidence that the development in question would increase traffic.[209] Nowhere did the court suggest a need to quantify the relationship, however. Indeed, in none of the reasonable relationship cases cited by the majority in *Dolan* in support of its "rough proportionality" standard did the courts clearly articulate a quantification requirement.[210]

Therefore, *Dolan's* greatest effect upon state law will probably come from the requirement that local governments make an individual determination that quantifies the relationship between exaction and projected

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particular facts); *see also* Home Builders Ass'n v. City of Kansas City, 555 S.W.2d 832, 835 (Mo. 1977) (holding that subdividers can "introduce evidence on the fairness of specific exactions to specific properties").

204. *See, e.g.*, City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 806-07 (Tex. 1984) (placing the burden on the developer "to demonstrate that there is no such reasonable connection"); Home Builders Ass'n v. Kansas City, 555 S.W.2d 832, 835 (Mo. 1977) (placing the burden on the developer); Bosselman & Stroud, *supra* note 18 at 81 (stating that the burden of proof normally rests on the challenger to the exaction).

205. *See* City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 806-07 (Tex. 1984).

206. *See* Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964).

207. *See* Dolan v. City of Tigard, 854 P.2d 437, 443-44 (Or. 1993).

208. 292 N.W.2d 297 (Neb. 1980).

209. *Id.* at 300-01.

210. *See* Parks v. Watson, 716 F.2d 646 (9th Cir. 1983); Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976); Simpson v. City of North Platte, 292 N.W.2d 297 (Neb. 1980); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984); Call v. West Jordan, 606 P.2d 217 (Utah 1979); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965).

development impact. Even here, however, the extent of *Dolan's* impact is not altogether clear, in part because of the uncertainty regarding whether all exaction relationships must be quantified, or only those of an unusual nature. Nevertheless, *Dolan* clearly disapproves of assumptions that are not axiomatic and suggests that most impacts and relationships must be quantified. As such, common assumptions about development impacts and relations between those impacts and required exactions would appear to be on dangerous ground after *Dolan*.

Finally, a brief word should be said about what impact, if any, *Dolan* will have on the types of exaction/impact relationships that states must examine. As suggested earlier, *Dolan* requires examination of three relationships: (1) whether the exaction alleviates the created harm; (2) whether the development created the need in question; and (3) whether the extent of the exaction is proportionate to that portion of the need attributable to the development. *Nollan* and *Dolan* both involved the first type of problem, where the exaction failed to address the need justifying regulation. Conversely, most state decisions have focused on the second and third concerns, with little scrutiny of whether an exaction would in fact alleviate the purported harm. It might appear, therefore, that *Dolan* requires state courts to shift their analytical focus.

Although the type of relationship scrutinized in *Nollan* and *Dolan* is distinct from the focus of most state cases, the analysis is nevertheless consistent with state exaction cases in several respects. First, as in *Nollan*, courts have struck down exactions that have no relationship to development impacts.[211] Second, the component of the rational nexus test that requires a sufficient relationship between the exaction and benefits conferred upon a subdivision is similar to *Dolan's* requirement that the efficacy of an exaction be quantified. Although not a common focus of discussion, courts have in essence interpreted that requirement to mean that the required exaction, usually impact fees, will in fact be used to address the created need giving rise to the exaction. Thus, courts have emphasized that fees collected must be specially restricted to addressing the need[212] and that time limits be put on their use. More relevant to *Dolan*, courts have also noted that land for parks must be within a reasonable proximity of the development.[213]

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211. *See, e.g.*, Parks v. Watson, 716 F.2d 646, 651-53 (9th Cir. 1983) (requiring a dedication of landowner's geothermal wells had no development impact).

212. *See, e.g.*, Contractors and Builders Ass'n of Pinellas County v. City of Dunedin, 329 So. 2d 314, 320-21 (Fla. 1976); *see generally*, Bosselman & Stroud, *supra* note 18 at 80-81.

213. *See* City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 807 (Tex.

As a practical matter, therefore, the exaction/benefit requirement of the rational nexus test would appear to be similar in purpose to *Dolan's* requirement that the exaction in fact address the created need. Because exactions are justified only when in response to projected development impacts, to be valid the exaction must be used to offset the impact which justified it in the first place. Otherwise, development impacts would be nothing more than an excuse to acquire interests unrelated to the impacts. In this sense *Dolan's* requirement that the state quantify the extent to which the exaction offsets development impacts is consistent with the broad focus and concerns of the rational nexus test.

VI. WHAT EXACTIONS ARE MOST AT RISK UNDER *DOLAN*?

The final question raised by *Dolan* are what types of exactions will be most at risk under the new "rough proportionality" standard. Predictions are difficult here, not only because of the uncertainty that still surrounds some of the decision, but also because under *Dolan* the validity of any particular exaction is based on whether it can be properly justified. Nevertheless, some general observations can be made regarding the types of exactions that might or might not be valid.

First, one clear principle that does emerge from *Dolan* is that most at risk will be those exactions that are imposed because the local government has already decided that it wants the land in question and uses the development approval process as a means to get it. Whatever its ambiguities, *Dolan* makes clear that to be valid, development exactions must be in response to the projected impacts of development. Where a development process is merely an excuse to obtain land already designated for public use, there is often little relationship to development impacts, and therefore, the process is invalid.

Indeed, both *Nollan* and *Dolan* involved precisely this type of improper scheme. The required exactions in both cases were imposed, not because of the perceived development impacts, but rather because the dedications in question had already been designated for acquisition in official plans.[214] In both cases the development approval process merely provided the means by which the property interests could be acquired. At a minimum, both decisions clearly state that exaction conditions must be driven not by a preexisting desire for the required property but as an attempt to offset development impacts.

1984).

214. *See Dolan v. City of Tigard*, 114 S. Ct. 2309, 2314 n.2 (1994); *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987).

The *Dolan* decision makes the common municipal practice of using the development exaction process as a means to capture already targeted tracts of land without paying just compensation highly questionable. Such exactions are not per se invalid, because the required exaction might turn out to be proportional to the development impact. However, in most instances, any proportional relationship would be fortuitous, since the type and extent of the exaction is determined by the preexisting determination of the plan rather than the impact of the development. Moreover, *Nollan* and *Dolan* send a clear signal that such exactions are to be closely scrutinized.

Conversely, those exactions least at risk under *Dolan* are those that are imposed in an honest effort to offset the impacts of development. *Dolan* clearly affirms that, if properly established, such exactions are a valid response to projected development impacts. As a general matter, such exactions will be valid if the local government can establish that the proposed development creates the need for the exactions, the degree of required exaction is proportionate to the need attributable to the development in question, and the local government can quantify the above.

As would be expected, many of the same types of exactions that might be at risk under the rational nexus standard will also be at risk under *Dolan's* "rough proportionality" standard. First, exactions will be at risk if the need for the exaction was not generated by the proposed development.[215] Second, an exaction will be invalid where it asks for too much,[216] such as where a residential development adds two hundred people to the community but the exaction is for a park site for one thousand. Third, and most obvious, is where the exaction fails to address the purported development impact. All three of the above pose the same basic problem under *Dolan* by seeking exactions unrelated to development impact.

Particular types of exaction schemes, even if sincere efforts to offset development impacts, might also be at risk under *Dolan*. Most apparent would be pre-set standards that do not provide for an individual assessment of development impact, such as where any development would be required to automatically pay a fee or dedicate a portion of land. Such pre-set standards would fail to meet *Dolan's* requirement for an individualized assessment of development impact.

Perhaps the most common example of such pre-set standards are requirements that a developer dedicate a fixed percentage of land for a park

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215. *See, e.g.*, Howard County v. JJM, Inc., 482 A.2d 908, 921 (Md. 1984); Simpson v. City of North Platte, 292 N.W.2d 297 (Neb. 1980).

216. *See, e.g.*, Land/Vest•Properties, Inc. v. Town of Plainfield, 379 A.2d 200, 204-05 (N.H. 1977); Home Builders Ass'n v. City of Kansas City, 555 S.W.2d 832 (Mo. 1977).

or school site in order to get development approval.[217] Lower courts have split on their validity, with some courts finding that it provided a sufficient relationship.[218] Such fixed percentage requirements would appear to violate *Dolan's* requirement for an individualized assessment of impact, since not all development of the same acreage would have the same impact on schools or parks. As a practical matter, the development impact of both is a consequence of population and not acreage, and thus would seem to fall short of the "rough proportionality" required by *Dolan*.

A more difficult question is whether rough formulas based on population would suffice to meet the requirements of "rough proportionality," or whether more sophisticated formulas are required. *Dolan* does not give a clear answer, but several factors seem to suggest that rather unsophisticated measures of relationship might suffice as long as an effort is made to apply the rough calculation to the specific facts of the development. First, *Dolan* emphasized in two places that mathematical precision is not required in quantifying the relationship.[219] Second, the phrase "rough proportionality" itself suggests the acceptability of rather loose methods of calculation. Moreover, the Court in *Dolan* appeared to accept without question a rather rough calculation of traffic impact, suggesting that rough calculations are sufficient.[220]

Thus, the type of exaction schemes that would appear most consistent with *Dolan* are those that use formulas that apply previously developed methodologies which provide for individual assessment. Although *Dolan* is not completely clear regarding how sophisticated a methodology must be, the decision suggests that calculations can be relatively rough in nature as long as they provide for an individual assessment of proportionate share. Not only does the term "rough proportionality" itself suggest some leeway in calculations, but the Court twice emphasized that mathematical precision was not required. Moreover, the Court specifically rejected any exacting

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217. *See, e.g.*, Call v. City of West Jordan, 606 P.2d 217, 218 (Utah 1979) (holding that a developer must dedicate seven percent of land for flood plain and/or parks).

218. *See* Collis v. City of Bloomington, 246 N.W.2d 19, 26-7 (Minn. 1976) (holding that a ten percent dedication requirement shall be interpreted to provide a developer an opportunity to rebut and thus, was valid); Call v. City of West Jordan, 606 P.2d 217, 220 (Utah 1979) (upholding a seven percent dedication requirement).

219. *See* 114 S. Ct. at 2319, 2322.

220. The Court stated that it had "no doubt that the city was correct in finding" that the proposed expansion would increase traffic, noting that the city had estimated an increase of "roughly 435 additional trips per day." It then summarized the city's methodology in a footnote, stating that it used an average of 53.21 trips per 1,000 square feet, and then multiplied that by the additional square footage to arrive at the estimated increase of 435 trips per day. *Id.* at 2321 & n.9.

level of relationship as it perceived was required under the "specific and uniquely attributable" test. For all these reasons the *Dolan* "rough proportionality" standard would seem to tolerate rather rough means of calculation.

Finally, it is safe to say that impact fees would generally fare better under the *Dolan* analysis than physical dedications. Not only might impact fees not be subject to the *Dolan* requirements to begin with, but by their very nature they are more easily tailored to actual development impacts and thus meet the proportionality test. To the extent that the impact fee is designed to assess a particular development's contribution to a community need and then to assess a fair fee for its share, impact fees would seem quite compatible with *Dolan*. This is not to say that impact fees automatically meet the *Dolan* test; clearly fees that are arbitrarily assigned with no effort to quantify actual impacts would be invalid. Yet, by their very nature impact fees lend themselves to the quantification and individualized assessment required by *Dolan* and as a general method would not appear to be at risk under *Dolan*.[221]

Indeed, it might be argued that local governments should generally shift from physical dedications to impact fees as a means to meet the *Dolan* standards, because fees provide greater flexibility in establishing proportionality. In some instances this may be appropriate, such as where government needs a physical dedication of minimum size to serve its purposes. For example, the pedestrian/bike path and greenway in *Dolan* required a set size from each landowner to be effective, yet impacts would vary. Since the size of the desired exaction in such situations remain constant for uniformity purposes, but the development impact would vary depending on the anticipated use, such a scheme would likely violate *Dolan's* proportionality standard in some instances. A better alternative would be an impact fee that could be tailored to the individual impacts, which could then be pooled to purchase the needed land in a uniform manner.[222]

Other types of physical dedications, such as for parks or schools, would not appear problematic under *Dolan* if approached properly. Since such dedication requirements typically include fee-in-lieu provisions anyway,[223] they avoid the problem of seeking minimum dedications that might not be justified by the particular development impact. Moreover, park and school

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221. *See* Merriam & Lyman, *supra* note 176 at 122 (noting that impact fees can be closely calibrated and suggesting that their popularity might increase after *Dolan*).

222. *See* Eric Damian Kelly, *Supreme Court Strikes Middle Ground on Exactions Test*, 46 LAND USE L. & ZONING DIG. 6, 8-9 (July 1994).

223. *See, e.g.*, City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965).

dedication sites can often be secured from one developer and thus closely tailored to created needs.

CONCLUSION

As previously stated, the basis message of *Dolan* is relatively simple: government may impose exactions to offset the impact of development, but the exactions must relate to and flow from the development itself. Government cannot use the land approval process to capture an interest unrelated to the impact of development. As such, the decision attempts to strike a reasonable balance between the property rights of landowners and the legitimate planning needs of local governments.

The Court's new "rough proportionality" standard should be seen in this light. By requiring proportionality between exaction and development impact, the Court established that the exaction must relate to development impacts, not only in nature, but also degree. Yet the Court repeatedly made clear that the relationship did not have to be established with precision, thus deferring to the practical constraints faced by government in this area. As a practical matter, "rough proportionality" provides government with substantial room with which to work, although the burden will clearly be on the government to justify exactions that are imposed.

Although the full impact of *Dolan* is yet to be seen, several predictions can be made about its potential impact. First, *Dolan's* "rough proportionality" standard should not have a significant impact in those states adopting the majority "rational nexus" test. Although *Dolan* has shifted the burden of proof for some states and might require greater quantification, the required degree of relationship under "rough proportionality" appears comparable to that required under rational basis. Conversely, those states applying the "reasonable relationship" standard to only require some connection between exaction and impact will be more clearly impacted by the more rigorous *Dolan* requirements.

Second, *Dolan* should not pose a threat to most types of exactions that are imposed in an honest effort to offset the impacts of development and provide for an individual determination of the exaction/impact relationship. Conversely, most at risk will be those exactions imposed because the government has already decided that it wants the land in question and uses the development approval process as a means to get it. Further, although impact fees should be subject to the *Dolan* test, they should not be at risk if properly prepared, because by their very nature they lend themselves to the quantification and individualized assessment by *Dolan*. Thus, *Dolan* might encourage some shift from physical dedications to use of impact fees.

Finally, and perhaps most significantly, *Dolan* must be seen as the latest of several recent Supreme Court decisions affirming the importance of property rights.[224] Although none of these recent decisions drastically alters the landscape of land use controls, together they demonstrate the Court's resolve to take property rights seriously. Local governments can engage in reasonable and responsive land use planning, but they must clearly be sensitive to the impact on property owners. In the long run, that might be *Dolan's* most significant impact.

224. *See* Lucas v. South Carolina Coastal Comm'n, 112 S. Ct. 2886 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987).