DEFENSIBLE EXACTIONS AFTER *NOLLAN v. CALIFORNIA COASTAL COMMISSION* AND *DOLAN v. CITY OF TIGARD*

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I. INTRODUCTION

The use of development exactions and fees has grown steadily over the last several decades in a well-documented evolution paralleling the growth in the cost of public services, the suburbs, and anti-tax sentiments. From the earlier use of mandatory dedications of land required by subdivision ordinances,[1] to the extraordinary growth in the use of impact fees in the 1980s,[2] courts have kept pace

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1. *See* Ira M. Heyman & Thomas K. Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1130–41 (1964); John D. Johnston, Jr., *Constitutionality of Subdivision Control Exactions: The Quest For a Rationale*, 52 CORNELL L.Q. 871 (1967); Richard M. Yearwood, *The Law and Administration of Subdivision Regulation: A Study in Land Use Control* (1966) (unpublished thesis, University of Florida).

2. *See* DEVELOPMENT EXACTIONS (James E. Frank & Robert M. Rhodes eds., 1987); THOMAS P. SNYDER & MICHAEL A. STEGMAN, PAYING FOR GROWTH: USING DEVELOPMENT FEES TO FINANCE INFRASTRUCTURE (Urb. Land Inst. 1986); Julian C. Juergensmeyer & Robert M. Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U. L. REV. 415 (1981); Symposium, *Evaluation of Real Estate Exactions, Linkage and Alternative Land Policies*, 10 N.Y. AFFAIRS (Winter 1988); Symposium, *Exactions: A Controversial New Source for Municipal Funds*, 50 LAW & CONTEMP. PROBS. 1

by developing standards that generally support the reasonable use of such development conditions. The case law defining the parameters of such exactions has developed primarily in state courts.

In the last decade, scholars and commentators have identified the predominant caselaw standard for such exactions to be the "rational nexus" test.[3] Under this test, a land dedication or development fee is acceptable as a condition to a development permit if the development creates the need for the capital facilities which will be funded by the fee, and if the fee represents the development's proportionate share of the costs of such facilities. The states' increasing emphasis on strict cost-accounting for such exactions and fees has been documented elsewhere,[4] including Florida's leading place among the states with well-developed caselaw on the rational nexus test.[5]

In 1987, the United States Supreme Court entered the development exactions picture in *Nollan v. California Coastal Commission*.[6] Having been re-awakened to land use issues in the late 1970s after a virtual silence for more than fifty years, the Supreme Court at the end of an active "takings decade" turned its attention, in *Nollan*, to a coastal building permit that was conditioned on the dedication to the public of a beach easement.[7] The Court found that the easement condition effected a "taking" of property in violation of the just

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(1987); Michael B. Kean, Comment, *Money Payment Requirements as Conditions to the Approval of Subdivision Maps: Analysis and Prognosis*, 9 VILL. L. REV. 294 (1964); Jay Sheen, Note, *Development Fees: Standards to Determine Their Reasonableness*, 1982 UTAH L. REV. 549.

3. Fred P. Bosselman & Nancy Stroud, *Legal Aspects of Development Exactions, in* DEVELOPMENT EXACTIONS, *supra* note 2; 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 (1987); *see* Juergensmeyer & Blake, *supra* note 2; Nancy Stroud, *Legal Considerations of Development Impact Fees*, 54 J. AM. PLAN. ASS'N 29 (1988).

4. 4. *See* DEVELOPMENT IMPACT FEES POLICY RATIONALE, PRACTICE, THEORY, AND ISSUES (Arthur C. Nelson, ed. 1988); *see also* DEVELOPMENT EXACTIONS, *supra* note 2; Snyder & Stegman, *supra* note 2.

5. *See* JULIAN C. JUERGENSMEYER & JAMES B. WADLEY, FLORIDA LAND USE AND GROWTH MANAGEMENT LAW ch. 17 (1994); IMPACT FEES IN FLORIDA (Fla. Advisory Comm. on Inter-Governmental Relations 1986); Fred P. Bosselman & Nancy E. Stroud, *Pariah to Paragon: Developer Exactions in Florida 1975–85*, 14 STETSON L. REV. 527 (1985); C. Allen Watts & Mary D. Hansen, *Impact Fees in Florida*, *in* FLORIDA ENVIRONMENT AND LAND USE LAW ch. 17 (James J. Brown ed. 1994).

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

7. *Id*.

compensation clause in the Fifth Amendment of the United States Constitution, because it lacked any nexus whatsoever with the legitimate purpose which it was intended to advance.[8] The relatively rare review of land use cases by the United States Supreme Court, combined with the Court's treatment of the Takings Clause, which encompasses a complex and changing field of law, generated a significant national discussion of the import of *Nollan*.[9] Hundreds of cases have cited *Nollan* in the nine years since it was decided.

Seven years later, the Supreme Court revisited the exactions issue in the case of *Dolan v. City of Tigard*.[10] Explicitly building onto the constitutional standards set in the *Nollan* case, *Dolan* reversed the Oregon Supreme Court's validation of a flood plain and bicycle pathway dedication condition to a site plan permit.[11] The Court left no doubt that exactions must be roughly proportional to the costs created by new development, which costs are intended to be defrayed.

This Article will explore the effects of *Nollan* and *Dolan* on the defensibility of land dedications and development fees as conditions to land development permits. It will provide a comprehensive survey of all reported federal cases and select state cases, and discuss the more relevant cases subsequent to *Nollan* that might indicate how the courts will react to *Dolan*.[12] The courts' initial reactions to *Dolan* will also be explored, as an indication of what might be in store for

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8. *Id*. at 836–37.

9. *See* Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land Use Planning*, 20 URB. LAW. 735 (1988); David L. Callies, *Property Rights: Are There Any Left?*, 20 URB. LAW. 597, 638–45 (1988); William A. Falik & Anna C. Shimko, *The "Takings" Nexus — The Supreme Court Chooses a New Direction in Land Use Planning: A View from California*, 39 HASTINGS L.J. 359, 376—97 (1988); Jerold S. Kayden, *Land-Use Regulations, Rationality and Judicial Review: The RSVP in the Nollan Invitation (Part I)*, 23 URB. 301 (1991); James A. Kushner, *Property and Mysticism: The Legality of Exactions as a Condition for Public Development Approval in the Time of the Rehnquist Court*, 8 J. LAND USE & ENVTL. L. 53, 105–73 (1992); Nathaniel S. Lawrence, *Means, Motives, and Takings*: *The Nexus Test of* Nollan v. California Coastal Commission, 12 HARV. ENVTL. L. REV. 231 (1988); Nicholas V. Morosoff, Note, *"Take My Beach, Please!"*: Nollan v. California Coastal Commission *and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. REV. 823 (1989); Peter F. Neronha, Note, *A Constitutional Standard of Review for Permit Conditions, Exactions, and Linkage Programs*: Nollan v. California Coastal Commission, 30 B.C. L. REV. 903 (1989).

10. 114 S. Ct. 2309 (1994).

11. *Id*. at 2329–30.

12. The review of cases is current through summer 1995.

future legal challenges to land dedications and development fees. Finally, a footnote surveys the reactions of the courts with jurisdiction in Florida to *Nollan* and *Dolan*, and examines how these developments in federal constitutional law will impact Florida's common law of exactions.

II. NOLLAN v. CALIFORNIA COASTAL COMMISSION

Introduction

The Supreme Court set the stage for *Dolan* with its decision in *Nollan v. California Coastal Commission*.[13] In *Nollan*, the Court announced that there must be an essential nexus between an exaction and the government's legitimate interest being advanced by that exaction.[14] Subsequently, it was hotly debated whether the "essential nexus" is essentially different from the familiar "reasonable relationship to a legitimate governmental objective" standard applied in zoning cases since *Village of Euclid v. Ambler Realty Co.*[15] Some authors argued that the standard had changed and that *Nollan* heralded a new era of more intensive judicial scrutiny of governmental regulations. Others, including the authors of this Article, find no such sea change in the regulatory takings arena as a result of *Nollan*.[16]

The cases subsequent to *Nollan* certainly did not resolve the issue. In the federal courts, the decision had astonishingly little impact. State courts went further in applying *Nollan* to invalidate

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13. 483 U.S. 825 (1987).

14. *Id.* at 837.

15. 272 U.S. 365 (1926).

16. *See*, *e.g.*, Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 925, 989–90; Pennell v. City of San Jose, 485 U.S. 1 (1988) (indicating that the *Nollan* strict scrutiny approach will be limited to unconstitutional conditions and perhaps possessory taking cases). *Nollan* demonstrates that:

> heightened scrutiny could yield any result depending, as it usually does, on the predilections of individual judges. For instance, some courts have adopted an economic efficiency model in analyzing takings cases.
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> *Hall* exhibits similar distrust of majority rule, suggesting that those supposedly benefiting from legislation do not understand their own best interests. Strict scrutiny of the means-end nexus reveals judicial disagreement with underlying economic policy, in essence requiring the legislature to prove that its scheme works. However, debates over economic theory belong in journals and legislative chambers, not in the courts.

Manheim, *supra*, at 948–50 (footnotes omitted).

governmental actions which previously might have been upheld, but a review of a sample of states reveals that the majority of decisions easily uphold reasonable governmental regulations under the *Nollan* nexus analysis. A few cases emphasize Justice Scalia's dictum regarding the required link between the exaction and the governmental purpose, while most courts place greater emphasis on the bottom-line holding of *Nollan*: the challenged exaction failed to meet even the loosest of standards. Courts which may have been predisposed to review government action more strictly use *Nollan* to justify their actions.

On balance, a review of the subsequent cases suggests that *Nollan* is best understood as the failure of a local government exaction to satisfy the "straight face test" — that is to say — whether one can defend the exaction with a straight face.[17] Read this way, *Nollan* is essentially a substantive due process case, in which the Supreme Court found the link between the lateral access requirement and the expressed purpose of protecting visual access to the ocean to be so tenuous as to be capricious. But because it involved the encumberment of a real property interest, and even more importantly, one that interfered with the Nollans' right to exclude others from their private property, the exaction in *Nollan* was found to be a taking.[18]

The *Nollan* Opinion

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17. *See*, *e.g.*, Healing v. California Coastal Comm'n, 27 Cal. Rptr. 2d 758, 769 (Ct. App. 1994) (citing *Nollan* regarding proper procedure to consider whether a Commission decision is a taking). In *Healing*, the Coastal Commission denied a permit for construction of a one-story, three-bedroom home because it had not received a recommendation from a non-existent board as to whether the property should be restricted from development under a non-existent program for acquisition and retirement of lots from development in the Santa Monica mountains. *Id*. at 764. Due to the non-existence of the board and the program, the court observed that the claim could forever remain unripe. *Id*. The court stated:

> It is in the nature of our work that we see many virtuoso performances in the theaters of bureaucracy but we confess a sort of perverse admiration for the Commission's role in this case. It has soared beyond both the ridiculous and the sublime and presented a scenario sufficiently extraordinary to relieve us of any obligation to explain why we are reversing the judgment . . . . To state the Coastal Commission's position is to demonstrate its absurdity.

Id.

18. *Nollan*, 483 U.S. at 825.

In *Nollan*, the California Coastal Commission refused to grant a rebuilding permit unless the Nollans provided oceanside access to the public, by an easement paralleling the shoreline along their property. The Nollans proposed to replace a small, rundown bungalow on their Ventura County beachfront lot with a larger house. The stated rationale for the Commission's condition was its concern over diminishing visual access to the Pacific Ocean resulting from intense development along the California coastline.[19]

A concrete sea wall separated the beach portion of the Nollans' property from the developed portion of the lot.[20] The Nollans leased the property with an option to buy, conditioned on their commitment to demolish the existing 504-square-foot bungalow used for summer rentals and replace it with a new three-bedroom house in keeping with the rest of the neighborhood.[21]

Consistent with the Commission staff's recommendation, the Commission decided to grant the permit, subject to the condition that the Nollans grant the public an easement to pass along the shore across the beachfront portion of their property, bounded by the mean high tide line to the west and their sea wall to the east. The condition required the recording of a deed restriction granting the easement.[22]

After the Nollans obtained a writ of administrative mandamus from the state court invalidating the access condition, based on the absence of evidence that their proposed house would have a direct adverse impact on public beach access, the case was remanded to the Coastal Commission for additional hearings. On remand, the Coastal Commission held a public hearing and found that "the new house would increase blockage of the view of the ocean, thus contributing to the development of a wall of residential structures that would prevent the public psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit."[23]

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19. *Id*. at 828. The Nollans' beachfront lot was located between two public beaches and the easement would have permitted public access from one to the other. *Id*. at 827–29. This may have contributed to the Court's skepticism about the expressed purposes and intent of the Commission's easement condition on the Nollans' coastal development permit.

20. *Id*. at 827.

21. *Id*. at 827–28.

22. *Id*. at 828.

23. *Nollan*, 483 U.S. at 828–29.

The Commission also found that the new house would increase private use of the shorefront and, along with other developments in the area, would cumulatively burden the public's ability to walk along the shoreline. The Commission also noted that it had consistently placed similar conditions on other coastal development permits in the area since first adopting the administrative regulations specifying such conditions. It reaffirmed the condition on the Nollans' permit.[24]

Although the superior court once again invalidated the access condition, the California Court of Appeal held that the easement condition was legitimately required under Commission criteria for new construction,[25] and that the condition was constitutional.[26] The appellate court cited *Grupe v. California Coastal Commission*[27] which provided that, as long as a project contributed to the need for public access, the condition was sufficiently related to the burden created by the development to be constitutional, even if the project considered in isolation did not create the need and even if there was only an indirect relationship between the access requirement and the need for access. The court of appeal also denied the Nollans' takings claim because, although the condition diminished the value of the lot, it did not deprive them of all reasonable use of their property. The Nollans subsequently appealed the holdings on these issues to the United States Supreme Court.

Justice Scalia's opinion for the Supreme Court majority initially observed that an outright requirement that the Nollans dedicate a public access easement across their beachfront would clearly be a taking.[28] The analysis began with a reminder of the Court's now familiar belief that the right to exclude others from private property is "one of the most essential sticks in the bundle of rights that is commonly characterized as property."[29] Thus, the easement condition was indeed a permanent physical taking.[30]

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24. *Id*. at 829.

25. *Id*. at 830. These criteria applied if the new construction's floor area, height, or bulk was more than 10% larger than the pre-existing house.

26. *Id*.

27. 212 Cal. Rptr. 578 (Ct. App. 1985).

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

29. *Id*. (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433, (1982) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

30. *Nollan*, 483 U.S. at 832.

Justice Scalia then proceeded to consider whether the fact that the easement was required as a condition for the issuance of a land use permit would justify such a taking. He recited the takings test stated in *Agins v. City of Tiburon*,[31] which held a land use regulation 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.'"[32] But Justice Scalia also noted that a use restriction "may constitute a `taking' if not reasonably necessary to the effectuation of a substantial government purpose."[33]

While admitting that the Supreme Court's jurisprudence has not elaborated on the type of connection between the regulation and the state interest necessary to satisfy the requirement of "substantially advance," Scalia recognized that a broad range of governmental purposes and regulations have satisfied these requirements. He asserted that the "substantially advance" terminology of *Agins* demonstrated that the standard for such takings has always been different from the standards for due process or equal protection violations caused by land use regulations, which are reviewed in terms of "reasonable relationship." Justice Scalia noted that *Goldblatt v. Town of Hempstead*[34] does not support this view, but summarily dismissed it with the assertion that such an assumption would be "inconsistent with the formulations of our later cases."[35]

Most significantly, however, a close review of the origin of the "substantially advance" standard shows that it is arguably nothing more than the traditional reasonable relationship test governing zoning legislation. In *Village of Euclid v. Ambler Realty Co.*,[36] the Court held that the Village's zoning regulations separating multifamily residential from single-family residential uses were not "clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals or general welfare."[37] This test was reaffirmed two years later, when the Court was first pre-

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31. 447 U.S. 255 (1980).

32. *Nollan*, 483 U.S. at 834 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

33. *Id*. (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978)).

34. 369 U.S. 590 (1962).

35. *Nollan*, 483 U.S. at 834 n.3.

36. 272 U.S. 365 (1926).

37. *Id*. at 395.

sented with an "as applied" challenge to a zoning regulation.[38] Moreover, when subsequently faced with takings claims on particular facts, the Supreme Court made it clear that there is no substantive distinction between the "reasonable relationship" and the "substantially advance" language of *Euclid*.[39]

Nollan itself further supports this contention. The actual holding of the case was explicitly decided under the "reasonable relationship" test and further was characterized as "consistent with the approach" of a large number of state court cases which were in fact "reasonable relationship" cases.[40] For these reasons, Justice Scalia's assertion that a more stringent review applies to takings cases under the "substantially advance" language appeared to focus on takings claims resulting from a requirement to convey some interest in property to public ownership and access, as was at issue in *Nollan*.[41]

Thus, even requirements to transfer property interests which infringe upon the property owners' ability to exclude others are constitutional under *Nollan*, so long as the condition furthers the governmental purpose justifying the condition.[42] When that requisite nexus is lacking, then the purpose of the restriction is essentially to obtain a property interest without payment of just compensation under the Fifth Amendment, or simply "an out and out plan of extortion."[43] The Supreme Court concluded that the Commission's

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38. *See* Nectow v. City of Cambridge, 277 U.S. 183, 187–88 (1928) (reciting *Euclid's* test and invalidating the zoning of Nectow's property because it had no relationship to a police power objective and precluded "practical use" of the property).

39. *See*, *e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1023 (1992); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 133–34 nn.29–30 (1978); *see also* Corn v. City of Lauderdale Lakes, 997 F.2d 1369, 1376 (11th Cir. 1993) (holding that the governmental regulation was "rationally based upon, i.e. was substantially related to" legitimate governmental interests), *cert. denied*, 114 S. Ct. 1400 (1994).

40. *Nollan*, 483 U.S. at 838–39.

41. *Id*. at 834 n.3. Justice Scalia recognized that if the Commission could constitutionally have forbidden the construction of the house altogether, based on its impact on beach access, then the imposition of a condition designed to ameliorate that impact on beach access would also have been constitutional. Scalia even acknowledged that the Coastal Commission had the power to require that "the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id*. at 836. Given the ideological setting of the *Nollan* decision, this was a remarkably generous concession.

42. *Id.* at 837.

43. *Id*. at 839 (quoting J.E.D. Assocs., Inc. v. Town of Atkinson, 432 A.2d 12, 14 (N.H. 1981)).

exaction condition failed to meet "even the most untailored standards" and, thus, held that it violated constitutional standards.[44]

Later Interpretation of *Nollan*

A survey of the hundreds of reported federal and selected state cases citing *Nollan* confirms that the significance of this case has been mostly limited to cases involving physical takings or the denial of all economically viable uses. In fact, the majority of cited decisions simply cite *Nollan* in passing, as an updated reference to traditional takings tests. Of the much smaller group of cases that address the required proximity between governmental conditions and purposes of regulation, few have risen to Justice Scalia's invitation in footnote three to apply a more searching review of governmental actions.

Subsequent to *Nollan*, only a few federal cases addressed traditional land use exactions,[45] and none directly addressed impact fees. However, some guidance for the use of exactions may be found in those cases, discussed below, where (1) the United States Supreme Court discussed *Nollan*; (2) *Nollan* was applied to exactions or fees; (3) a taking was found; or (4) a court actually grappled with and resolved the basic issue of the required relationship between governmental means and ends.

United States Supreme Court

Rails to trails,[46] control of submerged lands,[47] development of

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44. *Id*. at 838.

45. See *infra* notes 288–92 and accompanying text for the Supreme Court's discussion of *Nollan* in *Dolan*.

46. *See* Preseault v. ICC, 494 U.S. 1 (1990). In this case, property owners challenged an Interstate Commerce Commission order which permitted discontinuance of rail service and the transfer of right of way to a public body for interim use as a public trail under the National Trails System Act, thereby defeating their reversionary claim to the right of way. *Id*. at 6. In a unanimous decision, the Court held that any potential taking claim was premature because the property owners had not pursued their Tucker Act remedies. *Id*. at 17. The Rails to Trails Act represented a valid exercise of congressional power under the Commerce Clause, even if it only advanced the legitimate government purpose of providing for recreational trails and did not, in fact, advance the second stated purpose of protecting railroad rights of way. *Id*. at 18. In a concurring opinion, Justices O'Connor, Scalia, and Kennedy emphasized that the issue of whether the property owners possessed a reversionary interest which could have been taken by the Trails Act was a question of state law, and that appropriation of a public easement would be a taking under *Nollan*, as would any permanent physical occupation of the

coastal barrier islands, and rent control have been the factual settings in which the Supreme Court has chosen to revisit *Nollan*. Only *Dolan* has applied *Nollan* to find a possible taking.

In its exhaustive opinion in *Lucas v. South Carolina Coastal Council*,[48] the Court found that South Carolina's restriction on building upon two ocean-front, barrier island lots denied all economically viable use and left the Lucas' property valueless. The Court referred to *Nollan*'s statement of the *Agins* two-part test as "[t]he second situation in which we have found categorical treatment appropriate . . . where regulation denies all economically beneficial or productive use of land."[49] As Justice Blackmun pointed out in his dissent, this statement goes beyond the holding of *Agins* and other earlier cases cited by the majority.[50]

The *Lucas* majority also cited *Nollan*, along with *Penn Central*, as evidence of its acceptance of a broad range of permissible police power purposes in its discussion of the early noxious-use analysis cases.[51] It concluded that the harmful use analysis was simply the progenitor of the more contemporary statements that "land use regulation does not effect a taking if it `substantially advance[s] legitimate state interests.'"[52] The Court thus implicitly recognized that the "substantially advance" criterion is grounded in the traditional,

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underlying property interest by the transfer to individuals of a permanent and continuous right to traverse the rights-of-way. *Id*. at 24 (O'Connor, J., concurring).

47. United States v. Alaska, 503 U.S. 569 (1992). This action was brought to determine the validity of a disclaimer of rights to additional submerged lands to which Alaska arguably had a claim, where the disclaimer had been a condition for the United States' approval of Alaska's permit under the Rivers and Harbors Act for construction of an obstruction to navigation in Norton Sound. *Id*. at 572. The condition was authorized because the construction moved the coastline seaward. *Id*. at 573. The Court rejected Alaska's argument that the regulations conflicted with *Nollan* and constituted an "out and out plan of extortion," on the basis that *Nollan* was not applicable to the evaluation of the statutory authority underlying the federal agency's action. *Id*. at 589 n.12. Assuming *arguendo* that *Nollan* was analogous, the United States' purpose for imposing the condition on the issuance of the construction permit (to protect federal rights to submerged lands) was the same as that for denying the permit. However, there was no discussion of the degree of relationship between these purposes.

48. 505 U.S. 1003 (1992).

49. *Id*. at 1015.

50. *Id*. at 1049–50 n.11 (Blackmun, J., dissenting).

51. *Id*. at 1023.

52. *Id*. at 1023–24. The Court cited to four cases in support of this assertion: the *Lucas* version of the *Agins* test, *id*. at 1049–50 n.11 (Blackmun, J., dissenting); *Nollan*, 483 U.S. 825 (1987); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978), and Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

substantive due process test which, in full text, equates "substantially advance" with a reasonable relationship analysis.[53]

III. YEE v. CITY OF ESCONDIDO *AND THE RENT CONTROL CASES*

Yee v. City of Escondido,[54] addressed a line of cases which had developed concerning the takings questions raised by mobile home rent control. The rent control cases are instructive with regard to land use exactions because many involve the limitation or transfer of a property interest or property value from one person to another. Most cases deal with the issue as one of physical taking, although a few courts have applied the regulatory taking analysis. The physical takings cases perceive the transferred interest as a strand of the valuable property rights, such as the right to exclude others or to possess one's own property, similar to land exactions. Other cases define the interest transferred as an increment of the market value of the property, in essence analogizing it to payment of an indirect fee, similar to impact fees or fees in lieu of dedication. Some cases analyze the takings both ways, as a physical and a regulatory taking. This discussion will focus on those cases that find a taking.

Yee concerned a mobile home park owner's challenge to the city's rent control ordinance. The owner alleged that the ordinance mandated a physical occupation of its property by tenants who owned mobile homes installed on the park owner's pads. California statutes provided that mobile home park owners could terminate a mobile home owner's tenancy only for nonpayment of rent or for a change in the use of their land, after six to twelve months' notice.[55] The statutes also prohibited park owners from removing a mobile

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53. *See supra* notes 13–15 and accompanying text. Justice Stevens' dissent also refers to *Nollan*, emphasizing that the key point was the specificity of the expropriating act, and whether there was a potential that the owner was being singled out to bear the burden of a broader problem not of his own making. *Lucas*, 505 U.S. at 1066–67 (Stevens, J., dissenting).

54. 503 U.S. 519 (1992). *Yee* was premised on a conflict in the circuits, including Pinewood Estates v. Barnegat Township Leveling Bd., 898 F.2d 347 (3rd Cir. 1990). *Pinewood Estates* interpreted *Nollan* to mean that a permanent physical occupation of property by the government or a government-authorized third party is a *per se* taking. *Id*. at 351; *see also* Pennell v. City of San Jose, 485 U.S. 1 (1988) (upholding general rent control regulation).

55. *Yee*, 503 U.S. at 524; *see* Mobilehome Residency Law, CAL. CIV. CODE § 798.56 (West 1982 & Supp. 1996).

home upon its sale,[56] from charging a transfer fee,[57] and from disapproving a purchaser who is able to pay the rent.[58] In this statutory context, the City of Escondido set mobile home rents back to their 1986 levels and required city council approval for rent increases, based on enumerated factors.[59]

The park owners argued that the combination of these statutes and the ordinance created a physical taking.[60] The Court disagreed, concluding that the rent control ordinance did not amount to a physical taking because the park owners voluntarily rented their land to tenants and continued to do so as regulated.[61]

The park owners also argued that the ordinance benefitted current tenants, as compared to future tenants, by creating a premium on existing homes that are held to below-market rent levels.[62] However, because this regulatory takings argument was not relevant to the physical takings question on which certiorari was granted, the Court refused to address it. The Court recognized that the question of whether an increment in value was transferred from the park owner to the current mobile home owner "may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance."[63] However, the Court again declined to address this issue because it was irrelevant to the physical takings question.[64]

The Court also refused to hear a substantive due process claim because it was not raised in the state court actions below.[65] It declined to be the first court in the nation to consider the question of whether such regulation could constitute a regulatory taking, without benefit of the lower courts' consideration.[66] However, the Court also said that "[a] different case would be presented were the stat-

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56. *See* CAL. CIV. CODE § 798.73.
57. *See id*. § 798.72.
58. *See id*. § 798.74.
59. *Yee*, 503 U.S. at 524.
60. *Id*. at 525.
61. *Id*. at 527–28. The Court also noted that any claim based on the statutes was not ripe because the park owners failed to exhaust the state procedures for the termination of mobile home use. *Id*. at 533–34.
62. *Id*. at 530.
63. *Yee*, 503 U.S. at 530 (referring to *Nollan*, 483 U.S. at 834–35).
64. *Id*.
65. *Id*. at 533.
66. *Id*.

ute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy."[67] The relevant point for the physical takings analysis in these cases was the invitation and absence of compelled physical occupation, not the actual rent that was ultimately applied.[68]

Florida state courts have had at least one occasion to address mobile home rent control ordinances since *Yee*. In *Aspen-Tarpon Springs v. Stuart*,[69] the First District Court of Appeal held that a statute prohibiting unreasonable rent increases was constitutional, but found the requirement that an owner desiring to change use of park property must either buy the tenants' homes or pay to have the homes moved (the "buy-out or move" provision) constituted a taking.[70] The court seemed to confuse physical and regulatory taking language because it expressly held that there was a regulatory taking, yet cited to several *per se* physical takings cases in support of its holding.[71]

Citing *Yee* and *Nollan*, the court found that the "buy-out or move" provision went "far beyond the legitimate goal of reasonably accommodating conflicting interests, that is, protecting mobile home tenants from burdensome costs of dislocation while at the same time insuring that mobile home park owners receive a fair return on their investment."[72] The regulation coerced park owners into surrendering indefinitely their rights to possess and occupy their land and exclude others.[73] The court indicated that *any* regulation requiring one to pay or surrender something of value in order to recover the right to possess and occupy one's own property would be confiscatory, but noted that the evidence in the case before it demonstrated that the buy-out and relocation options were not even economically feasible.[74]

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67. *Id*. at 528 (citing to *Nollan*, 483 U.S. at 831–32, and FCC v. Florida Power Corp., 480 U.S. 245 (1987)). In *Florida Power*, a power company invited a cable television company to install cables at a higher rent and the federal government subsequently reduced the rent to a much lower level. 480 U.S. at 249. The rent restriction was upheld. *Id*.

68. 503 U.S. at 531–32.

69. 635 So. 2d 61 (Fla. 1st Dist. Ct. App. 1994) (involving a mobile home park owner's challenge to legislation regulating rent increases and changes in the use of the park property).

70. *Id*. at 66, 67–68.

71. *Id*. at 68.

72. *Id*. at 67–68 & n.6.

73. *Id*. at 68.

74. *Stuart*, 635 So. 2d at 68.

Thus, the court concluded that there had been a permanent physical occupation, and that the "buy-out or move" provision "does not substantially advance a legitimate state interest, but instead singles out mobile home park owners to bear an unfair burden, and, therefore, constitutes an unconstitutional regulatory taking of their property."[75]

Prior to *Yee*, in *Azul Pacifico, Inc. v. City of Los Angeles*,[76] the Ninth Circuit found that vacancy control provisions had transferred the right to occupy indefinitely a space in the mobile home park, at below-market rent, from the park owner to the tenant, without compensation, and thus had worked a physical taking.[77] If the city de-

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75. *Id.*

76. 948 F.2d 575 (9th Cir. 1991), *withdrawn on statute of limitations grounds*, 973 F.2d 704 (9th Cir. 1992) (holding that no cause of action was available directly under the Constitution and that a claim under § 1983 was barred by statute of limitations), *cert. denied*, 506 U.S. 1081 (1993).

77. *Id.* at 582–83. Other cases considering the physical taking question include Sierra Lake Reserve v. City of Rocklin, 938 F.2d 951, 959 (9th Cir. 1991) (holding that rent control regulations at issue could work a physical taking), *vacated for reconsideration in light of Yee*, 506 U.S. 802 (1992), *on remand*, 987 F.2d 662 (9th Cir. 1993) (vacating its discussion of physical taking, but reinstating its due process and equal protection analysis). The court noted that *Yee* failed to address regulatory taking questions and that this question had not been presented by the parties in the instant case either. *Id.* In Rent Stabilization Ass'n v. Dinkins, 805 F. Supp. 159, 162 (S.D.N.Y. 1992), *aff'd*, 5 F.3d 591 (2d Cir. 1993) (dismissing facial challenge to rent control law), the denial of reasonable return was held to not necessarily constitute a prevention of economically viable use for regulatory taking purposes. The court held that the reasonable return standard would be so broad as to render most any action a taking and unjustly favors those who paid more for their investment over those who paid less. *Id.* at 163. Instead, one should look at whether the owner is realizing any profit whatsoever and whether there was a market for the sale of the property as restricted. *Id.* at 162 (citing Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), for the *Agins* test, along with Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987)).

In Casella v. City of Morgan Hill, 280 Cal. Rptr. 876 (Ct. App. 1991), the court held that a mobile home park owner's challenge to mobile home rent control ordinance was not a taking of property without just compensation. The owner based his challenge on the lack of vacancy decontrol provisions which would permit rents to return to market levels when a tenant departed. Under the California or United States Constitution, the court asserted that the distinction between physical occupation and regulatory takings was non-existent, rejected plaintiff's argument that heightened scrutiny should apply under *Nollan*, and treated the claim as it would any other rent control case. In City of Berkeley v. Rent Stabilization Bd., 33 Cal. Rptr. 2d 317 (Ct. App. 1994), tenants sought to overturn rent control regulation regarding annual indexing of rents for inflation. The court found that city rent stabilization board was within its discretion allowing for full annual indexing of rents for inflation, including the debt service component of net operating income (NOI), and the board had discretion in setting rents to provide for a return on investment to landlord, as required to prevent slow unconstitutional taking.

cided that it desired to create such a windfall for current mobile home park tenants, according to the Ninth Circuit, it had to spread the burden among all of its citizens rather than placing it on mobile home park owners.[78] However, after *Yee*, the decision was vacated on statute of limitation grounds. Nevertheless, the Ninth Circuit's application of *Nollan*'s nexus requirement to a regulatory taking also claimed in the case remains instructive.

The City of Los Angeles' purpose in enacting the restrictions was to "safeguard tenants from excessive rent increases" and their "concomitant hardships and displacements."[79] It argued that the failure of the free market (or as the court saw it, the lag time in the free market adjustment for an inadequate supply of affordable housing) provided an opportunity to take advantage of elderly and fixed-income tenants.[80] The Ninth Circuit noted that it had previously recognized this purpose as a valid basis for governmental regulation of the landlord/tenant relationship in a substantive due

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Id. at 328. Substantial competent evidence before the board established that the result of indexing rents by a formula based on only the costs specified in the city's rent control ordinance, and excluding the landlord's debt service as part of NOI, would be confiscatory. *Id*. at 330. The board was also within its discretion in allowing individual rent adjustments for those properties which had abnormally low rents at the time rents were frozen. *Id*. at 337. The court stated that people who acquired property reasonably relied on the fact that their constitutional rights would not be violated and that rental adjustments necessary to protect net operating income from the property would be granted in the future as it had been in the past. *Id*. at 336.

In Westwinds Mobile Home Park v. Mobile Home Park Rental Review Bd., 35 Cal. Rptr. 2d 315 (Ct. App. 1994), a mobile home park owner challenged the constitutionality of a rent control ordinance which granted only a low rent increase to the mobile home park owner. The owner cited *Nollan* for close scrutiny. The court stated

> *Nollan* held that when a statute physically takes property without compensation to the owner, it cannot be upheld merely because a legislature could rationally have decided the law might have achieved a state objective. Instead when physical takings are involved, the court more closely scrutinizes the law to determine whether it substantially advances a legitimate state interest . . . . However, *Nollan* involved a statute which physically expropriated property. The statute involved here however merely regulates the use of land and does not impose a physical taking.

Id. at 318 (citing *Yee*, 112 S. Ct. at 1529). The court held the statute was not facially unconstitutional for failure to substantially advance, even if such heightened scrutiny did in fact apply to non-physical takings. *Id*. (citing Blue Jeans Equities v. City of San Francisco, 4 Cal. Rptr. 2d 114 (Ct. App. Ct.), *cert. denied*, 506 U.S. 866 (1992)).

78. *Azul Pacifico*, 948 F.2d at 588.

79. *Id*. at 583.

80. *Id*. at 582.

process context.[81] However, it continued, "[t]he Supreme Court has held that the relationship between the means and the ends must be closer for purposes of takings clause analysis."[82]

Undertaking a close analysis of the means of protecting the asserted governmental interest, the Ninth Circuit found that the plaintiffs had proven that the effect of the vacancy control provisions was merely to transfer the value of the controlled rent from the mobile home park landlord to the tenant.[83] It further found that this transfer of wealth, standing alone, would not serve any rational governmental purpose under *Nollan*.[84]

The Ninth Circuit concluded, however, that the provisions protected existing tenants because without vacancy control, tenants could not sell their homes if park owners raised the rent to a level that prospective buyers could not afford. Moreover, the correctness of the city's decision to protect against unscrupulous landlords was a legislative question, which the Ninth Circuit would not question. Thus, the vacancy control provision served the same governmental purpose as the rent stabilization ordinance (i.e., protecting incumbent tenants) which provided a sufficient nexus under *Nollan*, and was therefore constitutional.[85]

The Ninth Circuit considered the issue to be the indirect payment of a sum of money from the landlord to the tenant, and considered that payment to be susceptible to a regulatory taking analysis. If applied to land use exactions such as impact fees, this case

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81. *Id*. (citing Sierra Lake Reserve v. City of Rocklin, 938 F.2d 951, 958 (9th Cir. 1991)).

82. *Id*. (citing *Nollan*, 483 U.S. at 834–35 & n.3.)

83. 948 F.2d at 583.

84. *Id*.

85. *Id*.; *cf*. Carson Harbor Village, Ltd. v. City of Carson, 37 F.3d 468, 473, 476 (9th Cir. 1994), *and* Sandpiper Mobile Village v. City of Carpinteria, 12 Cal. Rptr. 2d 623 (Ct. App. 1992) (applying *Yee* to find no physical taking in city's rent control ordinance and applying *Penn Central* tests to facial regulatory taking question), *cert*. *denied*, 507 U.S. 1032 (1993). The *Sandpiper* court upheld the vacancy control ordinance and stated that even if Sandpiper could plead that its profits were severely reduced, it would not be a denial of "substantially all economically viable use" amounting to a taking. 12 Cal. Rptr. 2d at 628. The *Sandpiper* court noted the ordinance provided for a just and reasonable return, included automatic annual increases, and also allowed additional adjustments as necessary for adjusting reasonable return, and, therefore, satisfied *Nollan's* requirements. *Id*. The *Sandpiper* court noted Carpinteria's ordinance had a legislative finding that the rent control program had proven to be effective and beneficial and stated that "[t]his legislative determination states a sufficient nexus between the effect of the ordinance and the objectives it seeks to advance." *Id*.

suggests that a broad range of governmental purposes may be used to justify them, and that they would be accorded the traditional deference to legislative judgment under *Nollan*.[86]

In *Golden Gate Hotel Ass'n v. City & County of San Francisco*,[87] a California district court found that a physical and regulatory taking occurred upon the application of a San Francisco residential hotel ordinance concerning the conversion of residential hotels to tourist hotels.[88] The ordinance required the owner to obtain a permit from the city, provide relocation assistance to hotel residents, and provide for the replacement of the hotel units being converted through payment of an in-lieu fee.[89] Although the holding was later reversed on procedural grounds, it held that the ordinance effected a *per se* facial physical and regulatory taking.[90]

San Francisco argued that *Yee* conclusively foreclosed any challenge that there had been a physical occupation taking.[91] The district court disagreed because, while in *Yee* the mobile home park owners could change the use of their land on notice, under the San Francisco ordinance the owners were, for all practical purposes, denied the freedom to terminate the rentals of their rooms. "[T]he Residential Hotel Ordinance provides that a hotel owner who wishes to change the use of his land may not simply evict his tenants, but must pay a king's ransom in order to discontinue the use of his property as a residential hotel."[92] The court concluded that the ordinance enabled members of the public to regularly use and permanently occupy the private hotel property, and thereby exercised forced con-

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86. Note, however, that the case preceded *Dolan*, and it is unclear from the record whether the relationship between this "transfer of wealth" and the need for protection against unscrupulous landlords is "roughly proportional."

87. 864 F. Supp. 917 (N.D. Cal. 1993), *vacated*, 18 F.3d 1482 (9th Cir. 1994).

88. *Id*. at 928.

89. *Id*. at 920. The ordinance required relocation assistance by either constructing replacement units, rehabilitating other residential hotel units, constructing or rehabilitating transitional emergency housing, or contributing an "in-lieu" fee to the city's preservation fund or a non-profit housing group in the amount of 80% of the construction cost of the number of units converted plus site acquisition costs. The Ninth Circuit opinion noted that there had been two previous challenges to this San Francisco ordinance, which was first enacted in 1979. 18 F.3d at 1484. The two challenges are Terminal Plaza Corp. v. City & County of San Francisco, 223 Cal. Rptr. 379 (Ct. App. 1986) and Bullock v. City & County of San Francisco, 271 Cal. Rptr. 44 (Ct. App. 1990); both concluded that the ordinance did not effect a taking of property.

90. *Golden Gate*, 864 F. Supp. at 920.

91. *Id*. at 923.

92. *Id*.

trol over the hotel owners' possessory interests in their properties, including the denial of the owners' right to exclude others.[93] Thus, the ordinance was a facial, *per se*, physical taking "because it interferes so drastically with the hotel property owners' fundamental rights to possess and exclude as to amount to compelled physical occupation."[94]

The district court further found a regulatory taking, holding that the ordinance went "too far" under *Pennsylvania Coal Co. v. Mahon*.[95] The court said the city's action amounted to a *physical* taking that wholly destroyed the landowner's right to exclude, equalling a compelled physical occupation of his property and a *per se* taking under *Lucas*. For purposes of its *regulatory* taking analysis, however, the district court assumed *arguendo* that there was no physical invasion.[96] It concluded that the ordinance did not deprive land owners of all economically beneficial use, because it allowed (or, in its view, compelled) the owner to continue the residential hotel use.

However, the district court found "fatal constitutional shortcomings" in the ordinance's deprivation of reasonable investment-backed expectations.[97] It effectively required hotel owners to maintain and preserve the residential units and prohibited them from altering or demolishing their buildings or converting them to any other use.[98] This substantially interfered with the fundamental right of hoteliers to go out of the rental business, which is protected by the California

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93. *Id*. at 924.

94. *Id*.

95. *Golden Gate*, 864 F. Supp. at 924. The court cited Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), for the proposition that there is no set formula for what is "too far," but identified several particularly significant factors in the takings analysis: (a) the character of the governmental regulation; (b) whether the regulation has deprived the property owner of viable uses of her property, her reasonable investment-backed expectations, or any sticks from her bundle of property rights; and (c) whether the regulation substantially advances a legitimate state interest. 864 F. Supp. at 925. The court derived these factors from Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Agins v. City of Tiburon, 447 U.S. 255 (1980); Kaiser-Aetna v. United States, 444 U.S. 164 (1979); Andrus v. Allard, 444 U.S. 51 (1979); Penn Cent. Transp. v. City of New York, 438 U.S. 104 (1978); and United States v. Causby, 328 U.S. 256 (1946).

96. *Golden Gate*, 864 F. Supp. at 926.

97. *Id*. at 926.

98. *Id*.

statutes.[99] This further interfered with other property rights by (a) denying hotel owners the right to use their property as they see fit; (b) requiring that certain units remain residential in a coerced rental provision, thereby depriving hotel owners of the fundamental right to possess their own property; and (c) "requiring owners to rent to specific tenants to whom they might otherwise not wish to rent, thereby depriving them of the right to exclude."[100]

The court agreed that alleviating homelessness was a legitimate state interest.[101] However, the stated interest supporting the ordinance — "alleviating the problem of homelessness caused by the conversion and demolition of residential hotel units" — was held to be "too narrow an interest to qualify as legitimate."[102] Even assuming that the actual purpose was the broader purpose of alleviating homelessness, the court found that the ordinance lacked the essential nexus between that purpose and the means chosen to achieve it, by illogically placing the blame for the social ill of homelessness on the shoulders of residential hotel owners. It singled out a few to bear costs which should be borne by the many, a constitutionally impermissible governmental act.[103]

In its conclusion, the court stated:

> Plaintiffs, hotel owners, voluntarily provided for some low income housing by operating their properties on a residential basis for a period of time. Rather than commending the hotel owners for their efforts to help low-income individuals, defendant San Francisco enacted the Residential Hotel Ordinance, effectively placing plaintiffs into perpetual servitude by forcing them to remain in the residential rental business and preventing them from changing businesses. Such an ordinance is impermissible under the constitution.[104]

The court cited *Pennell v. City of San Jose* for the principle that the redistribution of wealth should be accomplished by society at large, not by individuals.[105]

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99. *Id.*
100. *Id.* at 927.
101. *Golden Gate*, 864 F. Supp. at 927.
102. *Id.*
103. *Id.* at 927–28.
104. *Id.* at 928.
105. *Id.* (citing Pennell v. City of San Jose, 485 U.S. 1, 21–22 (1988) (Scalia, J.,

On motion for reconsideration, the district court expunged its discussion of the character of the governmental action as being a physical invasion,[106] but reaffirmed that under *Lucas*, there was no denial of all economically viable use, and that the facial takings analysis required a look at the extent to which plaintiffs had been deprived of economically productive use.[107] It compared the loss of value to "how the owners' reasonable expectations had been shaped by the State's law of property."[108] The interests alleged to have been diminished were the classic property rights "to exclude, to use and to possess, and the statutorily based right to go out of the rental business."[109] Because these rights had been "deeply trenched upon," the court concluded that the economically viable uses of the hotel owners' land were significantly diminished.[110] Thus, even though there had not been a denial of all economically productive use, these severe impacts on investment-backed expectations and classic property rights constituted a deprivation of economically productive use amounting to a taking.[111] The court also modified the summary of its holding to state as follows:

> In accordance with the foregoing discussion, this court finds that the challenged Ordinance is unconstitutional on its face because it too severely trenches on the hotel owners' reasonable investment-backed expectations, it too significantly deprives the hotel owners of three strands of their bundle of property rights, it too severely diminishes the economically viable uses of the land, and it fails to substantially advance legitimate state interest.[112]

Another facial regulatory taking was found by a federal district court in *Richardson v. City & County of Honolulu*, where a rent control ordinance did not allow lessors a reasonable rate of return and, "although it was enacted to further a legitimate public purpose, the means chosen by the drafters were thus not rationally related to

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concurring)).

106. Golden Gate Hotel Ass'n v. San Francisco, 836 F. Supp. 707 (N.D. Cal.), *order modified by* 864 F. Supp. 917 (N.D. Cal. 1993), *vacated*, 18 F.3d 1482 (9th Cir. 1994).

107. *Id*. at 710.

108. *Id*.

109. *Id*.

110. *Id*.

111. *Golden Gate*, 836 F. Supp. at 710–11.

112. *Id*. at 711.

that purpose."[113] Even if the rent control ordinance had no express provision guaranteeing landlords a just and reasonable rate of return, the court stated that such a provision must be implied if the ordinance were to be upheld. The ordinance indiscriminately and uniformly based its maximum renegotiated rent on the initial rent paid under the lease, and neglected to provide any mechanism for adjustment or review. The legitimate public purpose asserted was the reduction of the cost of leasehold housing for the people of Hawaii, while providing a fair rate of return for lessors.[114]

The district court found a taking because the ordinance did not rationally further this legitimate purpose.[115] Based on California law, the court stated "[a]n ordinance is unconstitutionally confiscatory if it is apparent from the face of the ordinance that its effect would be to lower rents more than is necessary for the stated legislative purpose or if it would preclude landlords from receiving a just and reasonable return on their property."[116] The court emphasized that the city had neglected to provide *any* mechanism for adjustment or review of the maximum renegotiated rent, and thus deprived owners of a just and reasonable rate of return.[117] The ordinance also created no agency to oversee the interpretation and application of it, and thus failed to assure that the public purposes of the ordinance would be effectuated.[118]

Another mobile home rent control provision was found not to be a taking, but was held to violate substantive due process in *Adamson v. City of Malibu*.[119] The court extensively discussed due pro

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113. 759 F. Supp. 1477, 1491 (D. Haw. 1991) (dealing with a takings challenge to constitutionality of a city ordinance purporting to impose a maximum ceiling on renegotiated lease rents solely for residential condominiums).

114. *Id*. at 1492.

115. *Id*. at 1497.

116. *Id*. at 1489.

117. *Richardson*, 759 F. Supp. at 1492. The ordinance determined the maximum rent by multiplying the total amount of rent paid by the lessee during the first year of the lease by the rent factor, which was an average of the inflation factor and the income factor. *Id*. at 1489. By tying the rent to the first year of the lease, the ordinance was arbitrary and failed to allow lessors to collect rents reflective of market value because it was conceded that the first year of many leases contained a discount to below-market value. *Id*. at 1490. The court accepted that if the first year rent were reflective of market value or at least reasonable, the ordinance could have been valid. *Id*. at 1489.

118. *Id*. at 1496.

119. 854 F. Supp. 1476 (C.D. Cal. 1994). In this case, the owners of mobile home parks brought an action challenging the constitutionality of a mobile home rent control ordinance. *Id*. at 1480. The court held the rent rollback moratorium and fair return pro-

cess and takings analyses, and carefully considered the validity of each aspect of the rent control ordinance under these theories. The court held that the denial-of-economically-viable-use question was not ripe for review as a regulatory taking because there was no evidence in the record regarding the economic impact on specific properties.[120] The court also reviewed the *Nollan* requirement that there must be a nexus between the regulation and the purpose the government wishes to advance by means of the regulation.[121]

The court noted the similarity of this analysis to its due process analysis, and recognized that "the Ninth Circuit has suggested that the due process standard of reasonable relation will apply in the regulatory takings field as well."[122] Relying on the 1991 Ninth Cir-

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visions were facially invalid and violative of substantive due process, but the ordinance in all other respects survived facial due process, equal protection and both physical and regulatory takings claims. *Id*. at 1503. The court held that the purpose of protecting the investments that tenants had made in their mobile home, notwithstanding the fact that sale prices for these homes were escalating, was legitimate. *Id*. at 1490. The city also had a legitimate interest in protecting tenants with lower or fixed incomes, notwithstanding that the mobile home park population, in general, was wealthier than the average population and that the ordinance would have an incidental benefit to wealthier tenants. *Id*. Allocation of a large portion of the placement value of the mobile home to tenants, by virtue of the vacancy control provision, was not violative of substantive due process. *Id*. The closure or conversion restriction, which required owners who wish to close or convert the properties to other uses to prepare detailed reports on the impact of closure or conversion on the residents of the park, was upheld. *Id*. at 1495. Pass-through provisions, intended to limit the amount of expenses that owners could pass through to tenants in their rents, were upheld even though they did not provide park owners with a method for increasing rent, where the owners failed to submit any evidence that they did not, in fact, advance a legitimate interest. *Id*. at 1493. The transfer of wealth and reduction of mobile home park owners' income was not a legitimate interest and the eight-year rent rollback provisions were not rationally related to any legitimate interest. *Id*. at 1491. The three-year moratorium at the end of long-term leases and a freeze on rent increases until after two years after the date of enactment were also violative of substantive due process because there was no evidence of arbitrary rent increases and the provisions did not include any reasonable adjustment mechanism. *Id*. In addition, the procedure to control base rent, in order to assure owners a fair return, was also held to violate substantive due process by allowing owners to apply for an increase only under limited economic circumstances and by giving owners no recourse for changes due to other economic conditions or occurrences during the eight-year period preceding the effective date of the base rate. *Id*. at 1494. The court expressed disagreement with Richardson v. City and County of Honolulu, 759 F. Supp. 1477 (D. Haw. 1991) (holding that rent control ordinance was ripe for review without exhaustion of state remedies and that no facial physical taking analysis applied where mobile home park owners had invited tenants onto their property).

120. *Adamson*, 854 F. Supp. at 1501.

121. *Id*. at 1502.

122. *Id*.

cuit holding in *Commercial Builders v. City of Sacramento*,[123] the court stated that the "substantially advance" test does not require scrutiny any stricter than rational basis.[124] The court expressed doubt as to whether the Supreme Court "meant `rationally related' when it wrote `substantially advance'" but found that the rent control ordinance passed both tests.[125]

In considering whether a nexus existed between the function of the ordinance and the purpose it was intended to achieve, the court concluded that the rent control ordinance directly promoted the legitimate interest of protecting the tenants' investments. The court found no logical discontinuity, like the one apparent in *Nollan*. However, the rent control ordinance was "far more onerous than necessary to solve the problem that it set out to address. No matter how onerous it is, however, it is not overbroad in the constitutional sense of encompassing persons or behavior not related to its purpose."[126]

Thus, all of the subsequent Supreme Court decisions citing *Nollan* involve *per se* taking fact patterns. Three of these are in relation to physical takings or occupations, as is *Dolan*'s pedestrian bikeway and flood plain requirement.[127] The *Yee* setting of rent control for mobile homes has proven a fruitful subject for many federal courts, especially in the Ninth Circuit. Most uphold reasonable rent control requirements. The fourth, *Lucas*, did not involve a physical taking, but created a new category of *per se* regulatory takings. The justices have not chosen to hear any traditional regulatory takings case, in the style of *Penn Central*, in the seven years since *Nollan*, and thus have not yet indicated whether they will apply it in such a

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123. 971 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1993); see *infra* notes 163–74 for a discussion of *Commercial Builders*.

124. *Adamson*, 854 F. Supp. at 1502.

125. *Id*. at 1502.

126. *Id*. The incidental windfall that tenants in possession at the time of the enactment of the ordinance received did not support a finding that the ordinance was a taking, because it was substantially related to the city's interests in giving buyers security as to what their future rent will be when they assume their tenancy. *Id*. The later tenants will share in the enhanced investment security created by the ordinance, the court concluded, even if they cannot share in the windfall. *Id*. Plaintiffs had argued that the desire to grant a windfall to a powerful constituency had influenced the city council, but the court stated that a suggestion of improper motivation by the members of the city council was not a sufficient basis for invalidation of the ordinance, where evidence of proper motivation was also presented. *Id*. at 1495.

127. United States v. Alaska, 503 U.S. 569 (1992); Yee v. City of Escondido, 503 U.S. 519 (1992); Preseault v. ICC, 494 U.S. 1 (1990).

setting.

IV. NOLLAN *IN THE ELEVENTH CIRCUIT*

The Eleventh Circuit first referred to *Nollan* in *A.A. Profiles, Inc. v. City of Ft. Lauderdale*,[128] its only case to date finding a taking under *Nollan*. There, Ft. Lauderdale, responding to public opinion, adopted an ordinance prohibiting a parcel from being used for the plaintiff's wood chipping operation and issued a stop work order.[129] The case was held to be ripe for federal review based on Florida's failure to provide an inverse condemnation remedy at the time of the city's actions.[130] The circuit court applied the *Nollan* taking standard of whether the city's action "substantially advanced" a legitimate state interest, or was "reasonably necessary to the effectuation of a substantial public purpose."[131] One may question the impact that *Nollan* actually had on the holding because the Eleventh Circuit stated that *A.A. Profiles* was indistinguishable from one of its pre-*Nollan* cases,[132] and because there was strong evidence that A.A. Profiles had a vested right to conduct wood chipping.[133]

Within the Eleventh Circuit, the case most directly addressing *Nollan's* essential nexus requirement found no taking. In *McNulty v. Town of Indialantic*, the Middle District of Florida was faced with a regulatory scheme somewhat similar to the coastal construction regulations at issue in *Lucas*, and determined that Florida's version of these regulations did not work a taking.[134] McNulty purchased four oceanfront lots abutting a public beach to the north, and abut-

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128. 850 F.2d 1483 (11th Cir. 1988).

129. *Id*. at 1485.

130. *Id*. at 1487; *see also* Corn v. City of Lauderdale Lakes, 816 F.2d 1514 (11th Cir. 1987). *But see* Barima Inv. Co. v. United States, 771 F. Supp. 1187, 1189 (S.D. Fla. 1991) (recognizing that inverse condemnation action is available in Florida state courts), *aff'd*, 959 F.2d 972 (11th Cir. 1992); Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622 (Fla. 1990) (a case recognizing the inverse condemnation remedy is mandated by *First English*).

131. *A.A. Profiles*, 850 F.2d at 1487 (citing Penn Cent. Transp. v. City of New York, 438 U.S. 104, 127, (1978)); Nollan v. California Coastal Comm'n, 483 U.S. 823 (1987).

132. 850 F.2d at 1488 (referring to Wheeler v. City of Pleasant Grove, 746 F.2d 1437 (11th Cir. 1984) (holding that a moratorium on apartment construction enacted in response to public opposition was a taking and denial of substantive due process)).

133. 850 F.2d at 1488 n.8.

134. McNulty v. Town of Indialantic, 727 F. Supp. 604, 606–07, 611, 613 (M.D. Fla. 1989).

ting twenty fifty-foot, privately owned, vacant beachfront lots to the south.[135] No habitable structures existed on any of these other lots along the oceanfront, which were used in connection with single family structures immediately across the street. The town later adopted setback ordinances for beachfront structures which placed all of McNulty's property seaward of the state's Coastal Construction Control Line (CCCL) setback.

McNulty unsuccessfully applied for a variance from the setback restrictions to construct a single-family dwelling. On appeal, the state circuit court struck down the town's ordinance as facially unconstitutional. The state district court of appeal reversed, holding that the ordinance was facially valid and that McNulty had not made a *prima facie* showing of an as-applied taking.[136] McNulty then reapplied for a variance to build a two-story, twelve-unit condominium complex, raising the estimated value of the proposed development from $80,000 to $600,000.[137] Both the board of adjustment and the town council denied this second application.[138]

In the subsequent federal litigation, the District Court considered the relevant question to be whether the town's actions bore a "substantial relationship to a valid public purpose," and whether its actions went "too far."[139] In describing the required nexus, the court cited *Penn Central*, regarding whether the use restriction was reasonably necessary to the effectuation of a substantial governmental purpose.[140] *Nollan* further defined the nexus, which "used strict scrutiny to examine the fit between the challenged regulation and the claimed state interest."[141] According to the court, a restriction on development that furthered any of the broad range of permissible governmental objectives would be valid under *Nollan*, despite a required concession of property rights by the landowner. *Nollan* was simply a case where the Supreme Court "found that the necessary connection between the regulation and claimed state interest was missing" and that the Nollans were subject to an out and out plan of

135. *Id*. at 605.
136. *Id*.
137. *Id*. at 605–06.
138. *Id*. at 606.
139. *McNulty*, 727 F. Supp. at 606.
140. *Id*. (citing *Penn Cent.*, 438 U.S. at 127).
141. *Id*. (citing *Nollan*, 483 U.S. at 825).

extortion.[142]

The Middle District of Florida concluded that the necessary connection was found in the uncontradicted expert testimony that projects like those proposed by McNulty would deplete and eradicate dune vegetation and cause beach erosion.[143] The prohibition on construction directly prevented damage which could result from erosion of the dunes and advanced the statutory goal of preserving the beach and dune system.[144] The district court further concluded that the ordinances and actions were "sufficiently related" to the stated goal of beach preservation, which was a permissible exercise of the police power, and noted that even the deprivation of the most beneficial use did not render a police power ordinance unconstitutional.[145]

The *McNulty* court, having found a sufficient nexus under *Nollan*, proceeded to apply *Penn Central* to determine if the beach development restrictions went "too far."[146] It found that structures considered expendable under wind and water forces, such as gazebos, boardwalks, and snack bars, were permitted and could be developed without economic hardship.[147] The court further concluded that the property was not valueless, when considered as a whole.[148] The owner's primary investment-backed expectation was his existing use, because McNulty had made no attempt to develop it for over fifteen years and, when he proposed to develop it, he proposed a project in violation of existing regulations.[149] McNulty's only relevant investment was his original purchase price and that value had increased. His expenses for plans and engineering services were not considered investments in the property, but rather investments in a variance or litigation, and thus were not relevant. The court further found that the town's safety and general welfare justification for the ordinance was supported by uncontroverted expert testimony.[150] Further, he retained the right to exclude others, considered so essential by the *Nollan* court.[151] An inability to use the property for

142. *Id*. at 606–07 (citing *Nollan*, 483 U.S. at 835–37).
143. *Id*. at 607.
144. *McNulty*, 727 F. Supp. at 607.
145. *Id*. at 603.
146. *Id*. at 607.
147. *Id*. at 608.
148. *Id*.
149. *McNulty*, 727 F. Supp. at 611.
150. *Id*. at 614.
151. *Id*. at 611.

production of an income stream or to make the highest and best use was held not to render the property without economically viable use.[152] Finally, the district court noted that McNulty benefitted from the coastal construction regulations, and that there was a reciprocity of advantage based on the continuing existence of the dune system to protect all property in the town. Even if McNulty's burdens exceeded his benefits, this fact was not considered dispositive.[153]

It is interesting to speculate whether, given *Lucas*, a different holding would result today. Given the significant factual differences (in *Lucas*, every other oceanfront lot had a house on it, and in *McNulty*, none of the other oceanfront lots had habitable structures on them) a court might reach the same conclusion today. Other Eleventh Circuit cases, addressing cable regulation[154] and the ripe

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152. *Id*.

153. *Id*. at 613. The court was not swayed by McNulty's showing that his proposed project was technologically feasible, and stated that this was not a sufficient answer to the town's concern about damage to the dune system. *Id*. at 614. It also noted the fact that McNulty had purchased the property for $25 per front foot in 1963 in a regulated environment, albeit before the enactment of the challenged regulations, when oceanfront lots of suitable depth for residential building purposes were selling for $500 a front foot. *Id*. at 611. The district court considered the character of the governmental construction setbacks to be more like a public program adjusting the benefits and burdens of economic life to promote the common good, rather than an interference or physical invasion. *Id*. at 612 (citing to *Penn Cent.*, 438 U.S. at 124). The court also noted that McNulty did not contend that a physical encroachment had occurred as in *Nollan*. *Id*. at 613. To the contrary, the town had actually erected a fence to protect McNulty's land from trespassers from the neighboring public beach. *Id*. at 613.

154. *See* Cable Holdings v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600, 605 (11th Cir.) (noting that the Cable Act, if interpreted to allow an involuntary intrusion onto private property for purposes of placing cable-connection facilities, would constitute a taking under federal law), *cert. denied*, 506 U.S. 862 (1992). The *Cable Holdings* court cited to *Nollan* and *Loretto* regarding the sanctity of the right to exclude others from one's property and interpreted the Cable Act to avoid potential takings problem. *Id.* at 604–05, 608–10; *see also* Central Cable Television Co. v. White Dev. Co., 902 F.2d 905 (11th Cir. 1990). The court in *Central Cable* held that a cable regulation which allowed a franchisee to construct a cable system over public rights of way and easements dedicated to "compatible" uses did not constitute a taking under *Loretto* because compliance was a "voluntary" act connected with the zoning process. 902 F.2d at 910. Judge Henley, in his concurrence, found this case more analogous to *Nollan* than to *Loretto* because the Cable Act did not require the granting of physical access to existing property, but rather placed a condition on further development of the property and stated that *Nollan* required that a restriction "substantially further" the asserted goal. *Id.* at 912 (Henley, J., concurring); *cf.* Consolidated Gas Co. v. City Gas Co., 912 F.2d 1262, 1315 n.52 (11th Cir. 1990) (Tjoflat, J., dissenting) (stating that a natural gas regulation ensuring a supply of gas and requiring the gas company to permit a pipe to be constructed to pull gas from its pipe system, is analogous to the public easement in *Nollan*, and arguably constitutes a

ness of a challenge to a wetlands regulation,[155] shed little light on *Nollan*.[156]

V. NOLLAN *IN THE OTHER CIRCUIT COURTS*

Considered as a group, the other federal circuit court decisions are generally consistent with the Eleventh Circuit's bottom line on *Nollan*: It is restricted to its facts and stands for the proposition that a mandatory physical conveyance of the right to exclude others must have an "essential nexus" with the impacts of the development. The few courts that actually apply the nexus analysis generally uphold the challenged regulation.

Many cases cite *Nollan* as a case applicable only to fact patterns involving physical occupation, deprivation of all economically viable use, or deprivation of essential strands of property rights, such as the right to exclude.[157] Other cases use it as an updated reference to

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taking under *Penn Central*).

155. *See* Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992), *cert. denied*, 115 S. Ct. 1693 (1995). Here, plaintiff attacked a local government comprehensive plan amendment "down-planning" a pristine mangrove swamp. *Id*. at 1133. The plaintiff owned adjacent property. *Id*.; *see also* Reahard v. Lee County, 978 F.2d 1212, 1213 (11th Cir. 1992) (remanding the case because, based on federal notions of ripeness, the court questioned federal jurisdiction over the matter). After remand, the court found the case was not ripe. Reahard v. Lee County, 30 F.3d 1412, 1418 (11th Cir. 1994). The court reaffirmed the doctrine that takings analysis was an individual, *ad hoc* exercise and noted that "substantially advance" question is irrelevant to a just compensation claim, which presupposes validity of the governmental action at issue. *Id*. at 1416 n.11. *See generally* Richard J. Grosso & David J. Russ, *Takings Law in Florida: Ramifications of* Lucas *and* Reahard, 8 J. LAND USE & ENVTL. L. 431 (1993).

156. The Southern District of Florida has mentioned *Nollan* once in Corn v. City of Lauderdale Lakes, 771 F. Supp 1557, 1572 (S.D. Fla. 1991), *aff'd in part, rev'd in part*, 997 F.2d 1369 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1400 (1994). There, the district court briefly referred to *Nollan* in its finding, which was subsequently upheld by the Eleventh Circuit, that there had been no taking of the front portion of Corn's property. *Id*. This front portion could not have been taken because the shopping center use was the intended use, and the owner had not been deprived of use by the city's rezoning of the remainder of the property to prevent mini-warehouse use. *Id*.

157. *See, e.g.*, Southview Assoc. v. Bongartz, 980 F.2d 84, 95 n.6 (2d Cir. 1992) (stating that *Nollan* involved a regulatory, not a physical, taking and is irrelevant because the state did not require occupation of the property by deer), *cert. denied*, 507 U.S. 987 (1993). The *Southview* court held the matter was not ripe. *Id.* at 99. Chief Judge Oakes, representing his own views and not the opinion of the panel, stated that "substantial advancement" was sufficient to defeat a taking claim arising from denial of a development application for property containing a deeryard. *Id.* at 105–06. Chief Judge Oakes defined substantial advancement as "a nexus" between the regulation's prohibition and the goal advanced as justification for that prohibition. *Id.* at 108. There is no "litmus

test" for determining legitimate state interest. *Id.* at 107; *see also* Pearson v. City of Grand Blanc, 961 F.2d 1211, 1214 (6th Cir. 1992) (maintaining that *Nollan* requires a showing of deprivation of economic viability as a prerequisite to bringing a taking challenge to a zoning action). Federal court review of zoning ordinances is very restrictive, and only determines whether they are clearly arbitrary and unreasonable, having no substantial relation to the public welfare as in *Euclid*. *Pearson*, 961 F.2d at 1223 & n.75. The court also provided an exhaustive review of the various substantive due process standards applied in the federal circuits. *Id.* at 1215–16.

Additionally, in Samaad v. City of Dallas, 940 F.2d 925 (5th Cir. 1991), the court postulated that automobile races at fairgrounds did not affect the essential attribute of neighbors' property ownership, and thus *Nollan* was inapplicable. *Id*. at 959. The court further stated that *Nollan* is evidence of the inappropriateness of applying the *Penn Central* three-part test too rigidly and that "the `character of the governmental action is a particularly wide-ranging factor.'" *Id.* at 938. However, the district court cited *Nollan* in its finding that the plaintiffs failed to allege restrictions so extensive as to amount to a taking. Samaad v. City of Dallas, 733 F. Supp. 239, 241 (N.D. Tex. 1990); *see also* Pinewood Estates of Michigan v. Barnegat Township Leveling Bd., 898 F.2d 347, 351 (3d Cir. 1990) (maintaining that *Nollan* means that a permanent physical occupation of property by the government or a government-authorized third body is a *per se* taking); Anchor Pointe Boat-A-Minium Ass'n v. Meinke, 860 F.2d 215, 219 n.4 (6th Cir. 1988) (approving lower court's determination that, when the Association had previously voluntarily opened its channel for public use, no taking question was presented).

In Austin v. City of Honolulu, 840 F.2d 678 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988), plaintiff retained the right to exclude others, "one of the most essential sticks in the bundle of [property] rights," according to *Nollan*. *Id*. at 681. Thus, plaintiff could not have suffered a physical taking from the city's delay in acquiring setbacks. *Id.* The *Austin* court held that the matter was not ripe because plaintiff failed to seek compensation from the Hawaii courts, and because plaintiff retained title and possession of the disputed property. *Id.* at 681–82.

In Moore v. City of Costa Mesa, 886 F.2d 260 (9th Cir. 1989), *cert. denied*, 496 U.S. 906 (1990), plaintiff claimed a temporary regulatory taking during the period a conditional variance applied. *Id*. at 264. The variance required deeding of a portion of the property to the City for proposed street-widening projects. *Id.* at 261. The Ninth Circuit affirmed the district court's judgment, which denied the plaintiff's motion for a new trial. *Id.* at 264; *see* Moore v. City of Costa Mesa, 678 F. Supp. 1448, 1452. The district court referred to *First English* and *Nollan* as "having changed the landscape somewhat" in takings law. *Id.* at 1451. Additionally, the court stressed that *Nollan* involved the denial of all property use because the existing cottage on the Nollans' property was uninhabitable. *Id.* at 1452 n.8; *see Nollan*, 483 U.S. at 827. California state courts had held this claim invalid. *Moore*, 886 F.2d at 264. The court noted *Nollan* did not decide this question, but merely invalidated the offending condition, and categorized this case as one of "normal delay" under *First English*. *Id.* at 263–64. Another Ninth Circuit case states that *Nollan* shows that recent Supreme Court cases have unequivocally indicated that there is no taking unless there is a denial of "economically viable use of . . . land." Kaiser Dev. Co. v. City of Honolulu, 913 F.2d 573, 575 (9th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991). Claims of unconstitutional exactions were not addressed on the merits given the lack of trial record on this theory. *Pinewood Estates*, 898 F.2d at 113 (affirming the government's summary judgment on review of other cases, including *Nollan*).

In Lockary v. Kayfetz, 908 F.2d 543 (9th Cir. 1990), plaintiffs challenged a failure to grant the water hook-ups necessary to obtain a building permit for all permitted

uses of plaintiff's residentially zoned property, pursuant to a 20-year moratorium on hook-ups. This was held to be a possible denial of all economically viable use. *Id*. at 546. The practice of "withholding available water from land zoned exclusively for residential use might interfere with reasonable investment-backed expectations." *Id.* at 547.

In Conti v. City of Fremont, 919 F.2d 1385 (9th Cir. 1990), the Ninth Circuit upheld restrictions on a conditional use permit for a nightclub, prohibiting service to 18- to 20-year-olds, under the Fifth Amendment. *Id*. at 1390. The court found no need to determine if the condition substantially advanced the city's interests, or how close the nexus must be, because plaintiff failed to produce any evidence of denial of economically viable use. *Id.*

In United States v. 99.66 Acres of Land, 970 F.2d 651 (9th Cir. 1992), citing *Nollan*, the court held that a claim of "a de facto taking of remainder . . . not included in the condemned tract" of land is effective only if plaintiff can show deprivation of all economically viable use. *Id*. at 657. Since the owner demonstrated delay in obtaining title, he could not meet *Nollan's* standard. *Id.*

Further, failure to substantially advance legitimate state interests does not automatically warrant compensation, unless there is a showing of deprivation of all use. Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468, 473 n.4 (9th Cir. 1994). A rent control law "is invalid if the required dedication of property is unrelated in nature, or disproportionate in extent, to the problem that the government seeks to mitigate or control." *Id.* at 476. In *Carson Harbor Village*, plaintiff lacked standing to challenge the ordinance because the "as-applied takings claims are not ripe." *Id.* at 477. However, this fact pattern could present a taking claim based on the unfair singling out of mobile home park owners. See discussion *supra* notes 54–127 regarding rent control cases and *infra* notes 270–436 regarding *Dolan*.

In Hoeck v. City of Portland, 57 F.3d 781 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 910 (1996), the city demolished a partially renovated building, abandoned due to loss of financing, pursuant to an ordinance permitting its demolition. *Id*. at 783. The court held that there was no physical or regulatory taking under Oregon law where the owner retained a valuable and developable lot. *Id.* at 788–89. The court cited *Nollan* for the proposition that inferences with the right to exclude may amount to a physical invasion taking. *Id.* at 787. This had not occurred when the city's presence for demolition purposes was temporary, and was avoidable if Hoeck had obeyed the city's repeated orders to repair the structure. *Id.* at 787–88. A demolition is not a physical taking, but rather a restriction on the use of the property to maintain an abandoned building. *Id.* at 788–89. The court applied the rational basis standard and found no substantive due process violation. *Id.* at 786.

In National Wildlife Fed'n v. ICC, 850 F.2d 694 (D.C. Cir. 1988), the court reviewed the Interstate Commerce Commission's final rules implementing the Act which converted abandoned railroad rights-of-ways to trails and deemed them voluntary transfers. *Id*. at 706. The court remanded the case for consideration of the effect of the conversion on reversionary interests as a possible taking. *Id.* at 706, 708 (citing *Nollan* for the principle that requiring individuals to pass "to and fro" along real property is equivalent to a "permanent physical occupation").

In Nixon v. United States, 978 F.2d 1269 (D.C. Cir 1992), former President Nixon sued for compensation for a taking of United States presidential papers. *Id*. at 1272–73. The court held that a per se physical takings doctrine applied even though Nixon retained some rights of access to the papers, because he lost the essential economic use of the surrendered papers, could not dispose of them and could not exclude others from their use. *Id.* at 1285–86.

Similarly, the EPA's entry onto private property to install groundwater monitor-

the traditional tests cited therein, such as the *Agins* test,[158] or are

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ing wells and conduct monitoring activities constituted a physical taking because it interfered with the right to exclude others, one of the most valuable property rights. Hendler v. United States, 952 F.2d 1364, 1374, 1377 (Fed. Cir. 1991) (citing *Nollan*) (*But cf.* California Hous. Sec., Inc. v. United States, 959 F.2d 955, 958–59 (Fed. Cir.) (holding that actions of RTC in appointment as conservator and receiver of savings and loan association is not a taking of savings and loan owner's property, despite status of right to exclude others as one of the most valuable property rights under *Nollan*), *cert. denied*, 506 U.S. 916 (1992). Liability for the entire period that the wells are in place is unaffected by the fact that the occupation by government workers might not have been continuous, exclusive and uninterrupted. *Hendler*, 952 F.2d at 1377–78.

In Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994), the court held that refusing to grant a wetland permit for development of a 12.5 acre portion of a 51 acre remnant of a 250 acre parcel deprived the landowners of all economically viable use of their property and was a regulatory taking under *Lucas*. *Id*. at 1180–82. The claims court previously determined that there was no countervailing substantial state interest outweighing the private interests at stake, and that the property owners had reasonable investment backed expectations. *Id.* at 1176–77. The court stated that the consideration of the nature of the governmental action under *Penn Central* included not only the avowed goal, but also whether the method of obtaining the goal was reasonable under *Nollan's* nexus requirement. *Id.* at 1176; *see also* Creppel v. United States, 41 F.3d 627, 631–33 (Fed. Cir. 1994) (holding that there was no taking in actions blocking a local land reclamation project on wetlands protected by the Clean Water Act; categorizing *Agins* and *Nollan* as the evolved version of the part two of the *Penn Central* three-part test, requiring a threshold showing of denial of all economically viable use).

In Fallini v. United States, 56 F.3d 1378 (Fed. Cir. 1995), *petition for cert. filed*, No. 95-1257 (U.S. Feb. 6, 1996), cattle ranchers claimed that conditions on their federal grazing permits, requiring them to permit wild horses to have access to water sources they cultivated for their domestic livestock pursuant to a 1971 federal statute, constituted a taking of their rights in the water. *Id*. at 1379. The court held that the ranchers had no compensable property interest in the water and "that their claim was time-barred." *Id.* at 1382–83. Like in *Nollan*, where the taking occurred when the government acted rather than every time another beachcomber crossed the Nollans' beachfront, in *Fallini*, the injury arose from the initial enactment rather than from every new drink taken by a wild horse. *Id.* at 1383.

158. *See, e.g.*, Gosnell v. City of Troy, 59 F.3d 654, 658 (7th Cir. 1995) (holding there was no violation of substantive due process in the code enforcement action and withholding of final permits); River Park, Inc. v. City of Highland Park, 23 F.3d 164, 166 (7th Cir. 1994) (citing *Nollan* as an example of how due process and taking jurisprudence does have some vitality because it does not permit the government to put a property into any zone it wants for any reason it desires); Mehta v. Surles, 905 F.2d 595, 599 n.5 (2d Cir. 1990) (per curiam) (citing to *Nollan* for the proposition that federal law is implicated in the state definition of property rights); Tenoco Oil Co. v. Department of Consumer Affairs, 876 F.2d 1013, 1021, 1026–27 (1st Cir. 1989) (holding that the taking was not ripe and citing *Nollan* for the proposition that the takings standard may be different from the due process and equal protection analysis). The *Gosnell* court stated that "[a] municipality may bring residential development to a halt for strong reasons or weak reasons. If the latter, the municipality has to pay for the privilege." *Gosnell*, 59 F.3d at 657 (citing *Dolan*, 114 S. Ct. 2309, and *Nollan*, 483 U.S. at 825);

decided on the basis that the instant case is not ripe or is otherwise procedurally barred.[159] Some courts explicitly state their belief that

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Herrington v. County of Sonoma, 834 F.2d 1488, 1498 (9th Cir. 1987) (stating taking claim waived), *amended*, 857 F.2d 567, 569 (9th Cir. 1988) (removing discussion of the distinctions between substantive due process and taking claims and substituting a statement that the taking claim was not ripe without a reapplication to prove that substantially all economically viable use was taken, but that the substantive due process claim was ripe), *cert. denied*, 489 U.S. 1090 (1989). The Herringtons alleged procedural due process, substantive due process and equal protection violations in the county's denial of a 32-lot residential subdivision arising from an incorrect determination of inconsistency with the county's general plan based on density, project design, conflict with resources, and in the subsequent downzoning of the property by a specific plan to permit only seven lots. *Id*. at 1490–91. The court invalidated a $2.5 million jury award as excessive. *Id*. at 1503. The court referred to *Nollan* in an extensive discussion of the ripeness question leading to its holding that the Herringtons showed futility. *Id*. at 1496, 1498 n.7. The court stated that taking claims and substantive due process claims are not fungible because the reasonableness test under the takings doctrine "is arguably less deferential to the government's decision-making authority" than that under substantive due process. *Id*. at 1498 n.7. While recognizing that the *Agins* court's "substantially advance" language had its origins in the old substantive due process cases, the Ninth Circuit considered *Nollan* as evidence that it might, nevertheless, be more stringent than substantive due process today. *Id*. (citing *Nollan*, 483 U.S. at 834 n.3). The court further noted that the takings challenge goes further than the substantive due process challenge, because it does not require a showing of arbitrariness or irrationality. *Id*. The court emphasized the extraordinarily heavy burden on the landowner to show such arbitrariness, and suggested that damages for substantive due process "may be lower" than for a taking because the owner cannot obtain compensation for denial of all use. *Id*. at 1498–99 n.7; *see also* Sierra Lake Reserve v. City of Rocklin, 938 F.2d 951, 954–55 (9th Cir. 1991) (holding that rent control regulations at issue could work a physical taking), *vacated for reconsideration in light of Yee*, 506 U.S. 802 (1992), *on remand*, 987 F.2d 662, 663 (9th Cir. 1993) (vacating its discussion of physical taking, but retaining its due process and equal protection analysis). On remand, the court noted that *Yee* failed to address regulatory taking questions, and this question was not presented by the parties in the instant case. 987 F.2d at 663; see discussion of rent control cases at notes 54–127 *supra*.

Kawaoka v. City of Arroyo Grande, 17 F.3d 1227 (9th Cir.), *cert. denied*, 115 S. Ct. 193 (1994), is a substantive due process case which cited *Nollan* for its rationality standard. *Id*. at 1238. The court found the takings precedent inapplicable because the claim was not ripe and there was insufficient evidence that the temporary water moratorium was a mere pretext for blocking the Kawaokas' development based on their racial heritage. *Id*.

159. *See Southview Assoc. Ltd.*, 980 F.2d at 100; *Tenoco Oil Co.*, 876 F.2d at 1026–27; Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172, 177–78 (4th Cir. 1988) (holding that the requirement for an easement in *Nollan* did not serve a governmental purpose, but billboard regulation did), *cert. denied*, 115 S. Ct. 317 (1994). The court stated that the analysis of the legitimate governmental purposes advanced by billboard regulation for First Amendment purposes is also sufficient for the takings analysis requirement that the regulation "advance" legitimate governmental interests. *Id*. at 178. The court remanded the case to consider ripeness. *Id*.

In Barancik v. County of Marin, 872 F.2d 834 (9th Cir.), *cert. denied*, 493 U.S. 894 (1989), plaintiff claimed that a transfer of a development rights scheme was analo-

Nollan represents no great change in takings law, and note that Justice Scalia specifically affirmed both that a broad range of governmental purposes can be legitimate and that normal permitting processes will also continue to be upheld.[160] Finally, a few actually

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gous to Scalia's example in *Nollan* of the invalidity of permitting a person to shout fire in a crowded theater simply because he paid a fee to do so. *Id*. at 837. The court rejected this analogy because there is only a finite amount of development permissible in a given area, the county is indifferent to who accomplishes it, and the payment does not serve to increase that finite amount of development. *Id*. The court held that the TDR program related to preservation of agriculture was rational, and that one unit per 60 acres did not violate substantive due process. *Id*. at 835, 837. The taking claim was barred by the statute of limitations. *Id*. at 836; *see also Fallini*, 56 F.3d at 1383; *Carson Harbor*, 37 F.3d at 474–75; *Kawaoka*, 17 F.3d at 1231.

Also of little import in the development of the *Nollan* analysis, but included here for the sake of completeness, are Resolution Trust Corp. v. Diamond, 18 F.3d 111, 121 (2d Cir. 1994) (holding that the RTC may repudiate leases under federal law without creating a federal takings claim), and Pro-Eco, Inc. v. Board of Comm'rs, 57 F.3d 505, 507–08 (7th Cir. 1995) (holding that the landfill moratorium ordinance resulting in a loss of an option to purchase property was not a deprivation of a property interest protected by Indiana law, and thus was not a compensable taking). In *Pro-Eco*, the company possessing the option was held not analogous to the Nollans, who also held an option, because California law recognizes unexercised options to purchase real estate as compensable property interest. 57 F.3d at 509.

160. *See, e.g.*, Glosemeyer v. Missouri-Kansas-Texas R.R., 879 F.2d 316, 321 (8th Cir. 1989) (declining to apply *Nollan* in a regulation of railroads, Commerce Clause, and rational basis case where plaintiff argued that *Nollan* required strict scrutiny), *cert. denied*, 494 U.S. 1003 (1990); Adolph v. Federal Emergency Management Agency, 854 F.2d 732, 737 (5th Cir. 1988) (rejecting argument that *Nollan* is evidence of increased conservativeness of the Supreme Court or that it revolutionized takings law; stating that neither *Nollan* nor *First English* cast any doubt on the validity of the National Flood Insurance Program building elevation requirements and sanctions); Moore v. City of Costa Mesa, 678 F. Supp. 1448 (C.D. Cal. 1987).

In Lakeview Dev. Corp. v. City of South Lake Tahoe, 915 F.2d 1290 (9th Cir. 1990), *cert. denied*, 501 U.S. 1251 (1991), the court rejected a *Nollan* argument and stated that the right to build could not be described as a governmental benefit. *Id*. at 1294. The court noted that *Nollan* dealt with the right to build a single family house, one of the most minimally regulated uses. *Id*. The court also noted that Scalia recognized legitimate permitting requirements, and that "[i]t is well established that there is no federal constitutional right to be free from changes in land use laws," even if they may result in the revocation of a once valid permit, absent the remaining elements of estoppel. *Id*. at 1294–95; *see* United States v. 99.66 Acres of Land, 970 F.2d 651 (9th Cir. 1992).

In Allied-General Nuclear Serv. v. United States, 839 F.2d 1572 (Fed. Cir.), *cert. denied*, 488 U.S. 819 (1988), the corporation claimed that refusal to recommence consideration of a license for the nuclear power reprocessing plant constituted a taking of a license, the plant or both. *Id*. at 1577. Citing to *Nollan*, the court recognized if the licensing power "is used to accomplish some object not within the purpose of that power," then it would be invalid. *Id*. Conversely, "use for purposes within the object of the power" are valid "even if detrimental to the owner's full utilization of the property." *Id*.

apply *Nollan* as requiring either a substantial advancement or rational relationship; most uphold the regulation at issue, however the test is worded.[161]

A handful of Ninth Circuit cases are worth discussing in greater depth, as it has gone the farthest of any circuit court in addressing the requirements of *Nollan's* "essential nexus." However, the only case to find a taking, *Azul Pacifico*, a mobile home rent control case, has been partially vacated in light of *Yee v. City of Escondido*.[162]

The Ninth Circuit's most extensive analysis of the requirements of *Nollan* came in 1991 in *Commercial Builders v. City of Sacramento*.[163] It concluded that the *Nollan* nexus analysis did not require

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161. Christopher Lake Dev. Co. v. St. Louis County, 35 F.3d 1269, 1274 (8th Cir. 1994) (challenging the development criteria which required the partnership to subsidize a drainage system for the entire watershed and citing *Nollan*, 483 U.S. at 835 n.4, for its version of the rational basis, equal protection analysis). The *Christopher Lake* court found no facial unconstitutionality, but remanded the as-applied claims for reconsideration in light of *Dolan*. 35 F.3d at 1275; Southview Assoc. Ltd. v. Bongartz, 980 F.2d 84, 106 (2d Cir. 1992), *cert. denied sub nom.* Southview Assoc., Ltd. v. Individual Members of Envtl. Bd., 507 U.S. 987 (1993); Esposito v. South Carolina Coastal Council, 939 F.2d 165, 169 (4th Cir. 1991) (finding that coastal state regulation at issue in *Lucas* is facially legitimate under *Nollan*, and bears a "substantial relationship" and "essential nexus" to the valid goal of preserving the beach dune system), *cert. denied*, 112 S. Ct. 3027 (1992); Rector v. City of New York, 914 F.2d 348, 357 n.6 (2d Cir. 1990) (rejecting the argument that the application of landmark preservation law did not substantially advance a legitimate state interest and holding that it was rationally related to a legitimate state interest), *cert. denied*, 499 U.S. 905 (1991); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172, 178 (4th Cir. 1988), *cert. denied*, 115 S. Ct. 317 (1994); *see* Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496, 1509 (9th Cir. 1990) (denying tentative map approval and refusing to extend a conditional use permit, limiting use and development and setting aside open space for public use for the butterfly park to protect Smith's Blue Butterfly). The *Del Monte* court considered the denials legitimate under *Nollan*, but remanded the case for a determination of whether they violated equal protection or substantive due process, as comparable properties had not been subjected to these conditions; Barancik v. County of Marin, 872 F.2d 834, 837 (9th Cir. 1989), *cert. denied*, 493 U.S. 894 (1989). *See also* Hoeck v. City of Portland, 57 F.3d 781, 787 (9th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3359 (Feb. 20, 1996); Allied-General Nuclear Services v. United States, 839 F.2d 1572, 1577 (Fed. Cir.), *cert. denied*, 488 U.S. 819 (1988). In *Chang v. United States*, petroleum engineers claimed that United States termination of oil contracts with Libya, and their resulting termination as employees, was a taking. 859 F.2d at 896. The court held that even if the engineers were frustrated in making the most beneficial use of their services, there was no taking because the imposition of the Libyan sanctions undeniably "substantially advanced legitimate state interests." *Id*. (citing *Nollan*, 483 U.S. at 834).

162. Azul Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704 (9th Cir. 1992), *cert. denied*, 506 U.S. 1081 (1993); Yee v. City of Escondido, 503 U.S. 519 (1992). *See supra* notes 76–86.

163. 941 F.2d 872, 873, 876 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992). In

an enhanced level of scrutiny of regulations that do not constitute a physical encroachment on land, and upheld a fee on commercial development for the provision of affordable housing. The developers argued that the earlier standard, under which regulations were upheld if the government could "rationally have decided" that the means accomplished the ends, no longer applied in light of *Nollan*.[164] Instead, they argued that an exaction can only be upheld if the development in question is directly responsible for the social ill that the exaction is designed to alleviate. The Ninth Circuit responded: "we are not persuaded that *Nollan* materially changes the level of scrutiny we must apply to this Ordinance."[165] It pointed out that in *Nollan*, the Supreme Court did not have to decide "how close a fit . . . is required because . . . the regulation in question did not meet even the most untailored standards," and that *Nollan* referenced several state court decisions which were, in fact, "rational relationship" cases.[166]

The Ninth Circuit also concluded that no cases decided after *Nollan* had interpreted *Nollan* as changing the level of scrutiny applicable to regulations that do not constitute a physical encroachment on land.[167] It held that:

> We therefore agree with the City that *Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the

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Commercial Builders, developers of commercial property filed suit challenging a city ordinance conditioning non-residential building permits on the payment of a fee to offset the burdens associated with the influx of low-income workers. *Id*. at 872–73. The court affirmed summary judgment for the city because there was a sufficient nexus between non-residential development and the demand for low-income housing under *Nollan*. *Id*. at 876.

164. *Id*. at 874.

165. *Id*.

166. *Id*.

167. *Commercial Builders*, 941 F.2d at 874. Its review included *Rector*, 914 F.2d at 357 n.6; Adolph v. Federal Emergency Management Agency, 854 F.2d 732, 737 (5th Cir. 1988); and *Naegele Outdoor Advertising, Inc.*, 844 F.2d at 178. The Ninth Circuit also recognized its own prior decision in *Leroy Land Dev. v. Tahoe Regional Planning Agency*, reversing a lower court's decision that development conditions failed to substantially advance their legitimate governmental goals, described above, as finding that the district court had attempted to require "too close a nexus" between the regulation and the interest at stake. *Commercial Builders*, 941 F.2d at 874 (citing Leroy Land Dev. v. Tahoe Regional Planning Agency, 939 F.2d 696, 697–99 (9th Cir. 1991), *rev'g* 733 F. Supp. 1399 (D. Nev. 1990)); *see infra* notes 175–78.

> social ill in question. Rather, *Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld.[168]

The Sacramento ordinance was implemented under a detailed study that revealed substantial connections between non-residential development and the need for affordable housing. The nexus between the fee provision, designed to further the legitimate interest in low-income housing, and the burdens caused by commercial development was thus held to be sufficient to pass constitutional muster.

The developers also argued that the fee provision must be treated differently from other exactions, because a fee represents a transfer of personal property and more closely resembles a physical taking. The Ninth Circuit disagreed on the basis that such a finding would lead to compensation for every fee and render every fee unconstitutional.[169] The court pointed out that *Sperry Corp. v. United States*,[170] the only circuit court decision to treat a fee provision as an unconstitutional taking after *Nollan*, was ultimately reversed. There, the United States Supreme Court held that the exaction by the Iran Claims Commission of a percentage of its awards was a permissible means of collecting reimbursement for costs incurred in its operation. The Supreme Court also expressed doubt as to the appropriateness of the analysis analogizing fees to physical takings, noting that "[u]nlike real or personal property, money is fungible."[171]

The developers in *Commercial Builders* additionally argued that a "mere desire to generate revenue for the public good cannot support [an] exaction."[172] The Ninth Circuit decided that *Sperry* had

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168. *Commercial Builders*, 941 F.2d. at 875.

169. *Id*.

170. 853 F.2d 904 (Fed. Cir. 1988), *rev'd*, 493 U.S. 52 (1989). In *Sperry*, the federal circuit court held that an exaction of a percentage of any award from the Iran Claims Commission was unconstitutional. The court treated the fee as a physical taking and invalidated it as arbitrary, because the cost of the Iran hostage crisis should have been borne equally by the whole nation rather than those associated with Iranian interests. *Id*. at 909.

171. United States v. Sperry Corp., 493 U.S. 52, 62 n.9 (1989).

172. Commercial Builders v. Sacramento, 941 F.2d 872, 875 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992). The developers cited to a Supreme Court case which "struck down a Florida statute confiscating all interest on interpleader funds" as serving no purpose because another statute already provided for payment for these services. *Id*. (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980)).

also rejected this argument. The Supreme Court had upheld the Iran Commission fee because it was used to pay for the operations of that commission, which served the people charged with the fee, creating a close nexus between the charge and the activity creating the cost. The Supreme Court explicitly recognized that Sperry could have been required to pay a charge for the availability of the tribunal *even if it never actually used the tribunal*.[173] From this, the Ninth Circuit concluded that a purely financial exaction will not constitute a taking if it is made for the purpose of paying a social cost that is reasonably related to the activity upon which the fee is assessed.

Finally, the developers also attacked the sufficiency of Sacramento's evidence of the relationship between commercial development and low-income housing. Because the ordinance accounted for the indirectness of the connection between the creation of new jobs and the need for low-income housing by charging only a small percentage of what the study had calculated to be the actual cost, the Ninth Circuit declined to require a more direct nexus than that achieved through the legislative process employed by Sacramento.[174] This suggests that the many impact fee ordinances nationwide which discount the actual costs and charge only a conservative amount are particularly likely to survive the *Nollan* nexus requirement.

The Ninth Circuit, again in 1991, reversed a district court's finding that development conditions were invalid in *Leroy Land Development v. Tahoe Regional Planning Authority*.[175] In *Leroy*, a

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173. 493 U.S. at 62–63.

174. *Commercial Builders*, 941 F.2d at 875. A dissent by Judge Beezer called the Sacramento ordinance an example of Scalia's "out and out plan of extortion." *Id*. (citing *Nollan*, 483 U.S. at 837). He interpreted the ordinance as a more politically expedient method of accomplishing transfer payments between the wealthy and the poor than taxing constituents, and found the ordinance to lack any benefit to the development. *Id*. He cited to a Florida impact fee case as support for this aspect of the required nexus. *Id*. at 877 (citing Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th Dist. Ct. App. 1983), *cert. denied*, 440 So. 2d 352 (Fla. 1983), and Pennell v. San Jose, 485 U.S. 1 (1988) (Scalia, J., dissenting)).

175. 939 F.2d at 699. The district court found that off-site mitigation conditions were a taking for lack of an adequate nexus under *Nollan* between these conditions and the governmental purpose of preserving the beauty of Lake Tahoe from any burden created by the construction of this project. *Leroy*, 733 F. Supp. 1399, 1401 (D. Nev. 1990), *rev'd*, 939 F.2d 696 (9th Cir. 1991). The court stated that the conditions went "far beyond alleviating any burden" the project might have imposed on the basin, and unfairly singled out the developer to accomplish this purpose. *Id*.

developer claimed that its obligation under a settlement agreement with the Regional Planning Authority constituted a taking under *Nollan*. The developer had agreed to mitigate the environmental impacts of its development with off-site and on-site measures.[176] After *Nollan* was decided, and five years after the settlement agreement was entered, the developer filed a motion to abate the mitigation conditions. The Ninth Circuit concluded that these mitigation requirements could not amount to a taking when they were consented to as part of a settlement agreement.[177]

The court further stated that, even if *Nollan* applied, the conditions did not constitute an impermissible taking because the relationship between the mitigation provisions and the Regional Planning Authority's regulations was quite clear. The parties agreed that the purpose of the interstate compact forming the regional authority was to minimize adverse effects of urbanization including, in particular, the deterioration of the water quality of Lake Tahoe due to erosion and pollution. The developer's property possessed a high erosion hazard and its impervious surface created a potentially serious erosion and drainage problem. The off-site mitigation provisions at issue were designed to "ameliorate erosion, destabilization and other adverse environmental effects caused by [it], and thus [were held to] directly further the governmental interest underlying the . . . regulations."[178]

The Ninth Circuit permitted a takings claim to survive a motion to dismiss in *McDougal v. County of Imperial*.[179] The county had argued that, even if there was a denial of economically viable use, if its flood protection ordinance "substantially advanced" a legitimate state interest, then there would be no regulatory taking under the

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176. *Leroy*, 939 F.2d at 698. The off-site erosion control measures included:

> (1) the installation of energy dissipater devices; (2) the installation of stabilization devices for the cut slope located on land adjacent to [the property]; (3) the provision of secondary access to [the property]; (4) the acquisition of adjacent or non-adjacent lands for open space; and (5) the mitigation of any additional items of impact identified by the environmental impact statement.

Id.

177. *Id*. (citing Xenia Rural Water Assoc. v. Dallas County, 445 N.W.2d 785, 788–89 (Iowa 1989) (holding that a "negotiated setback requirement not a taking when part of an agreement between parties")).

178. *Id*. at 699.

179. 942 F.2d 668, 670, 676–77 (9th Cir. 1991) (designating plaintiff's land as floodway, allegedly denying all economically viable use which resulted in the denial of the application for a conditional use permit).

First English Evangelical Lutheran Church v. County of Los Angeles federal and state decisions.[180] The Ninth Circuit could not agree that *any* legitimate purpose automatically validated regulations. Instead, under *Agins v. City of Tiburon*, it is required to "balance the strength of the public interest against the severity of the private deprivation," a balancing which could not be accomplished on a motion to dismiss.[181]

The Ninth Circuit noted that the Court in *Agins* traced the balancing of public and private interests to *Village of Euclid v. Ambler Realty Co.*, where zoning laws were upheld because "they bore a substantial relationship to the public welfare and their enactment inflicted no irreparable injury upon the landowner,"[182] and that *Nollan* had reaffirmed the *Agins* test.[183] *Agins* also considered the detriment to the developer, as well as whether the ordinance "substantially advanced" legitimate goals.[184]

In short, the court concluded that "while the `public use' requirement of the takings clause may be co-extensive with the exercise of the police power, the just compensation requirement is not,"[185] and held that a claim of inverse condemnation could be stated even though the purpose of the flood control ordinance was le-

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180. *Id*. at 675 (citing *First English*, 258 Cal. Rptr. 893 (1989), *cert. denied*, 493 U.S. 1056 (1990)). The *First English* remand was distinguished from *McDougal* because *First English* had *not* been denied all use of its property, and because it involved only a facial challenge. *Id*. at 679. The court also noted that the *First English* remand did find that the Los Angeles "zoning restriction `substantially advance[d]' the highest possible public interest." *Id*. (citing *First English*, 258 Cal. Rptr. at 905).

181. *Id*. at 676 (citing Agins v. City of Tiburon, 447 U.S. 255, 260–61 (1980)). The court also stated the general rule that inverse condemnation claims are particularly inappropriate for Rule 12(b)(6) dismissals. *Id*. (citing Hall v. City of Santa Barbara, 833 F.2d 1270, 1274 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988)). In addition, the Ninth Circuit stressed the necessity to permit plaintiffs to produce evidence of illegitimate purpose and the lack of a reasonable relationship between this legitimate flood control purpose and the burdens on their property. *Id*.

182. *McDougal*, 942 F.2d at 677 (quoting *Agins*, 447 U.S. at 261 (citing Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395–97 (1926))).

183. *Id*.

184. *Agins*, 447 U.S. at 260–61. The Ninth Circuit further indicated that other Supreme Court precedent all demonstrated the inappropriateness of the county's bright-line test. *McDougal*, 942 F.2d at 677. It considered the county's argument to be, in essence, Justice Brandeis' dissent in *Pennsylvania Coal*, a case which has not yet been overruled. *Id*. at 678 n.8. It also noted that neither *Goldblatt* nor *Hadacheck* nor *Mugler* prohibited all use of the property at issue in those cases. *Id*. at 678 n.9.

185. *Id*. at 678 (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.20 (1987); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984)).

gitimate.[186] On remand, the court was instructed to consider the nature and legitimacy of the state's interest in comparison to the nature and extent of the impact on the owner's use of land.[187]

Finally, in the Ninth Circuit's most recent reference to *Nollan*, *Outdoor Systems, Inc. v. City of Mesa*, a billboard regulation was upheld against a takings challenge.[188] The court categorized the nex-

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186. *Id*. at 679–80.

187. *Id*. at 680.

188. 997 F.2d 604, 616 (9th Cir. 1993). In *Outdoor Systems*, billboard owners challenged the city sign code which required the removal of non-conforming billboards whenever the land on which they stood was developed. *Id*. at 608. Because that code violated neither the First Amendment nor the taking clause, the court held that there was no taking under Arizona law. *Id*. at 618. *See also* Outdoor Sys., Inc. v. City of Mesa, 819 P.2d 44, 45 (Ariz. 1991), where the court addressed the question of whether Mesa's sign codes violated the state statute regarding the discontinuance of non-conforming uses. The court held that prohibition of off-site billboards and requirement to remove existing non-conforming billboards before developing or changing the use of the property on which they are situated were not violative of the statute. *Id*. at 53. The court rejected the billboard company's argument that the choice between maintenance of the non-conformity and development of the site provided a "Hobson's choice" of the type prohibited by *Nollan*. *Id*. at 51. The court stated in dicta that "[t]he elimination of non-conforming uses, . . . clearly effectuates a `legitimate state interest' as mandated in *Nollan*." *Id*. (citing *Nollan*, 483 U.S. at 841). This state case relied extensively on Circle K Corp. v. City of Mesa, 803 P.2d 457, 458 (Ariz. Ct. App. 1990) (upholding an ordinance requiring "the elimination or modification of a nonconforming sign as a condition to erecting a separate conforming sign on the same property").

The *Outdoor Systems* state court noted that the ordinances challenged in that case were consistent with the statute involved in *Circle K* and did not function as a taking. *Outdoor Systems*, 819 P.2d at 52. In *Circle K* the court found that the nexus between bringing the existing sign into compliance and the new sign use was "as close as it could be" and it furthered the city's stated interest in improving the visual environment. *Circle K*, 803 P.2d at 464. The court apparently accepted the city's argument that the "illegal exaction" holding in *Nollan* did not apply because the regulation did not require a dedication or an occupation of the plaintiff's property. *Id*. at 462. The court emphasized the voluntary nature of the actions triggering the application of this requirement. *Id*. *Cf*. Tahoe Regional Planning Agency v. King, 285 Cal. Rptr. 335 (Ct. App. 1991) (holding that the billboard control regulation did not effect facial taking).

The *Tahoe* court found that the fact issue presented as to whether the ordinance as applied constituted a taking precluded summary judgment for the regional planning agency. *Id*. at 338. The five year amortization period "substantially and directly advance[d the agency's] legitimate interest in maintaining the natural scenic quality of the [r]egion," and satisfied the substantially advance test. *Id*. at 356. Under *Tahoe*, *First English* and *Nollan* did not overrule the longstanding California law that existing billboards might be removed after a reasonable amortization period. In addition, aesthetics or scenic zoning remain a legitimate focus of such regulation. *Id*. at 355–56. *See also* Georgia Outdoor Advertising Inc. v. City of Waynesville, 900 F.2d 783 (4th Cir. 1990) (upholding billboard amortization provision); National Advertising Co. v. Village of Downers Grove, 561 N.E.2d 1300, 1303–04 (Ill. App. Ct. 1990) (holding that a denial of variance from size limitations in an outdoor sign ordinance was not violative of the First

us requirement of *Nollan* as a sub-part of the requirement that a regulation "substantially advance" a legitimate state interest. It described *Nollan* as holding that "if there is no nexus or connection between the effect of the regulation and the governmental interest sought to be achieved, the regulation does not advance the state's interest."[189]

In contrast to the lack of nexus between visual and lateral access in *Nollan*, the Ninth Circuit found that there was a simple and clear nexus between the vacant lot provisions of Mesa's sign codes and Mesa's police power interests. Moreover, the public interest in restricting billboards and eliminating non-conforming billboards was advanced directly by these provisions. The court rejected plaintiff's contention that there must be a nexus between the purposes behind the *building and occupancy permits* and the state interest in removing non-conforming billboards. The vacant lot provisions achieved the city's interests by conditioning the development of land supporting a non-conforming billboard on the removal of that billboard. The building and occupancy permits which issue for the removal of non-conforming billboards were merely the mechanisms by which Mesa achieves its legitimate purpose of sign control. Thus, the Ninth Circuit concluded that the sign codes, including the vacant lot provisions, "substantially advance" the legitimate interests of Mesa.[190]

Amendment, due process, or taking clause), *appeal denied*, 567 N.E.2d 333 (Ill. 1991), *and cert. denied*, 501 U.S. 1261 (1991). In *National Advertising Co.*, the plaintiff advertiser was a lessee rather than a property owner, and the court found that the ordinance did not interfere with the company's legitimate investment-backed expectations because the sign was in violation of the ordinance at the time it was leased. *Id*. at 1309. In addition, there was no physical invasion, no evidence of denial of economically viable use, and the ordinance promoted the common good of traffic safety and esthetics. *Id*. *See also* Naegele Outdoor Advertising Co. v. City of Lakeville, 532 N.W.2d 249 (Minn. Ct. App. 1995) (holding that a sign ordinance requiring removal of billboards as a condition to development of property did not effect a taking). The court stated that "[a] regulatory taking occurs where a governmental body conditions some discretionary benefit on compliance with an otherwise unconstitutional regulation." *Id*. at 252 (citing *Dolan*, 114 S. Ct. 2309, 2317 (1994)).

189. *Outdoor Sys.*, 997 F.2d at 616.

190. *Id*. at 617. The Ninth Circuit further rejected plaintiff's argument that the sign codes effected a *per se* taking under *Lucas*. The Ninth Circuit characterized *Lucas* as holding that "a regulation depriving a property owner of all economically beneficial and productive use of his or her land constitutes a *per se* taking, regardless of the governmental interest advanced by the regulation, unless the intended use is already proscribed by extant state rules." *Id*. Under the Mesa sign regulations, a viable land use remained for the lots on which the billboards were located and, therefore, *Lucas* did not

VI. NOLLAN *IN THE FEDERAL DISTRICT COURTS*

In the vast majority of reported decisions, the federal district courts, as a group, also fail to apply *Nollan*'s "substantially advance" requirement in any meaningful way. As with the federal circuit courts, many find the case not ripe or otherwise procedurally barred,[191] or cite it for previously established principles.[192] Many also

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apply. *Id*.

191. E.E.O.C. v. Massachusetts, 680 F. Supp. 455, 457 (D. Mass.) (holding that judges are not protected by the Age Discrimination in Employment Act), *aff'd*, 858 F.2d 52 (1st Cir. 1988). The court noted that none of the enumerated exceptions to the Act concern the judicial branch, and the court expressed concern about the "loose fit between objectives of the Act[s] . . . and the form of remedy prescribed." *E.E.O.C.*, 680 F. Supp. at 460.

See also Ackerley Communications, Inc. v. City of Somerville, 692 F. Supp. 1, 27 (D. Mass. 1988) (challenging restriction on the size of signs and the requirement that non-conforming signs be removed, as deprivation of all economically viable use of property leased for billboard use, of the billboards themselves, and of state billboard permits, despite five year amortization provision), *rev'd on First Amendment Grounds*, 878 F.2d 513 (1st Cir. 1989). The *Ackerley* court stated that this is a heavily litigated area, and held that the takings claim was not ripe. *Ackerley*, 692 F.2d at 27; Martinez v. Junta de Planificacion de Puerto Rico, 736 F. Supp. 413, 416 (D.P.R. 1990) (challenge to public use zoning which the court held was not ripe for lack of final decision because plaintiff failed to apply for available variances).

The Second Circuit cases based on ripeness include Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370, 418 (N.D.N.Y. 1987) (challenging constitutionality of statute excluding nuclear power plant costs from rate base if plant was not in operation by a certain date). The court held that the taking claim was not ripe, *id*. at 396, and asserted that substantive due process and equal protection review will always be different because the latter involves the fundamental social value of equality. *Id*. at 409. It also held that the initial burden shifts to the government in equal protection claims. *Id*. at 421. *See contra* CECOS Int'l, Inc. v. Jorling, 706 F. Supp. 1006, 1026 n.13 (N.D.N.Y. 1989) (rejecting shift of burden in equal protection analysis based on subsequent Supreme Court precedent), *aff'd*, 895 F.2d 66 (2d Cir. 1990). The court upheld a statute governing siting of hazardous waste facilities under due process and equal protection analyses, and determined that the taking claim was not ripe. *CECOS*, 706 F. Supp. at 1029.

In the Fourth Circuit, there is Northern Va. Law Sch., Inc. v. City of Alexandria, 680 F. Supp. 222, 224 (E.D. Va. 1988), a law school brought an action against a city for failure to rezone from residential to commercial uses, which allegedly rendered a landlocked parcel of land useless. The court held that the takings claim was not ripe for failure to pursue adequate state remedies. The city sought dismissal on the alternate ground that the face of the complaint revealed that not all use was precluded. *Id*. In the Eighth Circuit, there is Mitchell v. Mills County, Iowa, 673 F. Supp. 332 (S.D. Iowa 1987) (alleging that county alterations to the drainage pattern along the county road resulted in deposition of all surface waters and took plaintiff's property), *aff'd*, 847 F.2d 486 (8th Cir. 1988). *Mitchell* held that the takings claim was not ripe for failure to seek state remedies (citing *Nollan* and *First English* for the fact that the claim may be ripe if those state remedies are inadequate). *Mitchell*, 673 F. Supp. at 335. A Tenth Circuit

limit *Nollan* to takings based on physical taking, denial of all economically viable use or denial of essential attributes of property, rather than true regulatory takings.[193] A few actually apply the

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district court case held that the takings claim was not ripe for failure to seek an available variance even though the government had refused to give the project further consideration, and for failure to seek state compensation. Wintercreek Apartments v. City of St. Peters, 682 F. Supp. 989 (E.D. Mo. 1988) (challenging a zoning ordinance permitting modular apartment complexes only in mobile home residential districts). *Id*. at 993. In its substantive due process analysis upholding the regulation, the court found that the restriction of modular units to certain districts was reasonably related to acceptable governmental purposes including concerns about density, fire protection, traffic, parking, aesthetics, maintenance of property values, open space, lot sizes and unit sizes. The court cited to *Nollan* for the test and for the broad range of acceptable purposes. *Id*. at 995; Queen Anne Courts v. City of Lakeville, 726 F. Supp. 733 (D. Minn. 1989) (alleging a taking from the city's refusal to permit landowner to expand mobile home park onto undeveloped adjoining parcels). The court held that the claim was not ripe for failure to seek state court compensation. *Id*.

192. Rent Stabilization Ass'n, Inc. v. Dinkins, 805 F. Supp. 159 (S.D.N.Y. 1992), *aff'd*, 5 F.3d 591 (2d Cir. 1993). *See also* Associated Builders & Contractors, Inc. v. Baca, 769 F. Supp. 1537 (N.D. Cal. 1991). In *Baca*, there was a challenge to the requirement that builders pay a prevailing wage to construction crews on private construction projects as a condition to obtaining a building permit. *Id*. at 1540. The court held that the conditions were not traditional land use regulations and did not restrict ownership, possession or use. Instead, the *Baca* court stated that at most, the conditions bargained for a lower construction and development cost, an interest not cognizable under the takings analysis. *Id*. at 1551–52. In Fulilar v. City of Irwindale, 760 F. Supp. 164 (C.D. Cal. 1991), a neighbor sued the city for issuance of a permit to construct in excess of setbacks on adjoining property. The *Fulilar* court held there was no protectible property interest asserted and cited to *Nollan* for the notion that a mere decline in property values is never considered sufficient to constitute a taking. *Id*. at 165–66. *See also* Queen Anne Courts v. City of Lakeville, 726 F. Supp. 733 (D. Minn. 1989); Robinson v. Ariyoshi, 703 F. Supp. 1412 (D. Haw. 1989) (citing *Nollan* as evidence of the complexity of takings law in considering application for attorney's fees), *rev'd on other grounds*, 933 F.2d 781 (9th Cir. 1991); Wintercreek Apartments v. City of St. Peters, 682 F. Supp. 989 (E.D. Mo. 1988); Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370 (N.D.N.Y. 1987), *vacated in part*, 888 F.2d 230 (2d Cir. 1989).

193. *See* Ackerley Communications, Inc. v. City of Somerville, 901 F.2d 170 (1st Cir. 1990); Mitchell v. Mills County, 847 F.2d 486 (8th Cir. 1988); Brosso v. Devices for Vascular Intervention, Inc., 879 F. Supp. 473, 478 (E.D. Pa.) (rejecting *Nollan* because no government action was involved), *aff'd*, 74 F.3d 1225 (3d Cir. 1995).

See also McMahan v. International Ass'n of Bridge Structural & Ornamental Iron Workers, 858 F. Supp. 529, 540 (D.S.C. 1994). In *McMahan*, a local union official sought reimbursement for lost wages during the period between his indictment and the reversal of his convictions for mail fraud and embezzlement. *Id*. at 543–44. The union argued that it was similar to *Nollan*, in that it might be good public policy for cleared officials to be compensated in this manner, but that as a private group it should not be compelled to contribute to that compensation. The *McMahan* court rejected the idea that an automatic taking occurs whenever a private person was required to use his assets for the benefit of another, and found the case more akin to *Connolly*, an ERISA case, than to *Nollan* and the land use taking cases. *Id*. at 540.

See also Clajon Prod. Corp. v. Petera, 854 F. Supp. 843, 852 (D. Wyo. 1994), *aff'd in part, dismissed in part*, 70 F.3d 1566 (10th Cir. 1995). In *Petera*, the plaintiff challenged hunting regulations, providing that all wildlife is the property of the state, as a taking of property on which the wildlife roams and forages. *Petera*, 854 F. Supp. at 849. The *Petera* court held there was no regulatory taking because there was no claim of deprivation of all economically viable use, and because the regulation's provision for temporary periods of public hunting did not preclude plaintiffs from continuing to hunt on their own property and allowed them to charge access and trespass fees to hunters. *Id*. at 852 n.15. The court held that, at most, their right to hunt game on their own property was diminished, and this was not sufficient to constitute a taking under *Nollan*, *Lucas* or *Agins*. *Id*. at 852; *see also* Northern Va. Law Sch., Inc. v. City of Alexandria, 813 F. Supp. 1158 (D. Md. 1993); Rent Stabilization Ass'n, Inc. v. Dinkins, 805 F. Supp. 159 (S.D.N.Y. 1992), *aff'd*, 5 F.3d 591 (2d Cir. 1993).

See also Hirtz v. Texas, 773 F. Supp. 6, 9 (S.D. Tex. 1991), *vacated on Eleventh Amendment grounds*, 974 F.2d 663 (5th Cir. 1992). In *Hirtz*, a building owner challenged the migratory nature of a public beach easement created by the state's Open Beaches Act. The owner's buildings became located within the public easement because of Hurricane Alicia and other storms. The court rejected the proffered analogy to *Nollan* and found the Act was a mere codification of the Texas common law public right to dry beaches up to the vegetation line, and that neither the Act nor the common law took the plaintiff's property by denying him the right to expand or build further obstructions in the public easement. *Id*. at 8–9.

In Weissman v. Fruchtman, 765 F. Supp. 1185 (S.D.N.Y. 1991), the plaintiff challenged a failure to grant permission for demolition. *Id*. at 1186. The court treated the claim as a regulatory taking issue and held that there was no physical taking, no blanket prohibition on development, or even any causal connection between denial of this permission and the claimed injuries. *Id*. at 1193.

In Browning-Ferris Indus., Inc. v. City of Md. Heights, 747 F. Supp. 1340 (E.D. Mo. 1990), a landfill operator brought action for denial of a permit to operate a landfill, resulting in a denial of a vested right in nonconforming use. *Id*. at 1341. Although the court found a violation of substantive due process in the city's failure to require reasons or a report from its Planning and Zoning Commission supporting denial of permit, the court cited *Nollan* for the proposition that denial of all economically viable use of property is a taking. *Id*. at 1347. Thus, the *Browning-Ferris* court held that because the city had permitted the operation of a landfill during pendency of litigation, any taking was temporary. Moreover, the court held that because simple depreciation in value resulting from such temporary activities is not compensable, and because of lack of conspiracy and the city's natural reluctance to permit a landfill in the face of heavy and vocal opposition, the court declined to award damages on taking or substantive due process grounds. *Id*. at 1349–50.

In 640 Broadway Renaissance Co. v. Cuomo, 740 F. Supp. 1023, 1033 (S.D.N.Y. 1990), *aff'd*, 927 F.2d 593 (2d Cir.), *cert. denied*, 500 U.S. 933 (1991), the plaintiff challenged a loft law requiring code compliance when commercial lofts were converted to residential use as a per se physical taking of the building. *Id*. at 1024. A regulatory taking question was considered in separate state action finding no taking. The court asserted that regulatory taking analysis necessarily included physical taking analysis for preclusion purposes. The plaintiff had attempted to argue *Nollan*, *First English*, and *Florida Power* had rendered the state court decision incorrect. *Id*. at 1033.

In Boone v. United States, 725 F. Supp. 1509 (D. Haw. 1989), *on motion to amend judgment*, 743 F. Supp. 1367 (D. Haw. 1990), *aff'd*, 944 F.2d 1489 (9th Cir. 1991), the court reaffirmed its prior holding despite the Corps' argument that *Nollan* went out

nexus requirement, most often to uphold the regulation at issue.[194]

A small number of district court cases involving land use exactions are worth examining in greater detail. A required dedication of right-of-way was held to be a physical taking in *William J. Jones Insurance Trust v. City of Fort Smith*.[195] There, city officials had

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of its way not to disturb *Kaiser-Aetna*. The *Boone* court held that *Kaiser-Aetna* represented a separate and not inconsistent analysis also applicable to fact patterns involving navigational servitudes. *Id*. at 1523. In *Boone*, an owner of an artificial lagoon sued to secure his ability to exclude the public. *Id*. at 1511. The *Boone* court held that the lagoon was not subject to a navigational servitude requiring public access and that the Corps' condition on a related dredging permit did not require public access. *Id*. at 1520. In *dicta*, the court speculated whether such a requirement would be constitutional under *Nollan*, which had placed an "increased burden" on the Corps to justify its action since *Kaiser-Aetna* upheld similar Corps requirements, and refused to conclude that the imposition of the condition "in such a manner so as to deprive the . . . [plaintiff] of a private property interest substantially advances a legitimate government interest, even if that interest is the improvement of navigation." *Id*. at 1523.

In Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin., 758 F. Supp. 6, 12 (D.D.C. 1991), the court found that a requirement to purchase stock was rationally related to revitalization of farm credit system and did not violate substantive due process. Again, the court rejected the applicability of per se property condemnation cases to this regulatory taking claim, applying *Connolly*, and citing to *Sperry Corp.*, 493 U.S. 52 (1989) for support. *Colorado Springs*, 758 F. Supp. at 12–13. On a motion to dismiss the court concluded that a claim for taking and a violation of substantive due process was stated by the requirement in the Agricultural Credit Act that plaintiff make a one-time purchase of allegedly worthless stock in a farm credit corporation. This was an amount equal to the association's unallocated retained earnings in excess of 13% of its assets. *Id*. at 17–18. This was a potentially severe economic impact and disruption of investment-backed expectations, and a potentially arbitrary requirement. The court stated that plaintiff's reliance on *Nollan* and *First English* is misplaced in this regulatory taking claim. *Id*. at 21.

In Faux-Burhans v. County Comm'rs, 674 F. Supp. 1172, 1175 (D. Md. 1987), *aff'd*, 859 F.2d 149 (4th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989), an airfield owner challenged county zoning restrictions on private airfield operations relating to intensity of use, size of aircraft and clear zones. The plaintiff had a special exception for private airfield use but was denied a special exception for public airfield use. The *Faux-Burhans* court summarily rejected the taking claim for failure to show denial of all use under the 1987 takings trilogy of cases, and found that the county had a legitimate interest in regulating private airfield land uses beyond federal regulations to control the future development of properties surrounding the airfield, control land use conflicts, and promoting an overall development scheme for the county. 674 F. Supp. at 1174–75.

194. Johnson v. City of Pleasanton, 781 F. Supp. 632 (N.D. Cal. 1991), *aff'd in part and rev'd in part on other grounds*, 982 F.2d 350 (9th Cir. 1992). In *Johnson*, homeowners challenged the validity of a regulation of satellite receive-only antennas. The court held that these regulations substantially advanced, and were sufficiently tailored to, the government's legitimate safety and aesthetic goals. *Id*.

195. 731 F. Supp. 912 (W.D. Ark. 1990). The operator of a gas station was denied permission to build a convenience store associated with a station. The owner was precluded from building based on his refusal to accept required dedication of right-of-way as

conditioned a permit to build a convenience store in association with an existing gas station on the grant of an expanded street right-of-way. The court began from the premise that such an access easement was an interest in property that interfered with the owner's rights of use and enjoyment sufficiently to give rise to a physical occupation. The court stated that the condition would be constitutional if it were "reasonably related to a public need or burden that [the plaintiff's new construction] create[d] or to which it contributed."[196] Nevertheless, the court found no such reasonable relation, because the city had failed to show that the planned expansion created additional burdens along the present right of way of Phoenix Avenue. The court stated:

> In other words, *Nollan* teaches that the City may constitutionally "tax" plaintiff to recoup the costs of the negative externalities that its increased business activities cause. Without a showing of such externalities, the condition which the City attaches to building permits is simple extortion. Perhaps it is not necessary for the city to show an exact, mathematical, one-to-one correspondence between the increased burden and tax, though it is plain that any clearly disproportionate tax would run afoul of the Fifth Amendment.[197]

Plaintiff's civil engineer testified that the additional burdens on the street attributable to the planned expansion would be *de minimis* at most. Further testimony stated that the very purpose of convenience stores is to capture business from those customers of other routine businesses located on the same street, thus minimizing the number of new trips on the road. While the court accepted that there would be increased traffic in and out of plaintiff's property, thus increasing congestion and perhaps slowing traffic, it held that a reasonable fact finder could conclude that the expansion would not create congestion but would rather relocate it in light of the showing that there were other convenience stores nearby. This court seem-

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a condition of approval. The court found a taking, absent a showing by the city that the traffic near the store would change as a result of the change in land use. The court ordered the issuance of an injunction to issue the requested permit unconditionally. *Id*. at 913–14.

196. *Id*. at 914 (citing *Nollan*, 483 U.S. at 838).

197. *Id*. The court signalled its philosophy by citing with admiration the work of libertarian Richard Epstein on takings.

ingly reversed the presumption of constitutionality.[198] The court found credible the city planners' testimony that convenience stores ordinarily had a certain and specific number of cars associated with them over a fixed period of time, but noted that the city failed to show what incremental traffic change, if any, could reasonably be expected from plaintiff's change in land use, which was the critical inquiry.[199]

In contrast, a dedication requirement was upheld in Oregon federal court in *Pengilly v. Multnomah County*,[200] where the requirement directly served the same interest (transportation efficiency) as would justify the development's prohibition, and was further held to be a rational means of promoting transportation efficiency. The plaintiff's property was located along a road which did not conform to current building standards for county road widths.[201]

The county contended that the dedication requirement served "its policies of increasing the efficiency and aesthetic quality of the trafficways and public transportation," as set forth in its comprehensive plan.[202] It also argued that it could have refused the building permit based on the inadequacy of the road in its current condition, as each residence added incrementally to the potential traffic problem by increasing the number of vehicles, and increased the pressure to bring the road up to standards. Due to budgetary constraints, the county was unable to condemn new rights-of-way as soon as they were needed. Dedication made it possible to meet the demand for improved roads which arises from new development, the county argued, while allocating some expense to those who cause the increased demand. The county also argued that this exaction requirement was directly tied to the impacts of new construction. Each

198. *Id*.

199. *William J. Jones*, 731 F. Supp. at 914. The court speculated that the city might have shown that the planned extension of Phoenix Avenue would increase the value of plaintiff's property, in order to show plaintiff's damages were not as great as were claimed. *Id*. However, the city made no attempt to introduce such evidence, and the court thus refused to address the issue further. *Id*.

200. 810 F. Supp. 1111 (D. Or. 1992). A homebuilder challenged the constitutionality of a requirement to dedicate five feet of additional right of way as a condition to issuance of a building permit for a single family home. The court held there was no taking or violation of equal protection. *Id*.

201. *Id*. at 1112.

202. *Id*. Policy 36 called for requiring the dedication of an additional right of way appropriate to the functional classification of streets, and the county code and street standards regulations implemented this plan policy. *Id*.

of those asked to contribute lived adjacent to the road, and each new residence had an incremental impact which, when combined with other similar impacts, led to the need to improve the road. Plaintiffs argued that the purpose of the dedication was simply to bring the road up to standard width, a different purpose than prohibition, which would not result in a wider road, and disagreed that the county could legitimately have refused to issue the building permit.[203]

The court agreed with the county, and held that the dedication requirement substantially advanced the interest in increasing road efficiency and aesthetics because it would make possible an actual increase in efficiency at some time in the future:

> County's purpose is more fairly characterized as increasing road efficiency and aesthetic quality than bringing roads up to standard widths. This purpose implicitly includes avoiding declines in the road efficiency caused by traffic increases engendered by new development. Such declines are the cumulative result of new residential construction and the associated increase in road use. They can be avoided either by prohibiting new residential development, (provided that property owners are not deprived of all economically viable uses of their land), or by imposing mitigating conditions on such development. Development prohibitions could take the form, *inter alia*, of zoning that would allow only land uses that are less traffic intensive than residential development.[204]

The court further found that the dedication requirement mitigated the cumulative impact of residential development along the road. It cited *Nollan* as recognizing the validity of basing land use regulations on the cumulative impact of regulated construction. The court noted that plaintiffs failed to show any authority for their implicit argument that the individual proposed developments must be shown to have deleterious impacts before the conditions can be imposed upon them.[205] One could argue that *Dolan* provides that authority and might require a different result today.

The court contrasted the direct connection between the impact of residential development on traffic in this case, and the indirect

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203. *Id.* at 1113.
204. *Id.*
205. *Id.*

connection between the impact of the Nollans' new house on the lateral access permit condition in *Nollan*.[206] Plaintiffs based their equal protection claim on the fact that previously developed properties, and properties not currently seeking a building permit, were not subject to the dedication requirement. Because the county would likely use its condemnation powers to accomplish the acquisition of right-of-way along these other properties, the plaintiffs claimed they were being treated unequally. The court disagreed and, applying the rational basis test, found that the dedication requirement was a rational means of promoting transportation efficiency.[207]

The Southern District of New York also upheld a dedication requirement in *Sudarsky v. City of New York*.[208] There, developers of property located within the special transit land use district of New York, the purpose of which was to reduce conflict between normal pedestrian traffic and persons attempting to gain access to the subway system, were required to provide access to the subway. If an access easement was necessary, then the developer was required to negotiate a transit easement agreement with the transit authority and the city planning commission. The planning department determined the exact location and dimensions of the proposed easement, in consultation with the developer.[209]

The plaintiffs claimed that the requirement to convey the transit easement was an impermissible condition on plaintiff's building permit and that, by making the easement a condition of issuing the building permit, the city effected a temporary regulatory taking. The court rejected plaintiff's argument that the easement ran afoul of *Nollan's* requirement that a condition placed on a permit must substantially further a governmental purpose that would justify denial of the permit. The court noted that *Nollan's* ultimate holding was

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206. *Pengilly*, 810 F. Supp. at 1113.

207. *Id*. at 1114.

208. 779 F. Supp. 287 (S.D.N.Y. 1991), *aff'd*, 969 F.2d 1041 (2d Cir. 1992), *cert. denied*, 506 U.S. 1084 (1993). The developer brought a 42 U.S.C. § 1983 action against the city planning commission, planning development, and transit authorities to recover damages from zoning changes which precluded development when developers refused to convey transit easement. *Sudarsky*, 779 F. Supp. at 290. The court held that there was no property interest in a building permit prior to the zoning change. *Id*. at 295. The court noted the transit easement was a permissible condition to development and was not a physical taking. Hence the court stated there was no final decision sufficient to permit review of the regulatory takings claim. *Id*. at 301.

209. *Id*. at 291.

that the easement utterly failed to further the end advanced.[210]

Plaintiffs next argued that the city must undertake an individualized inquiry to determine whether the proposed development would have any effect on street congestion or subway use. The court concluded that the Constitution did not require the city to undertake the type of detailed study that plaintiffs argued was necessary:

> The nexus between higher population density occasioned by new development and increased use of public facilities has long been recognized as sufficient to justify the transfer of a portion of developers' property to public use to help alleviate the additional burden placed on public services.[211]

Again, this holding may be questionable after *Dolan*, although it is possible that the transit easement requirement would survive "roughly proportional" review. The city had proffered an affidavit that the plaintiff's development, including a seventeen-story building with 153 apartments, a community facility and a restaurant, would have precisely the type of impact that the transit district was designed to mitigate. The court found this determination to be sufficient to satisfy the nexus requirement of *Nollan*.[212]

An ordinance requiring property owners to provide for low income housing, upon major renovation of their buildings (the "cure percentage" requirement) if they had previously harassed or displaced low income tenants, was held not to constitute a physical occupation or other taking in *A.B.N. 51st Street Partners v. City of New York*.[213] The court found that the incorporation of a nexus requirement into the ordinance's definition of harassment assured

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210. *Id*. at 298–99, 301. Plaintiffs had apparently conceded that the city could have prohibited new development in the area of the Second Avenue subway to prevent street and sidewalk congestion and overburdening of the subway facilities. *Id*.

211. *Id*. at 299.

212. *Id*.

213. 724 F. Supp. 1142, 1153 (S.D.N.Y. 1989). Plaintiff challenged the ordinance's cure percentage requirement which applied where there had been a finding that the landlord had harassed tenants and displaced communities. The ordinance required reservation of 28% of floor space for low income housing upon major renovations, as a government-authorized occupation by low income tenants. *Id*. at 1146. Because the plaintiff was left with substantial control over the building, the plaintiff could choose the amount of renovations it wished to conduct and could choose its tenants. Thus, the court held that no physical occupation occurred and entered summary judgment for the city. *Id*. at 1153.

that the means were tailored to the ordinance's specific goals and did not arbitrarily punish all acts of harassment with the cure percentage requirement. The definition of "harassment" of low income tenants was any act "which materially advanced the *development, enlargement,* demolition," conversion, or alteration of the properties.[214] The ordinance's provision that the cure requirement ran with the land was also found to be rationally related to the goal of preventing harassment.[215]

The district court explained that, in *Nollan*, a compensable physical taking had occurred in the Coastal Commission's absolute prohibition on rebuilding if the Nollans refused to convey the beach access easement because of the "utter failure" to further the end advanced.[216] Thus, the *A.B.N.* court framed the issue as whether the cure percentage condition furthered the ordinance's stated objective. The court concluded that "an essential nexus" existed between the cure percentage condition and the requirement of a permit for major alterations sufficient to defeat the physical taking claim.[217]

Because *A.B.N.* was a facial challenge, the economic situation of the plaintiff was not relevant and the plaintiff's burden was to show

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214. *Id*. at 1146.

215. *Id*.

216. *A.B.N.*, 724 F. Supp. at 1153.

217. *Id*. As have many other plaintiffs, A.B.N. emphasized at oral argument Justice Scalia's citation to *Armstrong*, i.e. that the purpose of the takings clause is to bar government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole. The court stated that its review of the authority cited for Scalia's dictum found that this sentiment did *not* expand the scope or definition of a physical taking. The court noted that, in *Armstrong*, plaintiff admittedly had compensable property which was taken for the government's own advantage and over which it was absolutely deprived of control. *Id*. The court also considered Justice Brennan's quote of *Armstrong* in his dissent to San Diego Gas and Elec. Co. v. City of San Diego, 450 U.S. 621 (1981), and concluded that it did not affect the definition of a physical taking because it arose in his discussion of the appropriate remedies for violations, rather than the grounds for liability. *A.B.N.*, 724 F. Supp. at 1154. The district court also considered *Penn Central* and found that the private bearing of a public burden rationale was applicable only to a physical *per se* taking, because *Penn Central* concerned whether use regulations were non-possessory takings. The court also noted that *Penn Central* criticized the *Armstrong* language as being vague. *Id*. It concluded:

> Although the quote is a consideration in takings jurisprudence, the Court chooses to ground its analysis in the concrete examples and specific formulas laid out in precedents "for determining when `justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than disproportionately concentrated on a few persons.

Id. (quoting *Penn Central*, 438 U.S. at 124).

that the enforcement of the ordinance eliminated economically viable uses of land in the entire neighborhood. The court further declined to find that any reduction of value was destruction of value sufficient to establish a taking.[218]

A district court refused to apply *Nollan* in an equal protection challenge to a North Carolina impact fee program for water and sewer services in *South Shell Investment v. Town of Wrightsville Beach*.[219] Instead, the court upheld the fee under the rational basis test, finding that imposing the costs of improvements to water and sewer systems necessitated by new development on the owners of newly developed property did not deny equal protection, even though the improvements benefitted all residents of the town.[220]

Federal district courts also have refused to find takings under *Nollan* in critical area regulations,[221] remodeling requirements of

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218. *A.B.N.*, 724 F. Supp. at 1154.

219. 703 F. Supp. 1192, 1201 n.5 (E.D.N.C. 1988), *aff'd*, 900 F.2d 255 (4th Cir. 1990). A developer asserted an equal protection claim arising from an imposition of increased utility system impact fees and tap fees for water and sewer services on owners of new development. *South Shell*, 703 F. Supp. at 1194. The developer did not assert a taking claim. *Id*. at 1201. The court held the fees were not an unauthorized tax under North Carolina law and were not unconstitutional. *Id*. at 1204. In addition, the court stated that developers were not estopped from challenging the fees by virtue of having paid them and received the benefits of connection to the water and sewer system. *Id*. at 1195.

220. *Id*. at 1201–02.

221. Crow-N.J. 32 Ltd. v. Township of Clinton, 718 F. Supp. 378, 384 (D.N.J. 1989). In *Crow*, the developer sought to void a township land use ordinance reducing the developable area on properties containing critical areas. *Id*. at 379. The court stated there was no taking under the Fifth Amendment and that a genuine issue of material fact existed precluding summary judgment on a substantive due process claim in plaintiffs' favor. The court further stated that the loss of an expectation interest may be the predicate for a takings claim even in the absence of a claim of economic non-viability, but failed to address the question of whether the ordinance deprived plaintiffs of profits, because mere diminution of value does not constitute a taking under *First English* and *Euclid*. The *Crow* court applied *Nollan* to determine whether there was a lack of nexus between the ordinance's requirements and the township's goal violating substantive due process. The court held that expert testimony was too conclusory to support summary judgment when the testimony provided that construction would not interfere with wetlands. After reviewing the record, the *Crow* court provided the following:

> While it may be true that a land use regulation that restricts the actual impact of development upon critical areas, rather than restricting development because of the mere presence of critical areas on parts of the property which are not to be developed, may be a better way to advance the township's interest, it is too soon to say that the Due Process Clause compels this court to second-guess the local governing authority.

Id. at 384.

the Americans with Disabilities Act,[222] a fee on doctors to support a statewide malpractice insurance program,[223] and an employment

222. Pinnock v. International House of Pancakes Franchisee, 844 F. Supp. 574, 586–89 (S.D. Cal. 1993). A restaurant franchisee unsuccessfully claimed that accessibility requirements of the Americans with Disabilities Act (ADA) constituted a physical taking. *Id*. at 586–87. Plaintiff argued that the restaurant would have to lose as many as 20 seats in his restaurant to meet the remodeling requirements and cited to *Loretto* for support. *Id*. at 587 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)). The court distinguished *Loretto* because it involved the use of private property by an outside entity, whereas the ADA simply requires the restaurant owner to use his own property for different purposes without an outside entity being permitted to physically intrude upon the property. *Id*. at 587. The court also concluded that the ADA did not deny the restaurant owner all economically beneficial or productive use of his land. *Id*. at 587–88. The court further pointed out that Congress had drafted the ADA attempting to protect existing businesses from undue hardship and had adopted a "readily achievable" standard to ensure that the required changes would reflect the individual businesses' ability to meet the standards. *Id*. at 588. Moreover, the court held that the ADA did not frustrate the reasonable investment-backed expectations of the restaurant because regulations have been upheld even where they prohibited all uses originally intended for the products or that resulted in a complete restriction upon a specific individual's future exploitation of the property for profit. *Id*. The court held that, under *Nollan*, the barrier removal requirements clearly furthered the ADA's stated objectives to eliminate adversity and discrimination against disabled people. *Id*. at 588–89 (quoting Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1) & (2) (Supp. V 1993)).

223. Meier v. Anderson, 692 F. Supp. 546, 554–56 (E.D. Pa. 1988), *aff'd mem.*, 869 F.2d 590 (3d Cir. 1989). Doctors claimed that Pennsylvania's Health Care Services Malpractice Act ("the Act") violated their substantive and procedural due process rights and constituted a taking. *Id*. at 551–57. The Act required health care providers to pay a surcharge to a professional liability malpractice fund. *Id*. at 548. The court held the Act was rationally related to a legitimate state interest; it did not violate substantive due process; procedural due process claims were not ripe; and the surcharge requirement was not a taking. *Id*. at 551–57. The court explained there was no unlawful taking because the fund placed the burden of contribution on all doctors instead of society as a whole, or only on those doctors who committed acts of malpractice. *Id*. at 554–55. The court further explained that there was no governmental invasion or permanent appropriation of the doctors' assets, nor any evidence that any doctor was unable to pay the surcharge or had to leave the profession because of it. *Id*. The court concluded that, because the property at issue in this case was money and not real property, the standard of *Agins* and *Nollan* was not applicable. *Id*. at 554. Moreover, even if *Agins* and *Nollan* applied, the court asserted that it would find the Act "substantially, if not directly, advances the Commonwealth's legitimate interests in compensating malpractice victims and in ensuring the continued availability of medical malpractice insurance." *Id*. at 554 n.6. Because the charge was determined based on each doctor's premium, which the court presumed was based on each doctor's claim history, and because each doctor was protected by this scheme, the court found reciprocity of advantage. *Id*. at 555. The surcharge constituting between 5 and 50% of the doctors' gross incomes, while undoubtedly representing a large proportion of plaintiffs' costs of doing business, did not deny economically viable use. *Id*. Finally, the court held that the plaintiffs failed to allege any investment-backed expectation of maintaining a certain income level in the regulated medical profession. *Id*.

discharge statute.[224] Thus, although a large number of federal courts have taken note of *Nollan* and, in particular, Justice Scalia's assertion that a stricter scrutiny of governmental actions is required, few courts have made this stricter scrutiny a reality. Where the courts have invalidated governmental actions, it has been in fairly extreme actions which might have been invalidated even before *Nollan*.

VII. NOLLAN *IN SELECTED STATE COURTS*

Norman Williams has categorized the state courts according to their views towards zoning regulations and describes those categories as the "pro-zoning" states, the "erratic" states, the "good gray middle," the "strongly developer-minded" states, and the always useful "other" category.[225] This Article will address at least one representative of each of these categories to give the reader an impression of how state courts have interpreted *Nollan*. In general, because the state courts are not as concerned with ripeness arguments or with whether the case presents a substantial federal question, they address the merits of the taking question more frequently.

A. Pro-Zoning states

Perhaps the most famous of the "pro-zoning" states is California.[226] The California state courts have construed *Nollan* far more

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224. General Offshore Corp. v. Farrelly, 743 F. Supp. 1177, 1200 (D. V.I. 1990). An employer brought an action challenging the constitutionality of the Virgin Islands Wrongful Discharge Act ("the Act"). *Id*. at 1181. The court stated that the challenges were not ripe and the Act was not facially unconstitutional. *Id*. Upon discussing the state's interest, the court noted that, although the *Nollan* inquiry should be more stringent than a substantial due process analysis, the legislature is still entitled to some deference. *Id*. at 1200–01. The court stated further that the right to fire an employee contributed to the value of the employment contract and was a protectable property interest. *Id*. at 1202. However, the *Farrelly* court noted that the statute met the public purpose requirement and substantially advanced a legitimate interest in avoiding completely arbitrary discharges, as well as discharges based on animus against native Virgin Islanders and against employees who patronize businesses after working hours. *Id*. Finally, the court held that the Act did not deny the property an economically viable use. *Id*.

225. 1 NORMAN WILLIAMS, JR., AMERICAN LAND PLANNING LAW: CASES AND MATERIALS § 6 (1978).

226. *See, e.g.*, Ellison v. County of Ventura, 265 Cal. Rptr. 795, 798–99 (Ct. App. 1990) (superseded by grant of rehearing) (downzoning 10-acre minimum lots for rural-agricultural use to 160-acre minimum lots for open space use, as designated in the plan at the time of purchase, was held not to be a taking where the market value had more than doubled). The *Ellison* court quoted Moore v. City of Cosa Mesa, 886 F.2d 260, 263

frequently than any other state. Thus, this Article can only summarize and highlight the most interesting of these cases.[227] As with the other state and federal courts, the California courts have not hesitated to use *Nollan* in their review of physical takings.[228] The Cali-

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(9th Cir. 1989), *cert. denied*, 496 U.S. 906 (1990), for its notion that "not all regulatory invasions of property rights amount to unconstitutional takings." *Ellison*, 265 Cal. Rptr. at 798. Comparing *Moore* with *Ellison*, the court noted there was no measurable detriment to any property rights because there was no physical invasion nor depression in market value. *Id*. Thus, the *Ellison* court rejected arguments based on speculative lost profits of $1 million, noting that property owners have no constitutionally protected right to subdivide unless there is a vested right. *Id*. at 799.

The *Ellison* court further stated that even if there has been a failure to "substantially advance legitimate state interests" there cannot be a taking unless there is injury to some strand of the owner's "'bundle' of property rights," whether adverse economic impact, restriction on use, or physical invasion. *Id*. at 797 (quoting Andrus v. Allard, 444 U.S. 51, 65–66 (1979)). Observing *Nollan*, the *Ellison* court noted that the Supreme Court first considered whether a property interest was at stake before it looked at the validity of the condition. *Id*. at 798. The *Ellison* court concluded that if there had not been an invasion of a property right, there would have been no need to decide whether there was a taking in *Nollan*. *Id*.

See also Gilbert v. State, 266 Cal. Rptr. 891, 893 (Ct. App. 1990) (challenging the Department of Health Services' approval of the water district's continued moratorium on new or additional service connections). Affirming plaintiff's dismissal, the *Gilbert* court held no protectable property interest in water connection under California law. *Id*. at 900. The plaintiffs argued that the deprivation of a water connection in their residentially zoned property deprived them of all economically viable uses of their property, especially where all uses required water hook-ups for development. *Id*. at 899. The court held that there was no deprivation of substantially all reasonable use, and that the department's actions substantially advanced the state's interest in ensuring a potable water supply which does not endanger the lives or health of its citizens, despite the fact that the declared water shortage emergency had apparently lasted for 20 years without improvements. *Id*. at 903. The *Gilbert* court concluded that "[w]ithout question the condition substantially fits and promotes the valid public health purpose of ensuring a continuous supply of potable water," and noted the intervening acts of the water district and the county in controlling water supply and land uses in the area. *Id*. at 903–04. The *Gilbert* court rejected the plaintiffs' arguments that the indirect effects of state action can constitute a regulatory taking even where the agency involved does not directly regulate real property. *Id*. at 905.

227. For a discussion of the California rent control and billboard regulation cases, see *supra* text accompanying notes 54–127.

228. *See, e.g.*, Carter v. City of Porterville, 22 Cal. Rptr. 2d 76, 78 (Ct. App. 1993) (opinion withdrawn by order of the court). A city's spillway diverted a natural watercourse and contained negligently constructed and unsafe pipe. The *Carter* court held that the diversion of a watercourse was a physical taking and remanded the case for further consideration of whether a properly constructed dam could be a temporary regulatory taking, which the government has the right to cure. *Id*. at 83, 88–89. However, the taking was not compensable as it failed to interfere with the continuation of the owner's existing use as rental property, which included a small farmhouse and pasture. *Id*. at 87. In discussing potential regulatory taking liability on substantial advancement

fornia Supreme Court has had only one opportunity to apply *Nollan* to a land use exaction fact setting, and it declined to do so.[229] Its second opportunity will come in its review of the *Ehrlich* case, on remand from the Supreme Court for reconsideration in light of *Dolan*.[230]

The intermediate appellate courts, however, have actively applied *Nollan*.[231] The most notable of these appellate decisions is *Blue*

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grounds, the court noted that the application of *Nollan* depended to a great extent on how the court characterized the regulatory action at issue. *Id*. at 86 (citing Nollan v. California Coastal Comm'n, 483 U.S. 825, 836–37 (1987)). If the court conceived the regulatory action as the construction of a dangerous dam, then the dangerousness of the dam would obviously not serve a legitimate purpose. *Id*. However, if the action "prevent[ed] development in a dangerous locale," then it would advance the legitimate interest of public safety. *Id*. The court refused to finally resolve the question because the taking was determined as a deprivation of all viable use. *Id*.

229. Russ Bldg. Partnership v. City of San Francisco, 750 P.2d 324, 327 n.6 (Cal. 1988). Here, developers of new office space sued for declaratory judgment on whether a city development fee for a downtown transit system violated state constitutional limitations and was improperly retroactively applied. *Id*. at 325. The California Supreme Court accepted the case only on the question of retroactivity, and let stand the lower appeals court decision that the fee did not constitute a taking, despite plaintiffs' subsequent request that the court expand the issues to consider whether the TIDF (Transit Impact Development Fee) was a taking under *Nollan*. *Id*. at 326–27 n.6. The court noted that *Nollan* was decided after they granted review and before oral argument. *Id*. at 327 n.6.

230. *See* discussion *infra* part VI.A.d.

231. *See, e.g.*, Jonathan Club v. California Coastal Comm'n, 243 Cal. Rptr. 168, 177–78 (Ct. App. 1988) (opinion withdrawn by order of the court). Here, a private club, located on Santa Monica beachfront property next to the most heavily used public beach in the state of California, leased certain state-owned parcels for its parking lot and paddle tennis courts. *Id*. at 170. The record demonstrated significant interference with public access to the beach, and the club was required to scale down development, continue parking shuttle service, and pay a sizable fee for shoreline enhancement. *Id*. at 171. The Coastal Commission's development permit condition, which precluded the club from discriminating on the basis of race, gender or religion, was upheld. *Id*. at 170–79. The court refused to apply *Nollan* because no easement was involved and no taking was claimed. *Id*. at 178. The court held that "there [was] a direct connection between the governmental purpose of maximizing public access to state beach lands" and the non-discriminatory condition intended to maximize access to the leased land by all citizens. *Id*.; *see also* First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893, 901 (Ct. App. 1989), *cert. denied*, 493 U.S. 1056 (1990). On remand from the United States Supreme Court, the *First English* court held that an ordinance, which prevented construction of any buildings in a flood protection area on an interim basis, did not deny all use of the property. *Id*. at 901–02. The court held that the ordinance substantially advanced a state interest in public safety by preventing injury and death during the next flood and, therefore, did not constitute an unconstitutional taking. *Id*. at 902–06. The interim ordinance did not constitute a "temporary unconstitutional taking" even if the court was to assume that ordinances were too broad if they were permanently imposed on the landowner. *Id*. at 906. This ordinance only imposed a reasonable morato-

Jeans Equities West v. City of San Francisco,[232] where the First District concluded that *Nollan* was a physical taking case that simply did not apply to impact fees or other monetary exactions, relying in part on the Ninth Circuit's similar conclusion in *Commercial Builders v. City of Sacramento*.[233] Prior to *Blue Jeans*, the Sec

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rium for a reasonable period of time while a study was conducted and a determination made as to what uses were compatible with public safety. *Id*. The *First English* court explained that the area was dangerous because it had burned, resulting in a lack of vegetation to slow flood water and allow it to percolate into the soil or flow into streams. *Id*. at 895. Furthermore, a crust had formed on the ground preventing such percolation, and the ash and debris left over from the fire increased the bulk of the water flow. *Id*. at 895 n.1. The burning therefore increased erosion damage caused by the runoff when the floods came. *Id*.

The court noted that the 1978 flood which inspired the regulation resulted from an 11 inch rain storm which drowned 10 people and inflicted millions of dollars in losses. *Id*. at 895. *Nollan* required that the ordinance substantially advance the precise state interest which validly motivated the regulation. *Id*. at 901. However, the interim ordinance did not deny *First English* use of its property, as it did not prevent occupancy and use of any structures that survived the flood or prohibit campground uses which could be carried out without reconstruction or the building of new buildings. *Id*. at 902. The ordinance only prohibited the reconstruction of destroyed structures and the construction of new structures. *Id*. Camping activities, such as the cooking of meals, playing of games, giving of lessons, and pitching of tents, which were fully consistent with the property's role as a camping facility, remained available during the period of the interim ordinance. *Id*.

232. 4 Cal. Rptr. 2d 114 (Ct. App.), *cert. denied*, 506 U.S. 866 (1992).

233. 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992). In *Blue Jeans*, the developer of an office, retail and condominium complex was properly subject to the city's transit impact development fee ordinance, despite the project's location away from traditional downtown area. *Blue Jeans*, 4 Cal. Rptr. at 114. See *supra* note 236 for a discussion of an identical fee before the California Supreme Court in Russ Building Partnership v. City of San Francisco, 750 P.2d 324 (Cal. 1988).

Blue Jeans was followed by City of San Francisco v. Golden Gate Heights Inv., 18 Cal. Rptr. 2d 467 (Ct. App.) (holding *Nollan* applies only to physical takings and refusing to apply to assumptions regarding permissible development of property used to calculate value of property that was subject of eminent domain action), *cert. denied*, 114 S. Ct. 338 (1993), and Saad v. City of Berkeley, 30 Cal. Rptr. 2d 95 (Ct. App. 1994). In *Saad*, plaintiffs argued that *Nollan* cast doubt on the "unanimous California precedents declaring [that] there is no fundamental vested right to build a single family residence," and that their claim should be subjected to the "independent judgment" standard of review, rather than that of "substantial evidence." 30 Cal. Rptr. at 98–99. The *Saad* court responded stating "[b]oth California and federal courts have rejected attempts to stretch *Nollan* beyond `possessory takings' to encompass `regulatory takings'." *Id*. at 99 (citing *Blue Jeans*, 4 Cal. Rptr. 2d at 114 and *Commercial Builders*, 941 F.2d at 872). *See also supra* notes 163–74 for a discussion of *Commercial Builders*.

For other exaction-related cases citing to *Nollan* not discussed in the text, see Tahoe Keys Property Owners' Ass'n v. State Water Resources Control, 28 Cal. Rptr. 2d 734 (Ct. App.), *cert. denied*, 115 S. Ct. 485 (1994). In *Tahoe*, a property owners' association disputed application of a lake pollution mitigation fee placed upon issuance of build-

ond District in *Long Beach Equities v. County of Ventura* had held that *Nollan* requires that a regulation advance the precise state interest which avowedly motivated it.[234]

If, as it appears, *Blue Jeans* is suspect after *Dolan*, a case which indicates the kinds of dedications which the California courts may invalidate is *Rohn v. City of Visalia*, a pre-*Blue Jeans* case arising

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ing permits. *Id*. Because the property owners' association could be fully compensated by the payment of money damages, there was no need for a preliminary injunction, which would pose significant risk of harm to the governmental agencies and the public interest from on-going deterioration of the lake. *Id*. The association failed to show substantial likelihood of success on the merits of the claim that the fee scheme was a regulatory taking. *Id*. Refusing to consider *Nollan*, a physical taking case, dispositive of this situation involving neither of the *per se* taking standards, the court stated that a substantial advancement requires a showing that the governmental interest reasonably relates to the property being regulated and that the regulation reasonably serves that interest. *Id*. 741–45. The court rejected the argument for a more stringent version of the test. *Id*. at 745. According to the court, the justification for regulation is not limited to needs or burdens created by subject property alone, and can still consider cumulative impacts after *Nollan*. *Id*. The court found that property owners were not unfairly singled out, given the special benefits they receive from preservation of Lake Tahoe, that regulation of their property is the only way to protect the lake, and that regulation of various kinds, if not this particular fee, applied to all property owners in the lake basin. *Id*. at 746–48.

See also California Ranch Homes Dev. Co. v. San Jacinto Unified Sch. Dist., 21 Cal. Rptr. 2d 557 (Ct. App. 1993) (refusing argument that *Nollan* required application of different statute of limitations, where a developer of a residential project, restricted to residents 55 years and older, sought a refund of school impact fees which was barred by statute of limitations), *cert. denied*, 115 S. Ct. 485 (1994); Griffin Homes, Inc. v. Superior Court, 274 Cal. Rptr. 456 (Ct. App. 1990) (claim of arbitrariness and illegal exactions stated under § 1983 for city's denial of remaining building permits pursuant to growth control ordinance despite developer having allegedly spent over $2 million on largely off-site improvements and dedicated over 100 acres of land to open space conservancy in exchange for $1 million, fee waivers, and other concessions), *vacated*, 280 Cal. Rptr. 792 (Ct. App. 1991) (stating case is barred by statute of limitations and condemnation claim not ripe).

234. Long Beach Equities, Inc. v. County of Ventura, 282 Cal. Rptr. 877 (Ct. App. 1991), *cert. denied*, 112 S. Ct. 3027 (1992). A developer claimed that growth guidelines and an ordinance would so greatly delay a proposed, one unit per acre, residential development as to render it economically infeasible. *Id*. at 890. The court upheld the requirement of annexation before an extension of facilities and annual limits on residential development to promote efficient delivery of community services, decrease density, preserve natural resources, promote aesthetics, and conserve open space. *Id*. at 885–86. The regulations bore a substantial relationship to the public welfare, even though they severely reduced the value of the developer's land and even though the relevant general plan projected urban uses for the property. *Id*. at 885. The court stated that a substantial relation requires something more than a reasonable relationship and the claim was not ripe in absence of final denial of applications for annexation, development and variances. *Id*. at 886–89.

from a different appellate district.[235] The city required a dedication of right-of-way to correct a past planning error in aligning the intersection. The record evidence of the city's need for the dedicated right-of-way was skimpy, and failed to specify the precise location and amount of property required for the street dedication. Staff reports examining the traffic impact of the proposed land use indicated that the proposed office uses would generate *less* traffic than the multi-family apartment uses which were permitted under the existing zoning. Construing California exactions law at length, the court concluded that there was absolutely no relationship between the required dedication and the proposed conversion to office uses.[236]

Citing *Nollan*, the court noted that compliance with the takings clause is "more than `a pleading requirement' or `an exercise in cleverness and imagination.'"[237] The court further noted the Supreme Court's particular concern that required conveyance of property involved a heightened risk that the government was avoiding eminent domain rather than advancing the stated police power objective. The city argued that the dedication generally advanced its overall needs for roads and traffic, but the court disagreed, noting that the plan to realign the streets was based solely on the fact that there was a prior error and was not shown to be related in any way to subsequent growth or development, including the conversion of this property to office uses. The court thus concluded that the proposed dedication bore "absolutely no relationship, either direct or indirect, to the present or future use of the property."[238] The court also noted that the city had purchased right-of-way in either direction from the intersection to accomplish its long-range plan for aligning this intersection properly, and appears to have been influenced by a sense of fundamental unfairness.[239]

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235. *See* Rohn v. City of Visalia, 263 Cal. Rptr. 319 (Ct. App. 1989). A building was located at an intersection where the streets were not perfectly lined up due to past planning error. *Id*. The *Rohn* court invalidated a condition on the plan amendment and rezoning for a minor conversion of property from single-family residential to professional uses, requiring the dedication of triangular piece of property, 25 feet wide at its widest point, arguably worth $25,000 and representing 14% of the entire property, to be used to correct the alignment of the streets at this intersection. *Id*.

236. *Id*. at 327–28.

237. *Id*. at 326 (citing Nollan v. California Coastal Comm'n, 483 U.S. 825, 841 (1987)).

238. *Rohn*, 263 Cal. Rptr. at 327.

239. *Id*. at 327–28.

Another pre-*Blue Jeans* case from another appellate district invalidating a development condition is *Surfside Colony Ltd. v. California Coastal Commission*.[240] Surfside's property was located near Anaheim Bay, which was protected by two jetties which enhanced the erosion on Surfside's property. Every six to eight years, the Army Corps performed a sand renourishment project on the beach. Even so, several homes were in danger of falling into the sea. The city received emergency permits to place sandbags and to install a large rock revetment in front of Surfside's homes. In later proceedings on Surfside's application for a standard permit, the Coastal Commission staff's recommended approval was based on four conditions: (1) that the property owner dedicate an easement for public access and passive recreational use along its private beach; (2) that the owner dedicate an easement for future construction of a boardwalk to extend the length of the revetment; (3) that the owner dedicate an easement for pedestrian and bike access across its property from the Pacific Coast Highway to the beach; and (4) that the owner post conspicuous signs regarding the existence of the public's right to cross its property to reach the beach. The Commission staff relied on several scientific studies that demonstrated the effects of revetments and seawalls generally on coastal erosion.

The court noted that a staff study indicated that knowledge of the specific beach is necessary in order to rationally estimate any erosion problem. Surfside provided an expert opinion that its revetment did not exacerbate erosion and, in fact, supposedly mitigated the impact of reflecting waves, and challenged the special conditions as an unconstitutional taking.[241]

The trial court upheld only the requirement to dedicate an easement for public access and passive recreational use along Surfside's private beach, referred to as the lateral access requirement. It invalidated the remaining conditions under *Nollan* as having no substantial connection or nexus between the public burden created and the necessity for the easement.[242]

The court faulted the commission's record for not containing studies specific to the particular revetment at issue. Pictures of the site in the record seemed to demonstrate that there had not been

240. 277 Cal. Rptr. 371 (Ct. App. 1991).
241. *Surfside Colony Ltd.*, 277 Cal. Rptr. at 374–75.
242. *Id*. at 375.

additional erosion or that there had even been accretion since the revetment had been installed. The court concluded that the commission had "no evidence establishing this revetment would cause erosion at this beach," and could not establish a nexus between the revetment and the public access requirement, and that the remaining conditions were therefore a taking under *Nollan*.[243]

The court explicitly stated that *Nollan* "changed the standard of constitutional review in takings cases."[244] Furthermore, the court noted that "whether the new standard be described as `substantial relationship' or `heightened scrutiny,' it is clear the rational basis test . . . no longer controls."[245] The court continued that general studies might be sufficient to establish mere rational relationship, but the evidence under *Nollan* must be more substantial than general studies, which may not even apply to the case at hand due to unusual local conditions.

However, other earlier California cases suggest that not all exactions will be invalidated without the benefit of the *Blue Jeans* presumption in favor of government. For example, in *Building Industry Ass'n of Southern California v. City of Oxnard*,[246] a growth requirements capital fee was upheld under *Nollan*. The ordinance required the payment of sixty-three cents per square foot of covered space in a new residential development, thirty-three cents per

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243. *Id*. at 376.

244. *Id*. at 377.

245. *Id*.

246. 267 Cal. Rptr. 769 (Ct. App. 1990) (holding growth initiative to be constitutional); *see also* Garrick Dev. Co. v. Hayward Unified Sch. Dist., 4 Cal. Rptr. 897 (Ct. App. 1992), where residential developers wanted a school facilities fee returned, which they paid under protest as a condition of obtaining building permits. The taking claim was rejected. Furthermore, the record supported a determination that fees imposed under the school district's resolution did not exceed the reasonable cost of facilities and, therefore, did not constitute an invalid special tax enacted without voter approval. The imposition of a fee was a quasi-legislative act and was not subject to site-specific takings review. The court refused to second guess a 20-year planning timeframe and decision to pursue permanent construction rather than utilize portable classrooms. Assuming for sake of argument that the *Nollan* nexus was applicable, the court held it was present, stating

> [T]here is a clear and close connection between fees imposed for school facilities and new residential construction, the most predictable single source of increased school enrollment. Plaintiffs have not sought in this litigation to show that their projects would *not* bring new students into the [district]. Nor have they sought to show that the amount of the fees imposed denied them an economically viable use of their land.

Id. at 908.

square foot of covered space in a commercial or industrial development, and three cents per square foot of uncovered space in a new industrial development. These amounts were determined by estimating the value of existing public facilities as of the date of the ordinance. These facilities were then divided into two categories: those largely associated with residential use such as library, community and service centers; and those facilities serving all types of uses such as the civic center, public safety equipment yard, parking lots and streets.

Seventy-four percent of the total developed area of the city was residential, so this amount of the value of the shared facilities was attributed to residential use. This value, combined with the value for facilities primarily devoted to residential use, was divided by the total number of square feet of residential use in the city, and the remaining twenty-six percent of shared facilities was applied to the commercial and industrial properties, resulting in the above-stated fees.[247]

The fees collected were placed in the capital outlay fund to be used only for the cost of those capital improvements defined as public facilities or equipment funded through the city's capital improvement budget. The outlay fund contained one fund for fees from new residential development and another for new commercial and industrial development. Residential fees could be used for all capital improvements; commercial and industrial fees were used for everything except for park, recreation, cultural and civic facilities. The amount of fees to be applied to any capital improvement was limited by the ordinance to that portion of the cost reasonably attributable to the need generated by the new development or benefit conferred upon new development.[248]

The fee was attacked for not charging the value of projected additional improvements, but rather a pro rata continuation of the existing ratio of facilities to land uses. Secondly, it was challenged for being for general purpose capital needs, which allegedly had too remote and attenuated a causal relationship to new development. The trial court found that the fees bore "a reasonable relationship to the need for public improvements created by new development, that the formula for determining the amount of the fee is reasonable, and

247. *Building Indus. Ass'n*, 267 Cal. Rptr. at 770.
248. *Id*.

that the fee is not a tax and not violative of the California constitution.[249]

The court assumed for the sake of argument that, under *Nollan*, the takings clause would require a reasonable nexus between the fees and the needs created by new development, and found that such a nexus existed.[250] The court noted that determining the specific needs and then apportioning those costs to developers is one, but not the only, reasonable method of imposing a fee.[251] The court found it reasonable to assume that if a city doubles in size, it will need to double the amount of capital invested in public facilities. It rejected the notion that newcomers were expected to buy into the existing facilities, or that the causal relationship was too remote.[252] The court held that the fee was reasonable in order to maintain the proper balance between the number of people and the amount of public facilities available.

B. Erratic States

William categorizes Florida as an "erratic" state, and several Florida decisions have mentioned *Nollan*, as discussed below in a footnote on Florida. Another of the "erratic" states is Ohio, which has considered *Nollan* only rarely and without any extensive analysis. Ohio's two intermediate appellate court decisions are favorable to the government.[253]

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249. *Id*.

250. *Id*.

251. *Id*. at 771 (citing J.W. Jones Co. v. City of San Diego, 203 Cal. Rptr. 580 (Ct. App. 1984)).

252. *Building Indus. Ass'n*, 267 Cal. Rptr. at 771.

253. *See* Shopco Group v. City of Springdale, 586 N.E.2d 145 (Ohio Ct. App.), *appeal dismissed*, 563 N.E.2d 302 (Ohio 1990). A landowner's claim that denial of rezoning was a federal temporary regulatory taking was for $20 million in damages. *Id*. at 149–50. The court affirmed summary judgment for the city on the basis that the owner was not deprived of all use of the property, and no balancing analysis was conducted. *Id*. at 150. The court's refusal to permit a regional shopping center, neighborhood retail center, hotel and office building complex, where owners retained the longstanding existing park use, did not constitute a denial of all use of the land or a taking. The court's denial of economic or development rights, even if one accepted that the property could not be profitably developed under the zoning, was not a denial of all use, including the right to possession and to existing use, under First English Evangelical Lutheran Church of Glendale v. Los Angeles, 258 Cal. Rptr. 893 (Ct. App. 1989), *modified on denial of rehearing* (1989), *and cert. denied*, 493 U.S. 1056 (1990); *Shopco Group*, 586 N.E.2d at 150. The court declined to decide that compensation was available for federal temporary

C. The "Good Gray Middle" States

Our chosen representative of the "good gray middle" is Connecticut. The Connecticut Supreme Court refused to consider that *Nollan* changed the relevant standards, yet the court proceeded to invalidate a regulation on rational basis grounds, using an analysis similar to *Nollan* in *Builders Service Corp. v. Planning & Zoning Commission*.[254] The *Builders* court challenged a minimum square

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takings in Ohio. *Shopco Group*, 586 N.E.2d at 150. According to the court in Agins v. City of Tiburon, 447 U.S. 255 (1980), the test requiring a weighing of the public and private interests, did not apply to temporary takings of less than all of the use of the property, and the *First English* remedy was unavailable in "normal delay" fact situations. *Shopco Group*, 586 N.E.2d at 149. The court specifically disagreed with plaintiff's argument that *Nollan* extended *First English* compensation to cases where only a portion of the property is temporarily taken, because *Nollan* concerned a regulation that was equivalent to a permanent physical occupation. *Id*.

See also State *ex rel*. Pitz v. City of Columbus, 564 N.E.2d 1081 (Ohio Ct. App. 1988). The city's denial of a building permit, which was based on the need to correct an erroneously designated floodway, prohibited construction of all structures on land zoned flood plain and was not a temporary taking where there was no deprivation of existing use as vacant land and the only issue was whether the owner could create new use of the property. *Id*. The court stated that the Ohio standard for a Fifth Amendment taking is identical to the United States Supreme Court standard, but proceeded to outline a standard whereby there can be no taking in the absence of physical encroachment or deprivation of access to one's property (as in *Nollan*), or interference with preexisting uses of a property (as was alleged in *First English*). *Id*. at 1086–87. The court rejected plaintiff's argument that the erroneous zoning of his property as part of the flood plain, thereby prohibiting all structures, worked a *per se* taking, similar to *Joint Ventures*. The court's rejection appears to completely overlook a *Penn Central*-style taking.

254. 545 A.2d 530 (Conn. 1988) (addressing cause of action where plaintiff sought to put modular home which conformed in all respects to zoning, except for the minimum square footage requirement); *cf*. Elysium Inst., Inc. v. County of Los Angeles, 283 Cal. Rptr. 688 (Ct. App. 1991). In *Elysium*, the court found that an ordinance which relegated nudist camps to a zoning classification different than other recreational clubs was unconstitutional. The court considered that the secondary effects of nudist camps, such as curiosity seekers and voyeurs, could be dealt with through regulation and the conditional use permit procedure, because other recreational clubs would pose similar parking or traffic problems. *Elysium*, 283 Cal. Rptr. at 701. The court refused to find a confiscatory taking absent a showing that the land use regulation did not substantially advance the precise state interest which had validly motivated the regulation. The court found no claim of denial of economically viable use, and that land could be used for one acre residential lots.

There is one other Connecticut case citing to *Nollan*, but refusing to apply it: Paupack Dev. Corp. v. Conservation Comm'n, 640 A.2d 70 (Conn. 1994). In *Paupack*, the town conservation commission denied a developer an inland wetlands permit to construct a house in a substantially complete subdivision. The court upheld it on statutory construction grounds, noting that the plaintiff did not raise a taking claim and that it

footage zoning requirement for single family homes, which varied by zoning district and was unrelated to the number of occupants in a residence. The *Builders* court held that the regulation was not rationally related to either of the legitimate purposes it purported to advance: public health or conservation of property values. Unlike some appellate courts, the Connecticut Supreme Court scrupulously refused to second-guess the trial court's findings of fact, including that the regulation far exceeded the actual minimum standards required for health, and that only the housing code properly included such regulations intended to promote public health. However, the Connecticut Supreme Court overruled the trial court's conclusion that a particular builder's expert witness was not credible.

The builder was also able to convince the Connecticut Supreme Court that, where a governmental action has effects contrary to the general welfare — here, making housing less affordable — it is subjected to closer scrutiny than if its effects were all positive.[255] Thus, even though Connecticut's supreme court specifically rejected the argument that *Nollan*'s standard of review overruled the rational relationship standard,[256] it used an enhanced review based on state law standards. The supreme court's discussion of the evidence and rationales was quite detailed, and included such facts as: that the challenged East Hampton restrictions were more strict than over one hundred other Connecticut local governments, that fifty towns had no such regulations, that the town had failed to introduce evidence showing that smaller houses or plaintiff's proposed house would destabilize or decrease property values. There was, also, a detailed discussion of the effect of the regulation on the affordability of the modular house plaintiff sought to build.[257] The supreme court labelled as "questionable" the potential justifications that more expensive single family homes are necessarily more desirable and that such houses generate more taxes from persons better able to pay

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therefore did not consider potential constitutional liability under *Nollan* or the Connecticut Constitution. *Paupack Dev. Corp.*, at 73 n.10.

255. The court cited a New Jersey case, Home Builders League of South Jersey, Inc. v. Township of Berlin, 405 A.2d 381 (N.J. 1979), and Connecticut case law regarding the "flexibility" of review of exercises of the police power, Builders Service Corp. v. Planning & Zoning Commission, 545 A.2d 530, 539 (Conn. 1988).

256. *Builders Serv. Corp.*, 545 A.2d at 539 n.12.

257. *Id*. at 544–50.

taxes and who places less demand on municipal services.[258] The town's asserted "special defense," proving the many steps it had taken to provide for affordable housing throughout its jurisdiction, was rejected by the supreme court as irrelevant as a matter of law to this as-applied challenge.[259]

D. Strongly Pro-Developer States

Even though it is considered one of the strongly developer-minded states, the decisions in Illinois citing *Nollan* fail to demonstrate any marked trend to favor property owners. The one case that found a taking involved pre-condemnation blight and likely would have found a taking even before *Nollan*.[260] The others have upheld the challenged regulations without any extensive or meaningful analysis of *Nollan*.[261]

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258. *Id*. at 543.

259. *Id*. at 548–49.

260. *See* Department of Transp. v. Amoco Oil Co., 528 N.E.2d 1018 (Ill. App. Ct.) (refusing to find valid an agreement that improvements, constructed pursuant to a permit for access to freeway, would not contribute to the value of the property when it was eventually condemned for the widening of the freeway where the department could have denied access, but holding that this permit had no relation to any legitimate objective other than to limit the amount of just compensation to be paid in the eminent domain action, and was thus invalid, citing to *Nollan*), *appeal denied*, 535 N.E.2d 400 (Ill. 1988).

261. *See* Tim Thompson, Inc. v. Village of Hinsdale, 617 N.E.2d 1227, 1244 (Ill. App. Ct. 1993) (holding that minimum lot size regulation requiring that plaintiff develop its property into two lots, rather than the three platted lots, was not taking; citing *Nollan* for general *Agins* standard; construing Lucas v. South Carolina Coastal Council to leave room for regulatory takings based on denial of less than 100% of economically viable use; proper unit of analysis was entire property, rather than individual lots); *see also* LaGrange State Bank v. Village of Glen Ellyn, 591 N.E.2d 480 (Ill. App. Ct. 1992) (holding that a denial of variance from minimum lot width requirements did not violate due process or constitute a taking; distinguishing *Nollan* and *First English* because those plaintiffs owned the property at the time the land use restriction was imposed; the court apparently failed to note that the Nollans only had an option on their property at the beginning of that litigation); National Advertising Co. v. Village of Downers Grove, 561 N.E.2d 1300 (Ill. App. Ct. 1990) (holding that a denial of variance from size limitations in outdoor sign ordinance was not violative of First Amendment, due process, or a taking — plaintiff advertiser was lessee rather than property owner; ordinance did not interfere with its legitimate investment-backed expectations because sign was in violation of ordinance at time it was leased, there was no physical invasion, there was no evidence of denial of economically viable use, and ordinance promoted the common good of traffic safety and aesthetics); Stepan Co. v. Pollution Control Bd., 550 N.E.2d 682, 687 (Ill. App. Ct. 1990) (finding no taking in board's amendments to air emissions rules, even if the effect of the required compliance date was to require the company to close its plant down; stating, without analysis that the rule "substantially further[ed] the governmental pur-

E. Other States

Creative plaintiff's attorneys have argued *Nollan* in a wide-ranging group of factual settings in the "other" states. These include the legitimacy of a state-wide cap on the amount of hazardous waste that disposal facilities in the state of Alabama can accept in a given year[262] and of a state's use of confidential oil well data for its internal efforts to conserve natural resources and maximize its profits on oil leases.[263] Others occupy very familiar fact settings in the takings jurisprudence, such as a Colorado case concerning the regulation of the amount of coal that must be left in the ground to support the surface estate.[264] The Colorado courts have also refused to find takings based on *Nollan* in cases concerning the regulation of mining and mill sites.[265]

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pose of restoring, protecting, and enhancing the quality of the environment" under *Nollan*).

262. *See* Hunt v. Chemical Waste Management, Inc., 584 So. 2d 1367, 1380–85 (Ala. 1991) (holding that the cap "advanced" legitimate state interests and did not render commercially impracticable the operation of such facilities, the court referred to its prior analysis of the legitimacy of the cap under the Contracts and Commerce Clauses, under RCRA, CERCLA and TSCA, and under the Due Process Clause as "already establish[ing] several times over" the advancement of legitimate interests).

263. *See* Alaska Dep't of Natural Resources v. Arctic Slope Regional Corp., 834 P.2d 134,139 (Alaska 1991). The court rejected the applicability of "physical interference with real property" cases including *Nollan*. *Id*. The court noted that United States v. Sperry Corp, 493 U.S. 52 (1989), supported its unwillingness to recognize the possibility of physically occupying or invading intangible property. *Artic Slope*, 834 P.2d at 142 n.10. The court found no investment backed expectations of confidentiality of data under *Monsanto*. *Id*. at 142.

264. City of Northglenn v. Grynberg, 846 P.2d 175, 180 n.5 (Colo. 1993) (maintaining there was no taking).

265. *See* Colorado Dep't of Health v. The Mill, 887 P.2d 993 (Colo. 1994) (owner attempted to claim unregulated right to use his property as it was, without modification; the property was a uranium-contaminated mill site, and the court held that there was no reasonable investment-backed expectations to use the property without cleaning it up; the court rejected a taking claim premised on the clean-up requirement, and referred to *Lucas* and longstanding state law that one cannot maintain a nuisance); *see also* Cottonwood Farms v. Board of County Comm'rs, 763 P.2d 551, 556 (Colo. 1988) (citing *Nollan* as support for the notion that in takings cases, like due process cases, the focus of the inquiry "shifts from the economic interest of the owner to the efficacy of the zoning regulation" at issue; no taking in denial of rezoning to permit mining of aggregate on A-1 land zoned to permit five-acre residential lots or agricultural uses, as not denying all reasonable use, despite fact that property had been identified as protected under state statute prohibiting rezonings or other such actions to uses that would interfere with the extraction of the minerals on site).

In *Van Sickle v. Boyes*,[266] the Colorado Supreme Court was faced with a challenge to the City of Boulder's attempts to enforce its updated fire code provisions against an older building. It refused to engage in its own exhaustive review and analysis of the state's legitimate interests, of the validity of the technical requirements of the fire code, or of the comparative benefits of the plaintiff's suggested safety measures in its application of the *Nollan* "substantially advance" standard, despite its recognition that *Nollan* required a "close connection" between the regulation and the interest it purports to advance.[267] The supreme court concluded that the city's safety code "substantially advanced" the city's legitimate interest in fire protection without such an inquiry, and noted that "[c]ourts are singularly unsuited to engage in such a task."[268]

Thus, although *Nollan* is considered by some state courts, it does not appear to have had the watershed significance suggested by some early commentators and feared by some local governments. In the cases most directly related to land use exactions, the California cases, the courts have clearly stated that the non-physical occupation type of regulations are not even affected by *Nollan*. The Connecticut case suggests that, at most, the effect of *Nollan* gives the traditional level of scrutiny a "bite" where disadvantaged classes are concerned, as in *City of Cleburne v. Cleburne Living Center*,[269] where the Supreme Court applied a stricter equal protection review to discrimination against homes for the mentally retarded. This Article will now examine *Dolan*, and determine whether it has affected the legitimacy of exactions.

VIII. THE DOLAN *CASE*

Mr. and Mrs. Dolan owned 1.67 acres of land in the City of Tigard's downtown central business district, on which they operated a successful plumbing and electric supply store, served by a gravel parking lot. They sought approval to tear down their existing 9700 square-foot building in order to expand their business into a 17,600 square-foot new building. They also proposed to expand their park-

266. 797 P.2d 1267 (Colo. 1990) (en banc).
267. *Id*. at 1272.
268. *Id*.
269. 473 U.S. 432 (1985).

ing lot by paving 20,200 square feet for thirty-nine parking spaces.[270]

The Dolan property abuts Fanno Creek, and the creek's 100-year flood plain is unusable for commercial development.[271] The city's planning and zoning documents recognized the unbuildable nature of the Fanno flood plain. The flood plain is designated in the city's Master Drainage Plan, which recommended that it remain free of structures and preserved as greenway. The city's Comprehensive Plan required that the flood plain be included in the city's greenway system, and its Community Development Code required dedicating sufficient open land area for adjoining greenway within the flood plain.[272]

The city also had adopted a pedestrian/bicycle plan, based on a transportation study. The Community Development Code provided that new development must facilitate pedestrian/bicycle pathways if it is located on a street with a designated pathway or adjacent to a greenway.[273] Specifically, the Code required dedication of land for the construction of a pedestrian/bicycle pathway within the flood plain pursuant to the adopted pedestrian/bicycle plan.[274] The Code also required fifteen percent of the total site coverage to be landscaped or preserved as open space.[275]

The Dolans submitted an application for their proposed development to the City Planning Commission in 1991.[276] The application was approved subject to conditions, including that the area lying within the 100-year floodplain be dedicated for a greenway and that an additional fifteen foot strip adjacent to the flood plain be dedicated for a pedestrian/bicycle pathway.[277] The required dedications

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

271. *Id*.; *see also* Dwight H. Merriam & R. Jeffrey Lyman, *Testing the Constitutionality of Land Use Exactions in* Dolan *and* Nollan, 17 ZONING AND PLAN. L. REP. 345 (1994) (describing the area, including the steep slopes to Fanno Creek).

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

273. *Id*. at 2313 n.1.

274. *Id*.

275. *Id*.

276. The property was zoned for commercial use, but was located within an "action area" overlay zone within which the city may impose conditions for anticipated transportation and public facility demands. Dolan v. City of Tigard, 854 P.2d 437, 438–39 (Or. 1993), *rev'd*, 114 S. Ct. 2309 (1994).

277. The Planning Commission's final order also required a traffic impact fee in the amount of $14,256 to be paid sometime during the development of the project; a fee in lieu of water quality improvements to mitigate the increase in impervious surface and accompanying runoff; and relocation of the eastern portion of the proposed building for

totalled approximately ten percent of the lot area, which could also be used to meet the open space requirements of the Code.[278] The Dolans requested a variance from the dedication conditions but did not offer alternative mitigation measures, as the city code allowed. They argued simply that the required dedications were unconstitutional.

The City Planning Commission denied the requested variance, and made certain findings related to the dedication conditions.[279] Specifically, it made a finding regarding the flood plain dedication that:

> anticipated increased stormwater flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes . . . [and] the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site.[280]

In regard to the pathway dedication, the City Planning Commission found that:

> it is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreation needs . . . [and] to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed.[281]

The Dolans appealed the dedication condition to the Tigard City Council, the Oregon Land Use Board of Appeals and the Oregon Court of Appeals, alleging that each dedication condition was considered a taking of property under the Fifth Amendment. Each of these appellate bodies upheld the city's conditions.

The Oregon Supreme Court issued its *en banc* decision in July,

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the purposes of protection and enhancement of the floodplain bank. These conditions were not challenged by the Dolans. *Dolan*, 114 S. Ct. at 2309.

278. *Id*. at 2314.

279. The findings in the Planning Commission's 27 page final order are set forth in more detail in the Oregon Supreme Court case, 854 P.2d at 439–40.

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

281. *Dolan*, 854 P.2d at 439.

1993.[282] The issues were narrowly drawn; the Dolans did not challenge the city's findings or their evidentiary support in the record.[283] Also, the Dolans did not dispute that establishing a greenway in the flood plain for stormwater or that providing a pedestrian/bicycle pathway system are legitimate public purposes. Instead, the Dolans' contention was that the relationship between the impacts of the proposed development and the exactions did not meet the "essential nexus" test of *Nollan v. California Coastal Commission*.[284]

The Oregon Supreme Court held that *Nollan* did not require as stringent a relationship as argued by the Dolans, but only required that exactions must be "reasonably related" to impacts. The supreme court found *Nollan*'s "essential nexus" test to be met by the city's conditions, and that "an exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of a permit would serve."[285] The court read *Nollan* not as abandoning the requirement that exactions and impacts be "reasonably related," but rather as having rejected the California Coastal Commission's permit condition because it did not meet even "the most untailored standards."[286]

The United States Supreme Court accepted certiorari and issued its opinion a month after oral argument. In its decision, the Court carried forward its growing interest in greater scrutiny of government decisions, which had become evident in earlier cases including *Nollan* and *Lucas v. South Carolina Coastal Council*.[287] In *Dolan*, the Court's deep division over this direction is evidenced not only in the increasingly common five–four split in the Court, but also in the vehement dissent by Justice Stevens who, in a departure from normal Court procedures, read his opinion from the bench.

A. United States Supreme Court Holdings in *Dolan*

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282. *Id*. at 437.
283. *Id*. at 440.
284. 483 U.S. 825 (1987).
285. *Dolan*, 845 P.2d at 443.
286. *Id*. (citing *Nollan*, 483 U.S. at 838).
287. 502 U.S. 966 (1992); *see* articles cited *supra* note 6; *see also* Justice Stevens' comment "One can only hope that the Court's . . . candid disavowal of the term `rational basis' to describe its new standard of review . . . [does] not signify a reassertion of the kind of superlegislative power the court exercised during the *Lochner* era." *Dolan*, 114 S. Ct. at 2329 (Stevens, J., dissenting) (citations omitted).

In *Dolan*, the United States Supreme Court majority added another test to the "essential nexus" requirement of *Nollan*. The *Dolan* Court explained that a question left open by the *Nollan* decision was whether "the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development."[288] The Court's answer is found in a new term for land use jurisprudence — a "roughly proportional" degree of connection.

While explicitly refusing to adopt it *per se*, the *Dolan* Court explained that the "reasonable relationship" requirement adopted by a majority of the state courts is similar to its "roughly proportional" degree of connection. The new federal standard is an intermediate level of scrutiny, falling between a lax standard of "very generalized statements"[289] presented in certain state court opinions and the exacting "specific and uniquely attributable" test of other state courts.[290] Under the latter standard, the government must demonstrate that its exaction is directly proportional to the specifically created need.[291]

The *Dolan* Court declined to use the term "reasonable relationship," however, because it appeared too similar to the "rational basis" test, a minimal level of scrutiny that is applied under the Equal Protection Clause of the Fourteenth Amendment. The *Dolan* Court further explained that, under the roughly proportional test it adopted,

> [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.[292]

The Oregon Supreme Court had made its decision based on

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288. *Dolan*, 114 S. Ct. at 2312.

289. *Id*. at 2318–19. The *Dolan* Court cited examples. *See* Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966); *see also* Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964).

290. *Dolan*, 114 S. Ct. at 2318–19; *see, e.g.*, Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961). Note that the Illinois Supreme Court has recently reaffirmed that it will continue to apply this more exacting test, even after *Dolan*. *See supra* notes 260–91 and accompanying text.

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

292. *Id*. at 2319–20.

what it perceived to be the "reasonable relationship" test required by *Nollan*. Like the United States Supreme Court, the Oregon Supreme Court cited to the case of *Parks v. Watson*[293] as representing that test.[294] However, when applying its test to the city's written findings, the Supreme Court could not agree that the test had been met. Instead, it reversed the judgment of the Oregon Supreme Court and remanded the case for further proceedings.[295]

It is clear that the Oregon Supreme Court did not look beyond the City Planning Commission's finding that the pedestrian/bicycle pathway system "could" offset some of the traffic demand created by the expanded use of the site. The United States Supreme Court, however, refused to accept the Planning Commission's finding at face value, but demanded more. Indeed, along with the new test, the Court established a new and stricter burden of proof for government, in what may become the most significant holding of the case. As a result, no longer do government findings come clothed in a presumption of correctness, instead the burden is now on the regulator to justify the required dedication. According to the United States Supreme Court, the new burden is appropriate to the type of decision made in this case, that is, "an adjudicative decision to condition petitioner's application for a building permit on an individual[ized] parcel."[296]

In reviewing the city's findings on the pedestrian/bicycle pathway, the *Dolan* Court conceded that "in theory" the pathway "provides a useful alternative means of transportation for workers and shoppers."[297] The *Dolan* Court also had no doubt that the proposed enlargement of the retail sales facility would increase traffic on the streets.[298] However, the city did not meet its burden of demonstrating that "the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement."[299] The city must quantify its findings in support of the dedication, although "no precise mathematical calculation is re-

293. 716 F.2d 646 (9th Cir. 1983).
294. *Compare Dolan*, 114 S. Ct. at 2319 *with Dolan*, 854 P.2d at 442.
295. *Dolan*, 114 S. Ct. at 2322.
296. *Id*. at 2320 n.8.
297. *Id*. at 2318.
298. *Id*. at 2321.
299. *Id*.

quired."[300]

The *Dolan* Court was similarly unimpressed by the city's analysis regarding stormwater runoff. The Court found it "obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the Creek's 100-year floodplain" and accepted that the expansion of the impervious surface on the property would increase the amount of stormwater runoff into Fanno Creek.[301] However, the *Dolan* Court questioned why a *public* greenway, as opposed to a *private* one, was required, suggesting that a simple requirement that the building be located out of the flood zone would be sufficient to limit the stormwater pressures on Fanno Creek. It clearly indicated its disfavor of the public access requirement by graphically describing its difficulty in seeing "why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek."[302]

The simple holdings of the case tell only half the story. Woven into the opinion and the dissent is a larger debate about how the courts should approach constitutional takings, the import of which has yet to be determined. Furthermore, the *Dolan* Court itself may not view this decision as a narrow one, limited to required dedications of land. A day after the *Dolan* decision was announced, the United States Supreme Court vacated a California appellate decision upholding the imposition of various development fees, and remanded the case specifically for consideration in light of *Dolan*.[303] On October 3, 1994, the Court granted certiorari and remanded a second case to the Court of Appeals of Oregon for further consideration in light of *Dolan*.[304] In *Altimus v. Oregon*, the Oregon appellate court had found constitutional a city's policy to require dedications as a condition to annexation.[305] More recently, the Court denied certiorari in a Georgia case upholding parking lot landscaping re-

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

301. *Id*. at 2318. "It is axiomatic that increasing the amount of impervious surface will increase the quantity and rate of storm-water flow from petitioner's property." *Id*. at 2320.

302. *Id*.

303. *See* Ehrlich v. City of Culver City, 114 S. Ct. 2731 (1994).

304. Altimus v. Oregon, 115 S. Ct. 44 (1994).

305. Oregon Dep't of Transp. v. Altimus, 862 P.2d 109 (Or. Ct. App. 1993), *cert. denied*, 871 P.2d 122 (Or. 1994).

quirements.[306] However, Justices Thomas and O'Connor dissented from the denial, citing lower court conflicts in applying *Dolan* to legislative decisions. Their dissent strongly suggests that *Dolan's* rough proportionality test should apply more broadly, including legislative decisions, and perhaps to requirements other than land dedication.

B. Questions Raised by *Dolan v. City of Tigard*

1. Does Dolan *Extend to Other than Land Dedication Cases?*

The most narrow reading of *Dolan* suggests that its principles apply only to conditions of a permit requiring land dedications or easements. *Dolan* specifically builds on *Nollan*, itself a land dedication case. The decision is replete with references to a concern about the landowner's "right to exclude others," and emphasized that this right is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[307]

The Court also explicitly distinguished *Dolan* from earlier land use regulation cases,[308] on the basis that "the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city."[309] Moreover, the state cases cited by the Court in its "roughly proportional" discussion are land dedication cases.[310]

a. *Dolan* As a Title Take Case

Like the cases following the Court's pronouncements in *Nollan*, a significant number of the cases following *Dolan* have read the Court's decision to apply only to "title takes" — exactions which require the owner to deed property to the government.[311] In *Harris*

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306. Parking Ass'n v. City of Atlanta, 115 S. Ct. 2268 (1995).

307. *Dolan*, 114 S. Ct. at 2320 (citing Kaiser-Aetna v. United States, 444 U.S. 164, 176 (1979)).

308. *See* Agins v. Tiburon, 447 U.S. 255 (1980); *see also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

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

310. Some of the cases also provide for fees in lieu of dedication. *See* cases cited *supra* note 137.

311. *See* Third & Catalina Assoc. v. City of Phoenix, 895 P.2d 115 (Ariz. Ct. App. 1994) (holding that *Dolan* does not apply to city regulation requiring retrofit of commercial highrises with sprinkler systems).

v. City of Wichita,[312] owners of approximately eighty acres lying within a designated "airport overlay district" (AOD) challenged AOD usage restrictions on the land, claiming takings, substantive due process and equal protection violations. The *Harris* court applied a reasonableness standard to the owners' facial challenge to the AOD, citing to the wide latitude traditionally granted to local governments' exercise of the police power.[313] The government defendants were granted summary judgment on the court's finding that the land use restrictions, requiring low density uses, and the boundaries of the district were reasonably calculated to achieve a legitimate purpose: to minimize the impact of an airline crash on the property within the AOD. The *Harris court* rejected the owners' argument that the regulations were, in effect, a *per se* taking because they permitted a physical invasion into the air space and created an "easement on the land for safer airplane crashes."[314]

Dolan was decided a day after the initial decision was issued in *Harris*, and the owners petitioned the court for reconsideration. After reviewing *Dolan*, the court decided that it did not apply to the AOD restrictions because they did not impose upon the owners the obligation to deed portions of their land to the local government.[315] *Dolan*, the court explained, was based on the facts of that case, and specifically distinguished from other land use regulation cases by the United States Supreme Court.[316]

In *Waters Landing Ltd. v. Montgomery County*,[317] developers challenged county transportation impact taxes as constitutionally

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312. 862 F. Supp. 287 (D. Kan. 1994).

313. *Id*. at 292.

314. *Id*. at 291.

315. *Id*. at 294.

316. *Id*. The AOD regulations were also distinguished because they were legislative in character. *Id*.; *see* discussion *infra* notes 364–90.

317. 650 A.2d 712 (Md. 1994); *see* Maryland Aggregates Ass'n v. State, 655 A.2d 886 (Md.) (discussing how the transfer of wealth, arising from statutes regulating the dewatering of surface mines in Maryland's karst terrain, does not violate taking clause because it does not render mining commercially impracticable or deny all beneficial use, citing to *Lucas* and *Yee* also citing to *Dolan* for general taking principle), *cert. denied*, 115 S. Ct. 1965 (1995); *see also* Security Management Corp. v. Baltimore County, 655 A.2d 1326, 1330 (Md. Ct. Spec. App. 1995) (citing *Waters Landing* in support of assertion that *Nollan*, *Lucas*, and *Dolan* have not made the takings test more strict where there is no allegation of deprivation of all use; also concluding that watershed protection zoning substantially advances a legitimate state interest, and noting that the creation of such a zone is "quintessentially a legislative judgment call").

invalid and violative of state statutes. Montgomery County originally imposed the transportation improvement charges as impact "fees" but they were struck down in 1990 as unauthorized taxes under Maryland law.[318] The court upheld the taxes under state law and allowed their retroactive application.[319] The impact tax also survived constitutional scrutiny against an equal protection claim. Although the court initially dismissed *Dolan* as inapplicable because the takings clause was not implicated in the Maryland case, it went on to distinguish the case from the facts in *Dolan*. In *Waters Landing*, the court specifically noticed that the tax did not require owners to deed portions of their property, and that the tax was imposed by legislation, not adjudication.[320] More recently, the Supreme Court of Kansas found that *Dolan* did not apply to a transportation impact fees program because *Dolan* was a land dedication case.[321]

The Supreme Court of Georgia applied a similar analysis to the City of Atlanta's surface parking lot regulations. In *Parking Association of Georgia, Inc. v. City of Atlanta*,[322] an association of companies managing or owning lots and individual owners sued the city for alleged federal and state constitutional violations. The regulations required minimum barrier curbs and landscaping areas equal to at least ten percent of the paved area within a lot, ground cover, and at least one tree for every eight parking spaces.[323] It applied to all surface parking lots with thirty or more spaces in several downtown and midtown zoning districts.[324] The Georgia court specifically declined to apply *Dolan*, distinguishing it in part on the basis that Tigard, unlike Atlanta, had required the landowners to dedicate property and also because Atlanta had made a legislative determination, not an adjudicatory decision.[325]

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318. *See* Eastern Diversified Properties, Inc. v. Montgomery County, 570 A.2d 850 (Md. 1990).

319. *Waters Landing*, 650 A.2d at 717. It found that the county was authorized to re-enact the fee as an "excise tax[ ], a tax imposed upon the performance of an act, the engaging [of] an occupation or the enjoyment of [the] privilege." *Id*. (quoting Continental Motor Corp. v. Township of Muskegon, 135 N.W.2d 908, 911 (Mich. 1965)). In this case, the tax is imposed on the privilege of developing property. *Id*.

320. *Id*. at 724.

321. McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995).

322. 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 115 S. Ct. 2268 (1995).

323. *Id*. at 201–02.

324. *Id*. at 201.

325. *Id*. at 203 n.3.

On petition for a writ of certiorari to the United States Supreme Court, the owners found sympathy from Justices Thomas and O'Connor. In their dissent from the denial of certiorari, the Justices argued that the case should be heard to resolve a conflict in the lower courts about whether *Dolan* should be applied to such legislatively-enacted regulations.[326]

b. *Dolan* and Other Forms of Regulation

Despite the federal and state court decisions limiting *Dolan* to its facts and applying it only to land dedication requirements, the Supreme Court's vacating of *Ehrlich* and remand in light of *Dolan* may reasonably be taken to mean that the Court itself may not limit *Dolan* to land dedication cases. However, it is questionable what real effect the remand will have on takings law in cases other than land dedication cases. *Ehrlich's* treatment by the California court on remand may be instructive. In December 1994, the California court modified its earlier opinion but once again upheld the fees under substantially the same reasoning, finding specifically that the recreation mitigation fee met the "roughly proportional" test and that *Dolan* was inapplicable to the art fee.[327] The case was accepted for review by the California Supreme Court in March 1995.[328]

Ehrlich involved two fees imposed by Culver City as conditions to various city approvals of the redevelopment of a private tennis club and recreational facility into a townhouse community.[329] The property owner had built and operated private tennis club and recreational facility for more than ten years, having purchased the property subsequent to the city's specific approval for such a facility from

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326. *See* discussion *supra* notes 113–18.

327. Ehrlich v. City of Culver City, No. 1355523 (Cal. Ct. App. Dec. 23, 1994). Justice Grignon, who wrote the original opinion for the unanimous court, also wrote the unpublished opinion. Justice Armstrong dissented on the basis that the mitigation fee did not relate to the nature and extent of the proposed townhouse development, because the city made no determination that the development would impact the city's recreational facilities, and the fee was not specifically restricted to replacement of the tennis facilities.

328. Ehrlich v. City of Culver City, 19 Cal. Rptr. 2d 468 (1993), *vacated by* 114 S. Ct. 2731 (1994). The case had not been resolved as of the date of publication of this Article.

329. The approvals included rezoning from commercial to low density multiple family uses, approval of a specific plan, a general plan amendment, and tentative tract map approval. *Id*. at 473.

the previous owner.[330] The club was not a financial success, however, and in 1988 the developer closed the club and applied to the city for permits to construct townhouses.[331]

The city initially denied the applications on the grounds that the existing recreational land use restrictions were needed and a land use change would negatively impact the availability of community recreational facilities, public or private, in the city. After filing a complaint in state court, the developer requested the city to reconsider and as a compromise, offered to build four unlit tennis courts in the city to replace the recreational facilities it was removing.[332] The city's estimates of the replacement cost for various recreational components of the club facility ranged from $135,000 to $300,000, with the replacement cost of the tennis courts component specifically ranging from $275,000 to $300,000.[333] The city approved the project subject to a $280,000 recreational mitigation fee, rejecting the developer's proposal to build four tennis courts. The parties entered into an agreement which provided, in part, that the city would use the fees "only for additional recreational facilities, as directed by the City Council."[334] The city also required the payment of a $30,000 fee in lieu of dedication of parkland.

Additionally, the developer paid a $33,220 fee in lieu of participating in the city's Art In Public Places Program. The program, adopted by ordinance in 1988, provided that large development projects[335] must participate in one of four ways: (1) placing art approved by the city on the project; (2) paying a fee in lieu of such artwork into a city art fund for the purchase of art for display in the city; (3) posting a bond in the amount of the fee; or (4) donating city-approved art to the city. The cost of the art or the amount of the in-lieu fee must equal one percent of the building valuation, calculated pursuant to the ordinance's formula.[336]

The developer challenged the recreational mitigation and art

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330. *Id*. at 471.

331. *Id*. In 1981, the developer unsuccessfully applied to the city for approvals to construct an office building on the site. *Id*.

332. *Id*.

333. *Id*. at 473.

334. *Ehrlich*, 19 Cal. Rptr. 2d at 474 (citing the city's and the developer's lien agreement).

335. *Id*. at 480. These include development projects with a building valuation in excess of $500,000 and remodeling projects with a valuation in excess of $250,000. *Id*.

336. *Id*.

fees. The trial court invalidated the $280,000 mitigation fee and upheld the art fee. The California Court of Appeals upheld both fees in an extensive opinion. In the course of the litigation, the townhouses were built and sold.[337]

In response to the claim that the mitigation fee was a taking of private property, the court explained that *Nollan* was satisfied because: 1) the city could have denied the request without the denial constituting a taking[338] and 2) the mitigation fee was rationally related to a legitimate governmental purpose. In its original opinion, the court also rejected the developer's argument that a heightened scrutiny applied to the fees, under which the fees must be found to "substantially advance" the governmental purpose, deciding instead that monetary exactions need only be rationally related to the governmental purpose.[339] The court alternatively found that, even if the heightened scrutiny test of *Nollan* was applicable, the mitigation fee would meet the *Nollan* test as having an essential nexus between the land use restriction and the fee.

On remand, the *Ehrlich* court supplemented its reasoning with findings from studies completed at the time of the project's denial, and further explained the rationale for finding the "essential nexus" between the fee and the governmental interest in making available community recreational facilities. Originally, the court had explained that the fee was directly related to the loss of the community recreational facilities resulting from the "benefit" conferred on the developer: the city's approval of the townhome project. The fact that the existing facility was privately owned and the fee was to be used for public recreational facilities was not a compelling distinc-

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337. *Ehrlich*, No. 13055523, slip op. at 5.

338. *Ehrlich*, 19 Cal. Rptr. 2d at 475. The court did not accept the fact that the "owner ha[d] not been able to make a profit from a particular recreational facility" sufficient evidence to "establish that *no* community recreational facility could be operated profitably on the [site]." *Id*. (emphasis added). Evidence in the record indicated that a facility could be profitable under certain circumstances. *Id*. Furthermore, the developer purchased the property while it was restricted for recreational use "and with the intent to develop the property as a private tennis club," so that the restrictions did not interfere with his reasonable investment-backed expectations. *Id*. at 475.

339. *Id*. The original opinion found precedents in Blue Jeans Equities W. v. City and County of San Francisco, 4 Cal. Rptr. 2d 114 (1992) (San Francisco Transit Impact Development Fee) and Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991) (low income housing fee), discussed *supra* at notes 123–26, 232–33. Their precedential value is now open to question because of the California Supreme Court's denial of certiorari in *Ehrlich*.

tion to the court in its original opinion, because the city had a legitimate need for either public or private community facilities. Furthermore, although the developer had abandoned the existing facility, the city could require that the developer use his property, if at all, for recreational purposes. Although the developer was entitled to go out of business, leave the land vacant or sell it, the city was not compelled to permit a change in use, just as a city is not compelled to permit apartments to be converted to condominiums, as an example.[340]

The court on remand also judiciously omitted its reference to the "benefit" granted to the developer,[341] and instead emphasized that the fee "bears a reasonable relationship to the projected impact of the rezoning, i.e. loss of recreational facilities, rather than to the projected impact of the proposed development on the need for recreational facilities."[342] Citing to *Dolan*, the court explained on remand that

> where a proposed development encroaches on existing restricted-use space (e.g., greenway, open, visual access to the ocean, recreational) requiring the developer `to provide some alternative [similar-use] space for the public either on the [developer's] property or elsewhere' is related both in nature and extent to the impact of the proposed development.[343]

The court also had originally upheld the amount of the fee as not arbitrary and excessive, because the fee was related to the cost of constructing four tennis courts at another location. On remand, the court emphasized that the amount of the fee was based on an individualized determination and supported by quantifiable findings. The court also found that it would have been reasonable to require the developer to provide alternative private lands that would be restricted to recreational use which, according to the court, would have been arduous and costly. The developer's offer to build tennis

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340. *Ehrlich*, 19 Cal. Rptr. 2d at 476.

341. The majority in *Dolan* rejects Justice Stevens' argument that the land dedication conditions there were simply business regulations warranting a strong presumption of constitutionality. *Dolan*, 114 S. Ct. at 2320. Justice Stevens would have the court balance "the burden associated with the loss of the power to exclude" with the benefits of enlarging the store and parking lot. *Id*. at 2325 (Stevens, J., dissenting).

342. *Ehrlich*, No. 13055523, slip op. at 21 n.3.

343. *Id*. at 22 (citing *Dolan*, 114 S. Ct. 2309, 2321).

courts was apparently on city land and did not include the intent to operate them. The court reasoned that "the developer cannot now contend that the *form* of the condition, which he proposed, is invalid."[344] The question remains whether a similar dedication would be upheld in the absence of a voluntary offer from the property owner.[345]

The original validation of the in-lieu art fee was analogized to other police power requirements such as setbacks, landscaping requirements or required open space. The court had recognized that such typical permit conditions ordinarily cannot be met by offsite improvements or in-lieu fees. The option of offering offsite art or in-lieu fees therefore made the art fee more similar to parkland dedication requirements. However, the art fee was distinguished further from parkland dedication fees, because the developer was given the ultimate choice whether to pay the fee or to place privately-owned art on the project, which would presumably add value to the project. On remand, the court found *Dolan* was inapplicable because the art fee was essentially a legislative determination applicable to all large development projects.[346]

Other courts have considered the application of *Dolan* to impact fees and have upheld the fees in Washington and Illinois.[347] In Arizona, an appellate decision upholding a water resource impact fee was on the Arizona Supreme Court docket when *Dolan* was decided.[348] In *Home Builders Association v. City of Scottsdale*,[349] the Arizona Court remanded the matter with directions to reconsider in light of *Dolan*. On remand, the court indicated that the fee might be subject to the takings analysis in *Dolan*, particularly considering the United States Supreme Court's remand of *Ehrlich*.[350] However, it determined that the water resources fee was not, in fact, subject to the *Dolan* analysis because it involved a legislative, not an adjudicative decision, therefore not implicating the *Dolan* tests.[351] The

344. *Id*. at 24.

345. *Compare* FCC v. Florida Power Corp., 480 U.S. 245 (1987) *with* the rent control cases cited *supra* notes 54–127, which emphasize the property owner's initial invitation to another to occupy the property as a factor in declining to find a physical taking.

346. *Ehrlich*, No. 13055523, slip op. at 39 n.6.

347. *See* discussion *supra* notes 260–61.

348. Homebuilders Ass'n v. City of Scottsdale, 902 P.2d 1347 (Ariz. Ct. App. 1995).

349. *Id*.

350. *Scottsdale*, 902 P.2d at 1351; *see supra* notes 327–28.

351. *See* discussion *supra* notes 260–61.

dissent argued that the city's ordinance would fail *Nollan's* nexus requirement, based on the Homebuilders Association's evidence at trial that Scottsdale could not provide water from the sources originally planned.[352] For the same reason, the dissent would also find that *Dolan's* rough proportionality standard could not be met.[353]

But for a failure of the developers to make a timely challenge, the First Circuit apparently would have applied *Dolan* to invalidate a low income housing fee exacted as a condition to a rezoning change.[354] The developers obtained a rezoning for higher density in order to redevelop an existing low income housing area for condominiums. As a condition of the rezoning, they agreed to pay a sum of $2.5 million, which was to be placed in a low income housing trust fund, and executed a promissory note to make the payments regardless of how many units were actually built and sold. After proceeding with their plans and making two payments, they defaulted. When the city sought to recover under the note, the developers defended their default on the basis that the consideration for the promissory note was illegal contract zoning. Although decided against the developers on a timeliness issue, the appellate court indicated that the record amply supported the district court's finding that there was no rational nexus between the payment and any demonstrable burden created by the zoning change.[355]

Although not a land dedication case, the Eighth Circuit referenced *Dolan* in *Christopher Lake Development Co. v. St. Louis County*,[356] which found constitutional violations where a subdivision developer was compelled to purchase land and install a drainage system that would serve other development in the watershed area. After construction of the system, the county refused to require repayment of a *pro rata* share of these costs from future developers. The court was persuaded that the developer was forced to "bear a burden that should fairly have been allocated throughout the entire watershed area," thereby violating equal protection and due process rights.[357] The case was remanded to the district court to deter

352. *Scottsdale*, 902 P.2d at 1353–54 (Grant, J., dissenting).
353. *Id*.
354. *See* City of Portsmouth v. Schlesinger, 57 F.3d 12 (1st Cir. 1995).
355. *Id*. at 13.
356. 35 F.3d 1269 (8th Cir. 1994).
357. *Id*. at 1275. The Eighth Circuit is, thus, among those federal courts which distinguish between "arbitrary and capricious due process violations" and "due process

mine the proper allocation of costs.

Certainly *Dolan* has had some immediate effects in cases involving fact patterns other than land dedications. Perhaps most far afield is *Manocherian v. Lenox Hill Hospital*,[358] wherein New York's highest court applied *Dolan* to support its finding that the state rent control law effected a taking of the property of apartment building owners.[359] The state law allowed non-profit hospitals an exemption from state rent control requirements, which otherwise requires that a lessor must have its primary residence in a rent-controlled apartment in order to maintain rent-controlled rates. Non-profit hospitals are thus able to use this exemption to sublet apartments to their employees at reduced rents.

The court found that under a *Nollan* and *Dolan* analysis, the building owners bore a disproportionate burden in order to benefit a select group, the non-profit hospitals, in violation of the takings clause. The court asserted that *Nollan* and, by implication, *Dolan* "refrained from placing any limitations or distinctions or classifications on the application of the `essential nexus' test."[360] The court concluded that the "peripheral and generalized state interests offered as justification" for the regulation were not closely or legitimately connected to the goals of rent control.[361] Notably, the court distinguished this case from *Yee v. City of Escondido*,[362] which upheld a local mobile home rent control ordinance against a physical takings challenge. The New York court characterized the local law in *Yee* as "general, not a targeted, narrow, special interest (regula-

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takings". For an excellent discussion of the difference, and the approaches among the various federal circuits generally to zoning challenges, see Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992); *see also* Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). The *Christopher Lake* court remanded the "taking without due process" claim without deciding which type of due process claim was made by Christopher Lake. *Christopher Lake*, 35 F.3d at 1275.

358. 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 115 S. Ct. 1961 (1995).

359. *Compare* rent control cases discussed *supra* notes 54–127.

360. 643 N.E.2d at 483–84.

361. *Id*. at 485. The court also suggested, but did not decide, that the legislation may have been invalid because it destroyed "reversionary property interests . . . a single element of an owner's bundle of rights." *Id.*; *see also* Laura M. Schleich, *Takings: The Fifth Amendment, Government Regulation, and the Problem of the Relevant Parcel*, 8 J. LAND USE & ENVTL. L. 381 (1993); *cf.* Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990).

362. 112 S. Ct. 1522 (1992).

tion)."[363]

2. Is Dolan *Limited to Adjudicative, as Opposed to Legislative Decisions?*

The Court in *Dolan* began its analysis of the case by discussing, as one side of the "ledger," the general authority of state and local government to engage in land use planning. The Court cited to earlier case law as reassurance that regulations that reasonably relate to and substantially advance legitimate state interests, and do not deny economically viable use of land, will not effect a taking.[364] However, the Court then clearly distinguished the land use regulations discussed in those cases on two bases: (1) they lack a land dedication requirement; and (2) "they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel."[365] Because the condition was an adjudicative decision, the Court also found it appropriate to place the burden on the city to justify the required dedication.[366] Thus, "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."[367]

One question raised by *Dolan* is when is a land use decision legislative, as opposed to adjudicative? Indeed, Justice Souter's dissent suggested that Tigard's decision to impose the conditions was legislative, because they were imposed pursuant to the city's Community Development Code. He further pointed out that the only adjudicative decision by the city was not to grant a variance, and that the case did not raise variance-type questions.[368]

Confusion on this issue is evident in the cases decided subsequent to *Dolan*. Both in Arizona and Maryland, the courts upheld development charges established by local ordinance on the basis that they were "legislative" decisions, and, thereby, out of the reach

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363. 643 N.E.2d at 486.

364. *Dolan*, 114 S. Ct. at 2316 (citing to Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); and Agins v. City of Tiburon, 447 U.S. 255 (1980)).

365. *Id*.

366. *Id*. at 2320 n.8.

367. *Id*. at 2319–20.

368. *Id*. at 2331 n.* (Souter, J., dissenting).

of *Dolan*. In *Homebuilders Ass'n v. City of Scottsdale*,[369] the court upheld the Scottsdale water development fee as involving a legislative rather than an adjudicative determination. On remand, specifically to consider *Dolan*, the appellate court found that the city's legislative body, after undertaking a sufficient analysis, had determined a policy and mandated uniform and specific means of accomplishing that policy. The development fee ordinance affected the entire city and set fees according to a standardized schedule, with no discretion in its application. Therefore, the court found that *Dolan* did not apply.[370]

Similarly, the Maryland Court of Appeals found that transportation impact taxes adopted by Montgomery County were legislative in nature, and that *Dolan*, therefore, did not apply.[371] The impact taxes were imposed in two areas of the county, as designated by the county council. The council had the further discretion to impose the fee in additional areas, based on certain factors listed in the county code.[372] Fees were based on the type of unit (residential or nonresidential) and the number of dwelling units or gross floor area.[373]

Neither the Montgomery County nor the Scottsdale cases discussed above indicate whether "variances" were permitted under the adopted ordinances. One must question if the cases were placed in a context more similar to *Dolan*, where a variance was denied, whether the "legislative" character of the charges would still control the result.

In land dedication cases, at least, the Oregon courts have heeded the United States Supreme Court's admonitions in *Dolan*, rejecting arguments that the dedications were legislative because they were required by local legislation. In *Schultz v. City of Grants Pass*,[374] the city conditioned a land partition on the dedication of right-of-way for abutting roads. The city argued that the street dedication provisions were not subject to a *Dolan* review because the city's ordinances required the imposition of the conditions and they

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369. 902 P.2d 1347 (Ariz. Ct. App. 1995). *See supra* notes 350–53 and accompanying text.

370. *Scottsdale*, 902 P.2d at 1351–52.

371. Waters Landing Ltd. v. Montgomery County, 650 A.2d 712 (Md. 1994); *see also supra* notes 350–53 and accompanying text.

372. 650 A.2d at 714 & n.3.

373. *Id*.

374. 884 P.2d 569 (Or. Ct. App. 1994).

were therefore the "functional equivalent" of legislative decisions.[375] The court rejected the argument, stating that "the city misses the point."[376] The nature of the exaction, that is, the deed requirement, was the overriding factor that required heightened scrutiny.

A month later, the Oregon court of appeals reviewed another dedication case and further clarified its reasoning. In *J.C. Reeves Corp. v. Clackamas County*,[377] the county required construction of certain street frontage improvements and elimination of a "spite strip" along the boundary of a proposed residential subdivision. Although the court remanded to the county for further findings, it reiterated that *Dolan* applies to the right-of-way and road improvement conditions.[378] According to the court, regardless of whether the condition is legislatively required or a case specific formulation, it is subject to the *Dolan* analysis. "A condition on the development of particular property is not converted into something other than that by reason of legislation that requires it to be imposed."[379]

If land dedication requirements "trump" the legislative/adjudicatory distinction, must any "fee in lieu" also be reviewed under *Dolan*? Certainly relevant is the fact that the state cases relied upon by the Supreme Court in *Dolan* to establish the new "rough proportionality" requirement included both dedication and fee in-lieu cases.[380] The Supreme Court of Washington, albeit in *dicta*, appears to assume that a fee in lieu of parkland dedication is subject to *Dolan*, and referred to the rough proportionality test to uphold King County's fee.[381] In the *Ehrlich* case, on remand, the court's rationale for upholding the mitigation fee under *Dolan* included that the fee

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375. *Id*. at 572–73.

376. *Id*.

377. 887 P.2d 360 (Or. Ct. App. 1994).

378. *Id*. at 363. The court assumed, without deciding, that *Dolan* applied to the requirement that the developer eliminate the "spite strip". *Id*.

379. *Id*. at 364 n.1.

380. *See* 114 S. Ct. at 2318–19, and cases cited therein. The cases cited by the majority opinion involving ordinances providing for fees in lieu of dedications in addition to land dedications included: Jenad, Inc. v. Scarsdale, 218 N.E.2d 673 (N.Y. 1966); Divan Builders, Inc. v. Planning Bd., 334 A.2d 30 (N.J. 1975); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984); Call v. City of W. Jordan, 606 P.2d 217 (Utah 1979); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965). In his dissent, Justice Stevens cited Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976). 114 S. Ct. at 2324 (Stevens, J., dissenting).

381. *See* Trimen Dev. Co. v. King Co., 877 P.2d 187 (1994) (en banc). Washington State cases are well developed in the *Nollan* and *Dolan* area; *see also* notes *infra*.

was merely a substitute for the cost of requiring the developer to build replacement tennis courts, which suggests that the mitigation fee is similar, at least, to an in-lieu fee. Of course, the city made no claim that the mitigation fee was required by a generalized ordinance. In contrast, although analogizing the art fee in part to parkland in-lieu fees, the *Ehrlich* court found that *Dolan* did not apply because the art fee was "essentially legislative," applicable to all large development projects.[382] The art fee program and its requirements were applicable generally through a "well-developed" ordinance.[383]

The legislative distinction was critical to the Supreme Court of North Dakota's decision to uphold a drainage district's requirement that a railroad company pay the costs of modifying its structures to comport with the drainage plan of the district.[384] Distinguishing *Dolan*, the court refused to find a constitutional taking, characterizing the railroad company's duty as arising not from an "adjudicative decision to condition," but rather from an express and generally legislated duty under the state statutes and the state's police power to regulate corporations.[385] The dissent's reminder that *Dolan*, *Nollan*, and earlier railroad cases demonstrate a re-emergence of the United States Supreme Court's interest in more fairly allocating the costs of public benefits was to no avail.[386]

At least two Supreme Court Justices have served notice that the adjudicative/legislative distinction should be subject to reevaluation. Recall that in *Parking Ass'n*, the Supreme Court of Georgia upheld parking lot regulations challenged as a constitutional taking, in part, because the regulations were legislative and "the city made a legislative determination with regard to many landowners and it simply limited the use the landowners might make of a small portion of their lands."[387] Justices Thomas and O'Connor dissented from the Supreme Court's denial of certiorari review of the case, pointing

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382. *Ehrlich*, No. 13055523, slip op. at 39 n.6.

383. 19 Cal. Rptr. at 480–81.

384. *See* Southeast Cass Water Resource Dist. v. Burlington N. Ry., 527 N.W.2d 884 (N.D. 1995).

385. *Id*. at 896.

386. *Id*. at 901 (Sandstrom, J., dissenting).

387. Parking Ass'n v. City of Atlanta, 450 S.E.2d 200, 203 n.3 (Ga. 1994), *cert. denied*, 115 S. Ct. 2268 (1995). The regulations applied to certain city zoning districts and to parking lots of a certain size within those districts. *Id*. at 201.

out that cases subsequent to *Dolan* are in conflict about the distinction.[388] Moreover, the dissent questioned "why the existence of a taking should turn on the type of governmental entity responsible for the taking" and further, "the general applicability of the ordinance should not be relevant in a takings analysis."[389] Finally, it appears that the dissent questioned whether *Agins* needs to be re-examined after *Dolan* as "the logic of these two cases appears to point in different directions."[390]

3. How Different Is "Roughly Proportional" from "Reasonable Relationship"?

The Supreme Court described the new "roughly proportional" test as similar to the "reasonable relationship" test adopted by the majority of the state courts, requiring "no precise mathematical calculation" but an "individualized determination" by the government that the dedication is related to the impact of the proposed development.[391] It is interesting to note, although not mentioned in *Dolan*, that similar language was used in the last century where the Court found a taking in a special assessment case.[392] In *Village of Norwood*, the Court stated:

> In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation. We say "substantial excess," because exact

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388. *See Parking Ass'n*, 115 S. Ct. at 2268 (Thomas, O'Connor, JJ., dissenting). The dissent cites to Harris v. City of Wichita, 862 F. Supp. 287 (D. Kan. 1994) (airport overlay district), for another case refusing to apply *Dolan* to a legislative action. In contrast, the dissent cites to Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479 (N.Y. 1994) (invalidating rent control exception for nonprofit hospitals), *cert. denied*, 115 S. Ct. 1962 (1995) and Trimen Dev. Co. v. King County, 877 P.2d 187 (Wash. 1994) (upholding park in-lieu fees). It is interesting that neither the *Manocherian* majority nor the *Trimen* court mention this distinction. *See also infra* notes 402–14 and accompanying text.

389. *Parking Ass'n*, 115 S. Ct. at 2268–69.

390. *Id*. at 2269. Contrast with the Eleventh Circuit's rejection of substantive due process claims based in executive decisionmaking. McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994), *cert. denied sub nom.* McKinney v. Osceola County Bd., 115 S. Ct. 898 (1995). McKinney was applied in Boatman v. Town of Oakland, 76 F.3d 341 (11th Cir. 1996) (certificate of occupancy).

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

392. *See* Norwood v. Baker, 172 U.S. 269 (1898).

> equality of taxation is not always attainable . . . .[393]

As in *Dolan*, the Court referred to state law for guidance on its decision. However, it did not undertake its own evaluation of the relation of the benefits to the assessment but struck down the assessment because the local government had not considered benefits at all.

Justice Stevens' dissent in *Dolan* insisted that the state cases on which the majority built its new "roughly proportionate" test do not stand for "anything akin" to the new federal test, although they lend support to the *Nollan* "essential nexus" test.[394] In addition, Justice Stevens argued, the state cases recognize the benefit gained by the property owner from governmental approval, consider the entire parcel, and do not simply focus, as the court did, on the owner's "power to exclude."[395] As discussed above, cases following *Nollan* did not find the *Nollan* requirements to be substantially different than the exaction standards followed by most states. Will *Dolan* have a greater impact than *Nollan* in regard to the way that exactions are calculated?

As was the case after the *Nollan* decision, particularly in cases that do not involve land dedications, courts have taken up the *Dolan* Court's more general language to support results that seem equally based on a general sense of "fairness."[396]

Similarly, in *Peterman v. Michigan Department of Natural Re-*

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393. *Id*. at 279.

394. 114 S. Ct. at 2323.

395. *Id*. at 2324.

396. *See infra* note 397–400 and accompanying text; *see also Manocherian*, 643 N.E.2d at 482 (invalidating rent control statute stating that "`fairness and justice' requires that compensation be paid"); *Parking Ass'n*, 450 S.E.2d at 203 n.3 (finding generally that the rough proportionality standard was met, even though not applicable).

A substantive due process case where a town official's requirement for the dedication of land in exchange for utility service obviously offended the court's sense of fair play is Walz v. Town of Smithtown, 46 F.3d 162, 169 (2d Cir.) (citing to *Dolan*), *cert. denied*, 115 S. Ct. 2557 (1995); *see also* Domme v. United States, 61 F.3d 787 (10th Cir. 1995) (Henry, J., concurring) (discussing the renewed concern in the Supreme Court, Congress, and by citizens generally about adequately compensating citizens deprived of their property by government action). *Dolan*'s application to the Cola Industry Retiree Health Benefit Act of 1992, 22 U.S.C. §§ 9701–9722, is illustrative of the potential for a result-oriented use of *Dolan*. *Compare* Unity Real Estate Co. v. Hudson, 889 F. Supp. 818 (W.D. Pa. 1995) (finding the Act to work a taking because it lacked the requisite proportionality between its benefits and the burdens imposed) *with* Templeton Coal Co. v. Shalala, 882 F. Supp. 799 (S.D. Ind. 1995) (finding just the opposite).

sources,[397] the Supreme Court of Michigan applied *Dolan*'s rough proportionality test in a somewhat novel manner, and obviously in a spirit of "fairness," to find a taking of beachfront had resulted from the state's construction of a boat launch ramp and jetties. The state court of claims originally found that the jetties and launch had altered the littoral drift of the current, and thereby deprived the adjacent landowners of a source of sand to their beach. The court of appeals reversed an award for trespass damages, and held that the landowners' taking claim was not preserved for appeal. The supreme court nevertheless heard the taking claim and found that there was a constitutional taking under *Dolan*.[398]

The court found no essential nexus between the construction and the loss of sand, because there was no "need" to take the beachfront in order to construct the improvements.[399] Furthermore, the manner of the taking and the state's interest did not meet the rough proportionality required by *Dolan*, because the improvements "could have been built without destroying the landowner's property" and were unscientifically constructed.[400] Thus, the court converted the "rough proportionality" test to a kind of negligent construction standard.

In the land dedication cases, the development of the rough proportionality standard will probably proceed slowly, on a case specific basis. There is some indication, however, that state courts will find that the *Dolan* standard is not particularly different than that required by state law, just as Justice Stevens suggested. This was the case when the Supreme Court of Washington reviewed the Kings County parkland in-lieu fee immediately after *Dolan* was decided.[401] In *Trimen Development Co. v. King County*, the court reviewed a challenge to the parkland fee ordinance as an invalid tax because it was not in compliance with state statutes authorizing subdivision

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397. 521 N.W.2d 499 (Mich. 1994).

398. The court also explicitly refused to limit *Dolan* to its facts. *Id.* at 512 n.34.

399. *Id*. at 511.

400. *Id*. at 512 n.35. The dissent notes that *Dolan* should not apply to the land below the high water mark, where the state has a much greater interest than in the purely private property at stake in *Dolan*. The dissent also observes that the majority "ignores, and does not even apply, the `rough proportionality' prong on which *Dolan* turned." *Id.* at 516.

401. *See* Trimen Dev. Co. v. King County, 877 P.2d 187 (Wash. 1994) (en banc) (imposing park development fee in lieu of dedication of land was reasonably necessary as direct result of developer's proposed developments).

exactions and development fees. The court found that the ordinance met state standards and, at the same time, met *Dolan*'s rough proportionality standard.[402]

The King County ordinance[403] provided that final subdivision approval must be contingent upon reservation or dedication of land for open space and recreation or payment of a fee in lieu thereof. If the developer chose to dedicate land, that land must be within the subdivision's "park service area," defined as an area roughly approximate to the boundaries of the district serving the subdivision. The amount of land to be preserved is determined by a formula which considers the gross land area of the proposed subdivision and the zone of the area. If a fee is paid, it is calculated based on the assessed value of the land that would have been reserved or dedicated. The fee can be appropriated only within the park service area of the proposed subdivision and must be allocated to a particular project within three years of fee acceptance.[404]

Washington statutes[405] authorized local governments to ensure that proposed plats make appropriate provisions for open space, park and school sites, including the dedication of land as a condition of subdivision approval. They also authorized development fees in lieu of dedication. The fee statute provided in relevant part that no payment shall be required which the local government "cannot establish [a]s reasonably necessary as a direct result of the proposed development or plat."[406] Additionally, the fees may only be expended to fund a capital improvement agreed upon by the parties "to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat . . . ."[407]

The process for preliminary plat approval in King County entails a review by county staff, which reports its recommendation to a hearing examiner, who in turn holds a public hearing and makes a recommendation to the county council. Trimen's plats received preliminary approval, with the condition that the applicant comply with

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402. *Id*. at 194.

403. *Id*. at 187 (citing King County Code § 19.38.020 (1981)).

404. *Id*. at 189.

405. *See* WASH. REV. CODE ANN. § 58.17.110 (West 1990 & Supp. 1995).

406. *Trimen*, 877 P.2d at 191 n.5 (citing WASH. REV. CODE ANN. § 82.02.020 (West 1981 & Supp. 1995)).

407. *Id*. at 192 (citing WASH. REV. CODE ANN. § 82.02.020 (West 1981 & Supp. 1995)).

the county ordinance. Trimen negotiated smaller fees for each plat than were originally calculated by the county, and was granted final approval by county ordinance. Trimen then paid the fees in lieu of land dedication without protest and, after the plats were recorded, filed suit challenging the ordinance and asking for restitution of the fees.[408]

Although the county did not conduct a site-specific study to determine the direct impact of the subdivision before imposing the park fees, the court found adequate evidence in the record that the fees were necessary as a direct result of the proposed developments.[409] The evidence included a comprehensive assessment of county park needs conducted in 1985, four to five years prior to the imposition of the fee, which indicated a deficit of 107 park acres in the area serving the proposed subdivisions. Based on adopted county standards, the assessment reported that over 300 acres of additional parkland would be required to meet the projected fifteen year population increase.[410] The court also found that the expected occupancy in the subdivisions created a need for an additional 2.52 acres of parkland,[411] while the developer had negotiated a reduction of five percent of that amount as a basis for the fee. Based on these calculations, the court determined that the fee was reasonable and lawful under the statute.[412]

In *Northern Illinois Home Builders Association v. County of DuPage*,[413] the court upheld transportation impact fees under *Nollan* and *Dolan* against a takings claim. The court found a legitimate state interest, also easily finding a nexus between preventing further traffic congestion and providing road improvements. The court looked more closely at whether the degree of exactions bore the required relationship to the projected impact of the new development. Recognizing that *Dolan* found the Illinois "specifically and uniquely attributable" test of *Pioneer Trust & Savings Bank v. Village of Mt.*

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408. *Id*. at 190.
409. *Id*. at 193.
410. *Id*. at 194.
411. *Trimen*, 877 P.2d at 194.
412. *Id*. The court also found that the statute's requirements that the fee be voluntary and be paid toward a capital improvement agreed upon by the parties were complied with because the ordinance presented a choice between land dedication or fee payment, and provided for the fee to be used within a park service area. *Id*.
413. 649 N.E.2d 384 (Ill. 1995).

Prospect,[414] to be the most exacting scrutiny required among the states, the court found it to be the proper constitutional measure. In applying the test, the court accepted an impact fee system that is generally standard for the field.[415] The DuPage County impact fee ordinance considered eight factors in determining the proportionate share of the cost of road improvements to be paid by the developer, among which included a fee calculation method using generally accepted traffic engineering practices, an option for developer credit for individual contributions to the cost of road improvements against any fees; and the expenditure of the fees within traffic impact districts from which they were collected. The fees are established according to a schedule, but developers may choose to conduct an individualized assessment. Because individualized assessments are not granted the same fifteen percent discount available if the schedule is used, the court found that provision unconstitutional, but severable from the remainder of the ordinance.

Two cases from the Oregon Court of Appeals, in which *Dolan* was applied to road improvement dedications, further indicate that the courts may not require radical changes as a result of the new test. In *Schultz v. City of Grants Pass*,[416] the city conditioned an application to partition a 3.85 acre parcel of property with the dedication of certain street right of way and storm improvements. The city justified its requirements by referring to policies in its comprehensive plan and specific implementing ordinances, which required that those who benefit from the development pay for the costs of extending services to the development. Deciding that the only issue in dispute was the required degree of connection between the dedication and the impact of the development, the court struck down the condition because it was based on the impact of *potential* development, as if the lots were to be subdivided and developed at their full potential. The actual proposed development was simply a partitioning of a single lot into two lots and nothing more. The relationship between the permit to partition and the exaction was thus found to

414. 176 N.E.2d 799 (Ill. 1961).

415. *Northern Ill. Home Builders Ass'n*, 649 N.E.2d at 391. "Our review shows that the testimony presented at trial established that the fee calculation method used by DuPage County complies with generally accepted traffic engineering practices and that a majority of impact fee ordinances nationwide use averages to predetermine impact fees." *Id.*

416. 884 P.2d 569 (Or. Ct. App. 1994).

be insufficient as a matter of law.

In *J.C. Reeves Corp. v. Clackamus County*,[417] a hearing officer for the county conditioned a residential subdivision approval on certain improvements, including improvements to the street bordering the proposed subdivision and the elimination of a one-foot spite strip on the property that would prohibit access on the adjacent property. The developer challenged the hearing officer's decision, which was affirmed by the state Land Use Board of Appeal.

The court held that the hearing officer's findings were lacking in the necessary specificity[418] because they relied on the zoning ordinance requirements which "simply posit the relationship between subdivision-generated traffic and the need for the improvements."[419] The case was remanded for findings consistent with the *Dolan* standards. However, the court interpreted *Dolan*'s rough proportionality test to be no "radical departure from the `reasonable relationship' standard."[420] Furthermore, it specifically rejected the developers' argument as to how the impacts should be measured.

The developer argued that the necessary street improvements should be measured by the vehicle use expected to be generated by the development as a proportion of the total vehicular use on the street. Because the street is an arterial, the 200 added trips from the subdivision would constitute only 2.6 percent of the total traffic projected on the road. The developer proposed, therefore, that its share of the improvements should be 2.6 percent of the cost of those improvements only. The court, however, decided that on remand "the appropriate comparison is between the traffic and other effects of the subdivision and the subdivision frontage improvements that the county has required."[421]

As to the "spite strip", the court held that its elimination was an appropriate condition for providing access to the adjacent property, because the proposed development would otherwise eliminate or impair that access, and no further findings were necessary to satisfy *Dolan*. "It is the fact of the strip's presence that threatens access,

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417. 887 P.2d 360 (Or. Ct. App. 1994).

418. *Id*. at 363. The court noted that the "requirements for findings under Oregon's land use decisional scheme may often amount to the practical equivalent of a burden of articulation . . . [not materially different] from what *Dolan* requires." *Id.*

419. *Id*. at 365.

420. *Id*. at 363.

421. *J.C. Reeves Corp.*, 887 P.2d at 365.

and no questions of level or intensity remain to be resolved."[422]

Other state courts find no difference between the *Dolan* standard and state standards, albeit with little explanation of their rationale.[423]

4. Of What Significance Is the Government's New Burden of Justification?

Perhaps the most surprising holding in *Dolan* was its direction that "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."[424] The majority explained that, in most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove its arbitrariness. It cryptically defended the shift in the burden on the city to justify the dedication by pointing out that "[h]ere, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city."[425]

The explanation begs the question of whether the burden shifts only if the government already has made an adjudicative decision, or whether the government, as a result of *Dolan*, must adjust its procedures to make an adjudicative decision in addition to justifying that decision in later court proceedings. The difference has practical implications for the record that must be prepared at the local government level when the decision to condition a permit is made. In states where land use decisions of an adjudicative nature are now required to be conducted in quasi-judicial proceedings, the new burden shift will have less import than in the states where land development

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422. *Id*. at 366. The court assumed without deciding that the proportionality test of *Dolan* applied. *Id.* at 365.

423. *See* North Amber Meadows Homeowners Ass'n v. Haut Enters., 647 A.2d 127 (Md. Ct. Spec. App. 1994) (finding no taking where city refused to allow relocation of drainage pond and denied grading permit for proposed office park). The court reviewed Maryland case law including cases requiring a "reasonable nexus" between dedication requirements and the subdivision itself, and concluded that nothing in *Dolan* compels a conclusion to the contrary. *See also* Sullivan v. Planning Bd. of Acton, 643 N.E.2d 703, 707 n.6 (Mass. App. Ct. 1995) (finding town's requirement that subdivider grant abutting road easement is reasonable regulation of adequate access to subdivision and does not require just compensation under state law nor under *Dolan*).

424. *Dolan*, 114 S. Ct. at 2319–20.

425. *Id*. at 2320 n.8.

approvals are decided in traditional legislative hearings. In Oregon, for example, whose courts pioneered the requirement of quasi-judicial proceedings for zoning decisions,[426] the court of appeals has indicated that the new constitutional burden may not be very different than that required by state law:

> Moreover, although the [*Dolan*] court spoke in terms of a "burden" resting on the body imposing the conditions rather than on the applicant, the requirements for findings under Oregon's land use decisional scheme may often amount to the practical equivalent of a burden of articulation on local bodies that does not differ materially from what *Dolan* requires.[427]

Certainly, the dissent in *Dolan* found the new burden objectionable. Justice Stevens argued that the burden should shift only when "the developer establishes that a concededly germane condition is so grossly disproportionate to the proposed development's adverse effects that it manifests motives other than land use regulation on the part of the city."[428] Instead, he stated,

> [t]he Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan . . . . The burden of demonstrating that those conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action's constitutionality. That allocation of burdens has served us well in the past. The Court has stumbled badly today by reversing it.[429]

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426. Board of County Comm'rs v. Snyder, 627 So. 2d 469 (Fla. 1993); Fasano v. Board of County Comm'rs, 507 P.2d 23 (Or. 1973) (en banc) (holding that staff report of county planning department was too conclusory and superficial to support zoning change); *see* Thomas G. Pelham, *Quasi-Judicial Rezonings: A Commentary on the* Snyder *Decision and the Consistency Requirement*, 9 J. LAND USE & ENVTL. L. 16 (1994); *see also* John W. Howell & David J. Russ, *Planning vs. Zoning:* Snyder *Decision Changes Rezoning Standards*, 68 FLA. B.J. 16 (1994).

427. *J.C. Reeves Corp.*, 887 P.2d 363; *see supra* note 417–22 and accompanying text; *see also* 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. LAW 187, 195–96 (1995).

428. *Dolan*, 114 S. Ct. at 2325.

429. *Id*. at 2326, 2330.

Likewise, Justice Souter questioned the soundness of the decision that unadvisedly placed the burden on the city to produce evidence of the proper relationship between the conditions and the impact of the development.[430]

The shift in the burden of justification, whether now required by constitutional law at the local decisionmaking level or during the presentation of evidence in court, is no doubt an important shift, if not "revolutionary."[431] It evidences the continuing shift of the presumption of constitutionality away from local land use decisionmakers that has been at least a decade long trend, as pointed out by Professor Daniel Mandelker and others.[432] The shift was foreshadowed in Justice Scalia's footnote in *Nollan* that "substantially advance" requires more than that the government *could* have rationally decided that the regulation might achieve the government interest.[433] The majority's suspicion of government was also plain in *Lucas v. South Carolina Coastal Council*,[434] when it rejected the South Carolina legislature's findings regarding the purposes of the coastal regulation held to be a taking. The added ingredient from *Dolan* is a procedural requirement that emphasizes the court's seriousness in holding government accountable for takings violations.

As argued by Justice Stevens, *Dolan* evidences a "resurrection of a species of substantive due process analysis that (the Court) firmly rejected decades ago."[435] Further, according to Justice Stevens, the Court's takings doctrine "has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified. Besides having similar ancestry, both doctrines are potentially open-

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430. *Id*.

431. "This shift in allocating the burden of proof is truly revolutionary, upsetting constitutional doctrine firmly established since at least 1938, when the Court dropped another famous footnote." Dwight H. Merriam & R. Jeffrey Lyman, *Dealing with* Dolan, *Practically and Jurisprudentially*, 1995 ZONING & PLAN. L. HANDBOOK 111, 118–19 (referring to United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938)).

432. *See* Daniel R. Mandelker, *The Shifting Presumption of Constitutionality in Land-Use Law*, 4 J. PLAN. LITERATURE 383 (1989); Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW 1 (1992); Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Established New Ground Rules for Land-Use Planning, in* REGULATORY TAKING: THE LIMITS OF LAND USE CONTROLS (G. Richard Hill ed., 1993).

433. *Nollan*, 483 U.S. at 834–35 n.3; *see supra* notes 34–35 and accompanying text.

434. 505 U.S. 1003 (1992).

435. 114 S. Ct. at 2326.

ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair."[436] The significance of the burden shift thus extends beyond the practical effects of requiring government to complete necessary studies and prepare an adequate record; it compels the government in the first instance to persuade the court that the permit condition is justified and invites the courts to then closely scrutinize that justification.

C. A Footnote on Florida

Florida courts have been among the state leaders in the use of the rational nexus test since the 1970s. In the late 1970s and 1980s, the appellate courts in Florida were faced with a number of impact fee challenges under which the court set out the principles of the rational nexus test.[437] As a consequence, impact fees have become a well utilized device to help pay the cost of necessary infrastructure, as well as an integral part of the state growth management system and, in particular, the mandate that infrastructure be available concurrent with the impacts of development.[438]

The rational nexus test has been meaningfully applied in Florida to ensure that development pays no more than its fair share of facility expansion capital costs due to growth. The courts have not been reluctant to strike down fees that were not adequately based on a reasonable cost allocation. For example, in *City of Tarpon Springs v. Tarpon Springs Arcade, Ltd.*, the court upheld the refund of water and sewer impact fees that did not adequately provide for crediting a renovated building for its usage prior to the renovation.[439] Similarly, the courts have not hesitated to invali

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436. *Id*. at 2327.

437. *See* St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635 (Fla. 1991) (school impact fees); Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th Dist. Ct. App.) (parks fees), *cert. denied*, 440 So. 2d 352 (Fla. 1983); *see also* Home Builders & Contractors v. Board of County Comm'rs, 446 So. 2d 140 (Fla. 4th Dist. Ct. App. 1983) (transportation fees), *cert. denied*, 451 So. 2d 848 (Fla.), *appeal dismissed*, 469 U.S. 976 (1984); Town of Longboat Key v. Lands End Ltd., 433 So. 2d 574 (Fla. 2d Dist. Ct. App. 1983) (parks and open space fees); Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976) (sewer and water fees).

438. *See* Watts & Hansen, *supra* note 5, at 17, 20, 28; *see also* Julian C. Juergensmeyer, *Impact Fees After the Growth Management Act of 1985, in* PERSPECTIVES ON FLORIDA'S GROWTH MANAGEMENT ACT OF 1985 (John M. DeGrove & Julian C. Juergensmeyer eds., 1986).

439. City of Tarpon Springs v. Tarpon Springs Arcade Ltd., 585 So. 2d 324 (Fla. 2d

date dedication requirements that did not meet a rational nexus test. For example, in *Lee County v. New Testament Baptist Church, Inc.*, the courts invalidated a right of way dedication condition to a driveway connection permit on the basis that the traffic demand created by the driveway would not necessitate expansion of the road.[440] Thus, the close nexus requirements of *Nollan* and *Dolan* are not likely to significantly increase the scrutiny already given to the allocation of costs by the Florida courts.

Of the several Florida decisions taking cognizance of *Nollan*, *Paradyne Corp. v. Florida Department of Transportation*[441] is the

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Dist. Ct. App. 1991); *see also* City of Punta Gorda v. Burnt Store Hotel, Inc., 650 So. 2d 142 (Fla. 2d Dist. Ct. App. 1995) (change in ownership, but no structural change, does not form the basis for a fee); Florida Keys Aqueduct Auth. v. Pier House Joint Venture, 601 So. 2d 1270 (Fla. 3d Dist. Ct. App. 1992) (finding that the Authority's fee for factory converted to hotel did not properly calculate the increase in water usage due to the hotel because it underestimated the water usage for the factory).

440. Lee County v. New Testament Baptist Church, Inc., 507 So. 2d 626 (Fla. 2d Dist. Ct. App.), *rev. denied*, 515 So. 2d 230 (Fla. 1987); *see also* Hernando County v. Budget Inns, Inc., 555 So. 2d 1319 (Fla. 5th Dist. Ct. App. 1990) (finding that the county requirement of land reservation on building plans for frontage road was a temporary taking, where there was no showing that there was a need in the immediate future for road expansion).

441. 528 So. 2d 921 (Fla. 1st Dist. Ct. App.), *rev. denied*, 536 So. 2d 244 (1988). Other cases cite to *Nollan*. *See, e.g.*, Aspen-Tarpon Springs, Ltd. v. Stuart, 635 So. 2d 61, 66 (Fla. 1st Dist. Ct. App. 1994) (involving a mobile home park owner who challenged legislation regulating rent increases and changes in the use of the park property). Four cases cite to *Nollan* in passing, for its statement of the *Agins* takings test: 4444 Corp. v. City of Orlando, 598 So. 2d 287, 288 (Fla. 5th Dist. Ct. App. 1992) (validity of historic preservation requirement for certificate of appropriateness for demolition of historic landmarks); Snyder v. Board of County Comm'rs, 595 So. 2d 65, 70 (Fla. 5th Dist. Ct. App. 1991) (validity of specific parcel rezoning), *rev'd in part and aff'd in part*, 627 So. 2d 469 (Fla. 1993); J.T. Glisson v. Alachua County, 558 So. 2d 1030, 1035 (Fla. 1st Dist. Ct. App. 1990) (upholding special area regulations); Conner v. Reed Bros., 567 So. 2d 515 (Fla. 2d Dist. Ct. App. 1990). In *Conner*, nursery owners brought an inverse condemnation action against the Department of Agriculture for a purely precautionary quarantine to control a statewide outbreak of citrus canker, which resulted in the destruction of healthy citrus seedlings. The court found that the regulation requiring destruction of plants or one-year quarantine was not arbitrarily or capriciously applied. The court noted that the quarantine to prevent only economic damage was a unique fact pattern, and that this case did not announce any rules of broader application. The court added that the greenhouse seedlings affected by the quarantine had value only at the three to six month stage of growth, and were valueless at one year old. The court held that the total destruction of the market value of the inventory was a taking, because the quarantine promoted only the state's welfare and was merely marginally important to the public health, safety and morals. The court observed that the concept of permissible police power regulation, for purposes of just compensation analysis, seems to have narrowed while its substantive due process counterpart has expanded, and speculated that when there were fewer, less restrictive statutes regulating property. As a result of early twen-

most relevant to exactions law. In *Paradyne*, a property owner challenged the revocation of its road connection permit and a requirement for a new, shared road connection located primarily on Paradyne's property but also servicing neighboring properties. The court approved the revocation and, in principle, the redesign requirements. However, it disapproved the requirement for the particular design as an invalid exercise of police power, because the Department of Transportation had failed to produce evidence demonstrating that either traffic congestion or safety hazards dictated the location of the road on Paradyne's property.

> Without evidence relating the requirement of a 250–foot joint use driveway on Paradyne's property to the legitimate state purpose of promoting the safety of the traveling public, we agree with Paradyne that requiring it to provide a private roadway to promote the private interests of the adjoining property owners, M & B, constitutes an unconstitutional taking of Paradyne's property without due process of law . . . [citing to *Nollan*] . . . As in *Nollan*, this is a case in which the condition imposed by the state goes beyond mere restriction on the use of private property, and instead, requires actual invasion of Paradyne's private property by others.[442]

As in *Nollan*, the holding was based on the absence of *any* relationship between the means and the purported ends, not on the lack of a substantial enough relationship. Also, like the Supreme Court in *Nollan*, the *Paradyne* court held that the Department could condition its permit upon a concession by Paradyne of its property rights "only so long as the condition furthers a public purpose related to permit requirement . . . " citing also to several of the state "reasonable relationship" cases referred to in *Nollan*, from Louisiana, Maryland, Nebraska and Virginia.[443]

Thus, the effect of the United States Supreme Court's cases in Florida may be felt more indirectly, as a result of Florida's prior leadership in importing substantive due process analysis into tak-

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tieth century strong substantive due process caselaw, there was reduced need to compensate persons under eminent domain for property affected by regulation. The court cited *Nollan* and *First English* as evidence of fact that once courts overruled *Lochner* and opened the door to more extensive regulation, the need to compensate persons increased. *Id*. at 519. *See also* discussion *supra* notes 180–81.

442. *Paradyne*, 528 So. 2d at 926–27.

443. *Id*. at 927.

ings cases similar to *Nollan* and *Dolan*.[444] Indeed, shortly after *Nollan* was decided, the Florida Supreme Court struck down land reservation requirements of a state statute which provided for a prohibition of development permits within an area designated by the Department of Transportation for future thoroughfare corridors. In *Joint Ventures, Inc. v. Department of Transportation*,[445] the court found the corridor provisions to be unconstitutional, apparently based on the takings clause, citing *Nollan* and finding that the statute was an attempt to circumvent constitutional protection of private property under the principles of eminent domain.[446]

Immediately, property owners within transportation corridors filed suit, claiming that under *Joint Ventures*, they had experienced a *per se* taking and were entitled to temporary taking damages. After a number of these cases made their way up to the district courts of appeal, the Florida Supreme Court resolved conflicts in the districts by rejecting the *per se* taking claims. In *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*,[447] the court clarified that in *Joint Ventures* the reservation statute was invalidated on due process grounds, not as a taking. The court directed attention to the remedy awarded, invalidation rather than compensation, and the opinion's focus on the analysis of the relationship between means and ends.[448] More specifically, the court stated that *Joint Ventures* stands for the proposition that it is a denial of due process for the state to take private property without just compensation, not that the reservation statute itself necessarily worked a *per se* taking of all property affected by it, as some district courts of appeal had mistakenly assumed.[449] Thus, having first ventured into the takings area by incorporating a *Nollan*-type process analysis, the Florida Supreme Court appears to have turned away from that path.

The Florida appellate courts have recognized the confusion cre-

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444. In contrast, the Florida courts have largely deferred to the federal law of ripeness. *See* City of Riviera Beach v. Shillingburg, 659 So. 2d 1174 (Fla. 4th Dist. Ct. App. 1995); Taylor v. Village of N. Palm Beach, 659 So. 2d 1167 (Fla. 4th Dist. Ct. App. 1995); Glisson v. Alachua County, 558 So. 2d 1030 (Fla. 2d Dist. Ct. App.), *rev. denied*, 570 So. 2d 1304 (Fla. 1990).

445. 563 So. 2d 622 (Fla. 1990).

446. *Id*. at 624 n.7.

447. 640 So. 2d 54 (Fla. 1994).

448. *Id*. at 57–58.

449. *Id*. at 58.

ated by *Nollan*'s mix of due process with takings analyses, but have generally read *Nollan* narrowly. Even before the decision in *A.G.W.S.*, the Fifth District, in *Department of Transportation v. Weisenfeld*,[450] correctly construed *Joint Ventures* as neither mandating a *per se* taking, nor working a taking in the case before it. Judge Griffin's concurrence in the case recognized that only in *Nollan* had the United States Supreme Court arguably equated an invalid exercise of police power with a taking, but only in the special context of a permanent physical invasion.[451] Likewise, in *City of Pompano Beach v. Yardarm Restaurant, Inc.*,[452] the court refused to find a taking where the city revoked and refused to reinstate permits for a conversion of restaurant property to a hotel and marina. The court stated that, whether involving a valid or invalid police power regulation, the *sine qua non* for inverse condemnation is a deprivation of substantially all use of the property.[453] Citing to *Nollan* and other Supreme Court cases, the court expressed concern that "[c]onfusion surely has also resulted from language used loosely in the cases."[454]

The Florida Supreme Court and district courts' reliance in takings cases on an *Agins*-style of balancing test, except where no use of property remains, reaffirms Florida's place in the mainstream of courts reluctant to second guess the land use decisions of government in the takings area. However, *Dolan's* invitation to scrutinize these decisions more closely, and in particular to require government to provide the initial justification for land use conditions, may pull the Florida courts once again toward a more activist position, if

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450. 617 So. 2d 1071 (Fla. 5th Dist. Ct. App. 1993) (en banc), *aff'd*, 640 So. 2d 73 (Fla. 1994).

451. *Id.* at 1081 n.5.

452. 641 So. 2d 1377, 1384 (Fla. 4th Dist. Ct. App. 1994).

453. *Id.*

454. *Id.*; *see* Lee County v. Sunbelt Equities II Ltd., 619 So. 2d 996, 1006 (Fla. 2d Dist. Ct. App. 1993) (validity of denial of site-specific rezoning request). In *Sunbelt Equities*, the court noted the *Nollan* requirement that land use restrictions must "substantially advance" a legitimate state interest, the *Lucas* requirement that regulations cannot be so intrusive as to deprive the land owner of reasonable economic use of the property, and that grandfathered uses should not be incautiously rescinded. The court assumed that if regulation is necessary for the welfare of public and is not physically invasive or confiscatory of some existing property rights, it is probably within the police power. The court stated that "[i]n the wake of *Lucas*, *Nollan*, and related cases, those favoring land use restrictions may find their activities the subject of heightened scrutiny into their reasonableness and intrusiveness. However, and despite the apprehensions (or hopes) of some observers, more fundamental change than this did not occur in *Lucas*." 619 So. 2d at 1007.

not in the takings arena, then in substantive due process cases.

The Florida Supreme Court may not need much encouragement, in light of its decision in *Snyder v. Board of County Commissioners*,[455] subjecting local governments to more exacting procedures and possibly closer scrutiny of quasi-judicial land use decisions. Obviously influenced by its perception that local government may be unduly influenced by political considerations in the review of land development permits,[456] the *Snyder* Court eliminated the presumption of correctness for local governments in site specific, adjudicative rezoning decisions. That change does not appear to go as far as the United States Supreme Court's shift of the burden in *Dolan*, but requires challengers of a local government decision to bear the initial burden to show that a proposed rezoning is consistent with the local government comprehensive plan and complies with procedural requirements.[457] If this initial showing is made, then the government must provide substantial competent evidence of an adequate police power reason to deny the rezoning.[458] Review of such rezoning decisions, as with other quasi-judicial decisions, is by certiorari in the circuit court; therefore, the record of proceedings before the local government becomes the record for purposes of court review.

The Florida Supreme Court has not had the opportunity to review the results of rezoning cases on their merits under this new system, so it is difficult to predict how closely, under *Snyder*, the court will scrutinize future local government zoning decisions.[459] It is also not clear, after *Snyder*, whether land dedications or impact fees will be reviewed by certiorari. An earlier case from the Fifth District found that adoption of a sewage impact fee was "quasi legislative"

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455. 627 So. 2d 469 (1991).

456. *Id*. at 472–73.

457. Martin County v. Section 28 Partnership, Ltd., 21 Fla. L. Weekly D546, No. 94-2243, 1996 WL 81781 (Fla. 4th Dist. Ct. App. Feb. 28, 1996) (holding that applicant failed to make this showing where county rejected substantial text amendments to its comprehensive plan necessary to make the applicant's development permissible, including the creation of an entirely new urban service district); *see also* Section 28 Partnership, Ltd. v. Martin County, 642 So. 2d 609 (Fla. 4th Dist. Ct. App. 1994) (on certiorari review).

458. 627 So. 2d at 476.

459. The court has reviewed appellate decisions for the purpose of deciding the proper review under certiorari or *de novo* proceedings. *See* Park of Commerce Assocs. v. City of Delray Beach, 636 So. 2d 12 (Fla. 1995); City of Melbourne v. Puma, 630 So. 2d 1097 (Fla. 1994); O'Connor Dev. Corp. v. Leon County, 630 So. 2d 578 (Fla. 1994).

and not appropriate for certiorari.[460] The supreme court recently indicated that certiorari review is a particularly limited review, even in the circuit courts, and it is not the court's place to second guess the decision of the lower tribunal, even if the lower tribunal is a local government.[461]

The Florida courts have not yet had the opportunity to apply *Dolan*, although two recent cases acknowledge its holdings. In *Department of Transportation v. Heckman*, court dicta referred to the *Dolan* principle that release of a property right cannot be compelled "where the property sought by the government has little or no relationship to the benefit to the property owner."[462] The court further observed, however, that the landowners "gave the city what it wanted, and in return they got what they wanted — a waiver of the city's platting requirement for the development of their property."[463] *Sarasota County v. Taylor Woodrow Homes Ltd.*,[464] reviewed a county action to compel compliance with a development agreement to dedicate a waste water treatment plant to the county. Reversing a motion to dismiss in favor of Taylor Woodrow Homes, the court held that the *Dolan* requirements of "rough proportionality" could not be determined in that case as a matter of law, but required the further development of the record. The court also appeared to equate the "rational nexus" test in *Lee County v. New Testament Baptist Church*, with the *Dolan* requirements.[465] Thus, it remains to be seen how broadly the Florida courts will implement the *Dolan* direction to more strictly scrutinize conditions to government permits.

IX. CONCLUSION

460. City of Cape Canaveral v. Rich, 562 So. 2d 445 (Fla. 5th Dist. Ct. App. 1990) (citing Board of County Comm'rs v. Circuit Court, 433 So. 2d 535 (Fla. 2d Dist. Ct. App. 1983) (water and sewer rates not reviewable by *certiorari*)).

461. *See* Haines City Community Dev. v. Heggs, 658 So. 2d 523 (Fla. 1995).

462. Department of Transportation v. Heckman, 644 So. 2d 527, 530 (Fla. 4th Dist. Ct. App. 1994) (reviewing a right-of-way dedication condition), *rev. denied*, 651 So. 2d 1194 (Fla. 1995).

463. *Id*.

464. 652 So. 2d 1247 (Fla. 2d Dist. Ct. App. 1995).

465. *Id*. at 1251; *see supra* note 440 and accompanying text.

At a minimum, the United States Supreme Court has signalled that its long disinterest in land use regulation and, in particular, exactions, has ended, and local governments can no longer assume that anything they enact will be routinely upheld under the presumption of constitutionality. However, it is also clear that some observers have far overstated the practical import of the Court's recent jurisprudence. This survey of the reported precedent since *Nollan* and *Dolan* proves that local governments need not shy away from reasonable land use exactions, uniformly applied and properly supported by appropriate planning studies, which do not attempt to force new development to bear the entire cost of the capital budget. No particular methodology is mandated, as long as the requirement bears an essential nexus to the legitimate governmental interests advanced in support of it, and the requirement is roughly proportional to the need created by the development so regulated.