NOTE

TIPPING THE SCALES FOR THE PRIVATE PROPERTY OWNER: *DOLAN v. CITY OF TIGARD*

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

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INTRODUCTION

A governmental entity may require a property owner to give a portion of that property to the public as a condition of approving a building permit application.[1] The government has the power to require a property owner to dedicate land to the public for streets, sidewalks, utilities, parks, and schools in exchange for the privilege of subdividing, platting, or building.[2] Because these conditions or exactions restrict land use and development of private property, they are a recurrent source of litigation. Developers and property owners claim that the exactions are an uncompensated taking of

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1. William C. Leigh & Bruce W. Burton, *Predatory Governmental Zoning Practices and the Supreme Court's New Takings Clause Formulation: Timing, Value, and R.I.B.E.*, 1993 B.Y.U. L. REV. 827, 839.

2. *See, e.g.*, Pengilly v. Multnomah County, 810 F. Supp. 1111 (D. Or. 1992) (approving dedication for street widening to offset development impact); Associated Home Bldrs., Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal.) (en banc) (upholding statute requiring dedications and in lieu of fees for parks), *appeal dismissed*, 404 U.S. 878 (1989); City of Bellefontaine Neighbors v. J.J. Kelley Realty & Bldg. Co., 460 S.W.2d 298 (Mo. Ct. App. 1970) (approving dedication for sewers and sidewalks); Crownhill Homes, Inc. v. City of San Antonio, 433 S.W.2d 448 (Tex. Ct. App. 1968) (approving dedication for water mains); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965) (approving dedication for parks and schools), *appeal dismissed*, 385 U.S. 4 (1966).

property in violation of the Fifth Amendment of the Constitution.[3] However, these exactions have been justified as a valid exercise of the government's police power as long as the exaction is necessary to offset a negative impact caused by the proposed development.[4]

While state courts have reviewed whether exactions are constitutionally permissible, the United States Supreme Court had not addressed the question until *Nollan v. California Coastal Commission*.[5] Although the Court attempted to deal with development exactions, the decision left the takings issue unsettled.[6] After allowing courts to struggle with its decision for seven years, the Supreme Court, in *Dolan v. City of Tigard*,[7] finally answered the question raised by its decision in *Nollan*. The Court's decision in *Dolan* answered the nagging question of what degree of connection courts require between the imposed exactions and the anticipated impacts of the proposed development.[8]

The test used by the *Nollan* Court was taken one step further in *Dolan*. In *Nollan*, the Court held that it must determine whether the "essential nexus" existed between the "legitimate state interest" and the permit condition required by the city.[9] In *Dolan*, the Court held that it must answer the question posed in *Nollan*, and if a nexus does exist, the Court must ask a new question: Does the degree of the exaction required by the city bear the necessary relationship to the anticipated impact caused by the proposed develop-

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3. *See* 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).

4. *Id*. at 824.

5. 483 U.S. 825 (1987). Prior to *Nollan*, the Supreme Court declined to hear state court appeals involving exactions. *See* Associated Home Bldrs., Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal.), *appeal dismissed*, 404 U.S. 878 (1971); Homebuilders & Contractors Ass'n v. Board of County Comm'rs, 446 So. 2d 140 (Fla. 4th Dist. Ct. App. 1983), *cert. denied*, 451 So. 2d 848 (Fla.), *appeal dismissed*, 469 U.S. 976 (1984); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966); *see* Morosoff, *supra* note 3, at 852 n.201.

6. For an overview of takings doctrine after *Nollan*, see William A. Falik & Anna C. Shimko, *Recent Developments in "Takings" Jurisprudence: The "Takings" Nexus — The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359 (1988).

7. 114 S. Ct. 2309 (1994) (5–4 decision). The decision was a victory for property rights advocates by the slimmest of margins. *Id*. at 2312.

8. *Id*.

9. *Id*. at 2317 (citing *Nollan*, 483 U.S. at 837).

ment?[10] The second step the *Dolan* Court added was not addressed in *Nollan* because the Court found no nexus between the state interest and the permit exaction.[11] By asking this additional question, the *Dolan* Court fashioned a new standard for answering the regulatory takings question, acknowledging a lack of federal precedent on which to base its newly made rule.[12] The Court fashioned the "rough proportionality" test to determine whether there has been a taking under the Fifth Amendment.[13]

Dolan is important because the decision deferred to private property rights more than ever before. With this new test, private property owners are given significant leverage against municipalities' use of the police power in regulating land uses. Exactions, once a valid exercise of the police power, may now be considered inappropriate and an infringement on personal property rights.

Dolan requires governmental entities, like the city of Tigard, to make individualized determinations that the requirements are related in nature and extent to the impacts. For example, if a proposed development created an increase in storm-water runoff, the city would be required to make an individualized determination that the required easement answered the need created by the development, both in nature and extent.[14] The *Dolan* test shifts the burden to the governmental entity by requiring a calculation of the extent of the exactions in relation to the benefit gained by the property owner as a result of the permit requirements.[15] By abandoning the "traditional presumption of constitutionality" and imposing a unique burden of proof on the city, the new test factor erects an additional constitutional obstacle.[16] The additional step will make it more difficult

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10. *Id*. at 2318 (citing *Nollan*, 483 U.S. at 834) (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978)).

11. *Id*. at 2322 (Stevens, J., dissenting).

12. *Id*. (Stevens, J., dissenting). The Court stated that it "[thought] the `reasonable relationship' test adopted by a majority of the state courts [was] closer to the federal constitutional norm than other" tests discussed. *Id*. at 2319. But, it did "not adopt [the test] as such." *Id*. The Court changed the name of the test and added the "rough proportionality" requirement. *Id*. at 2319–20.

13. *Id*. The Court answered the question concerning the degree of connection between the requirement and the impact that the *Nollan* Court did not address.

14. *Id*. at 2320–21.

15. *Id*. at 2319. The Court stated that "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination" and "quantify its findings." *Id*. at 2319, 2322.

16. *Id*. at 2326. A city's attempt to implement its comprehensive land use plan is

for governmental entities to use the police power to effectuate necessary land use planning and to regulate the use of private property for the benefit of all.

Furthermore, *Dolan* is heralded as a victory for private property owners.[17] As for the future, *Dolan* may well represent a veritable trump card for private property owners in their fight against governmental entities over private property rights. Used as a bargaining chip by a property owner, *Dolan* may cause governmental entities to either abandon or retreat from selected land use measures despite their prior validity under the police power. Thanks to *Dolan*, the Supreme Court extended personal property rights further than ever before. But what appears to be a victory for property owners may in fact be a stinging loss to land use planning programs necessary for ordered and efficient growth and development for the public good.

Following a statement of the facts and the procedural history of *Dolan*, this Note will provide a historical overview of regulatory takings. Next, this Note will set out the Supreme Court's analysis of the test articulated in *Nollan* along with the new requirements the Court imposed in *Dolan*, determining that Tigard's permit requirements amounted to an unconstitutional taking of property in violation of the Fifth Amendment.[18]

The *Dolan* case is an unfortunate decision from the government's perspective when considering the government's efforts to protect the health, safety, and welfare of the public by virtue of the police power. This Note will criticize the Court's fashioning of a new test factor. This new constitutional hurdle shifts the burden to

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typically upheld as a valid exercise of its regulatory powers. *Id*.

17. Jennifer Mears, *Property Owners See Better Deals from Courts, Laws*, CHI. TRIB., Aug. 7, 1994, at 6R (the Dolan "decision has given the [property rights] movement added impetus"); Ronald A. Taylor, *Landowners Fight Green Laws that Put Them in Red*, WASH. TIMES, July 12, 1994, at A1 ("rights of landowners are making a comeback"); Hazel Bradford, *Court Backs Property Rights*, ENGINEERING NEWS-REC., July 4, 1994, at 13 ("Property rights advocates are claiming victory in a . . . ruling by the U.S. Supreme Court that restricts government's right to impose restrictions on private land"); *Property Rights II:* Dolan v. Tigard — *How's it Playing?*, GREENWIRE, June 30, 1994) (eighteen editorials collected by Greenwire show 13 support, four criticize, and one is undecided on the *Dolan* decision).

18. Justice Stevens filed a dissenting opinion in which Justices Blackmun and Ginsburg joined. *Dolan*, 114 S. Ct. at 2322. Justice Souter also filed a dissenting opinion. *Id*. at 2330. See *infra* notes 191–224 and accompanying text for a discussion of the dissenting opinions.

the city in defending a valid use of the police power in the enforcement of its comprehensive land use management program.

THE FACTS OF DOLAN

Florence Dolan[19] brought suit against the city of Tigard, a suburb of Portland, Oregon, because the city required Dolan to dedicate a portion of her property to the city as a condition of a building permit.[20] Dolan owns a plumbing and electrical supply store on Main Street in the central business district of Tigard.[21] The store is situated on a 1.67 acre lot, the building and a gravel parking lot cover 9700 square feet of the eastern portion of the lot.[22] Fanno Creek flows along the western boundary of the lot and through the southwestern corner.[23] The area is part of the creek's 100-year flood plain, rendering the area unusable for commercial development.[24] The flood area, as required by Tigard's comprehensive land use plan, is part of Tigard's greenway system.[25]

Dolan applied to the city for a building permit to nearly double the size of her store and pave a thirty-nine space parking lot.[26] The

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19. John T. Dolan, husband of the Petitioner, Florence Dolan, initially joined with his wife in bringing suit. However, Mr. Dolan died of leukemia in 1993 before the Court heard the case. Brief for Petitioner at ii, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (No. 93-518); Ronald L. Weaver & Mark D. Solov, *Emerging Property Rights Protection*, FLA. B.J. June 1994, at 103.

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

21. *Id*. Dolan's property was subject to CBD zoning, Commercial Business District, and AA, Action Area Overlay zoning. Brief for Petitioner at 2, *Dolan* (No. 93-518). The CBD zoning allowed for many uses including retail stores. *See* Community Development Code (CDC) § 18.66.030, *cited in* Brief for Respondent app. B at 32b, *Dolan* (No. 93-518). The AA zoning applied to areas of intensive land use and "ensure[d] that projected public facility needs, pursuant to CDC chapter 18.164 are addressed during redevelopment and intensification of use in the area." *See* CDC § 18.86.040.A., *cited in* Brief for Respondent app. B at 32b, *Dolan* (No. 93-518).

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

23. *Id*.

24. *Id*. Dolan's property qualified as a Sensitive Land area according to the CDC because it was located within a floodplain area. CDC § 18.84.010.A, *cited in* Brief for Respondent app. B at 15b, *Dolan* (No. 93-518). The CDC stated that permits for property in this area could be subject to conditions. CDC § 18.84.040.C, *cited in* Brief for Respondent app. B at 28b, *Dolan*, (No. 93-518).

25. *Dolan*, 114 S. Ct. at 2313. Tigard's Master Drainage Plan noted that flooding occurred along Fanno Creek, including the area near Dolan's property. *Id*. The Master Drainage Plan recommended keeping the floodplain free of buildings and preserving the area as "greenways to minimize flood damage to structures." *Id*.

26. *Id*. The current building size is 9700 square feet and the building permit appli-

permit was approved subject to conditions imposed by Tigard's Community Development Code.[27] The Community Development Code's standard for site development approval required that where development is allowed adjacent to the 100-year floodplain, the city mandates the dedication of open land for a greenway along and within the floodplain.[28] This greenway must include an area for the construction of a pedestrian/bicycle pathway.[29] The building permit conditions required Dolan to dedicate her property within the 100-year floodplain to allow the city to improve the storm drainage system along Fanno Creek and to dedicate a fifteen foot strip of land along the floodplain as a pedestrian/bicycle pathway.[30] The required dedication consists of approximately ten percent of Dolan's property.[31]

Dolan applied for variances from the Community Development Code requirements.[32] Only by showing that the requirements would cause an unnecessary hardship because of special circumstances pertaining to the specific lot in question would the variance be

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cation calls for the building to be increased to 17,600 square feet. *Id*. The new store will be built on the opposite side of the lot from the existing store and, as construction on the new store progresses, the old store will be razed in sections. *Id*. If the proposed development included changes which caused major impacts, the development was called a "major modification" and subject to discretionary approval called "site development review." Brief for Respondent at 2–3, *Dolan* (No. 93-518). *See* CDC § 18.120.020.A, *cited in* Brief for Respondent app. B at 38b, *Dolan* (No. 93-518). As a "major modification," Tigard could attach conditions to development within the Action Area Overlay to facilitate the bicycle/pedestrian circulation if the property was adjacent to a greenway, as was the case here. CDC § 18.86.040.A.1.b, *cited in* Brief for Respondent app. B at 32b–33b, *Dolan* (No. 93-518). Dolan did not dispute that her proposed development was a "major modification." Brief for Respondent at 3, *Dolan* (No. 93-518).

27. *Dolan*, 114 S. Ct. at 2314. See *supra* notes 21, 24 for a discussion of the zoning classifications applied to Dolan's property.

28. *Id*. (quoting CDC § 18.120.180.A.8, *cited in* Brief for Respondent app. B at 45b–46b, *Dolan* (No. 93-518)).

29. The language of the CDC standard is as follows:

> Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.

CDC § 18.120.180.A.8, *cited in* Brief for Respondent app. B at 45b–46b, *Dolan* (No. 93-518).

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

31. *Id*.

32. *Id*.

granted.[33] Dolan merely argued that her proposed building plan was consistent with the comprehensive plan instead of suggesting alternative measures for dealing with the impacts of her proposed development.[34] The City Planning Commission denied her application.[35]

The Commission's findings noted that a relationship existed between the required dedications and the impacts of the proposed development.[36] In regard to the bicycle pathway, the Commission found it reasonable to assume that customers and employees of the future uses on the land,[37] including Dolan's expanded store, would use the bike path for transportation and recreation.[38] As for the

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33. *Id*. CDC § 18.134.050 lists the following criteria used by the decision making authority to approve, approve with modifications, or deny a requested variance:

> 1. The proposed variance will not be materially detrimental to the purposes of this title, be in conflict with the policies of the comprehensive plan, to any other applicable policies of the Community Development Code, to any other applicable policies and standards, and to other properties in the same zoning district or vicinity;
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> 2. There are special circumstances that exist which are peculiar to the lot size or shape, topography or other circumstances over which the applicant has no control, and which are not applicable to other properties in the same zoning district;
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> 3. The use proposed will be the same as permitted under this title and City standards will be maintained to the greatest extent that is reasonably possible while permitting some economic use of the land;
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> 4. Existing physical or natural systems, such as but not limited to traffic, drainage, dramatic land forms or parks will not be adversely affected any more than would occur if the development were located as specified in the title; and
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> 5. The hardship is not self-imposed and the variance requested is the minimum variance which would alleviate the hardship.

Id. at 2324 n.3 (citing CDC § 18.134.050.A.1-5, *cited in* Brief for Respondent app. B at 49b, *Dolan* (No. 93-518)).

34. *Id*. at 2314. Dolan submitted a one-half page statement to the city in an attempt to justify a variance. Brief for Respondent at 4, *Dolan* (No. 93-518). But the statement did not contain any of the required information relating to the drainage and traffic impacts caused by the proposed development. *Id*. Dolan's variance application provided her an opportunity to prove facts relating to the impacts of the proposed development as well as any changes or mistakes in the zoning map or comprehensive plan. *Id*. at 6. Because Dolan's application for a variance was incomplete, the city could have denied the application. *Id*. Despite the incomplete application, the city evaluated it with the facts available. *Id*. *See* CDC §§ 18.32.250.A, .E, 18.10.010, 18.16.010.B, *cited in* Brief for Respondent app. B at 1b–7b, *Dolan* (No. 93-518).

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

36. *Id*.

37. *Id*. Dolan's plans included a second phase of development on the property: an additional structure for complimentary businesses for the northeast side of the lot as well as additional parking. *Id*. at 2313–14.

38. *Id*. at 2314.

floodplain dedication, the Commission found the dedication reasonably related to Dolan's request to increase the impervious surface area of her property.[39] The expected increase in storm water flow from Dolan's property into the already strained creek and drainage basin would augment the public need to maintain the stream channel and floodplain to facilitate drainage.[40] The Tigard City Council approved the Commission's final order.[41]

Dolan appealed to the Land Use Board of Appeals (LUBA).[42] As grounds for the appeal, Dolan stated that the city's dedication requirements were not related to the proposed development.[43] Therefore, according to Dolan, the requirements were an uncompensated taking under the Fifth Amendment.[44]

LUBA embraced the city's impact findings of the proposed development as being "supported by substantial evidence."[45] No one disputed that the proposed development, including the enlarged building and the increased paved parking area, would increase the impervious surface area and storm water runoff into Fanno Creek.[46] The city also produced findings that the increased development, the larger building, and the parking lot would attract a greater number of employees, customers and their vehicles, thus impacting the area with increased traffic congestion.[47] A pedestrian/bicycle pathway could alleviate the traffic congestion by providing an alternative means of transportation.[48] LUBA found a reasonable relationship between the dedication requirements and the proposed development

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39. *Id*. at 2315.

40. *Id*.

41. *Id*.

42. *Id*. In 1979, the Oregon legislature implemented a new system for reviewing land use decisions made by governmental entities. Brief for Amici Curiae 1000 Friends of Oregon at 9, *Dolan* (No. 93-518). LUBA, the new reviewing agency, is the first governmental body that reviews land use decisions. *Id*. LUBA has exclusive jurisdiction over such decisions. OR. REV. STAT. § 197.825(1) (1993). Decisions by LUBA are subject to judicial review by the court of appeals. *Id*. § 197.825(2)(b).

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

44. *Id*.

45. *Id*. Dolan did not provide any evidence so the city used the storm drainage plan and the transportation plan to conclude that the proposed development substantially impacted both the flooding and traffic problems. Brief for Respondent at 47 n.34, *Dolan* (No. 93-518).

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

47. *Id*.

48. *Id*.

impacts.[49]

The Oregon Court of Appeals affirmed.[50] The court found that there was a direct and reasonable relationship between the prerequisites attached by the city to the building permit for the approval of the intensified use and the impacts and public needs created by the proposed development.[51] The Supreme Court of Oregon similarly affirmed,[52] agreeing with LUBA's conclusion: The conditions imposed by the city compelling dedication of portions of Dolan's property were not an unconstitutional taking of property, and therefore were not in violation of the Fifth Amendment.[53]

Dolan appealed to the United States Supreme Court. The Court granted certiorari[54] and reversed and remanded the decision.[55] HELD: The building permit conditions requiring the dedication of portions of Dolan's property were an uncompensated taking of property.[56]

HISTORICAL OVERVIEW[57]

Historically, governmental entities have had the authority to regulate land use to protect the health, safety, morals, and welfare of the public.[58] The power to regulate the use of land is derived from

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49. *Id*.

50. Dolan v. City of Tigard, 832 P.2d 853 (Or. Ct. App. 1992).

51. *Id*. at 856. The court rejected Dolan's argument that in *Nollan* the Supreme Court abandoned the "reasonable relationship test" for the stricter "essential nexus test." *Id*.

52. Dolan v. City of Tigard, 854 P.2d 437 (Or. 1993) (en banc).

53. *Id*. at 444. The Oregon Supreme Court also rejected Dolan's argument that the reasonable relationship test had been abandoned in *Nollan*. *Id*. at 442. The Supreme Court of Oregon interpreted *Nollan* to mean that an "exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve." *Dolan*, 114 S. Ct. at 2315 (quoting *Dolan*, 854 P.2d at 443).

54. 114 S. Ct. 544 (1993). The Court granted certiorari to resolve the question left unanswered by Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), of "what is the required degree of connection between the exaction imposed by the city and the projected impacts of the proposed development." *Dolan*, 114 S. Ct. 2309, 2312 (1994).

55. *Dolan*, 114 S. Ct. at 2322. On remand, the Oregon Supreme Court reversed the decision of the court of appeals and the order of LUBA, remanding the case to the city of Tigard for further proceedings. *See* Dolan v. City of Tigard, 877 P.2d 1201 (Or. 1994) (en banc) (per curiam).

56. *Dolan*, 114 S. Ct. at 2321–22.

57. For an excellent historical overview of regulatory takings, *see generally* Morosoff, *supra* note 3.

58. *See*, *e.g.*, Transportation Co. v. Chicago, 99 U.S. 635, 642 (1878). The classic

the police power.[59] A problem arises when a property owner argues that a land use regulation pursuant to the police power amounts to a taking under the Fifth Amendment.[60] Whether the property owner should be protected from the land use regulations is a confusing constitutional question. The confusion stems from the Takings Clause itself which neglects to define the terms "property" and "taken."[61]

The regulatory takings[62] issue originated in cases dealing with harm-prevention rules. In 1887, in *Mugler v. Kansas*,[63] the Supreme Court upheld legislation banning the sale and manufacture of alcohol.[64] The property owner was no longer allowed to use his property as a brewery, thereby greatly diminishing his property value.[65] The

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statement of the rule limiting public encroachment on private property was stated in 1894 as follows:

> To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Lawton v. Steele, 152 U.S. 133, 137 (1894). The Court found many different purposes as qualifying under the police power. *See*, *e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (public access to see the beach); Agins v. City of Tiburon, 447 U.S. 254 (1980) (open space/scenic zoning); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (historical preservation); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (residential zoning); Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878) (nuisances injurious to public health).

59. The police power was described in Mugler v. Kansas, 123 U.S. 623 (1887), as that power "exerted for the protection of the health, morals, and safety of the people." *Id*. at 668. The *Mugler* Court went on to find that "a prohibition simply upon the use of property for purposes that are declared . . . to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Id*. at 668–69. The police power has existed since before the Constitution. *See* Thomas A. Hippler, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle of Rights" from* Mugler *to* Keystone Bituminous Coal, 14 B.C. ENVTL. AFF. L. REV. 653, 654 n.4 (1987).

60. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

61. *See* Morosoff, *supra* note 3, at 832.

62. For a clear explanation of the differences between eminent domain and the police powers as well as the different types of police power regulations, see James J. Brown, *Takings: Who Says it Needs to Be So Confusing?*, 22 STETSON L. REV. 379 (1993).

63. 123 U.S. 623 (1887).

64. *Id*. at 670.

65. *Id*. at 657. The buildings and machinery on the property had little value if not used for making beer. *Id*. The enforcement of the legislation against the manufacture of beer caused the value of the property to greatly diminish. *Id*.

Court found that the prohibition of use for purposes the legislature deemed to be injurious to public health was neither an appropriation nor a taking.[66] The legislation was a legitimate use of the police power adapted to a legitimate public purpose.[67] The Court rejected the property owner's argument that the regulation was a taking under the Fifth Amendment and concluded that it deserved no compensation.[68]

In *Hadacheck v. Sebastian*,[69] the property in question was originally used for a brickyard. Subsequent zoning of the property prohibited industrial use.[70] Though the value of the property decreased considerably, the Supreme Court held that the zoning was within the realm of the police power.[71] The Court awarded no monetary compensation.[72] The *Hadacheck* Court reaffirmed the rule in *Mugler* that a police power restriction on the use of property could not constitute a taking.

Until 1922, the Supreme Court upheld the government's aggressive exercise of the police power in land use regulations.[73] Takings

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66. *Id*. at 668–69. Justice Harlan went on to say that "such legislation does not disturb the owner in control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one for certain forbidden purposes, is prejudicial to the public interests." *Id*. at 669.

67. *Id*. at 661–62. The *Mugler* Court found that the legislation banning the manufacture and sale of intoxicating liquors was proper because the law was not aimed at depriving citizens of constitutional rights, but at protecting the public health, morals, and safety which "may be endangered by the general use of intoxicating drinks." *Id*.

68. *Id*. at 671. The Court held that the state legislature had the authority to prohibit the manufacture of beer and to declare that beer manufacturing facilities were common nuisances. *Id*. at 669. Nothing in the legislation deprived persons of their property without due process of law. *Id*.

69. 239 U.S. 394 (1915).

70. *Id*. at 404. The ordinance in the city of Los Angeles made it illegal to establish or operate a brickyard or brick kiln within the city limits. *Id*.

71. *Id*. at 405. The value of the property dropped from $800,000 used as a brickyard to $60,000 used as residential property. *Id*. The Court was unsympathetic to the decrease in value and looked strictly to the nature of the brickyard as a noxious use or a nuisance. *Id*. Furthermore, the Court found that it was dealing with the police power, "one of the most essential powers of government, one that is the least limitable." *Id*. at 410. Though it may "seem harsh in its exercise, [it] usually is [harsh] on some individual[s], but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily." *Id*.

72. *Id*. at 412. The ordinance did not prohibit the land owner from removing the brick clay and taking it to a kiln elsewhere, so the property still retained some of its value. *Id*.

73. *See* John M. Groen & Richard M. Stephens, *Takings Law,* Lucas *and the Growth Management Act*, 16 U. PUGET SOUND L. REV. 1259, 1269–70 (1993); *see, e.g.*,

law has been in a state of confusion since the Court decided *Pennsylvania Coal Co. v. Mahon*[74] in 1922. The decision in *Pennsylvania Coal* signalled the Court's attack on the government's police power land use regulations. *Pennsylvania Coal* concerned subsidence legislation.[75] The legislation did not allow the coal company to mine the coal which served as support for the surface land.[76] The coal company argued that the regulation was an uncompensated taking in violation of the Fifth Amendment.[77] The Court agreed, holding that the regulation resulted in a taking.[78] The decision marked the first time the Court used the Fifth Amendment in relation to a use regulation on private property.[79] Justice Holmes' opinion pointed out that a land use regulation would be a taking under the Fifth Amendment if there was no "reciprocity of advantage."[80] If the regulation did not provide a balance of benefit between the regulated property owner and the community in general, the regulation could not be justified under the police power.[81] Justice Holmes' majority opinion provides the language most often cited by petitioners arguing a regulatory taking: "[W]hile property may be regulated to a certain ex-

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Reinman v. City of Little Rock, 237 U.S. 171 (1915) (upholding an ordinance prohibiting livery stables in certain parts of the city).

74. 260 U.S. 393 (1922).

75. *Id*. at 412. The legislation was known as The Kohler Act, 1921 Pa. Laws 1198. The Kohler Act forbade the mining of anthracite coal if the mining would cause subsidence of any structure used for human habitation as well as other structures. 260 U.S. at 412–13.

76. *Id*. An exception to the mining restriction allowed subsurface mining when the surface was owned by the same person who owned the subsurface rights to the coal so long as the property was more than 150 feet from improved property belonging to another person. *Id*. at 413.

77. *Id*. at 404.

78. *Id*. at 414. The Court found that the extent of the taking was great, acting to destroy the coal company's constitutionally protected right to the coal itself, thus destroying the coal company's valuable estate in land. *Id*. The ordinance was a taking of property because the "right to coal consists in the right to mine it." *Id*. at 414 (quoting Commonwealth v. Clearview Coal Co., 256 Pa. 328, 331 (1917)).

The Court did not use the police power argument to uphold the subsidence legislation, Justice Holmes stated, because the statute in question benefitted only one house instead of providing a benefit to the public in general. *Id*. at 413. Without a general public benefit, the mining of the coal causing damage to a single house could not be considered a public nuisance. *Id*.

79. DANIEL R. MANDELKER, LAND USE LAW § 2.11, at 29 (3d ed. 1993).

80. *Pennsylvania Coal*, 260 U.S. at 415.

81. *Id*. at 422 (Brandeis, J., dissenting).

tent, if regulation goes too far it will be recognized as a taking."[82] Unfortunately, Holmes did not provide any guidance on when the taking "goes too far."[83]

Starting in 1978, the Supreme Court began to hear regulatory takings cases more frequently.[84] In the landmark case *Penn Central Transportation Co. v. New York City*,[85] the Court upheld a historic preservation zoning ordinance.[86] Deciding that the Court had never before adopted a set formula for the Takings Clause, it developed a multi-factor balancing test.[87] The three factors considered were the economic impact of the regulation, the extent the action interferes with "investment-backed expectations," and the character of the action.[88] Using the multi-factor balancing test, the Court found that

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82. *Id*. at 415; *see*, *e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992); Yee v. City of Escondido, 112 S. Ct. 1522, 1529 (1992); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 508 (1987); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 198 (1985); San Diego Gas and Elec. Co. v. City of San Diego, 450 U.S. 621, 649 (1981); United States v. Central Eureka Mining Co., 357 U.S. 155, 182 (1958); *see* MANDELKER, *supra* note 79, § 2.11, at 29.

83. *Pennsylvania Coal*, 260 U.S. at 415. Justice Holmes stated that the statute in question benefitted only one home instead of providing a benefit to the public in general. *Id*. at 413. Without a general public benefit, the mining of the coal could not be considered a public nuisance. *Id*.

84. The Court decided at least nine cases in the 10 years following Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Morosoff, *supra* note 3, at 837 n.109. In 1926, the Court heard Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). *Euclid* upheld the constitutionality of a comprehensive zoning ordinance though the zoning could have caused a severe diminution of property value. *Id*. at 397.

Another nuisance case decided by the Supreme Court was Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), in which the Court upheld a safety ordinance regulating dredging and pit excavation within town limits. The ordinance was not an unconstitutional taking even though it deprived the property of its most beneficial use. *Id*. at 592–95.

85. 438 U.S. 104 (1978).

86. *Id*. at 138. The Grand Central Terminal, owned by Penn Central, was designated as a landmark. *Id*. at 116. The Court upheld as constitutional a historic preservation law which denied Penn Central permission to build a multi-story addition on top of the existing building because the construction would impair the "aesthetic quality" of the building. *Id*. at 110, 137. The land use regulation was aimed at enhancing the "quality of life by preserving the character and desirable aesthetic features of a city." *Id*. at 129.

87. *Id*. at 124.

88. *Id*. When dealing with the character of the action, the Court compared a physical invasion, readily determined as a taking, and an interference caused by a public program whereby the Court must adjust and weigh the "benefits and the burdens of economic life to promote the common good" before the ordinance is considered a taking. *Id*. The latter includes land use regulations. *See* MANDELKER, *supra* note 79, § 2.13, at

the ordinance's preclusion of the use of the air rights above Penn Central was not a compensable taking.[89] The Court considered the whole parcel to determine whether the ordinance was a taking.[90] Justice Brennan stated that "`[t]aking' jurisprudence does not divide a single parcel into discrete segments" and then determine if the rights in that particular segment have been completely nullified.[91]

In 1979 and 1980, the Supreme Court decided several cases concerning the destruction of only one strand in the total bundle of property rights.[92] In *Kaiser Aetna v. United States*, the Court held that a regulation eliminating a property owner's right to exclude people from his property constituted a taking.[93] Nevertheless, the Court held in *PruneYard Shopping Center v. Robins*[94] that the property owner's right to exclude is merely one strand in the bundle of property rights.[95] Instead of concentrating on a single strand in the bundle, the Court held that the property rights should be viewed in their entirety.[96] The *PruneYard* Court held that the property owner

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89. *Penn Central*, 438 U.S. at 137.

90. *Id*. at 130.

91. *Id*. Penn Central argued that the airspace above the terminal was valuable property which was taken when the trial court refused to allow construction on top of the terminal. *Id*. The Court found that the property should be looked at as a whole and the inability to exploit one aspect of the property to its fullest potential was not a taking worthy of compensation. *Id*.

92. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Andrus v. Allard, 444 U.S. 51 (1979).

93. Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979). The owners of a private pond invested a substantial sum of money dredging the pond and developing an exclusive marina and surrounding community which was open only to fee-paying members. *Id*. at 165–67. The federal government tried to compel free public use of the marina stating that when the pond was connected to navigable water, it became subject to the federal navigation servitude. *Id*. at 177–78. The Court held that the ordinance regulated the property owners' right to exclude, which interfered with their "reasonable investment backed expectations." *Id*. at 175, 179–80.

94. 447 U.S. 74 (1980). In *PruneYard*, the plaintiffs owned a shopping center open to the public which had a policy of not allowing any activity considered public expression, such as the circulation of petitions. *Id*. at 77. A group of high school students attempted to solicit signatures on a petition against the war and were told to leave the shopping mall. *Id*. The students sued to enjoin the shopping center from denying them access to PruneYard to exercise their constitutional right of expression by petitioning. *Id*.

95. *Id*. at 82. The Court found that the right to exclude was one essential stick in the bundle of rights. *Id*. (citing *Kaiser Aetna*, 444 U.S. at 179–80). But the Court's decision in *PruneYard* was the opposite of *Kaiser Aetna*. See *supra* note 93 and accompanying text for a discussion of *Kaiser Aetna*.

96. 447 U.S. at 83. The Court held that not allowing the shopping center to ex-

failed to demonstrate that the right to exclude others was so essential to the use and value of the property that the limitation of the right amounted to a taking.[97]

The Supreme Court's next regulatory takings decision was *Agins v. City of Tiburon*[98] where the court upheld an open-space zoning ordinance. In *Agins*, the Court adopted a two-part takings test, different from the multi-factor test the Court set out in *Penn Central*.[99] The Court held that if the zoning ordinance does not "substantially advance legitimate state interests" or if it denies the property owner "economically viable use" of his property, the ordinance effects a taking.[100] The open-space ordinance substantially advanced

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clude the petitioners was not an unconstitutional infringement under the Takings Clause because the requirement did not "unreasonably impair the value or use of [the] property as a shopping center." *Id*.

The Court's decision in Andrus v. Allard, 444 U.S. 51, 68 (1979) was also based on viewing the entire bundle of property rights. "[W]here an owner possesses a full `bundle' of property rights, the destruction of one `strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id*. at 65–66. In *Andrus*, federal legislation banned the sale of Indian artifacts made from the feathers of particular birds. *Id*. at 53–54. The Court held that the prohibition of the most profitable use of the property, the right to sell, was not a taking. *Id*. at 66.

97. *Id*. at 84. The United States Supreme Court also heard cases dealing with physical occupation takings or per se takings. In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), New York law authorized a cable television company to install cable equipment on Loretto's apartment building. *Id*. at 421. The Court held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id*. at 426. The permanent placement of the cable box was a taking of property. *Id*.

The Court limited the holding of *Loretto* in Yee v. City of Escondido, 112 S. Ct. 1522 (1992). *See* MANDELKER, *supra* note 79, § 2.14, at 34. In *Yee*, an Escondido rent control ordinance prevented a lot owner from raising lot rent at his mobile home park without City Council approval. 112 S. Ct. at 1527. The Court rejected the argument that the rent control ordinance subjected the mobile home lot owner to a physical occupation of his land. *Id*. at 1528. The ordinance regulated the use of the land, but did not result in a physical taking. *Id*. at 1529.

In Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), the Supreme Court adopted a new rule for regulatory per se takings. *Id*. at 2900. The Court held that a beachfront management act prohibiting any permanent structures on Lucas' property was unconstitutional because it denied Lucas all economically viable use. *Id*. at 2889, 2895–96. Justice Scalia avoided applying historical takings jurisprudence by creating a new category of per se regulatory takings. *See* MANDELKER, *supra* note 79, § 2.18, at 41.

Dolan is not a per se takings case. The Petitioner chose to base her case against the city on a heightened scrutiny argument. *See* Brief for Respondent at 39 n.30, *Dolan* (No. 93-518).

98. 447 U.S. 255 (1980).

99. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

100. *Agins*, 447 U.S. at 260–61; *see* Nectow v. Cambridge, 277 U.S. 183, 188 (1928).

legitimate government goals.[101] The zoning regulations were an exercise of the city's police power to protect the city's residents from the "ill effects of urbanization."[102] But the Court's omission of the applicable standard of judicial review caused uncertainty in the takings law.

In 1987, the Court decided *Keystone Bituminous Coal Ass'n v. DeBenedictis*, and thereby confirmed the Court's two-part takings rule in *Agins*.[103] In *Keystone*, the Court upheld a subsidence statute similar to that struck down in *Pennsylvania Coal*.[104] The subsidence statute in *Keystone* differed from that in *Pennsylvania Coal* because in *Keystone* the law arguably advanced legitimate state interests in protecting public health and safety and the environment.[105] The Court referred to the *Penn Central* three-part test in a footnote,[106] but used the *Agins* test,[107] marking an important change in takings decisions.[108] The Court's use of the *Agins* test reintroduced into takings analysis an emphasis on government purposes, helping to protect land use regulations from constitutional attacks.[109] In addition, the Court reintroduced the *Pennsylvania Coal* "reciprocity of advantage" rule[110] and the *Penn Central* "whole parcel" rule.[111]

Also decided in 1987 was *First English Evangelical Lutheran Church v. County of Los Angeles* in which the Supreme Court stated for the first time that if a land use regulation is invalidated as a taking, the Fifth Amendment requires that the government pay

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101. *Agins*, 447 U.S. at 261.

102. *Id*; *see, e.g.*, *Penn Central*, 438 U.S. at 129; Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394–95 (1926).

103. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987).

104. *Id*. at 481–85; *see* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

105. *Keystone*, 480 U.S. at 485–86, 488. As discussed in note 78 *supra*, the *Pennsylvania Coal* statute protected only a single private home, unlike the statute here which protected public buildings, schools, churches, homes, cemeteries, streams, and aquifers. *Id*. at 476 n.6 (citing PA. STAT. ANN. tit. 52, § 3101 (1966)), 486.

106. *Id*. at 488 n.18.

107. *Id*. at 495.

108. *See* MANDELKER, *supra* note 79, § 2.15, at 36.

109. *Keystone*, 480 U.S. at 498. This subsidence ordinance was enacted by virtue of the police power to protect the public. *Id*. at 488–89.

110. *Id*. at 491; see *supra* notes 80–83 and accompanying text for a discussion of *Pennsylvania Coal*'s average reciprocity of advantage rule.

111. *Keystone*, 480 U.S. at 497; see *supra* note 91 and accompanying text addressing the Court's requirement that the property be viewed as a whole.

compensation for the temporary taking.[112] In *First English*, a church in Los Angeles County owned a parcel of land that it used as a recreational facility for handicapped children.[113] Because a forest fire denuded the hills upstream from the church's recreational campsite causing a serious flood hazard to the church property, Los Angeles County adopted an ordinance to prevent the construction, reconstruction, or enlargement of any building or structure within the flood protection area.[114] The ordinance in question was the type typically upheld on the basis of the state's police power authority to enact safety regulation.[115]

The church filed a complaint against the county stating that the ordinance denied it of all use of its property and demanded just compensation.[116] The Supreme Court accepted the church's allegations that the ordinance completely denied it of all use of its property.[117] The Court held that excessive regulation of property, even for the time it takes to have the ordinance reviewed and invalidated by the court, is a temporary taking deserving compensation.[118] This landmark decision left unanswered the question of what constitutes an unconstitutional regulatory taking.[119] By failing to announce a workable definition or a set standard, the Court did little to clear up the confusion plaguing the regulatory takings issue.[120]

In *Nollan v. California Coastal Commission*, also decided in 1987, the Supreme Court struck down a building permit condition

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112. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987). *First English* and *Nollan*, both decisions announced in June of 1987, have proved to be two of the most significant land use cases of the last 50 years. Falik & Shimko, *supra* note 6, at 359. Both decisions "tipped the scale toward the side of property owners" in the fight between the state's police power authority and private property rights. *Id*.

113. 482 U.S. at 307.

114. *Id*. The church's camp for handicapped children, known as Lutherglen, consisted of several buildings including bunkhouses, a caretaker's lodge, a dining hall and an outdoor chapel. *Id*. A flood destroyed all of the buildings. *Id*. Because of the ordinance, the church was not permitted to rebuild the campsite. *Id*.

115. Falik & Shimko, *supra* note 6, at 359; *see* Goldblatt v. Town of Hempstead, 369 U.S. 590, 592–93 (1962); Mugler v. Kansas, 123 U.S. 623, 668 (1887).

116. *First English*, 482 U.S. at 308.

117. *Id*. at 321.

118. *Id*. at 319.

119. Falik & Shimko, *supra* note 6, at 361.

120. *Id*. The decision left at issue whether the landowner must prove only that the regulation prohibited all use of the property, or whether the landowner must additionally show that the regulation was beyond the scope of the government's police powers. *Id*.

that required the owners of beachfront property to dedicate an easement enabling the public to pass across their beach.[121] In its analysis, the Court stated that had the state required the Nollans to dedicate a beach easement for public use, rather than condition a building permit to rebuild their home on the dedication, the requirement would have been a taking.[122] Where the government action represents a permanent physical occupation of the property, it is a taking.[123]

However, in *Nollan*, because the requirement was attached to a building permit, the question was whether the land use regulation "substantially advance[d] legitimate state interests" without denying the owner "economically viable use of his land."[124] The Court conceded that none of its cases had elaborated on the standards for deciding what is a legitimate state interest or what kind of connection must exist between the regulation and the state interest to satisfactorily qualify as substantially advancing those interests.[125] The Court merely announced the "essential nexus" standard and stated that the lack of nexus between the easement required as a condition precedent to the building permit and the purpose of the condition made the exaction scheme an invalid regulation of land.[126] The Court went on to say that "[w]hatever may be the outer limits of `legitimate state interests' in the takings and land-use context, this is not one of them."[127]

In using the *Nollan* nexus test, the Court reaffirmed the two-

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121. Nollan v. California Coastal Comm'n, 483 U.S. 825, 841–42 (1987).

122. *Id*. at 831.

123. *Id*. at 831–32; see *supra* note 97 regarding physical occupation takings.

124. *Nollan*, 483 U.S. at 834 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)); *see* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978).

125. *Nollan*, 483 U.S. at 834. The Supreme Court had not fashioned a formula to determine when a regulation goes "too far." Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992).

126. *Nollan*, 483 U.S. at 837. Prior to *Nollan*, state courts used similar standards requiring a reasonable relationship or rational nexus between the condition and the purpose. *See, e.g.*, Ayres v. City Council, 207 P.2d 1 (Cal. 1949) (en banc); Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961); Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964); Land/Vest Properties, Inc. v. Town of Plainfield, 379 A.2d 200 (N.H. 1977); Longridge Bldrs., Inc. v. Planning Bd., 245 A.2d 336 (N.J. 1968); Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966); Call v. City of West Jordan, 614 P.2d 1257 (Utah 1980); *see* Morosoff, *supra* note 3, at 847.

127. *Id*.

part test in *Keystone*[128] and *Agins*,[129] but elaborated by stating that the takings standard is more exacting than the typical due process standard.[130] The Court stated in a footnote that the test standard set out in *Agins* required heightened scrutiny when evaluating the relationship between the condition and the state objective.[131] The standard was above that of the equal protection standard which requires that the state "could rationally have decided" that the condition achieved the purpose.[132] The Court went on to hold that if a permit condition served the same legitimate purpose under the police power as a rejection of the permit, the condition would not be a taking.[133] For example, if the condition precedent on a building permit required a public ocean viewing spot on the beachfront property and the purpose was to guaranty the public visual access to the ocean, the rejection of the permit and the permit condition would serve the same purpose.[134] If the condition did not advance the purpose serving as the justification of the condition, the exactions would be constitutionally improper.[135] Without the essential nexus, the purpose of the condition was merely an attempt by the government to obtain the easement without paying compensation, and not for the furtherance of the closely related purpose.[136]

In *Nollan*, the Court found that the Commission's justification

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128. See *supra* notes 103–11 and accompanying text for a discussion of *Keystone*.

129. See *supra* notes 99–102 and accompanying text for a discussion of *Agins*.

130. *Nollan*, 483 U.S. at 834 n.3; *see* Leigh & Burton, *supra* note 1, at 840. The test used in *Nollan* was consistent with the approach taken by every other court except California. *Nollan*, 483 U.S. at 839. The Court listed Parks v. Watson, 716 F.2d 646 (9th Cir. 1983), as an example of the test used. *Nollan*, 483 U.S. at 839. *Parks* used the rational nexus test which employs a middle of the road standard of scrutiny. *Parks*, 716 F.2d at 652–53. See *infra* note 150 regarding *Parks*.

The *Nollan* Court did not abandon the reasonably related test but gave some guidance when testing the required relationship by stating that there had to be more than "cleverness and imagination" when determining the existing relationship between the exaction and the impact. Dolan v. City of Tigard, 854 P.2d 437, 443 n.10 (Or. 1993) (citing *Nollan*, 483 U.S. at 841).

131. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

132. *Nollan*, 483 U.S. at 834 n.3; *see* Leigh & Burton, *supra* note 1, at 340.

133. *Nollan*, 483 U.S. at 836.

134. *See id*.

135. *Id*. at 837. In summary, the Court held that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but `an out-and-out plan of extortion.'" *Id*. (quoting J.E.D. Assocs., Inc. v. Town of Atkinson, 432 A.2d 12, 14 (N.H. 1981)).

136. *Id*. at 837.

for the land use regulation, visual access, did not bear the essential nexus to the exaction imposed upon the property owner, the easement.[137] The Court found it impossible to understand how the easement allowing people already on a public beach to walk across the Nollans' property could reduce the obstructed view caused by a new house.[138] Because the easement for lateral access would not advance the same purpose as rejection of the permit, the regulation was therefore a taking.[139] If the land use regulation had banned fences or limited the height of the new structure, the condition would have been constitutional because there would have been an essential nexus between the condition and the police power justification.[140]

The nexus test used by the *Nollan* Court was not new. State courts have applied similar nexus tests in deciding the takings issue in land use cases.[141] The Takings Clause of the Fifth Amendment is applicable to the states via the Fourteenth Amendment, and most state Constitutions have a Takings Clause.[142] "The state courts regularly decide takings cases" thereby providing "a more substantial body of law than United States Supreme Court cases."[143] Rules set down by the Supreme Court, though based on the Fifth Amendment, as suggested by the states' interpretation of the takings issue, are enforceable in state courts.[144] No set formula has been adopted by all of the state courts.[145] The level of scrutiny varies from court to court. For example, some courts rely upon a generalized statement to describe the connection required between the regulation and the impact produced by the proposed development.[146] Other state courts apply a more restrictive version of the nexus test requiring the exaction to be "specifically and uniquely attributable" to the impact of

137. *Id*. at 849–51 (Brennan, J., dissenting).

138. *Id*. at 838.

139. *Id*. at 839–42.

140. *Id*. at 836.

141. Morosoff, *supra* note 3, at 847; see *supra* note 126 for a list of state court decisions using the nexus test.

142. *See* MANDELKER, *supra* note 79, § 2.01, at 20.

143. *See id*. § 2.25, at 47.

144. *Id*. § 2.02, at 21.

145. *Id*. *See* Dolan v. City of Tigard, 114 S. Ct. 2309, 2318–19 (1994).

146. *See*, *e.g.*, Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182, 188 (Mont. 1964) (indicating that the court has a duty to uphold legislative enactments if there is any rational basis on which they can be upheld).

the development.[147] Still, other state courts apply a more intermediate version of the nexus test referred to as the "reasonable relationship test."[148] This test requires a reasonable relationship between the dedication required by the land use regulation and the impact produced by the proposed development.[149] Many state courts have adopted some form of the reasonable relationship test.[150] Because the *Nollan* decision left unanswered the question of the degree of connection required between the exaction and the impact proposed, the Supreme Court in *Dolan* used representative state court decisions to help answer this question.[151]

COURT'S ANALYSIS

In *Dolan v. City of Tigard*, the Supreme Court began its analysis by noting that the Takings Clause of the Fifth Amendment[152] is

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147. *Dolan*, 114 S. Ct. at 2319 n.7; Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961); *see*, *e.g.*, J.E.D. Assocs., Inc. v. Town of Atkinson, 432 A.2d 12, 15 (N.H. 1981); Divan Bldrs., Inc. v. Planning Bd., 334 A.2d 30, 40 (N.J. 1975); McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370, 374 (Ohio Ct. App. 1971); Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910, 913 (R.I. 1970).

148. *Dolan*, 114 S. Ct. at 2319; *see* Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966). The *Dolan* Court cited Simpson v. City of North Platte, 292 N.W.2d 297 (Neb. 1980) as a typical example of the intermediate test. *Dolan*, 114 S. Ct. at 2319. In *Simpson*, the Supreme Court of Nebraska stated:

> The distinction, therefore, which must be made between an appropriate exercise of the police power and improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.

Dolan, 114 S. Ct. at 2319 (quoting *Simpson*, 292 N.W.2d at 301).

149. *Dolan*, 114 S. Ct. at 2319; *see* MANDELKER, *supra* note 79, § 9.18, at 420.

150. *Dolan*, 114 S. Ct. at 2319; *see*, *e.g.*, Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976); Home Bldrs. Ass'n v. City of Kansas City, 555 S.W.2d 832 (Mo. 1977); Patenaude v. Town of Meredith, 393 A.2d 582 (N.H. 1978); Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984); Call v. City of West Jordan, 614 P.2d 1257 (Utah 1980); Coulter v. City of Rawlings, 662 P.2d 888 (Wyo. 1983); *see also* MANDELKER, *supra* note 79, § 9.18, at 420–21 n.105.

In Parks v. Watson, 716 F.2d 646 (9th Cir. 1983), the court adopted a test similar to the reasonable relationship test. *Id*. at 652–53. This test which falls between the most lax standard and the "specifically and uniquely attributable" standard is referred to as the rational nexus test. Falik & Shimko, *supra* note 6, at 385.

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

152. "[N]or shall private property be taken for public use, without just compensa-

applicable to the states through the Fourteenth Amendment.[153] The Takings Clause prevents governmental entities from requiring a few people to shoulder alone the public burdens which should be borne by the public at large.[154]

According to the Court's reasoning in *Nollan*, if the city had required Dolan to dedicate a strip along Fanno Creek instead of conditioning her building permit upon the dedication of the property, it would have been an unconstitutional taking.[155] The appropriation of property not linked to permit approval which eliminates the owner's right to exclude others should be accomplished by government payment.[156] But, state and local governments engaging in land use planning have been able to regulate the use of land without the regulation constituting a taking.[157] So long as the permit requirement "substantially advances state interests" without denying the owner "economically viable use of his land" the requirement is constitutionally valid.[158]

To evaluate Dolan's claim, the Court began its analysis by applying the takings test set out in *Nollan*.[159] The *Nollan* Court recited the standard, but because the exaction and the purpose did not relate at all, the *Nollan* Court went no further in its analysis.[160] The *Dolan* Court first had to determine if an essential nexus existed between the legitimate state interest and the permit exactions required by the city.[161] The prevention of flooding and the reduction of

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tion." U.S. CONST. amend V.

153. Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994) (citing Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 239 (1897)); *see*, *e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978). Chief Justice Rehnquist noted that Justice Stevens' dissent suggested that this case dealt with substantive due process instead of the Fifth Amendment Takings Clause "applicable to the States by the Fourteenth Amendment." *Dolan*, 114 S. Ct. at 2316 n.5. Justice Rehnquist cited landmark takings cases like *Penn Central* and *Nollan*, which relied on *Chicago, B. & Q. R.R.*'s holding that the Takings Clause is applicable in these types of cases. *Id*.; *see id*. at 2327 (Stevens, J., dissenting).

154. *Dolan*, 114 S. Ct. at 2316 (quoting Armstrong v. United States, 364 U.S. 40 (1960)).

155. *Id*.

156. Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987).

157. *See* Leigh & Burton, *supra* note 1, at 839–40.

158. *Dolan*, 114 S. Ct. at 2316 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

159. *Id*. at 2317.

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

161. *Dolan*, 114 S. Ct. at 2317; see *supra* notes 126–51 and accompanying text for a discussion of the "essential nexus" test set out in *Nollan*.

traffic congestion were deemed to be the types of legitimate public purposes previously upheld by the Court.[162] Therefore the essential nexus question was satisfied.[163]

The *Dolan* Court then stated that because the nexus existed it must then determine if the degree of the exaction imposed by the city bears the required relationship to the impact of the proposed development.[164] The Court considered the city's findings to determine if they were constitutionally sufficient to support the building permit conditions, if they proved that the exaction was sufficiently related to the purpose.[165] To find the answer, the Court turned to state court opinions dealing with this question.

First, the Court analyzed those state court opinions that employed a generalized statement as to the necessary connection between the dedication or exaction and the impact.[166] The Court found this generalized approach to be too lax because it did not adequately protect the property owner's right to just compensation if the property was in fact taken.[167] Second, the Court considered state opinions which required a very precise standard in determining the necessary connection.[168] The test was described as the "uniquely attributable" test.[169] If the governmental entity could not show that

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162. *Id*. at 2318; *see* Agins v. City of Tiburon, 447 U.S. 255, 260–62 (1980).

163. *Dolan*, 114 S. Ct. at 2317–18.

164. *Id*. at 2318.

165. *Id*.

166. *Id*; see *infra* note 167 regarding the state court test requiring only a general connection between the dedication and the proposed development.

167. *Dolan*, 114 S. Ct. at 2319. The Court held that not just any connection would be sufficient. *Id*. Some state courts defer to governmental entities on the question of whether the exactions imposed satisfy the rational nexus requirement. Morosoff, *supra* note 3, at 865. For example, in Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964), the court explicitly stated that it would leave the rational nexus determination up to the governmental entity. *Id*. at 188. Other state courts have also used the "judicial deference" test and refused to scrutinize the connection between the exaction and the impacts of the proposed development. Morosoff, *supra* note 3, at 867. *See*, *e.g.*, Associated Home Bldrs., Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal.) (en banc), *appeal dismissed*, 404 U.S. 878 (1971); Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966); see *supra* notes 141–50 and accompanying text in the Historical Overview regarding the state court tests.

168. *Dolan*, 114 S. Ct. at 2318; see *infra* note 169 regarding the state test requiring an exacting correspondence between the dedication and the proposed development.

169. *See* Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961). The "specifically and uniquely attributable" test is the opposite of the "judicial deference" test. Morosoff, *supra* note 3, at 867. The court requires the governmental entity to prove that the exaction serves to "alleviate the public need specifically

the exaction was directly proportional to the specific need created by the proposed development, the exaction was a taking.[170] The Court decided that the Fifth Amendment did not require such precise scrutiny.[171] Neither the very general nor the very specific example of state court analysis satisfied the Court's inquiries as to the best standard to be applied.[172]

Lastly, the Court discussed state court opinions that took an approach midway between the two extremes and which was referred to as the "reasonable relationship" test.[173] The governmental entity need only show that the exaction bore a reasonable relationship to the impact of the proposed development.[174] While the Court claimed that the reasonable relationship test adopted by the states was the proper test, it did not adopt it as such.[175] To eliminate confusion caused by the similarities between the term reasonable relationship used in takings cases and the term rational basis which applies to the minimal level of scrutiny required under the Equal Protection Clause of the Fourteenth Amendment, the Court decided to rename the takings test.[176] The test was referred to as the "rough proportionality" test.[177] Though the Court was quick to point out that no mathematical calculation was required, the city must still make an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[178]

The *Dolan* Court next turned to whether the city's findings dealing with the floodplain easement and the pedestrian/bicycle pathway satisfied the requirements of the newly fashioned rough proportionality test.[179] As for the floodplain easement, the Court stated

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attributable to the proposed development." *Id*. In other words, the exaction must be in direct proportion to the need created. *Id*. Without the direct proportionality, the exaction is deemed a taking. *Id*. at 868; see *supra* note 147 and accompanying text in reference to cases where the "specifically and uniquely attributable" test was applied.

170. *Dolan*, 114 S. Ct. at 2319; *see Pioneer*, 176 N.E.2d at 802.

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

172. *Id*.

173. *Id*.

174. *Id*.

175. *Id*.

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

177. *Id*.

178. *Id*. at 2319–20.

179. *Id*. at 2320.

that it was "axiomatic" that an increase of impervious surface area on the property will increase the amount of storm water flow into Fanno Creek.[180] The city wanted Dolan not to build in the floodplain and wanted the area for its greenway system.[181] By requiring the floodplain to remain open and free from development, the city was hoping to avoid threats to public safety caused by floodwaters.[182] But the Court, concentrating on the use of the greenway as a recreational easement, noted that Dolan would lose her ability to exclude others from her property — just a single strand in her bundle of property rights.[183] The ultimate decision on the floodplain easement was that the city's findings did not show the required reasonable relationship between the floodplain easement and the proposed development.[184]

In regard to the pedestrian/bicycle pathway, the Court held that the city correctly found that the larger store would increase traffic in the central business district.[185] Dedications for streets and sidewalks have been held to be reasonable requirements on building permits to avoid traffic congestion.[186] However, the Court found that the city did not meet its burden in proving that the additional vehicle and bicycle trips reasonably related to the dedication requirement for a pedestrian/bicycle pathway.[187]

The city found that creating the pathway "could offset" a portion

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180. *Id*.

181. *Dolan*, 114 S. Ct. at 2320. The greenway system is required by the CDC and covers the city area within the Fanno Creek flood zone. Brief for Respondent at 9, *Dolan* (No. 93-518). This greenway area is to be kept clear of all structures in order to eliminate flood damage to those structures. *Id*. The CDC also stated that the greenway area would incidentally serve as a recreational easement. *Id*.

The city required that Dolan dedicate an easement, but did not require Dolan to pay for the implementation of the drainage plan because the property would be dedicated to the city. *Id*. at 10. The dedication of the flood area would be a direct benefit to Dolan because the intensified use proposed would increase the storm water runoff, aggravating the flooding along Fanno Creek. *Id*. at 7. Without the upgraded drainage system, Dolan's property would be in greater danger of flooding because of a rise in the floodplain elevation. *Id*.

182. Brief for Respondent at 15, *Dolan* (No. 93-518)

183. *Dolan*, 114 S. Ct. at 2321. The Court analogizes the case to PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980). *Dolan*, 114 S. Ct. 2321.

184. *Id*.

185. *Id*. A city study indicated that the proposed development would contribute roughly 435 additional automobile trips. *Id*. at 2321 n.9.

186. *Id*. at 2321.

187. *Id*.

of the traffic generated and relieve some of the increase in traffic congestion.[188] Stating that the pathway could offset the congestion was found to be a conclusory statement instead of an effort to qualify the findings as the Court required with the "rough proportionality" test.[189] Based on its findings that the city did not fulfill the "rough proportionality" portion of the regulatory takings test, the Court reversed and remanded the case.[190]

Justices Stevens and Souter filed dissenting opinions in *Dolan v. City of Tigard*.[191] In the first dissenting opinion, Justice Stevens noted that the record did not state the dollar value of Dolan's interest in excluding the public from the greenway area.[192] Petitioners in takings cases usually present evidence as to the economic loss suffered by the land owner as a result of the land use regulation.[193] Without this information, the multi-factor test set out in *Penn Central* could not be applied because it addresses economic impact and interference with investment-backed expectations.[194]

Justice Stevens next addressed the issues not in dispute. Unquestioned was the fact that the enlargement of the building on Dolan's property would have a detrimental impact on the city's genuine and considerable interests in controlling drainage and storm water runoff along Fanno Creek and reducing traffic congestion.[195] The majority and Justice Stevens both found that the impact of the

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188. *Id*. at 2321–22.

189. *Id*. at 2322. In his dissenting opinion to the Oregon Supreme Court's decision of the *Dolan* case, Justice Peterson maintained that the city's findings that the pedestrian/bicycle pathway "could offset some of the traffic demand" was a "far cry" from finding that the pathway would offset the increased traffic. Dolan v. City of Tigard, 854 P.2d 437, 447 (Or. 1993) (Peterson, J., dissenting).

However, both Justice Stevens and Justice Souter found the argument against the pedestrian/bicycle pathway to be no more than word play. *Dolan*, 114 S. Ct. at 2326 (Stevens, J., dissenting); *id*. at 2330 (Souter, J., dissenting).

190. *Dolan*, 114 S. Ct. at 2322. The Oregon Supreme Court, on remand, reversed the decision of the Oregon Court of Appeals and the order of the Land Use Board of Appeals and remanded the case to the City of Tigard for further proceedings. Dolan v. City of Tigard, 877 P.2d 1201 (Or. 1994) (en banc) (per curiam).

191. *Dolan*, 114 S. Ct. at 2322, 2330.

192. *Id*. at 2322 (Stevens, J., dissenting). Justice Blackmun and Justice Ginsburg joined with Justice Stevens in his dissent. *Id*.

193. *See*, *e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 129–30 (1978); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915); Mugler v. Kansas, 123 U.S. 623, 657 (1887).

194. See *supra* notes 84–88 regarding the *Penn Central* test.

195. *Dolan*, 114 S. Ct. at 2322 (Stevens, J., dissenting).

proposed development was sufficient to justify a denial of the building permit application.[196] As stated in *Nollan*, if a permit condition served the same legitimate police power purpose as the rejection of the permit, the condition could not be a taking.[197]

Additionally, Justice Stevens' dissent pointed out that the majority "candidly acknowledg[ed] the lack of federal precedent for its exercise in rulemaking."[198] According to Justice Stevens, the majority's use of state court decisions in reaching its holding, though an entirely appropriate approach, does not demonstrate support for the Court's conclusions because the Court's requirements were not apparent in the state court decisions.[199] The new test of rough proportionality was not derived from these representative state court cases.[200] As in the state court cases, the majority determined that the exactions satisfied the essential nexus requirement of *Nollan*.[201] But, as Stevens pointed out, a new constitutional hurdle was erected by the "rough proportionality" test.[202] As understood by Justice Stevens, none of the state cases cited used a test corresponding to the rough proportionality test requiring an individualized determination.[203] The state court decisions looked to the benefit conferred upon the property owner in exchange for the condition required.[204] In addition, the cases looked to the property as a whole instead of concentrating on one strand in the bundle of rights as did prior Supreme Court cases.[205] Justice Stevens point

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196. *Id*. at 2317–18, 2322.

197. *Id*. at 2322. See *supra* notes 126–51 and accompanying text for a discussion of the takings test as set out in *Nollan*. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834, 836 (1987).

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

199. *Id*. at 2323. See *supra* notes 141–50 and accompanying text for a historical discussion of the state court decisions.

200. *Dolan*, 114 S. Ct. at 2333.

201. *Id*. See *supra* notes 126–51 and accompanying text regarding the essential nexus requirement of *Nollan*.

202. *Dolan*, 114 S. Ct. at 2323.

203. *Id.*

204. *Id*. at 2324. Many state courts looked to the benefits conferred upon the property owner in exchange for the governmental entities' approval with conditions of the proposed development. *Id*.; *see*, *e.g.*, Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 448 (Wis. 1965) (finding that municipality approval of the proposed subdivision helped subdivider benefit financially because platted lots can be sold for greater prices than unplatted lots), *appeal dismissed*, 385 U.S. 4 (1966).

205. *Dolan*, 114 S. Ct. at 2324–25 (Stevens, J., dissenting); *see*, *e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979) (holding a "taking" had occurred because the right to

ed out that the majority chose to apply heightened scrutiny to a single strand in Dolan's bundle of rights — her right to exclude.[206]

Justice Stevens also identified an issue not addressed by the majority: The commercial nature of the property as compared to the residential nature of the property in *Nollan*.[207] Personal property rights deserve greater respect than commercial property rights.[208] The exactions should have been dealt with as a type of business regulation which would have "warranted a strong presumption of constitutional validity."[209]

Justice Stevens next addressed the majority's opinion that the city's findings did not provide the rough proportionality required.[210] The Court decided that the city's finding that the pathway could offset some of the increased traffic congestion was not an unequivocal statement.[211] Justice Stevens dubbed the Court's rejection as "nothing more than a play on words."[212] The defects in the city's findings were merely harmless error.[213]

Additionally, Justice Stevens argued that the majority made a serious error when choosing to abandon the traditional presumption of constitutionality and to subject the city to an uncommon burden of proof.[214] Justice Stevens proposed that the test used in the past had served the Court well and should continue to be used.[215] He also

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exclude was infringed upon).

206. *Dolan*, 114 S. Ct. at 2327–28 (Stevens, J., dissenting).

207. *Id*. at 2326. Justice Stevens suggested that exactions imposed on commercial property are a form of business regulation that warrant a strong presumption of constitutionality. *Id*. at 2325. The majority discounted Justice Stevens' argument by stating that calling a regulation a "business regulation" did not prevent a constitutional challenge. *Id*. at 2320. However, the majority pointed to First Amendment takings cases instead of regulatory property takings cases. *Id*. The majority also stated that it saw no reason why the Fifth Amendment Takings Clause should not be afforded the same scrutiny as the First and Fourth Amendments. *Id*.

208. United States v. Orito, 413 U.S. 139, 142 (1973) (identifying special safeguards for privacy of home and residential property).

209. *Dolan*, 114 S. Ct. at 2325 (Stevens, J., dissenting).

210. *Id*.

211. *Id*. at 2326.

212. *Id*.

213. *Id*.

214. *Dolan*, 114 S. Ct. at 2326.

215. *Id*. at 2329–30.

> If the government can demonstrate that the conditions it has imposed in a land-use permit are rational, impartial and conducive to fulfilling the aims of a valid land-use plan, a strong presumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably

disagreed with the majority's use of the doctrine of "unconstitutional conditions" when dealing with this mutually beneficial transaction between Dolan and the city.[216]

Justice Souter filed the second dissenting opinion. He stated that the majority looked at the degree of the connection, while *Nollan* focused on the nature of the connection.[217] Justice Souter stated that the majority fashioned a test and then did not apply it to the facts of the case.[218] According to Justice Souter, the majority concentrated on the incidental recreational use of the easement instead of on the drainage use relied upon by the city as its legitimate purpose.[219] Concentration on a use not even remotely related to flood control should have led the majority to find no rational nexus to flood control at all.[220] Nonetheless, the majority held that the relationship between the easement and flood control satisfied the essential nexus requirement.[221] According to Justice Souter, the majority should have limited its application of the regulatory takings test to the legitimately proposed purpose, flood control, rather than to incidental uses.[222]

Justice Souter also argued, as did Justice Stevens, that the majority should have relied on the usual rule in police power cases of presumed constitutionality instead of placing the burden of producing specific evidence on the city.[223] The city lost because of the majority's focus on how the city expressed its findings, its choice of words — "could" instead of "would."[224]

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impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action's constitutionality.

Id.

216. *Id*. at 2327–28. See *infra* notes 303–09 and accompanying text for a discussion of the benefits gained by the property owner in connection with the exactions imposed. Another topic raised by Justice Stevens deals with the majority's discussion of a substantive due process argument which, according to Stevens, was rejected decades ago. *Id*. at 2327.

217. *Id*. at 2330 (Souter, J., dissenting).

218. *Id*.

219. *Id*.

220. *Id*.

221. *Id*. at 2317.

222. *Id*. at 2330.

223. *Id*. at 2331.

224. *Id*.

CRITICAL ANALYSIS

Traditionally, governmental entities, by virtue of their police power, regulated land uses. In many instances, even if the regulation adversely affected the value of the regulated property, the land use regulation was constitutionally valid.[225] As the Court stated in *Pennsylvania Coal*, government would not be able to survive if it had to pay for every loss of value caused by a land use regulation.[226] The value in the rights incident to property ownership may be trumped by the police power.[227] But, if the entire economically valuable use of the property is taken, the regulation is invalid.[228] In *Dolan*, the property owner did not provide any information regarding the dollar value of her interest in excluding the public from the greenway easement exacted.[229]

Following any of the Supreme Court takings tests set out prior to the new test in *Dolan*, the city of Tigard's land use regulation would have been declared a valid use of the police power. As set out in the following pages, application of each of the main tests from the takings cases demonstrates the validity of the exactions. Applying the first test, the multi-factor test set out in *Penn Central*, the ordinance would not have been a compensable taking.[230] The first factor in *Penn Central* is the economic impact of the regulation.[231] Dolan suffered no great economic loss because of the regulation. Allowing intensified use of the property in return for an easement dedication equal to ten percent of the property[232] could hardly be recognized as causing a great diminution of value. Indeed, the property value would likely increase due to the intensified use.[233]

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225. *See*, *e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887).

226. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

227. *Id*.

228. *Id*.; *see*, *e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Agins v. City of Tiburon, 447 U.S. 255 (1980). A majority of state courts find a taking only if the owner cannot make any economically viable use of the property because of a zoning restriction; *see* MANDELKER, *supra* note 79, at 51 n.99.

229. Dolan v. City of Tigard, 114 S. Ct. 2309, 2322 (1994) (Stevens, J., dissenting).

230. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). See *supra* notes 87–89 and accompanying text regarding the *Penn Central* test.

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

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

233. Brief for Respondent at 41, *Dolan* (No. 93-518).

The second *Penn Central* test factor required the Court to consider investment-backed expectations.[234] Dolan suffered no interference with her investment-backed expectations because her store was already enjoying commercial success on the property.[235] Allowing the intensified use and requiring the dedication of an unbuildable portion of her property located in the floodplain[236] would not have affected the investment-backed expectations which she had already realized. Lastly, the third test factor which is the character of the action, is also satisfied because the government action provided a balance of the benefits and burdens between Dolan and the city.[237] Any analysis of the takings issue to invalidate the ordinance could not therefore be based upon an economic takings test.

The second test applied is the two-part takings test adopted in *Agins* and confirmed in *Keystone*. This test would also have validated the land use regulation at issue in *Dolan*. As articulated in *Agins*, if the zoning ordinance substantially advances legitimate state interests and does not deny "all" economically viable use of the property, the ordinance is not a taking.[238] The city's findings in *Dolan* provided the necessary information to show that the easement dedication advanced the legitimate state interest in controlling increased storm water runoff and increased traffic congestion which would be caused by the proposed development. The *Dolan* Court recognized that the city's interests in flood and traffic control were legitimate and substantial.[239] In addition, the Court recognized that an obvious nexus existed between the exactions and the impacts.[240] Therefore, the *Dolan* ordinance should have withstood constitutional attack.

Prior to *Nollan*, the test used by the Supreme Court to determine whether there was a regulatory taking was the reasonable

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234. *Penn Central*, 438 U.S. at 124. Dolan "may continue to use the property precisely as it has been used. . . . So the law does not interfere with what must be regarded as [Petitioner's] primary expectation concerning the use of the parcel." *Id*. at 136; Brief for Respondent at 34, *Dolan* (No. 93-518).

235. *Dolan*, 114 S. Ct at 2316 n.6.

236. Brief for Respondent at 16, *Dolan* (No. 93-518).

237. See *supra* notes 87–91 and accompanying text regarding the *Penn Central* test. See *infra* notes 303–10 and accompanying text for discussion of the balancing of benefits and burdens.

238. Agins v. City of Tiburon, 447 U.S. 255, 260–61 (1980).

239. *Dolan*, 114 S. Ct. at 2317–18.

240. *Id*.

relationship or the rational nexus test.[241] This test, set out in *Agins*, was also used and therefore reaffirmed in *Nollan*, but was renamed as the essential nexus test.[242] However, the new test outlined in *Dolan* goes one step further. The *Dolan* Court fashioned a new test requiring an accounting of proportionality[243] never before required in Supreme Court takings precedent.[244] *Dolan* places the burden on the government/municipality to defend the building permit exaction and to prove proportionality instead of keeping the burden where it belongs, on the shoulders of the individual complaining about the exaction.[245]

Historically, the Court has held that the existence of facts to support legislative judgment was to be presumed.[246] As long as the land use regulation is "fairly debatable," legislative judgment controls.[247] The burden of proving that an ordinance is unconstitutional lies on the one who denies the constitutionality.[248] The burden on the petitioner has been the controlling burden for years. As recently as 1989, the Court in *United States v. Sperry Corp.*[249] upheld the constitutionality of an exaction by stressing that the challenging

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241. Many state court opinions also depended on the "reasonable relationship" test. See *supra* notes 148–49 for a discussion of these state court decisions. As pointed out in note 150 *supra*, the *Parks* test referenced by the *Nollan* Court was called the rational nexus test and represented a midstream takings analysis. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 839 (1987); Parks v. Watson, 716 F.2d 646, 652–53 (9th Cir. 1983).

242. *Nollan*, 483 U.S. at 836–37. The essential nexus test is often referred to as the rational nexus test. *See* Morosoff, *supra* note 3, at 847.

243. *Dolan*, 114 S. Ct. at 2319–20.

244. *Id*. at 2322–23 (Stevens, J., dissenting).

245. *Id*. at 2319–20.

246. United States v. Carolene Products Co., 304 U.S. 144, 152 (1938). The debatable question of reasonableness is not for the courts to decide, but for the legislature. Goldblatt v. Town of Hempstead, 369 U.S. 590, 595 (1962). *See Dolan*, 114 S. Ct. at 2331 (Souter, J., dissenting) (stressing the idea of presumed constitutionality); Sproles v. Binford, 286 U.S. 374, 388 (1932). Justice Souter also stressed the idea of presumed constitutionality. *Dolan*, 114 S. Ct. at 2331 (Souter, J., dissenting).

247. *See*, *e.g.*, Northwest Airlines, Inc. v. County of Kent, 114 S. Ct. 855, 866 n.18 (1994); United States v. Sperry Corp., 493 U.S. 52, 64 (1989); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987) ("facts not proven"); Minnesota v. Cloverleaf Creamery, 449 U.S. 456, 464 (1981); Goldblatt v. Town of Hempstead, 369 U.S. 590, 599 (1962); Berman v. Parker, 348 U.S. 26, 32 (1954); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926); Brief for Respondent at 24–25, *Dolan* (No. 93-518).

248. Brown v. Maryland, 25 U.S. 419, 436 (1827) (opinion of Chief Justice Marshall).

249. 493 U.S. 52 (1989). The exaction at issue in *Sperry* was a user fee charged by the government to successful claimants against the Iran-United States Claims Tribunal. *Id*. at 57–58.

party must bear the burden of demonstrating that the exaction is a taking.[250] In *Dolan*, the land owner had the opportunity to present evidence along with her application for a variance proving that the exaction was an uncompensated taking.[251] However, Dolan filed only a half-page statement claiming that her development request was within the parameters allowed for CBD development.[252] Dolan challenged neither the city's storm water studies nor its traffic studies.[253] She did not attempt to challenge the factual findings demonstrating the nexus requirement outlined in *Nollan*.[254] She made no demonstration that the condition did not "substantially advance legitimate state interests" or that the condition caused great economic loss by "depriving her of economically viable use of her property."[255] She also failed to show that the condition did not address the same purpose as a rejection of the permit.[256] Because Dolan did not satisfy her burden of proof, the Court should have followed the well established presumption of constitutionality that has served the Court well.[257] The Court should not have placed upon the city an uncommon burden of proof.[258]

The majority opinion stated that in evaluating general zoning regulations, courts recognize the presumption of constitutionality.[259] The burden of proving the regulation unconstitutional rests

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250. *Id*. at 60. In Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), the Court pointed out that it was not shifting to the state the burden of showing that the regulation was not a taking. *Id*. at 2893 n.6. No heavy burden of proof was required of the government. *See Sperry*, 493 U.S. at 64–65 (1989); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986).

251. Brief for Respondent at 4, *Dolan* (No. 93-518).

252. *Id*.

253. *Dolan*, 114 S. Ct. at 2376.

254. *Id*.

255. *Id*.

256. Brief for Respondent at 4, *Dolan* (No. 93-518).

257. *Dolan*, 114 S. Ct. at 2326.

258. *Id*. The majority agreed with Justice Stevens that the burden of proof rests on the one who complains, but in *Dolan* the city made an adjudicative decision to require the permit exactions on the individual property. *Id*. at 2320 n.8. As an adjudicative decision, the burden rests with the city. *Id*.

Justice Souter addressed the issue by noting that the permit conditions were imposed pursuant to Tigard's CDC. *Id*. at 2331 n.* (Souter, J., dissenting) (citing CDC § 18.84.040, *cited in* Brief for Respondent app. B at 26b, *Dolan* (No. 93-518)). The adjudicative decision dealt with the variance request, not the initial imposition of the exactions. *Id*.

259. *Id*. at 2320 n.8.

with the challenging party.[260] However, the majority identified the city's decision to impose land use regulations as adjudicative rather than legislative.[261] In an adjudicative proceeding, the courts required a higher level of scrutiny and placed the burden on the city.[262] But, as Justice Souter pointed out, the regulation in this case was not a quasi-judicial decision.[263] The land use regulation was a legislative decision mandated by the city of Tigard's CDC affecting all property owners within the city limits situated along the Fanno Creek drainage basin and in the Sensitive Land areas.[264] Because the land use regulation requirements were the result of legislative enactments designed to treat all similarly situated property owners equally, the exactions should have been afforded a presumption of constitutionality.[265]

The *Dolan* Court should have tested the regulation using the rational nexus test which the *Nollan* Court renamed as the essential nexus test.[266] Though the *Dolan* majority claims to have applied the test used in *Nollan*, the standards used by the *Dolan* Court were not the same as those used as the foundation for the *Nollan* test.[267] The *Nollan* Court found that the standard which should be applied in takings cases is comparable to the state court standards which fall between the lax standard which approved nearly all regulations under a presumption of constitutionality and the "specifically and uniquely attributable" standard which negated nearly any regula-

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260. *Id*.

261. *Id*.

262. *Id*. Dolan argued that judicial deference was inappropriate in this case because regulation stemming from a quasi-judicial land use decision requires a higher level of scrutiny. Petitioner's Reply to Brief for Respondent at 10 n.5, *Dolan* (No. 93-518). The Oregon Supreme Court held that a land use decision that affects a small geographical area is a quasi-judicial act rather than a legislative act. *Id*. (citing Fasano v. Washington Bd. of County Comm'rs, 507 P.2d 23 (Or. 1973)).

263. *Dolan*, 114 S. Ct. at 2331 n.* (Souter, J., dissenting).

264. *See*, *e.g.*, CDC § 18.84.040, *cited in* Brief for Respondent at 4, *Dolan* (No. 93-518). Even Dolan stated that the regulations in the CDC affected all land owners within the specified areas. Petitioner's Reply to Brief for Respondent at 16 n.5, *Dolan* (No. 93-518) (Dolan and other owners with land adjacent to the creek will be subject to the regulations).

265. *Dolan*, 114 S. Ct. at 2331; *see* United States v. Sperry Corp., 493 U.S. 52, 60 (1989).

266. *Nollan*, 483 U.S. at 839.

267. *Id*. at 839–40. See *supra* notes 121–51 and accompanying text for a discussion of *Nollan*.

tion that did not provide an exact connection.[268] The *Dolan* majority agreed that the *Nollan* test should be the standard used.[269] By renaming the test as the rough proportionality test, the Court did not claim to change the connection required.[270] The *Nollan* Court's analysis followed the language in *Agins* — if the regulation substantially advanced a legitimate state interest and did not deny a property owner all economically viable use of his property, then the regulation does not effect a taking.[271]

In a footnote to the *Nollan* opinion, Justice Scalia addressed the level of scrutiny required by the takings analysis.[272] Justice Scalia stated that the standard is not the rational basis standard applied to equal protection cases, yet he did not go so far as to say that the strict scrutiny applied to suspect classes and fundamental rights is the appropriate standard.[273] The level of scrutiny was undoubtedly heightened in *Nollan* as compared to state cases that used the lax standard of complete deference involving no true evaluation of the relationship between the exactions and impacts.[274] The *Nollan* Court called for a takings test that requires a more meaningful and careful application of the nexus test rather than simple judicial "lipservice."[275] But the Court did not call for analysis in the opposite extreme as that which applied to suspect classes.[276]

By applying the *Nollan* standard, the exactions imposed in *Dolan*, the easements, substantially advanced the legitimate state interests to ameliorate the burdens created by the proposed development. The burdens included the increased storm water flow into an already strained Fanno Creek drainage basin and the increased traffic congestion brought on by the property's intensified uses.[277]

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268. *Nollan*, 483 U.S. at 839; *see* Falik & Shimko, *supra* note 6, at 386 n.149.

269. *Dolan*, 114 S. Ct. at 2319; *see Nollan*, 483 U.S. at 839–40.

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

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

272. *Id*. at 834 n.3.

273. *Id*.

274. *Id*. at 841. *Nollan* required more than "cleverness and imagination" in finding the relationship between the exactions and the impacts. *Id*.

275. Brief for Respondent at 28, *Dolan* (No. 93-518).

276. *Id*.

277. *Dolan*, 114 S. Ct. at 2322 (Stevens, J., dissenting). Dolan conceded that the city's interest in controlling flooding and traffic were legitimate and substantial state interests. *Id*.

The connection between the exaction and the impact went well beyond cleverness and imagination.[278] After a prudent and meaningful examination of the exaction/impact relationship, the required nexus had evidently been satisfied. Therefore, the decision of the Oregon Supreme Court should have been affirmed.

As Justice Stevens argued, the majority fashioned a fledgling test for determining a regulatory taking in a situation where the municipality made a valid use of its police power.[279] Because the *Dolan* Court found that the exactions did bear a reasonable relationship to a legitimate state interest, the exactions placed on the proposed development should have been upheld.

The newly fashioned test required *Tigard* to make an "individualized determination that the required dedication [was] related both in nature and extent to the impact of the proposed development."[280] The city provided evidence including the Drainage Plan and the transportation study to support its permit requirements.[281] The municipality should not have been required to make exact calculations as to the proportionality between the burden and the benefit.[282] In analyzing the city's findings, the Court should not have concentrated on the choice of words used to express these findings. By using "could" instead of "would," the city gave the Court a hook on which it could perilously hang its reasoning that the findings were too speculative.[283] The Court may have decided otherwise if the city's CDC findings had been merely worded differently — if the city had said that the exactions "would" or "will likely" remedy the impacts.[284]

Imposing a new constitutional hurdle will impede a municipality's ability to carry out its land use planning goals through the use of the police power. This decision will also serve to inhibit governmental entities in the process of developing legitimate

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278. *Nollan*, 483 U.S. at 841.

279. *Dolan*, 114 S. Ct. at 2322 (Stevens, J., dissenting).

280. *Id*. at 2319–20.

281. *Id*. at 2313.

282. The new test in *Dolan* is reminiscent of the "specifically and uniquely attributable" test of Pioneer Trust & Sav. Bank v. Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961), discarded by the *Dolan* Court. *Dolan*, 114 S. Ct. at 2319.

283. *See Dolan*, 114 S. Ct. at 2330 (Souter, J., dissenting). Justice Souter stated that the city lost because of one word, "could" instead of "would," even though the connection the Court looks for, substantially advancing a legitimate state interest, was evident. *Id*.

284. Dolan v. City of Tigard, 854 P.2d 437, 447 (Or. 1993) (Peterson, J., dissenting).

and necessary land use plans. Without the usual presumption of constitutionality, the threat of a lawsuit with every land use regulation promulgated could prove to be overwhelming. With this decision, property owners now have a powerful bargaining chip with which to overrule governmental entities' attempts to regulate property.

The Court's concentration on one particular strand in Dolan's bundle of property rights, the right to exclude, has produced a result not in line with prior Supreme Court holdings.[285] The right to exclude was essential in *Kaiser Aetna*,[286] but the facts in the two cases are not similar. In *Kaiser Aetna*, the federal government attempted to limit the property owner's right to exclude by imposing the federal navigation servitude over the pond and marina built by the property owner, but not as a means to correct some negative impact caused by the new development.[287] In *Dolan*, the easement imposed as a permit condition served the same purpose as a rejection would have, thereby qualifying the exaction as a valid land use regulation.

Although the right to exclude persons from private property is an important right,[288] a limitation of that right alone is not enough to require compensation.[289] The Court's decision in *Keystone* reintro-

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285. *Dolan*, 114 S. Ct. at 2324–25 (Stevens, J., dissenting). In *Penn Central*, the Court stressed that in deciding takings cases the entire parcel should be considered, not merely one aspect of the property rights. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978). *See*, *e.g.*, Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2290 (1993); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (requiring a shopping center to allow entrants to exercise their freedom of speech and petition, eliminating the right to exclude, was not a taking); Andrus v. Allard, 444 U.S. 51 (1979) (holding that ordinance regulating the right to sell was not a taking). *Cf.* Kaiser Aetna v. United States, 444 U.S. 164 (1979) (holding that requiring public access to a private pond was a taking because it eliminated the property owner's right to exclude).

Dolan is not a per se takings case. Brief for Respondent at 39 n.30, *Dolan* (93-518). *See supra* notes 155–58 and accompanying text. The city did not require Dolan to transfer fee simple title to the easement area. Brief for Respondent at 17 n.16, *Dolan* (No. 93-518).

286. 444 U.S. at 178. See *supra* notes 93–97 and accompanying text regarding cases dealing with the right to exclude.

287. 444 U.S. at 177–78.

288. *Dolan*, 114 S. Ct. at 2324–25 (Stevens, J., dissenting); *see Kaiser Aetna*, 444 U.S. at 179–80.

289. *Dolan*, 114 S. Ct. at 2325 (Stevens, J., dissenting); *see PruneYard*, 447 U.S. at 82–84. The *Dolan* Court should not have concentrated on the recreational use of the easement. Such use was only incidental to the floodplain dedication requirement and was not advanced as the city's reason for requiring the exaction.

duced to the takings analysis *Penn Central*'s "whole parcel" rule.[290] When analyzing the effect of the regulation, the property should be regarded as a whole.[291] The inability of the property owner to exploit one aspect of the property to its fullest potential does not constitute a taking.[292] Therefore, a limitation to the single strand, the right to exclude, in the bundle of property rights should not be a compensable taking.[293]

As Justice Stevens pointed out, this narrow focus on one strand in the bundle of property rights is misplaced, particularly in *Dolan*, because the regulation is imposed on commercial property.[294] Protection of commercial property rights should not mimic that of residential property rights. The exaction imposed in *Nollan* deserved closer scrutiny because it affected residential property rather than commercial property.[295] However, the majority discounted Justice Stevens' argument stating that the nature of the exaction does not negate it from constitutional challenge.[296] But this is not Justice Stevens' contention.[297] The majority cited cases which invalidated commercial regulations as being contrary to the First and Fourth Amendments.[298] The cases cited deserved the strictest form of scrutiny because they dealt with fundamental rights.[299] Never before has the Court subjected a land use regulation to the highest level of scrutiny — the level which is applied to fundamental rights such as

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290. *Penn Central*, 438 U.S. at 130.

291. *Id*.

292. *Id*.; *see also* Andrus v. Allard, 444 U.S. 51 (1979) (holding that destruction of the right to sell was not a taking).

293. Although the *Nollan* Court struck down the easement exaction, it stressed that an easement directly addressing the interest in maintaining visual access to the beach, requiring the Nollans to provide a viewing spot for passersby on their property would not be a taking. *Nollan*, 483 U.S. at 836.

294. *Dolan*, 114 S. Ct. at 2325 (Stevens, J., dissenting). Regulation of commercial property rights does not warrant as strict a level of scrutiny as regulation of residential property. United States v. Orito, 413 U.S. 139, 142 (1973) (noting that the Constitution grants special safeguards for the privacy of the home and residential property).

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

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

297. *Id*. at 2321. Justice Stevens argued that a business regulation deserves a presumption of constitutionality and not the strict scrutiny applied to regulations infringing upon more fundamental rights. *Id*. at 2325 (Stevens, J., dissenting).

298. *Id*. at 2320.

299. The Supreme Court has afforded strict scrutiny to cases with regulations infringing on freedom of speech, freedom of association, or suspect classes such as race, religion, or alienage.

free speech and suspect classes.[300] The *Nollan* Court stated that the nexus it employed was consistent with every other court except that of California.[301] The cases the Court cited in *Nollan* represent the reasonable relationship test and not an example of the strict scrutiny employed in fundamental rights cases.[302]

In applying takings analysis to this land use regulation, the *Dolan* Court should have considered *Pennsylvania Coal*'s "reciprocity of advantage" rule.[303] If a regulation provides a balance of benefit between the regulated property owner and the community in general, the regulation is justified under the police power.[304] In the instant case, the required exaction, the easement, provided benefits to both Dolan and the city. Dolan's proposed development would aggravate the storm water drainage and the traffic congestion problems. The improved drainage system would lessen Dolan's danger of flooding, the possibility of which was aggravated by the proposed increased impervious surface area.[305] In addition, the pedes-

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300. *See* Brief for Respondent at 28 n.22, *Dolan* (No. 93-518); Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973); *see*, *e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (freedom of religion); Central Hudson Gas & Elec. Corp v. Public Serv. Comm'n, 447 U.S. 557 (1980) (freedom of speech); Graham v. Richardson, 403 U.S. 365 (1971) (alienage as a suspect class); McLaughlin v. Florida, 379 U.S. 184 (1964) (race as a suspect class); Korematsu v. United States, 323 U.S. 214 (1944) (nationality as a suspect class); *see also* Brief for Respondent at 23 n.22, *Dolan* (No. 93-518).

In a recent article, Justice Breyer noted that, in his opinion, property rights should not be afforded the same measure of constitutional protection as fundamental rights like speech rights and privacy interests. *Supreme Court: Nominee Ranks Property Rights Below Speech*, GREENWIRE, July 14, 1994.

Since the *Dolan* opinion was published, decisions have referenced the majority's following language:

> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation.

Dolan, 114 S. Ct. at 2320; *see*, *e.g.*, NLRB v. Windemuller Elec., Inc., 34 F.3d 384, 395 (6th Cir. 1994); Peterman v. Michigan Dep't of Natural Resources, 521 N.W.2d 499, 505 (Mich. 1994).

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

302. *Id*. The *Nollan* Court cited 22 cases representing the reasonable relationship test. *Nollan*, 483 U.S. at 839–40.

303. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (Brandeis, J., dissenting).

304. *Id*.

305. Brief for Petitioner at 14, *Dolan* (No. 93-518); *see also Dolan*, 114 S. Ct. at 2320. Dolan's proposed finished floor elevation of 152.5 feet would put it within the two to five foot range calculated by the Tigard flood plan as the projected rise in the 100-year flood elevation for Fanno Creek should the drainage improvements not be made.

trian/bicycle pathway would help to alleviate the additional traffic congestion the intensified property use would cause.[306] Furthermore, Dolan would benefit from improved access to her commercial property.[307] The required easement not only mitigated the city's problems caused by Dolan, but also conferred benefits on Dolan without requiring her to bear more than her share of the burden, providing a true reciprocity of advantage.[308] Therefore, the regulation should have been upheld.[309]

In light of *Dolan*, most conditions on a building permit may now be questioned as an alleged regulatory taking. Without the historical presumption of constitutionality, governmental entities will be required to make exact findings in each and every case, demonstrating that the new nexus requirement is met. Requiring the more exacting standard of rough proportionality, defending once legitimate land use regulations will become too burdensome on governmental entities. In *Dolan*, the city was not able to rely on studies dealing with drainage and traffic because the studies were not conducted specifically for this permit, nor were the findings intimately linked to this permit.

The cost of conducting extensive studies and research for each conditional permit would be too prohibitive in terms of time and expense. Not only will defending the regulations become a virtual nightmare, the mere act of planning may also become an act in futility, knowing that every land use regulation requiring a condition from a property owner could result in litigation. There may well be an adverse effect on everyone except the regulated property owner. While the property owner would be allowed to build without the conditions, other property owners would suffer from the ill effects, such as increased flooding and traffic gridlock caused by the new

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Brief for Respondent at 42, *Dolan* (No. 93-518). Therefore, the 100-year flood elevation would exceed Dolan's new store's elevation. *Id*.

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

307. Brief for Respondent at 41, *Dolan* (No. 93-518).

308. *See Dolan*, 114 S. Ct. at 2316 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). Other property owners along Fanno Creek were subject to regulation as well. Petitioner's Reply to Brief for Respondent at 10, *Dolan* (No. 93-518).

309. An additional benefit to Dolan was that she would be permitted to use the floodplain dedication as a full credit toward the CDC landscaping requirement. Brief for Respondent at 32, *Dolan* (No. 93-518). The landscaping would be planted and maintained by the City. *Id*. This credit would allow Dolan to use an additional 7000 square feet of her property that would otherwise have been required for open-space. *Id*.

development.

While the private property owner fights to limit the police power to almost nothing, the governmental entities' powers to regulate for the common good wanes. The fear that the police power would one day take over all property rights[310] now becomes the fear that the police power will become inhibited and ineffectual. *Dolan* will end up costing cities too much time, effort, and money to actively and effectively use once well-tested land use regulations for the benefit of the entire community. What was once a legitimate police power exaction will now require eminent domain proceedings and payment by governmental entities which are already short on funding. Greenspaces and other required facilities may soon become too expensive for governmental entities to provide, and then we truly will all "pay" the consequences.

CONCLUSION

The *Dolan* Court's fashioning of a new takings test, admittedly not based on precedent, is very unfortunate. Though the Court claimed that its analysis followed that of *Nollan* and state court decisions, the Court's fledgling test goes measurably further in erecting a constitutional hurdle to impair once valid land use regulations based on the police power. This decision, which abandons the presumption of constitutionality, imposes on the government a unique burden, requiring intensive study uniquely attributable to each permit condition, requiring proof of proportionality in nature and extent. Such studies would prove too prohibitive in terms of time and money.

If the Court had considered precedent, the permit condition would have passed constitutional muster. Using any or all of the tests, the multi-factor *Penn Central* test, the two-factor *Agins* test, or the essential nexus *Nollan* test, the permit conditions would remain valid. The *Dolan* Court also failed to consider the reciprocity of advantage from *Pennsylvania Coal* and the whole parcel concept from *Penn Central*. Most importantly, the Court failed to realize that the permit condition and a rejection of the permit advanced the very same objective — maintaining health, safety, and welfare of Tigard's citizens. Historically, the permit condition in question

310. *See* Morosoff, *supra* note 3, at 835–40.

would not have amounted to a taking in violation of the Fifth Amendment.

Though heralded as a major victory for the real property owner, *Dolan* will most likely be a stinging loss to land use planning programs necessary for ordered and efficient development of cities and towns. As Justice Stevens proclaimed, "property owners have surely found a new friend today."[311]

311. *Dolan*, 114 S. Ct. at 2326 (Stevens, J., dissenting).