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The Supreme Court's Land Use Decisions (Symposium - The Supreme Court and Local Government Law, 1993-94 Term)

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THE SUPREME COURT'S LAND USE DECISIONS

*Hon. Leon D. Lazer**:

INTRODUCTION

Good afternoon. Last year's Term of the Supreme Court continued a trend, let us say a movement, in the direction of greater protection of property rights which commenced in 1987.¹ In *Dolan v. City of Tigard*,² an Oregon case, the United States Supreme Court rendered a decision which has caused great alarm among municipal officials and students of municipal police power.³

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1. The United States Supreme Court resumed its interest in land use cases in 1987 with the landmark cases of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *First Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304 (1987), and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). The Court continued this trend last year with cases such as *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992) and *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

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

3. See Bradley Inman, *Court Decision Could Muddle Housing Policies*, THE S.F. EXAMINER, July 10, 1994, at E-5 (stating that "the balance of power has shifted and the ability of the developer to threaten a lawsuit is greater" due to the *Dolan* decision); Alex Philipidis, *Supreme Court's Land-Use Decision Draws Local Praise*, WESTCHESTER COUNTY BUS. J., July 25, 1994, at 6 (stating "that [the *Dolan*] decision is going to inhibit the freedom of municipal planning boards to demand improvements as liberally as they have done previously"); Frank Shafroth, *Cities Lose Takings Clause Case in Dolan v. City of Tigard*, NATION'S CITIES WKLY., July 4, 1994, at 1 (finding that the decision could lead to a significant increase in the federal court intrusion into municipal land use planning and development).

However, it is really inappropriate to discuss *Dolan* without first considering its forebear, *Nollan*.⁴ Those two cases go together.

I. THE COURT'S EARLY INTEREST IN LAND USE REGULATION

The Supreme Court's renewed interest in land use cases is quite recent.⁵ In 1926, the Court decided *Euclid v. Ambler Co.*,⁶ and approved the use of the police power for land use regulation. What we now call Euclidian zoning is the land use regulation system that this country has adopted as a result of that case.⁷ Euclidian zoning involves districts that specify the permitted uses and area dimensions in various locations as they appear on a zoning map.

In 1928, the United States Supreme Court decided *Nectow v. City of Cambridge*.⁸ The case is interesting now, even as ancient as it is, because in *Nectow* the Supreme Court found unconstitutional the Cambridge zoning law as it affected the western portion of a much larger piece of individually owned property.⁹ Today, we would call this kind of zoning decision, segmentation. Whether segmentation applies to today's zoning concepts is highly questionable. Whether the courts can simply strike down a zoning ordinance if it affects only a small portion of a larger piece of

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

5. *See supra* note 1 (discussing the recent trend of the United States Supreme Court in deciding land use issues).

6. 272 U.S. 365 (1926).

7. The Euclidian zoning policy was basically that "zones of the same use must be treated the same. For example, the owner of property in a light industrial zone must have the same development rights as all other owners of property in such a zone." *Valley Briefing: The Zoning Game; Playing With a City's Building Blocks*, L.A. TIMES, July 13, 1994, at B14.

8. 277 U.S. 183 (1928).

9. *Id.* at 185-88. The ordinance in this case placed a small portion of the plaintiff's land in a residential zone while the remaining portion of the land remained in a commercial zone. The residential restriction caused a purchaser of the plaintiff's land to terminate a previously entered into sales contract. The Court overruled the ordinance as the restriction did not bear a substantial relation to the public health. *Id.*

property is in substantial doubt. Nevertheless, between 1928 and 1974, not a single zoning case was decided by the Supreme Court.

In 1974, the United States Supreme Court decided *Village of Belle Terre v. Boraas*,¹⁰ which dealt with the definition of "family" for zoning purposes.¹¹ It was not until 1987, however, that the Court embarked on a regular course of deciding land use cases.¹² Was there some lack of interest or was there some lack of land use litigation in those years that would explain the paucity of cases in the Supreme Court? No. The Supreme Court bobbed and weaved and, to be colloquial about it, simply ducked these kinds of cases by speaking in terms of ripeness, of abstention, and of exhaustion of state remedy. Between *Euclid v. Ambler Co.*¹³ in 1926 and the 1987 renewed interest of the Supreme Court in zoning and land use regulation,¹⁴ the state courts filled the gap. A

10. 416 U.S. 1 (1974).

11. *Id.* at 2. The Belle Terre ordinance that the Court upheld defined family as:

[O]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) or no more than two living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage shall be deemed to constitute a family.

Id.

12. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (holding that an uncompensated permanent public-access easement is violative of the Takings Clause, however, if the government conditioned the appellant's building permit on the granting of such an easement it would be a lawful land-use regulation if it furthered governmental purposes); *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304 (1987) (holding that pursuant to "the Just Compensation Clause where the government has taken property by a land-use regulation, the land owner may recover damages for the time before it is finally determined that the regulation constitutes a taking"); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (holding that the petitioners did not satisfy their burden of proving that § 4 and § 6 of the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act constituted a taking without compensation in violation of the Fifth and Fourteenth Amendments).

13. 272 U.S. 365 (1926).

14. See *supra* notes 5-13.

vast body of jurisprudence set forth for all of us the parameters for the use of the police power to regulate the use of land.

II. *NOLLAN V. CALIFORNIA COASTAL COMMISSION*: AN OVERVIEW OF THE SUPREME COURT'S 1987 DECISIONS

In 1987, the United States Supreme Court decided three cases involving land use.¹⁵ One of them was the very interesting *First English Evangelical Lutheran Church of Glendale*¹⁶ case, which decided that a property owner could recover monetary damages for the period that an unconstitutional ordinance or law restricted the use of the property.¹⁷ This decision was almost earth shattering for the land use world.

In a second case decided that year, *Nollan v. California Coastal Commission*,¹⁸ the Supreme Court rendered a decision that reverberates rather loudly in the *Dolan* case that we will discuss this afternoon.¹⁹ The California Coastal Commission is charged by California law, with the underpinning of federal legislation, with the protection of a great American resource, the California coast. The Commission is also charged with the duty to protect both physical and visual access to that coast.²⁰

15. See cases cited *supra* note 12.

16. *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304 (1987).

17. *Id.* at 306-07 (holding the Fifth and Fourteenth Amendments required compensation for the period that an unconstitutional ordinance or law restricted the use of the property).

18. 483 U.S. 825 (1987).

19. See *infra* notes 71-111.

20. The Coastal Commission is given power by both the state and federal governments. See 16 U.S.C. §§ 1451-64 (1982). These sections provide in pertinent part:

The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states . . . in developing land and water use programs for the coastal zone including unified policies, criteria, standards, methods, and

The California Coastal Commission grants development permits in the areas along that coast within its jurisdiction. Between 1972 and 1985 the commission granted 42,000 such permits.²¹ Those of you who have visited, are aware that development exists up and down the California coastline. Such development clearly limits access to the coast, both visually and physically.

The plaintiffs, in *Nollan*, leased a 504 square foot bungalow along the beach of the Pacific Ocean.²² The provisions of the lease mandated that a larger structure be built as a condition of the option to buy the property.²³ The Nollans applied to the California Coastal Commission as well as the local zoning authorities for permission to construct a 2,500 square-foot two-story building to replace the 504 square-foot bungalow.²⁴ The Coastal Commission granted the permit on the condition that the Nollans provide an easement across their portion of the beach.²⁵

Let me just illustrate for you what it actually looked like, because what it looked like ultimately determined the Supreme Court's opinion that there was no connection between what the

processes for dealing with land and water use decisions of more than local significance.

Id.; see also CAL. PUB. RES. CODE § 30001.5 (West 1995). Section 30001.5 states in pertinent part:

The Legislature further finds and declares that the basic goals of the state for the coastal zone are to . . . [p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources . . . [and to m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone.

Id.

21. See *Grupe v. California Coastal Comm'n*, 166 Cal. App. 3d 148, 167 n.12, 212 Cal. Rptr. 578, 589 n.12 (1985); see also Paul Morrison, Note, *Staring Down the Barrel of Nollan: Can the Coastal Commission Dodge the Bullet?*, 9 WHITTIER L. REV. 579 (1987). "The Commission, in its first six years alone granted permission for construction of nearly fifty thousand building units within its land jurisdiction." *Id.* at 584.

22. *Nollan*, 483 U.S. at 827.

23. *Id.* at 828. "The Nollans' option to purchase was conditioned on their promise to demolish the bungalow and replace it." *Id.*

24. *Id.* at 826.

25. *Id.* at 828.

California Coastal Commission was demanding of the Nollans and the obligation and jurisdiction of the Commission to protect visual access to the ocean. The Nollans' lot fronts the Pacific Ocean.²⁶ There is a seawall which crosses their property which is about eight feet high. Approximately ten feet exists between the seawall and the mean high water mark.²⁷ The Coastal Commission wanted the Nollans to dedicate an easement that would permit the public to traverse the Nollans' beach front property and permit people to pass from one to the other of two public beaches, located within a quarter of a mile of the Nollans' property in either direction.²⁸ The Nollans rejected the condition, brought suit alleging that the condition amounted to a taking of property,²⁹ and then proceeded to build without the permit.³⁰

The Commission, in fixing the condition, declared that the new construction would burden the public's ability to traverse to and along the waterfront.³¹ Ultimately, that declaration of the Coastal Commission was fatal to its position, because traversing the beach front did not have any connection with visual access to the ocean.

The action was brought in the California courts by the Nollans. They lost in the California Court of Appeals³² and appealed directly to the United States Supreme Court,³³ which took the case

26. *Id.*

27. *Id.* at 853 (Brennan, J., dissenting).

28. *Id.* at 826.

29. *Id.* at 829-30. The Fifth Amendment of the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V. In a 1978 case, the Supreme Court identified several factors to apply to determine whether there has been a taking. *Pennsylvania Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978). Some of the factors the Court looked at included the "economic impact of the regulation on the claimant . . . [and] the character of the government action. A 'taking' may readily be found when the interference with property can be characterized as a physical invasion by government." *Id.* at 124.

30. *Nollan*, 483 U.S. at 829-30.

31. *Id.* at 829.

32. *See Nollan v. California Coastal Comm'n*, 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986) (reversing the California Superior Court decision that was in favor of the plaintiffs).

33. *Nollan*, 483 U.S. at 827.

after having rejected earlier cases involving attacks on land use regulatory powers.

Justice Scalia, writing for the majority, made an interesting analysis. If the Nollans had not sought a building permit and if the California Coastal Commission had wanted an easement across the property, it would have had to pay for it.³⁴ Absent payment, imposition of the easement would amount to a taking.³⁵ We recognize, wrote Justice Scalia, that municipalities are beset with problems, that they have the right for the benefit of the public and of the constituents to impose conditions and restrictions. The Court has no difficulty with that.³⁶ However, there must be a connection between the exaction or condition imposed and the jurisdiction of the body that imposes it.³⁷ The exaction must have a connection with the need for the exaction.³⁸ There must be a nexus.

Justice Scalia repeated what you have read repeatedly, that a regulation is not a taking if it substantially advances a legitimate state interest and does not deny an owner economic viable use of land.³⁹ Therefore, if the condition advanced a legitimate governmental purpose and did not deprive the Nollans of viable use of their land, it would be constitutional.⁴⁰

34. *Id.* at 831.

35. *Id.* at 831. Justice Scalia simply stated that “[h]ad California simply required the Nollans to make an easement across their beach front available to the public on a permanent basis in order to increase public access to the beach, . . . we have no doubt there would have been a taking.” *Id.*

36. *Id.* at 834 (recognizing that “land use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’ and does not ‘[d]eny an owner economically viable use of his land’” (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980))).

37. *Id.* at 838.

38. Justice Scalia held that this governmental action would fail even if the Court applied a reasonable relation test. *Id.* The Court found that it is “quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans’ property reduces any obstacles to viewing the beach created by the new house.” *Id.*

39. *Id.* at 834 (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

40. *Id.* at 835-36. The Court stated that “the Commission unquestionably would be able to deny the Nollans their permit outright if their new house . . . would substantially impede [legitimate governmental] purposes,

There was no claim in *Nollan* that denial of the permit would have deprived the Nollans of viable use of land. They still had a piece of property that was valuable, building permit or not.

Justice Scalia further stated that the Court recognized California's right to regulate and to protect visual access.⁴¹ If the California Coastal Commission had limited the height of the building, which was increasing to two stories and would have some effect on visual access to the ocean, or if it had imposed a restriction on fencing that might restrict visual access, or even if it had conditioned the permit on the Nollans providing a spot on their property for people to view the ocean, that might be constitutional.⁴² But here, the condition imposed had nothing to do with visual access.⁴³ What it had to do with was the desire of the California Coastal Commission to provide a method for people to walk up and down between two public beaches.⁴⁴ Indeed, the California Coastal Commission had obtained easements from almost all of the property owners up and down that beach and it needed this easement as well. When Justice Scalia declared for the five person majority of the Court, was that there was no "nexus,"⁴⁵ which is the key word in *Nollan*, he meant that there was no nexus between the requirement that the California Coastal Commission imposed and visual access.⁴⁶ Justice Scalia gave an illustration of what he meant. The importance of the illustration becomes more visible in the *Dolan* case that I will discuss in a few moments.⁴⁷

unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking." *Id.*

41. *Id.* at 835. The Court agreed with the Commission's argument that "among [the] permissible purposes are protecting the public's ability to see the beach . . . and preventing congestion on the public beaches." *Id.*

42. *Id.* at 836.

43. *Id.* at 837. The Court stated that there was a "lack of nexus between the condition and the original purpose of the building restriction." *Id.*

44. *Id.* at 828.

45. Nexus is defined as "a link . . . [or] a connected group or series." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 797 (9th ed. 1989).

46. *Id.* at 837. "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." *Id.*

47. See *infra* notes 71-111.

Justice Scalia's illustration envisions a government safety regulation that prohibits the shouting of fire in a crowded theater, but grants a dispensation to shout fire if the shouter pays \$100 into the state treasury.⁴⁸ Clearly, this is an illustration of non-nexus, but the fact that Justice Scalia referred to a monetary sum reveals, in the opinion of some, an intention by the Court to limit the ability of municipalities to impose monetary exactions such as park fees and things like that.

Ultimately, Justice Scalia declared that absent this nexus between the need and the exaction, the condition imposed by the California Coastal Commission "becomes an out-and-out scheme of extortion."⁴⁹ If the California Coastal Commission wanted this easement to fulfill what it deemed to be its obligation to make it possible for people to walk between public beaches or for people to have the right to walk across the Nollans' property, it had to pay for it.⁵⁰

Four of the justices dissented.⁵¹ Justice Brennan's dissent⁵² stated that the standard of review in cases such as this, has always been reasonableness.⁵³ Was there some kind of a reasonable connection between what the government was trying to do and what it was exacting? Justice Brennan supported the reasoning of the California Coastal Commission that the building of the Nollan

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

49. *Id.* (quoting *J.E.D. Assoc. Inc. v. Atkinson*, 432 A.2d 12, 14 (N.H. 1981)).

50. *Id.* at 841-42. "California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose' . . . but if it wants an easement across the Nollans' property, it must pay for it." *Id.*

51. Justices Brennan, Marshall, Stevens, and Blackmun dissented. Justice Marshall joined Justice Brennan's dissent. *Id.* at 842 (Brennan, J., dissenting). Justice Blackmun wrote a separate dissent. *Id.* at 865 (Blackmun, J., dissenting). He also joined Justice Stevens' dissent. *Id.* at 866 (Stevens, J., dissenting).

52. *Id.* at 842 (Brennan, J., dissenting).

53. *Id.* at 843 (Brennan, J., dissenting). "It is . . . by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State '*could rationally have decided*' that the measure adopted might achieve the State's objective." *Id.* (Brennan, J., dissenting) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)).

house would create some kind of psychological barrier for those who walked across the beach. If people could walk up and down the beaches, that psychological barrier would be extinguished or alleviated.⁵⁴ The Commission's approach to its problem was not very useful to the defense of its position. Implicit in Justice Brennan's dissent, is a criticism of the lawyering for the California Coastal Commission.

Justice Brennan also noted that the California Constitution provides that access to the ocean and to the tideland is guaranteed.⁵⁵ Therefore, there is no reasonable expectation by an owner adjacent to tideland or the sea that people will be excluded from getting access to the water across the owner's property.

In his majority opinion, Justice Scalia referred to a stick in the bundle of rights that constitute the right of direct ownership of property.⁵⁶ One of the most important sticks (referred to by Justice Rehnquist in *Dolan* as a "strand"⁵⁷) is the right to exclude others from the property.⁵⁸ Depriving the Nollans of the right to exclude

54. *Id.* at 847 (Brennan, J., dissenting). In the Commission's "informed judgment such a trade off would preserve the net amount of public access to the coastline. The [majority's] insistence on a precise fit between the forms of burden and condition on each individual parcel along the California Coast would penalize the Commission for its public trust mandate." *Id.* (Brennan, J., dissenting).

55. *Id.* at 855 (Brennan, J., dissenting). Justice Brennan quoted article X, § 4 of the California Constitution, which guarantees public access to the ocean. This section of the constitution states that "the Legislature shall enact such laws as will give *the most liberal construction to this provision* so that access to the navigable waters of this State shall be always attainable for the people thereof." CAL. CONST. art. X, § 4 (emphasis added). Furthermore

California therefore has clearly established that the power of exclusion for which [the Nollans'] seek compensation simply is not a strand in the bundle of [their] property rights . . . and [they] cannot claim that the deed restriction has deprived them of a reasonable expectation to exclude from their property persons desiring to gain access to the sea.

Nollan, 483 U.S. at 858 (Brennan, J., dissenting).

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

57. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2324 (1994).

58. *Nollan*, 483 U.S. at 831. "We have repeatedly held that . . . 'the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* (quoting *Loretto v. TelePrompTer Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)).

people from walking across their property, simply amounted to a taking.⁵⁹

Justice Brennan argued that the majority was subjecting the police power exercise relative to property rights to heightened scrutiny. Heightened scrutiny has not been the test in land use regulation.⁶⁰ It has always been rational basis review. The majority was quantifying something that had never quantified before and subjecting the state to an intolerable supervision, hostile to the basic principles of our government.⁶¹ The standard always was a reasonable relationship between the governmental purpose and the regulation.

Those of us who have dealt in the field of land use on one side or another have always been aware that when a planning board said that it wanted the grant of some property because it had a plan to widen a particular road in the future or when it exacted park land as a condition of building a subdivision because children would be coming into the development there was a reasonable connection between the demand and the need. In other places, outside of New York, for example, California, as well as some other states, municipalities require developers to pay money into a fund to help pay for the costs that the development might otherwise inflict on the public. Thus, in San Francisco, if the developers are building offices or factory buildings, the city assumes that people will be moving into the city to work in those buildings, that the city cannot afford to buy or build housing for them, and requires the developers to build housing or pay into a fund money that will help pay for housing.⁶²

59. *Id.* "To say that the apportion of a public easement across a landowner's premises does not constitute the taking of a property interest . . . is to use words in a manner that deprives them of all their ordinary meaning." *Id.*

60. *Id.* at 842 (Brennan, J., dissenting) (finding that "[t]he Court imposes a standard of precision for the exercise of a state's police power that has been discredited for the better part of this century").

61. *Id.* at 846 (Brennan, J., dissenting) (citing *Sproles v. Binford*, 286 U.S. 374, 388 (1932)).

62. *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) (holding specifically that unlike the lack of nexus in *Nollan*, the exacting here was directly aimed at a governmental interest in housing), *cert. denied*, 112 S. Ct. 1997 (1992).

These relationships between the demands created by development and the solutions are loose. No one who says to a developer, "I want from you X feet along your entire frontage on the street because we will widen the highway sometime in the future," quantifies the additional burden that this new development is going to place on highways. No one who pays, \$250 an acre into the park fund for each lot, quantifies how much park land the children moving into the development will need in the future. It has always been a reasonable relationship, and in *Nollan*, the Supreme Court subjected the reasonableness to a heightened scrutiny.⁶³

III. THE CONTINUING TREND OF LAND USE DECISIONS: HOW THE COURTS DEALT WITH THE *NOLLAN* DECISION

In the seven years between 1987 and 1994 other decisions were rendered which dealt with the degree of scrutiny of police power exercises relative to property.⁶⁴ But as might be expected, once the shock of *Nollan* had diminished, the courts began to erode the case. *Commercial Builders v. City of Sacramento*⁶⁵ dealt with a fund that Sacramento required from people who were building industrial plants.⁶⁶ The fund subsidized housing for the low-paid workers who would eventually work in the plants. The Ninth Circuit found that all *Nollan* really meant was that there had to be a reasonable relationship between the purpose and the solution and there did not

63. *Nollan*, 483 U.S. at 834 (stating there is not a taking when a land use regulation "substantially advance[s] legitimate state interests"). *But see Commercial Builders*, 941 F.2d at 874 ("As a threshold matter, we are not persuaded that *Nollan* materially changes the level of scrutiny we must apply.").

64. *See, e.g., Yee v. City of Escondido*, 112 S. Ct. 1522 (1992) (entitling mobile home park owners to compensation under the Takings Clause of the Constitution because a local California rent control ordinance mounted to a physical occupation of their property); *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991) (holding that a developer's denied permit did not constitute a denial of substantive or procedural due process).

65. 941 F.2d 872 (9th Cir. 1991).

66. *Id.*

seem to be a reasonable relationship in the facts of *Nollan*. There was, however, a reasonable relationship between the housing needs created by the building of an industrial plant and funding those needs.⁶⁷

Other courts took a tighter view of *Nollan*. In the *Seawall* case, involving a prohibition upon the destruction of single-room occupancy buildings in New York City, unless the owners paid money into a housing fund, the New York Court of Appeals found that there had to be a closer connection between homelessness and the destruction of single-room occupancy units.⁶⁸ The report the City had relied upon in imposing these rather harsh restrictions was insufficient to support a nexus.⁶⁹ In *Seawall*, the New York Court of Appeals relied on *Nollan* in striking down the legislation.⁷⁰

IV. *DOLAN V. CITY OF TIGARD*: THE RESTRICTIVE TREND CONTINUES

Let us now discuss *Dolan*.⁷¹ In *Dolan*, the State of Oregon enacted legislation requiring that each municipality enact a land use plan.⁷² The City of Tigard, enacted a plan that provided in part that in a central business district only eighty-five percent of each

67. *Id.* at 875.

68. *See Seawall Assocs. v. City of N.Y.*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, *cert. denied*, 493 U.S. 976 (1989).

69. *Id.* at 112, 542 N.E.2d at 1069, 544 N.Y.S.2d at 552.

70. The court followed *Nollan*'s analysis by asking, "Is there a sufficiently close nexus between these burdens and the 'end advanced as the justification for [it].'" *Id.* at 111, 542 N.E.2d at 1068, 544 N.Y.S.2d at 551 (quoting *Nollan*, 483 U.S. at 841). The court found that in the absence of "an offsetting provision for fair payment," the city's actions under the police power requiring single-resident occupancy owners to dedicate their properties to a public purpose amounted to an unconstitutional taking. *Id.* at 115, 542 N.E.2d at 1070, 544 N.Y.S.2d at 553.

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

72. *Id.* at 2313. In addition to the zoning plan, the city enacted a Master Drainage Plan due to the flooding along the Fanno Creek area, including the area around the petitioner's land. *Id.* To combat the risks of floods, the city suggested a series of improvements to the creek's basin. These suggestions included a "channel excavation in the area next to petitioner's property." *Id.*

piece of property could be developed and fifteen percent had to be free from all structures and pavement.⁷³

Dolan, the petitioner, owned a 1.67 acre parcel of land.⁷⁴ Fanno Creek, prone to flooding coursed through the southwest portion of the Dolan property.⁷⁵ The property contained a plumbing and electric supply store of about 9,700 square feet⁷⁶ and Dolan sought a building permit to double the size of that store with the intention to build some other stores in the future.⁷⁷ Dolan's plan also provided for bicycle racks for people who transported themselves both recreationally and for business purposes on bicycle.⁷⁸

As a result of the new improvements, Dolan intended to pave the entire area and provide for thirty-nine parking places. Paving meant the creation of impervious surfaces with consequences to Fanno Creek and its flood plain. In other words, the storm water that would flow from these impervious surfaces would travel into the flood plain and increase the volume and speed with which the water flowed down the channel at times when there was flooding.⁷⁹

Dolan applied for a permit which was granted conditioned on a dedication of land adjacent to the flood plain plus an additional fifteen feet of land, which would be part of a greenway that was to run throughout the City.⁸⁰ The greenway would run not only through the flood plain, but through the additional fifteen feet of land. The pedestrian/bike path would be located on the fifteen feet of land and would be used for business and recreational purposes.⁸¹

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* The store and a gravel parking lot were located on the eastern side of the 1.67 acre plot of land. *Id.*

77. *Id.* at 2314. The proposed renovations were found to be "consistent with the city's zoning scheme." *Id.*

78. *Id.*

79. *Id.* at 2313.

80. *Id.*

81. *Id.*

Dolan litigated the condition through two stages of appeal within the City of Tigard⁸² and ultimately through the Oregon courts⁸³ and into the United States Supreme Court.⁸⁴ The ultimate consequence was the decision of the Supreme Court written by Chief Justice Rehnquist.⁸⁵ The Court held that not only must there be a nexus between purpose and means, but there must also be “rough proportionality” between the need and the exaction.⁸⁶ The decision required that the governmental agency produce a real quantification of the need that is to be balanced against the exaction.⁸⁷

To summarize the facts, we have a variance application by petitioner. The City requires her to dedicate ten percent of her property in order for her to get the permit. The City explains that Dolan must leave fifteen percent of her property undeveloped and unbuilt pursuant to the local ordinance. The City was willing to count the ten percent against the fifteen percent that was to remain undeveloped.⁸⁸

Now, I am going to read to you some of the language used by the City. It is important because these findings were deemed to be insufficient by the Supreme Court on the issue of rough proportionality. “[I]t is reasonable to assume that customers and employees of the future uses of this site could utilize a

82. *Id.* at 2315.

83. *Id.* The petitioner appealed on the ground that the city’s dedication requirements “were not related to the proposed development and therefore those requirements constituted an uncompensated taking of their property under the Fifth Amendment.” *Id.* at 2314.

84. *Id.* The Court granted certiorari in 1993 because of the conflict between the Oregon Supreme Court’s decision and the United States Supreme Court’s decision in *Nollan*.

85. *Id.* at 2312. The Chief Justice was joined by Justices O’Connor, Scalia, Kennedy, and Thomas. Justice Stevens filed a dissenting opinion in which Justices Blackmun and Ginsburg joined. *Id.* at 2322 (Stevens, J., dissenting). Justice Souter filed a separate dissent. *Id.* at 2330 (Souter, J., dissenting).

86. *Id.* at 2319. The Court held that “[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and to the extent to the impact of the proposed development.” *Id.* at 2319-20.

87. *Id.* at 2314.

88. *Id.*

pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs.”⁸⁹ It is reasonable to expect that some of the people who will be using the bike racks will be using the pathway.⁹⁰ Finally, the creation of a convenient, safe pedestrian/bicycle system, “could,” -- the Supreme Court does not like the use of this word, -- “could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion.”⁹¹ On the basis of these findings, the City authorities demanded a dedication of property as a condition of the issuance of the building permit.⁹²

In affirming the City’s position,⁹³ the Oregon Supreme Court asserted that there is a *Nollan* nexus if the exaction serves the same purposes that the denial of the permit would serve.⁹⁴

It is clear now that the Oregon Supreme Court’s view of nexus was overly simple. Not only must there be a nexus but it must be “roughly proportional” to the need. The City’s demand that Dolan dedicate a portion of its property was disproportionate to the need, which, in any event, had not been properly quantified. The United States Supreme Court held that the dedication demand was unconstitutional, a taking, and not proportional to the need. In so holding, the Court was confronted with seventy years of jurisprudence to the effect that those attacking constitutionality have an extremely heavy burden in overcoming the strong presumption of constitutionality. Indeed in New York, the burden is to prove unconstitutionality beyond a reasonable doubt.⁹⁵ In other states, the proof must be clear and satisfactory.⁹⁶

89. *Id.* at 2314-15.

90. *Id.*

91. *Id.* at 2315.

92. *Id.*

93. *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993).

94. *Dolan*, 114 S. Ct. at 2315 (quoting *Dolan v. City of Tigard*, 854 P.2d 437, 443 (Or. 1993)).

95. *See, e.g.*, *G.V. Licari v. Scheyer*, 193 A.D.2d 604, 606, 597 N.Y.S.2d 165, 167 (2d Dep’t 1993) (stating that it is “axiomatic that one who claims a land regulation has effected a taking of his property bears the burden of overcoming the presumption of constitutionality which attaches[.]” indeed he must prove that all but the bare residue of the value of the property has been destroyed beyond a reasonable doubt); *Sobel v. Higgins*, 188 A.D.2d 286, 286,

Justice Rehnquist's response was that those cases only apply where the legislation at issue deals with large areas.⁹⁷ When the issue involves the property of a single owner the process is adjudicative and not subject to the presumptions of constitutionality in favor of the constitutionality of legislation.

In concluding that the government cannot require a person to give up a constitutional right in return for a discretionary benefit,⁹⁸

590 N.Y.S.2d 883, 884 (1st Dep't 1992) (holding that the regulation concerning rental housing, including restrictions on rents and evictions, will be struck down where the challenger has established that a statute is unconstitutional beyond a reasonable doubt); *Schulz v. State*, 156 Misc. 2d 169, 177, 601 N.Y.S.2d 239, 244 (Sup. Ct. Albany County 1993) ("Legislative enactments are presumed to be constitutional . . . while this presumption is rebuttable, unconstitutionality must be proven beyond a reasonable doubt." (quoting *Maresca v. Cuomo*, 64 N.Y.2d 242, 250, 475 N.E.2d 95, 98, 485 N.Y.S.2d 724, 727 (1984))).

96. *See, e.g., Robinson v. Town of Riviera*, 25 So. 2d 277, 278 (Fla. 1946) ("[T]he burden of proving an acceptance of a dedication of lands for the general public rests on the party asserting it, and . . . must be clear, satisfactory and unequivocal."); *Waffle House v. DeKalb County*, 406 S.E.2d 477, 479 (Ga. 1991) (stating that "the challenger to the validity of the ordinance, has the burden to present clear and convincing evidence that he has suffered a significant detriment which is unsubstantially related to the public health, safety, morality and welfare"); *LaSalle Nat'l Trust, N.A. v. Village of Westmont*, 636 N.E.2d 1157, 1162 (Ill. 1994) ("A zoning ordinance is presumed to be valid, and the party challenging the presumption has the burden of establishing by clear and convincing evidence that, as to the subjective property, the ordinance is arbitrary, capricious, and unreasonable, and bears no substantial relationship to public health, safety, or general welfare.").

97. Justice Rehnquist distinguished cases like *Agins*, *Euclid*, and *Mahon* by stating that these cases "involved essentially legislative determinations classifying entire areas of the city, whereas in [*Dolan*] the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel of land." *Dolan*, 114 S. Ct. at 2316. Therefore, the Court found that there was no need to apply the above mentioned presumptions.

98. *Id.* at 2317.

Under the well settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . to receive just compensation when property is taken for a public use - in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.

Id.

Justice Rehnquist cited some First Amendment cases.⁹⁹ Why is that significant? It is significant because, as the Court stated, in the past, we have been treating property rights under the Fifth Amendment as some sort of poor cousin to the rest of the Bill of Rights. Therefore, it is time that we recognize the truth, that these rights are all part of the First Ten Amendments and have to be treated equally.

This conclusion flies in the face of *United States v. Carolene Products*¹⁰⁰ where Justice Stone had written, in a now famous footnote, that voting rights, discrimination, personal rights against discrimination, the First Amendment rights, and free speech rights are to be considered as a higher priority than property rights.¹⁰¹ So what Justice Rehnquist revealed in citing First Amendment cases and then declaring that property rights should not be treated as some kind of poor cousin, is that from here on forward there is going to be change and heightened scrutiny will be applied to property right restrictions. No longer will there be an exaltation of police powers, particularly where the government demands that property be dedicated or where the government takes property rights.

The Court further stated that in considering the cases that have dealt with the issue of such exactions, there are some cases, (only one is cited) where the state courts have required a particularized close connection between the exaction and the need.¹⁰² There are,

99. Examples of the First Amendment cases the majority cites include: *Perry v. Sindermann*, 408 U.S. 593 (1973) and *Pickering v. Board of Educ. of Township High Sch. Dist.*, 391 U.S. 563 (1968).

100. 304 U.S. 144 (1938).

101. Famous footnote number four provides in pertinent part that: "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." *Id.* at 152 n.4.

102. See *Pioneer Trust & Sav. Bank v. Mount Prospect*, 176 N.E.2d 799 (Ill. 1961) (setting forth the "specific and uniquely attributable" test). The *Dolan* Court explained that "[u]nder [the specific and uniquely attributable] standard . . . the local government [must] demonstrate that its exaction is directly proportional to the specifically created need." *Dolan*, 114 S. Ct. at 2319.

of course, lots of cases where the courts have held that what is required is simply a reasonable relationship.¹⁰³ Justice Rehnquist noted, that what the Court was talking about was fairly close to the reasonable relationship rule except that the traditional reasonable relationship rule only provided for a minimum level of scrutiny. In applying the rough proportionality test the Court is rejecting reasonable relationship, because the rough proportionality test involves a higher level of scrutiny.¹⁰⁴

Thus, the City must make an individualized determination that the dedication is related, both in nature, extent and quantification to the impact of the proposed development.¹⁰⁵ Note, that it is the City that must make this determination and prove it in court. Does that mean that the burden of proof in such a case is upon the government? The answer to that is clearly yes.¹⁰⁶ That answer reflects an alteration in land use jurisprudence that is of substantial dimension. In his dissent, Justice Stevens immediately seized upon this change but, Justice Rehnquist had no great problem dealing with it.

The dissenters looked at the two aspects of what the City demanded. First, it wanted a dedication of property along Fanno

103. *Dolan*, 114 S. Ct. at 2319. *See, e.g.*, *Collis v. Bloomington*, 246 N.W.2d 19 (Minn. 1976) (requiring a showing of a reasonable relationship between the planned subdivision and the municipality's need for land); *Call v. West Jordan*, 606 P.2d 217, 220 (Utah 1979) (affirming use of reasonable relation test).

104. *Dolan*, 114 S. Ct. at 2319. Justice Rehnquist simply stated that [w]e think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm . . . [b]ut we do not adopt it as such. . . . We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment.

Id.

105. *Id.* at 2319-20.

106. *Id.* at 2320 n.8.

Justice Stevens . . . is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation . . . [h]ere, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.

Id. (citations omitted).

Creek to keep the flood plain clear and for a greenway. There was no question that the construction of that parking lot was going to dump a lot of storm water into the flood plain and into Fanno Creek, so why wasn't that evidence of proportionality? Why wasn't that good enough? The answer to the question by Justice Rehnquist is rather clear. The City did not need a dedication. Why was the City insisting on this important "strand in the bundle of property rights," the right to exclude people, when the same results could have been achieved by imposing a restriction that the property not be developed or used. That was all that was needed on the flood problem. If the City wanted to create a greenway, it should have paid for it. It had no right to take the property.¹⁰⁷ That was why there was no proportionality with respect to the easement adjacent to the flood plain where the bicycle path was to exist.¹⁰⁸

The City had estimated that the new development on the Dolan property would produce 435 additional trips a year.¹⁰⁹ The City estimated that this easement or bicycle/pedestrian pathway could reduce automobile traffic because some people might use bicycles. In the Court's majority view that was not good enough.¹¹⁰ There had to be a quantification. How many cars will the pedestrian/bikeway reduce from the central business district? As one of the dissenters said, would a percentage estimate suffice? If the City had spoken in terms of such numbers would that have

107. *Id.* at 2320.

108. *Id.* The majority found that increasing the amount of the impervious surface was legitimate, but more was demanded, the city "not only wanted petitioner not to build in the flood plain, but it wanted petitioner's property along Fanno Creek for its Greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control." *Id.*

109. *Id.* at 2321.

110. *Id.* at 2321-22.

The city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway could offset some of the traffic demand . . . and lessen the increase in the traffic congestion.

Id.

sufficed?¹¹¹ Whatever the criticism, we know that there will have to be a quantification to meet a challenge based on *Dolan*.

CONCLUSION

Why is *Dolan* significant in the context of real life zoning? The planning board that approves a subdivision, or the zoning board of appeals that grants a variance or a special permit or a site permit and imposes conditions does not generally have a quantification survey in its file. Perhaps it has some advice from a planning director who has stated that there is a need because there will be more children or more traffic in the area but there is nothing quantified. Under *Dolan*, there will now have to be a quantification.

In addition, and certainly very significantly, shifting the burden of proof to the government is going to have quite an effect.¹¹² Shifting the burden of proof in a proceeding which is adjudicative presents a real problem for municipalities. Is the planning board, the zoning board of appeals, or for that matter the town board, which is sitting in judgment on an application, supposed to make a presentation on the record of the very matter it is deciding? How would they do that? New York experimented with this idea briefly during the era of Judge Keating in *Fulling v. Palumbo*.¹¹³ But then dispensed with this requirement.

The *Dolan* dissenters argued that police power regulations, when dealing with developments and commercial properties, are really dealing with business regulations,¹¹⁴ not the matter of hearth and

111. *Id.* at 2326 (Stevens, J., dissenting). The dissent criticized the majority's requirement that the city quantify the traffic benefits of a bike path, noting that the benefit should be reasonable as long as it was within the range of 5-100%. *Id.* (Stevens, J., dissenting).

112. *Proportionality and Land Use*, SACRAMENTO BEE, July 3, 1994, at F04. "[L]ocal agencies will be expected to ensure that their land-use conditions are reasonable before they adopt them -- rather than requiring the landowner to bear the costs of proving in court that they are unreasonable after they [have] been adopted." *Id.*

113. 21 N.Y.2d 30, 233 N.E.2d 272, 286 N.Y.S.2d 249 (1967).

114. *Dolan*, 114 S. Ct. at 2325 (stating that "subdivision control exactions are actually business regulations").

home. Subdividers produce a product; they take land and process it; produce a product and then they sell it.¹¹⁵ Justice Stevens, in making this analysis, quotes from a law review article.¹¹⁶ Responding in a footnote, Justice Rehnquist seems to mock the source.¹¹⁷ Justice Stevens went on to raise the specter of the *Lochner* era,¹¹⁸ when the Supreme Court overturned public welfare legislation as an unconstitutional interference with contractual rights. In *Lochner*, the Supreme Court held in 1909 that it was unconstitutional to fix the maximum working hours for bakers because it interfered with their freedom to contract. The case has become a hobgoblin.

The dissenters are of the opinion that the majority in *Dolan*, *Nollan*, *Lucas*, and other real property and police power cases, are seeking to elevate property rights to the same level of sanctity as freedom of speech or other such rights under the Bill of Rights.

Audience Member:

As a practical purpose, won't the quantification requirement increase the cost of development? If these studies are going to be done to quantify the exaction then somebody will have to pay for it. Either a zoning board, town board, or city planning board is going to have someone test it and do the studies and show what the development is going to be and whether it is going to pass the cost on permanently.

115. *Id.* at 2325 (Stevens, J., dissenting). See John D. Johnston, Jr., *Constitutionality of Subdivision Control Exactions: The Quest For a Rationale*, 52 CORNELL L.Q. 787, 973 (1967) (asserting that a "subdivider is a manufacturer, processor and marketer of a product; land is but one of his raw materials").

116. For the law review article Justice Stevens quoted from, see *supra* note 115.

117. *Dolan*, 114 S. Ct. at 2329 n.13.

118. In *Lochner*, the Supreme Court stated that it was unconstitutional to fix the maximum working hours for bakers who were working 60 hours a week, for to do so would interfere with the right of the bakers to freely contract with their employers. *Lochner v. New York*, 198 U.S. 45 (1905).

Hon. Leon D. Lazer:

That may well be a consequence. It seems to me that when dealing with a hostile property owner, it is going to be the board's obligation to quantify the basis for the regulation that the owner is opposed to. That this will cost more money, there can be little doubt.

I think the saving grace in all of this, whether it is nexus or whether it is the *First English Evangelical Lutheran Church of Glendale* case is that the builders and the developers are out to build and develop. They are not interested in three, four, five, or eight years of litigation and so they go along with the municipal demands. But if anybody wants to fight, it is going to be difficult for the government to quantify. If the demands are for the dedication of property, and actual conveyance, the current majority of the Supreme Court looks askance at that.

Audience Member:

Except you do not know in advance who is going to fight with you and who is not and if you are going to protect yourself, you are going to have these studies done.

Hon. Leon D. Lazer:

Well, I think I tried to imply that. You will, I suppose, every time you impose that kind of an exaction, have to have the backup for it and that is going to cost money. I suspect the back up will sometimes be spurious anyway, because all you can do is guess as to what the need really is.

