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EXACTIONS FOR TRANSPORTATION CORRIDORS AFTER *DOLAN V. CITY OF TIGARD*

I. INTRODUCTION

[N]or shall private property be taken for public use, without just compensation.¹

Once we saw the black ribbon stretching to the horizon as the solution to all our transportation problems.² As long as we could make the road longer or wider, we could solve congestion with just a bit more asphalt.³ Modern reality requires a variety of approaches for commuting, shopping, and business travel. Transportation corridors can promote efficiency, the formulation of comprehensive planning and intermodal solutions, and the protection of fragile

1. U.S. CONST. amend. V.

2. Before 1900 the demand to pave roadways came from bicyclists. ALAN BLACK, URBAN MASS TRANSPORTATION PLANNING 41 (1995). The first federal highway Act was passed in 1916. *Id.* (citing Federal-Aid Road Act of 1916, 39 Stat. 355.) Federal urban highway programs began during World War II. *Id.* (citing Federal Highway Act of 1944, 58 Stat. 839, ch. 626.) Not until 1956, however, with the passage of the Interstate and Defense Highway System Act, did construction begin on the project to connect all major population centers. Sallie Gaines, *The Roads That Changed America: Our Tale of the Interstates is One of Vision, Politics and \$116 Billion*, CHI. TRIB., Oct. 20, 1991, § 17 (Transportation), at 1, 5. President Eisenhower had admired the German autobahns while serving as Allied commander-in-chief. *Id.* He saw in them not only an opportunity to create a large number of jobs quickly after the end of the Korean conflict but also an essential means for moving troops and equipment in national emergencies. *Id.*

The Federal-Aid Highway Act of 1962, Pub. L. No. 87-866, 76 Stat. 1145, added 23 U.S.C. § 134, introduced regional solutions by providing that federal funding be “based on a continuing comprehensive transportation planning process.” This section was amended by the Intermodal Efficiency Surface Transportation Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (codified as amended in scattered sections of 23, 49, and other titles of the U.S.C.) to read that “transportation plans and programs for urbanized areas . . . shall provide for the development of transportation facilities (including pedestrian walkways and bicycle transportation facilities) which will function as an intermodal transportation system.” 23 U.S.C. § 134(a) (Supp. V 1993).

3. See, e.g., MELVIN M. WEBBER, ON STRATEGIES FOR TRANSPORT PLANNING 1 (Organization for Economic Cooperation and Development Working Paper No. 100, 1969) (on file with the *Loyola of Los Angeles Law Review*).

environmental and natural resources.⁴ Traditional zoning techniques may actually cause greater traffic congestion—resulting in energy inefficiency and pollution production—by allowing large retail developments that make public transportation impractical, and by increasing the distance between residences and commercial structures.⁵

When society benefits from preserving existing land uses—residences, shops, vacant lots, and even entire neighborhoods—property owners feel that society should bear the cost, not the individual property owner.⁶ In 1987 the Court began to shift the balance back toward private property rights.⁷ In a series of decisions, the Court has expressed and refined a test for takings analysis. In *Dolan v. City of Tigard*,⁸ Chief Justice Rehnquist, writing for a five-four majority, expanded the “essential nexus” test of *Nollan v. California Coastal Commission*.⁹ *Nollan* required that the exaction sought by local government be substantially related to the harms imposed by the development.¹⁰ Now a simple nexus is no longer sufficient; the municipality bears the legal burden of showing that the exaction is roughly proportionate to the harm.¹¹ However the Court, by imposing the rough proportionality requirement on top of the

4. A working definition of a transportation corridor is:

[A] specific geographic area which includes: (1) the maximum right-of-way required to meet the transportation needs generated by the projected population and employment through the life of the corridor plan, and (2) all adjacent areas which are affected by the transportation facility and are reasonably necessary to accomplish the objectives established in the plan.

Robert H. Freilich & Stephen P. Chinn, *Transportation Corridors: Shaping and Financing Urbanization Through Integration of Eminent Domain, Zoning and Growth Management Techniques*, 55 UMKC L. REV. 153, 156 (1987).

5. See Robert Cervero, *Jobs-Housing Balancing and Regional Mobility*, 55 J. AM. PLAN. ASS'N 136, 139 (1989). The Southern California Association of Governments has reduced its 1989 predictions to account for the economic downturn of the 1990s; yet, it still predicts an ever increasing distance between centrally located housing and outlying affordable housing in Southern California. See SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS, REGIONAL COMPREHENSIVE PLAN AND GUIDE, chs. 2-6 (May 1995).

6. See, e.g., *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (finding property owner sought variance from providing easement for floodplain and bike path in order to receive redevelopment permit); *Ayres v. City Council*, 34 Cal. 2d 31, 207 P.2d 1 (1949) (finding developer challenged required dedication of land for highway bordering subdivision).

7. See *infra* notes 64-123 and accompanying text.

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

9. 483 U.S. 825 (1987).

10. *Id.* at 837.

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

essential nexus test, fails to allow city planners the flexibility necessary to design creative solutions to reduce the negative impacts of regional development.¹²

At first the concept of rough proportionality is seductive. Why should any government possess the power to exact remedies not directly related to the problems exacerbated by private development? The reality is that city planning requires consideration of a larger area than a single parcel. Neighborhoods and cities are vibrant, integral units. Each new or more intensive use of a site creates a regional impact. If the city fails to require the developer to mitigate the burdens created, the cost for mitigation falls on the existing neighboring property owners. The city planner's goal is to ensure that each development or improvement also contributes to the improvement of the community at large.¹³

Exactions fall on the party in the best position to absorb the cost—the developer—who will, theoretically, realize a sizable profit on the investment.¹⁴ The alternative is to place a growing tax burden on other property owners who are unable to externalize the cost. This alternative not only raises issues of fairness but may also destroy marginal businesses, thus adding to the blight of the neighborhood.¹⁵

The Court in *Dolan* rejected the city of Tigard's demand for a bike path dedication.¹⁶ Holding that the city had failed to establish

12. See, e.g., EUROPEAN CONFERENCE OF MINISTERS OF TRANSPORT & ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *URBAN TRAVEL AND SUSTAINABLE DEVELOPMENT* 23 (1915) ("Difficult decisions will have to be made: the planning of development, the cost of travel, the design of vehicles and management of traffic will all have to change."); John Black, *URBAN TRANSPORT PLANNING: THEORY AND PRACTICE* 21 (1981) ("There is a wide divergence of opinion on how to solve the 'urban transport problem', but the aim of transport planning is to search for the best solutions given the resources available.").

13. See, e.g., Weber, *supra* note 3, at 2 ("[T]he accumulating research findings are dramatizing the long-sensed fact that transportation facilities are integral subsystems within the larger city systems and that personal travel and goods shipment are inextricably bound up in the workings of modern societal systems.").

14. See Vickie Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 483, 493 (1991).

15. See, e.g., Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J.L. REF. 689 (1994) (concluding that redevelopment projects designed to revitalize inner cities ignored local concerns and contributed to decline of neighborhoods).

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

that the path would alleviate the problems caused by increased car trips to a much larger hardware store on the site,¹⁷ the Court's new addition to the takings analysis potentially cripples the necessary flexibility of city planning. State and federal laws now support the expanding view of alternative transportation options.¹⁸ To ensure that development is not merely economically sustainable but also environmentally sustainable, municipalities must have the tools to alter existing traffic options in favor of intermodal ones.

Part II of this Note examines the history of exactions and regulatory takings. Part III examines the background of *Dolan* and the basis for the decision. By examining the cases used to refine the test, Part IV seeks to determine how the Court will apply the test to future factual situations. Part V analyzes the holding in light of the equities involved and the need for alternative solutions to existing problems. Part VI concludes that the Court should use rough proportionality only to ensure that the exactions imposed on developments do not wildly exceed the burdens imposed. The test should not be used to tie the hands of city planners.

II. HISTORY OF EXACTIONS AND REGULATORY TAKINGS

The Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.¹⁹

A. *Physical Invasions and Regulatory Takings*

As far back as *Pumpelly v. Green Bay Company*,²⁰ the Court established that the permanent physical invasion of a property right constituted a compensable taking.²¹ In *Pumpelly*, a dam constructed

17. *Id.* at 2321-22.

18. See, e.g., James W. Spensley, *New Clean Air Regulations: Limiting Transportation Development Options*, 23 COLO. LAW. 1099 (1994) (urging that local communities must develop alternative transportation options); Robert E. Yuhnke, *The Amendments to Reform Transportation Planning in the Clean Air Act Amendments of 1990*, 5 TUL. ENVTL. L.J. 239 (1991) (noting the federal statute will require the development of alternative transportation options).

19. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

20. 80 U.S. (13 Wall.) 166 (1871).

21. The Court noted that improvements to roads or waterways were intended to benefit the public; thus, any consequential damages resulting from the improvements were not compensable takings. *Id.* at 180-81. But "where real estate is actually invaded by

downriver of the subject property caused permanent flooding of the site and destruction of the property's value.²² Seventy years later the Court held that frequent takeoffs and landings by military aircraft at low altitudes that forced chicken farmers to abandon their business constituted a physical invasion.²³ The Court more recently upheld the physical invasion standard in *Loretto v. Teleprompter Manhattan CATV Corp.*,²⁴ in which a local regulation requiring landlords to allow installation of cable television junction boxes on their property was held to effect a compensable taking.²⁵

The Court has upheld regulatory takings—restrictions by the municipality on the use of property—as a proper application of the police power.²⁶ After the citizens of Kansas amended their constitution in 1880 to forbid the manufacture and sale of alcohol,²⁷ two brewery owners were sued for continuing a nuisance in violation of the amendment.²⁸ They brought suit for compensation, claiming that the state's action caused their breweries to lose all or most of their

superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." *Id.* at 181. The government must compensate the owner despite the weight of the justification for the invasion. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992).

22. *Pumpelly*, 80 U.S. (13 Wall.) at 176-77.

23. *United States v. Causby*, 328 U.S. 256 (1945). The Court held that the flights were below the navigable airspace that Congress placed in the public domain and thus imposed a servitude on the property. *Id.* at 264-67. However, the flights must be both so low and so frequent that they cause a "direct and immediate interference with the enjoyment and use of the land" to constitute a taking. *Id.* at 266.

24. 458 U.S. 419 (1982).

25. *Id.*

26. The term police power is defined very broadly:

An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.

Berman v. Parker, 348 U.S. 26, 32 (1954).

27. *Mugler v. Kansas*, 123 U.S. 623, 624 (1887).

28. *Id.*

value.²⁹ The Court held that the police powers of a state—those that regulate the health, safety, and welfare of the public—are subjects over which the federal government has no power.³⁰ The police powers allow the abatement of a nuisance, even when the value of the property is destroyed.³¹ Such actions do not violate the Fourteenth Amendment, which is not incompatible with the principle “that all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community.”³²

The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken from an innocent owner.³³

Later cases found the Court upholding regulations that effectively prohibited the legitimate existing uses of property, including a livery stable,³⁴ a brick yard,³⁵ a grove of cedar trees,³⁶ a gold mine,³⁷ and a gravel pit.³⁸ In the words of Justice Holmes, “[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”³⁹ Holmes held invalid a regulation prohibiting coal mining that might cause surface subsidence, even if it allowed the destruction of a home

29. *Id.* at 654.

30. *Id.* at 658-59 (citing *The License Cases*, 46 U.S. (5 How.) 504 (1847)).

31. *Id.* at 658.

32. *Id.* at 665.

33. *Id.* at 669.

34. *Reinman v. Little Rock*, 237 U.S. 171 (1915).

35. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

36. *Miller v. Schoene*, 276 U.S. 272 (1928). The red cedar trees were ordered destroyed to prevent the spread of cedar rust, which was fatal to apple trees in a nearby orchard. *Id.* at 277. The statute provided compensation for the expense incurred for felling the trees, but not for the value of the standing trees or the decrease in the property’s market value. *Id.* The exercise of the police power was justified by the threat to a more valuable resource. *Id.* at 279-80.

37. *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958).

38. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). The statute prohibited any excavations below the water table, effectively ending a business that had operated for 31 years. *Id.* at 595-96.

39. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

built above the ore.⁴⁰ Sixty-five years later, in *Keystone Bituminous Coal*, the Court sought to reconcile Holmes' view with a separate line of cases that upheld similar regulations.⁴¹ Where Justice Holmes saw the earlier statute as wrongfully restoring rights freely contracted away,⁴² the Court in *Keystone Bituminous Coal* found the new act was a public, not a private, benefit as it applied to all the surface lands overlying coal fields.⁴³ The public goal was "'conservation of

40. *Id.* at 414-16. Pennsylvania law was unique in considering subsurface support as a separate interest from the surface or mineral estate. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500 (1987). As a practical matter, the "support estate" is always owned by the owner of one of the other two estates. *Id.* at 500-01. During the period from 1890 through 1920, approximately 90% of the support estate in the bituminous coal fields of western Pennsylvania was severed from the surface estate. *Id.* at 478. The Mahons, who had purchased only the surface on which they built their home, sought an injunction under the Kohler Act of 1921, PA. STAT. ANN. tit. 52, § 661 (1966), which prohibited mining that would cause subsidence under structures. *Pennsylvania Coal Co.*, 260 U.S. at 412. The Court accepted the mining company's argument that the Kohler Act was not a bona fide action under the state's police powers but legislation designed to increase the property rights of a few homeowners. *Keystone Bituminous Coal*, 480 U.S. at 482-83. Justice Brandeis, dissenting in *Pennsylvania Coal Co.*, summarized the nuisance exception to compensable takings:

Coal in place is land; and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance; and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the legislature has power to prohibit such uses without paying compensation.

Pennsylvania Coal Co., 260 U.S. 417 (Brandeis, J, dissenting).

41. 480 U.S. 470 (1987). In 1966 the Pennsylvania Legislature enacted the Bituminous Mine Subsidence and Land Conservation Act, PA. STAT. ANN. tit. 52, §§ 1406.1-21 (Supp. 1995) [hereinafter Bituminous Subsidence Act], to remedy the failings of the state's existing subsidence statutes. *Id.* at 474. The Act prohibited the mining of coal that would cause subsidence in public buildings, residences, and cemeteries that existed when the legislation was enacted. *Id.* at 476. The Pennsylvania Department of Environmental Resources promulgated regulations requiring that at least 50% of the coal beneath the listed land uses must be left in place to provide surface support. *Id.* at 476-77. The Court distinguished the Subsidence Act from the Kohler Act due to the legislature's explicit finding in the former that the "'act shall be deemed to be an exercise of the police powers of the Commonwealth for the protection of the health, safety and general welfare of the people.'" *Id.* at 485 (quoting Bituminous Subsidence Act, *supra* § 1406.2). The Kohler Act was held by Holmes to benefit a few private parties since it did not apply to land whose surface was owned by the coal companies. *Id.* at 486 (quoting Bituminous Subsidence Act, *supra* § 1406.2).

42. The Court has interpreted the Contract Clause, U.S. CONST. art. I, § 10, to invalidate acts intended to repudiate existing debtor-creditor relationships, not to override the states' police power. *Keystone Bituminous Coal* at 502-03 (citing *Manigault v. Springs*, 199 U.S. 473, 480 (1930)). Protection of health, morals, and welfare was deemed paramount to rights granted in contracts between individuals. *Id.*

43. *Keystone Bituminous Coal* at 486.

surface land areas,'⁴⁴ which the Court considered a valid exercise of the police power.⁴⁵ Had the act eliminated all economically viable use of the land, the state would have committed a compensable regulatory taking.⁴⁶ Petitioners claimed a taking based on the estimated twenty-seven million tons of coal the association could not mine as a result of the restrictions.⁴⁷ But that quantity of coal represented less than two percent of the petitioners' total potentially minable coal.⁴⁸ None of the mines had shown an operating loss as a result of the regulation;⁴⁹ therefore, the coal operations were economically viable enterprises.⁵⁰

In holding that the two percent was inseparable from the entire volume of coal owned by the mining companies, the Court relied on *Penn Central Transportation Co. v. New York City*.⁵¹ In *Penn Central*, the city, under an historical landmark preservation statute, had prevented the owners of Grand Central Terminal from constructing a fifty-story office tower above the historical building.⁵² The Court rejected the owners' takings claim, refusing to consider the air rights as severable from the remainder of the full block parcel under a takings analysis.⁵³ The owners could continue to use the terminal, which produced revenue,⁵⁴ and could sell or transfer the air rights to other nearby sites.⁵⁵

A physical invasion of private property by the government, or its agent, will always constitute a taking.⁵⁶ For a regulatory taking count to succeed, however, the plaintiff must allege not only an

44. *Id.* at 485 (quoting Bituminous Subsidence Act, *supra* note 41, § 1406.2).

45. *Id.*

46. *Id.*

47. *Id.* at 496.

48. *Id.*

49. *Id.*

50. *Id.* at 497.

51. 438 U.S. 104, 130-31 (1978).

52. *Id.* at 116-19.

53. "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.* at 130.

54. *Id.* at 135.

55. *Id.* at 136-37.

56. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982). The Court added that this type of physical invasion will constitute a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.*

almost complete destruction of economically viable use of the property, but that destruction must affect the broadest possible definition of the extent of the property.⁵⁷

B. *Exactions, From Subdivisions to Redevelopment*

Subdividing a piece of property can greatly increase its value. But the same increase in land use density that generates the greater value also creates a burden on the local infrastructure.⁵⁸ Courts since the 1920s have upheld subdivision exactions as a means of ameliorating these burdens.⁵⁹ These exactions are not a taking or an act of eminent domain because they are “reasonable and necessary for the public welfare” and are granted in exchange for the privilege of recording the developer’s plat.⁶⁰ However, the municipality’s exaction must conform with the state’s enabling legislation.⁶¹

57. See, e.g., *Keystone Bituminous Coal*, 480 U.S. 470 (holding two percent of the coal that the company could not mine under the regulations was not severable from remaining 98% in order to establish a compensable taking); *Penn Central*, 438 U.S. 104 (holding marketable air rights not severable from property and structure value for takings analysis).

58. The Court addressed this burden/benefit reasoning in *Bauman v. Ross*, 167 U.S. 548 (1897). In 1893 Congress passed an act to plot the continuation of major thoroughfares in the District of Columbia outside the existing boundaries of the cities of Washington and Georgetown. *Id.* at 551. Where the extensions passed through existing subdivisions, the government was required to pay for the land it condemned, half coming from the government and half from an assessment of those lands bordering the thoroughfares for the benefit they would receive from the roadway. *Id.* at 558.

59. Michigan upheld an exaction to conform with their dimensions recorded in the city’s general plan in *Ridgefield Land Co. v. City of Detroit*, 217 N.W. 58, 60 (Mich. 1928). The New York courts first upheld an exaction for parkland within a proposed subdivision in *In re Lake Secor Development Co.*, 252 N.Y.S. 809, 812 (Sup. Ct. 1931).

60. *Ridgefield Land Co.*, 217 N.W. at 60; see *Mansfield & Swett, Inc. v. Town of West Orange*, 198 A. 225, 229 (N.J. Sup. Ct. 1938) (the state possesses the inherent authority—it antedates the Constitution—to resort, in the building and expansion of its community life, to such measures as may be necessary to secure the essential common material and moral needs. . . . A comprehensive scheme of physical development is requisite to community efficiency and progress; see also *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 644, 484 P.2d 606, 615, 94 Cal. Rptr. 630, 639 (1971) (the rationale of the cases affirming constitutionality . . . [is] that the subdivider realizes a profit from governmental approval of a subdivision since his land is rendered more valuable by the fact of subdivision, and in return for this benefit the city may require him to dedicate a portion of his land for park purposes whenever the influx of new residents will increase the need for park and recreational facilities.).

61. See, e.g., *City of Corpus Christi v. Unitarian Church*, 436 S.W.2d 923 (Tex. Ct. App. 1968) (holding that lack of constitutional, statutory, or charter authorization for required dedication of easement without compensation in order to record plat violates

With diminishing funds available for land condemnation and capital improvements, cities have imposed a wide variety of in lieu fees on proposed subdivisions.⁶² The fees imposed may go beyond the immediate impact of the development to alleviate regional problems exacerbated by the development.⁶³

C. Modern Takings Analysis

The beginnings of the modern trend in takings analysis were apparent in *Keystone Bituminous Coal*.⁶⁴ Justices Powell, O'Connor, and Scalia joined Chief Justice Rehnquist in his dissent.⁶⁵ Finding little difference between the two Pennsylvania statutes,⁶⁶ the Chief Justice distinguished the Subsidence Act from the Court's historical analysis of nuisance statutes, which avoided a takings problem by "rest[ing] on discrete and narrow purposes."⁶⁷ But more importantly, the dissent considered the twenty-seven million tons of coal

takings clause).

62. See Donald L. Connors & Michael E. High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 69 (1987); Charles Siemon, *Who Bears the Cost?*, 50 LAW & CONTEMP. PROBS. 115 (1987). In a case remanded three days after the Court decided *Dolan*, the Court signalled that in lieu fees for sports facilities and public art would receive heightened scrutiny after the *Dolan* decision. *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 19 Cal. Rptr. 2d 468 (1993), *vacated*, 114 S. Ct. 2731 (1994).

63. In dictum, the California Supreme Court noted:

It is difficult to see why, in the light of the need for recreational facilities . . . and the increasing mobility of our population, a subdivider's fee in lieu of dedication may not be used to purchase or develop land some distance from the subdivision but which would also be available for use by subdivision residents. If, for example, the governing body of a city has determined . . . that a specific amount of park land is required for a stated number of inhabitants, if this determination is reasonable, and there is a park already developed close to the subdivision to meet the needs of its residents, it seems reasonable to employ the fee to purchase land in another area of the city for park purposes to maintain the proper balance between the number of persons in the community and the amount of park land available.

Associated Home Builders, 4 Cal. 3d at 640 n.6, 484 P.2d at 612 n.6, 94 Cal. Rptr. at 636 n.6.

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

65. *Id.* at 506-21 (Rehnquist, C.J., dissenting).

66. *Id.* at 507-08 (Rehnquist, C.J., dissenting). The dissent noted that the legislature passed the Kohler Act to eradicate public evils including wrecked streets, collapsed buildings, broken pipelines, and loss of human life—all recognized by the Pennsylvania Supreme Court as a valid exercise of the police power. *Id.* at 509-10 (Rehnquist, C.J., dissenting) (citing *Mahon v. Pennsylvania Coal Co.*, 118 A. 491, 492 (Pa.), *rev'd*, 260 U.S. 393 (1922)).

67. *Id.* at 513 (Rehnquist, C.J., dissenting).

separately from the remaining coal.⁶⁸ Disdaining the majority's determination that this challenge was to a regulatory taking, not a physical invasion, the Chief Justice concluded the distinction was irrelevant when discussing the impact on property rights.⁶⁹ While a physical invasion will always destroy the full bundle of property rights, the impact of a regulation may destroy only one or more of the individual sticks in that bundle.⁷⁰

Chief Justice Rehnquist returned to the nuisance rationale that serves as a basis for most land use and environmental law, finding that at most it serves as an exemption to compensable takings for two reasons.⁷¹ First, the Court recognized that nuisance regulations had "discrete and narrow purposes" justifying the government's right to exercise its police power.⁷² Second, and more important in light of the dissent's conclusion that the twenty-seven million tons of coal were a separate interest from the remainder, the Court has previously upheld regulations that have dramatically reduced the value of a parcel but has never upheld one that has extinguished the entire value.⁷³ By defining the coal that the companies could not mine as a distinct property interest, the Chief Justice had no trouble determining that the Subsidence Act was a compensable taking.⁷⁴

68. *Id.* at 517 (Rehnquist, C.J., dissenting).

69. *Id.* at 515 (Rehnquist, C.J., dissenting). The Chief Justice cited *Causby* in which the continuous takeoffs and landings over the chicken farm were held as much a taking as if the government "had entered upon the surface of the land and taken exclusive possession of it." *Id.* at 516 (citing *United States v. Causby*, 328 U.S. 256, 261 (1946)).

70. *Id.* at 516 (Rehnquist, C.J., dissenting).

71. *Id.* at 512-13 (Rehnquist, C.J., dissenting).

72. *Id.* at 513 (Rehnquist, C.J., dissenting). The Chief Justice cited *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), in which the regulation prohibited excavation below the water table in order to protect ground water supplies; *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), concerning a regulation that prohibited the operation of a brickyard within city limits; and *Mugler v. Kansas*, 123 U.S. 623 (1887), where a countywide prohibition act forced the closure of local distilleries. *Keystone Bituminous Coal*, 480 U.S. at 513 (Rehnquist, C.J., dissenting).

73. *Keystone Bituminous Coal*, 480 U.S. *Id.* (Rehnquist, C.J., dissenting). The Chief Justice referred to *Miller v. Schoene*, 276 U.S. 272 (1928), in which a regulation mandating the owner of diseased red cedar trees to destroy his trees did not extinguish the value of his land because he could still salvage their value as lumber. *Keystone Bituminous Coal*, 480 U.S. at 513 (Rehnquist, C.J., dissenting). Even when the local government enjoined the entire enterprise, as in *Goldblatt*, *Hadacheck*, and *Mugler*, the land retained some value. *Id.* at 513-14 (Rehnquist, C.J., dissenting).

74. *Keystone Bituminous Coal*, 480 U.S. at 520-21 (Rehnquist, C.J., dissenting).

1. *Nollan* and essential nexus

The Nollans owned a small beach cottage in a strip of private residences located between two public beaches.⁷⁵ They sought to replace the structure with a three-bedroom house.⁷⁶ The Coastal Commission (Commission) approved the permit contingent upon the Nollans granting a public easement to the beach between the high tide line and their existing concrete seawall.⁷⁷ When challenged, the Commission justified this exaction as necessary to prevent a solid wall of two-story residences from creating a psychological barrier to the public.⁷⁸ The Commission reasoned that if the public could not see the beach, then it could not realize that it had a right to pass below the high tide line between the two public beaches.⁷⁹ After the Commission promulgated its regulations, it approved forty-three shoreline development permits in the same tract, each one carrying the same dedication as the Nollans'.⁸⁰

The California Court of Appeal upheld the dedication as sufficiently related to the burden created, even if the burden was a cumulative one not created solely by the Nollans' home.⁸¹ Further, the court held that the regulation did not deprive the Nollans of all reasonable use of their property.⁸²

75. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827 (1987).

76. *Id.* at 828.

77. *Id.* Under the California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-30900 (West 1986 & Supp. 1995), any development within the coastal zone required a permit from the commission. CAL. PUB. RES. CODE § 30600 (West 1986).

78. *Nollan*, 483 U.S. at 828-29.

79. *Id.*

80. *Id.* at 829.

81. *Id.* at 830 (citing *Nollan v. California Coastal Comm'n*, 177 Cal. App. 3d 719, 723-24, 223 Cal. Rptr. 28, 30-31 (1986), *rev'd*, 483 U.S. 825 (1987)). The court of appeal relied on an earlier case, *Grupe v. California Coastal Comm'n*, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985), in which the court upheld a similar exaction because "[r]espondent's beach front home [was] one more brick in the wall separating the People of California from the state's tidelands." *Id.* at 167, 212 Cal. Rptr. at 589. The court in *Grupe* also noted that while "a particular development need not create the need for a particular exaction, we believe *Associated Home Builders* does require that the exaction be designed to meet needs to which the project contributes, at least in an incidental manner." *Id.* at 166 n.11, 212 Cal. Rptr. at 589 n.11 (referring to *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971)).

82. *Nollan*, 483 U.S. at 830.

The Supreme Court reversed.⁸³ Justice Scalia, writing for the five-person majority, began by noting that if the Commission had required the Nollans to dedicate the beachfront easement without conditioning it on a building permit, then that action would constitute a taking.⁸⁴ However, the majority assumed, without deciding, that the Commission's purposes were valid.⁸⁵ They further assumed that the Commission could deny the permit unless the denial so drastically interfered with the Nollans' use of their property that the action itself constituted a taking.⁸⁶ Had the Commission proposed an exaction that protected the public's right to view the ocean, the Court would have upheld it.⁸⁷ But the required dedication of access to the beachfront lacked an "essential nexus" to the Commission's stated purpose.⁸⁸ Justice Scalia rejected the comparison between visual access and physical access, deeming it a mere play on words.⁸⁹ Without an essential nexus between the harm caused and the exaction sought, the Commission's act became an attempt to take land without compensation.⁹⁰

2. *Lucas*

Justice Scalia had another opportunity to narrow the takings analysis in *Lucas v. South Carolina Coastal Council*.⁹¹ David Lucas purchased two residential lots on a barrier island intending to build single family residences.⁹² After he purchased the lots, South Carolina passed the Beachfront Management Act,⁹³ which effectively

83. *Id.* at 842.

84. *Id.* at 831. Justice Scalia rejected Justice Brennan's contention that such an easement could constitute "a mere restriction" on the use of the property. *Id.* Relying on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), Justice Scalia reiterated the importance of the right to exclude others from one's property. *Nollan*, 483 U.S. at 831.

85. *Nollan*, 483 U.S. at 835-36.

86. *Id.*

87. *Id.* at 836. Justice Scalia suggested height or width restrictions as legitimate means of fulfilling the Commission's purpose. *Id.* Even a permanent easement for public access on the Nollans' property that would allow passersby to still view the ocean would pass constitutional muster. *Id.*

88. *Id.* at 837.

89. *Id.* at 838.

90. *Id.* at 837.

91. 112 S. Ct. 2886 (1992).

92. *Id.* at 2889.

93. S.C. CODE ANN. §§ 48-39-10 to 48-39-360 (Law. Co-op. 1987 & Supp. 1994).

prohibited all construction on either lot.⁹⁴ Lucas filed suit seeking compensation, and the trial court held the statute had destroyed “any reasonable economic use of the lots.”⁹⁵

Justice Scalia examined the “harmful or noxious uses” standard applied in early Court takings decisions.⁹⁶ He found the nuisance test was equivalent to the modern takings analysis as stated in *Agins v. City of Tiburon*,⁹⁷ namely that “land use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests.’”⁹⁸ Justice Scalia noted that a court could read the regulation either as harm preventing and therefore not compensable, or benefit conferring and compensable.⁹⁹ Which reading a given court applies to the regulation “depends primarily upon one’s evaluation of the worth of competing uses of real estate.”¹⁰⁰ Rejecting noxious use as an objective criterion,¹⁰¹ the majority returned to the bundle of rights an owner gains upon acquiring title.¹⁰² All owners must anticipate some use restrictions on their property under a lawful exercise of the police power.¹⁰³ However, if a statute is enacted after the owner acquires title, and that statute destroys all economically valuable use, then that statute has effected a taking of the property.¹⁰⁴ If the owner’s proposed use would constitute a nuisance to neighboring properties, the state could then enjoin the use without employing inverse condemnation.¹⁰⁵ Such a proposed use was always unlawful, even if the state had not explicitly proscribed it.¹⁰⁶

The new test for a total taking of property must include an analysis of the harm posed to neighboring properties, the appropriate-

94. *Lucas*, 112 S. Ct. at 2889. The act allowed Lucas to construct a walkway or small deck on the site. *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484, 485 (S.C. 1992).

95. *Lucas*, 112 S. Ct. at 2890 (citing *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 896 (S.C. 1991), *rev’d*, 112 S. Ct. 2886 (1992)).

96. *Id.* at 2897-99.

97. 447 U.S. 255 (1980).

98. *Lucas*, 112 S. Ct. at 2897 (quoting *Nollan*, 483 U.S. at 834 (quoting *Agins*, 447 U.S. at 260)).

99. *Id.* at 2898.

100. *Id.*

101. *Id.* at 2899.

102. *Id.*

103. *Id.*

104. *Id.* at 2900.

105. *Id.* at 2900-01.

106. *Id.* at 2901.

ness of the proposed use for the particular site, and any possible mitigation measures.¹⁰⁷ On remand, the state was instructed to identify nuisance principles under state law, which would meet the new standard, or grant Lucas's petition for compensation.¹⁰⁸

Four justices filed separate opinions, reviewing the same briefs, yet finding a seemingly different set of facts. Justice Kennedy felt it necessary to examine the reasonableness of Lucas's expectations.¹⁰⁹

Justice Blackmun noted that during half of the previous forty years the two lots in question were either part of the beach or flooded twice daily at high tide.¹¹⁰ In fact, both lots were completely submerged between 1957 and 1963.¹¹¹ After Lucas moved to the island and before he purchased the two lots, the homes in the area required repeated sandbagging and construction of two seawalls to protect them from the encroaching ocean.¹¹² The South Carolina statute included a finding that beachfront construction had, among other effects, "accelerated erosion[] and threatened adjacent property,"¹¹³ thereby acting as a private nuisance under the majority's scheme.¹¹⁴

Next, Justice Blackmun challenged the majority's characterization of the property's state as valueless.¹¹⁵ Justice Blackmun argued that the owner could still use the site to camp, live in a tent or movable trailer, swim, or picnic.¹¹⁶ The owner could also sell the property, which would have value to neighbors as protection for their own property.¹¹⁷ Finally, Lucas retained the right favored by both Justice Scalia and the Chief Justice, the right under *Kaiser Aetna v.*

107. *Id.*

108. *Id.* at 2901-02. On remand the South Carolina Supreme Court held that the Coastal Council was unable to establish any nuisance action that would justify the taking, and remanded the case to the trial court solely for determination of damages. *Lucas*, 424 S.E.2d at 486.

109. *Lucas*, 112 S. Ct. at 2903.

110. *Id.* at 2905 (Blackmun, J., dissenting).

111. *Id.* (Blackmun, J., dissenting).

112. *Id.* (Blackmun, J., dissenting).

113. *Id.* at 2906 (Blackmun, J., dissenting) (quoting S.C. CODE ANN. § 48-39-250(4) (Law. Co-op. Supp. 1994)).

114. *Id.* at 2905-06 (Blackmun, J., dissenting). "If the state legislature is correct that the prohibition on building in front of the setback line prevents serious harm, then, under this Court's prior cases, the Act is constitutional." *Id.* at 2906 (Blackmun, J., dissenting).

115. *Id.* at 2908 (Blackmun, J., dissenting).

116. *Id.* (Blackmun, J., dissenting).

117. *Id.* (Blackmun, J., dissenting).

United States to exclude others.¹¹⁸ If the gravel pit in *Goldblatt v. Town of Hempstead*¹¹⁹ and the shuttered brickyard in *Hadacheck v. Sebastian*¹²⁰ retained residual value, then Justice Blackmun had no trouble finding such value in Lucas's lots.¹²¹

Justice Stevens, after finding no support for the majority in the Court's past decisions,¹²² predicted that the new test "will, I fear, greatly hamper the efforts of local officials and planners who must deal with increasingly complex problems in land-use and environmental regulation. . . . [T]hese officials face both substantial uncertainty because of the ad hoc nature of takings law and unacceptable penalties if they guess incorrectly about that law."¹²³

III. *DOLAN V. CITY OF TIGARD*

A. *Expanding a Hardware Store in Six Easy Years*

[Q]uestions arising under the Just Compensation Clause rest on ad hoc factual inquiries, and must be decided on the facts and circumstances in each case.¹²⁴

Florence Dolan owns a chain of plumbing and hardware supply stores,¹²⁵ including the 9700 square foot A-Boy Electric and Plumbing Supply store located at 12520 SW Main Street in the Central Business District of Tigard, Oregon.¹²⁶ The existing structure dates from the late 1940s.¹²⁷ Tigard is a city of some 30,000 residents on the outskirts of Portland.¹²⁸ The store is located on a 1.67 acre lot that also includes a thirty-nine space paved parking lot that covers

118. *Id.* (Blackmun, J., dissenting) (citing *Kaiser Aetna v. United States*, 444 U.S. 164 (1979)).

119. 369 U.S. 590 (1962).

120. 239 U.S. 394 (1915).

121. *Lucas*, 112 S. Ct. at 2908-12 (Blackmun, J., dissenting).

122. *Id.* at 2919 (Stevens, J., dissenting).

123. *Id.* at 2922 (Stevens, J., dissenting).

124. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting).

125. Brief for Respondent at 1, *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (No. 93-518) [hereinafter Respondent Brief].

126. Petition for Writ of Certiorari app. G at G-6 to -9, *Dolan* (No. 93-518) [hereinafter Petition for Certiorari].

127. *Id.* at G-8.

128. Respondent Brief, *supra* note 125, at 1.

forty percent of the property.¹²⁹ Main Street marks the southern boundary of the property, and Fanno Creek crosses the southwestern corner marking the western boundary of the site.¹³⁰

In 1989 Mr. and Mrs. Dolan applied to redevelop their property.¹³¹ The City approved the design subject to conditions the Dolans found unacceptable.¹³² They appealed to the Land Use Board of Appeals (LUBA),¹³³ which rejected their takings challenge as not ripe for review.¹³⁴ The Dolans had failed to seek a variance from the City.¹³⁵

In March 1991 the Dolans made a virtually identical application to the City including a variance request.¹³⁶ The proposal included razing the existing store, constructing a new 17,600 square foot hardware store, and paving a thirty-nine car parking lot.¹³⁷ Future plans for the site consisted of a separate structure to house rental businesses and an expansion of the parking lot.¹³⁸

In compliance with Oregon's Comprehensive Land Use Management Program,¹³⁹ Tigard adopted a comprehensive plan in its Community Development Code (CDC).¹⁴⁰ Properties located in the Central Business District must leave at least a fifteen percent greenway, so that structures and pavement will not cover more than eighty-five percent of the site.¹⁴¹ The site is also located within the Action Area Overlay Zoning District.¹⁴² To reduce street conges-

129. Brief for Petitioner at 3-4, *Dolan* (No. 93-518) [hereinafter Petitioner Brief].

130. *Id.*

131. Respondent Brief, *supra* note 125, at 3.

132. *Id.* at 7.

133. Oregon law grants LUBA exclusive jurisdiction to hear appeals of land use decisions. *Dunn v. City of Redmond*, 735 P.2d 609, 610 (Or. 1987).

134. Petitioner Brief, *supra* note 129, at 7 n.1.

135. Petition for Certiorari, *supra* note 126, app. D at D-4 (citing *Dolan v. City of Tigard*, Or. LUBA No. 91-161 (Jan. 7, 1992), *rev'd*, 114 S. Ct. 2309 (1994)).

136. *Id.*

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

138. *Id.* at 2313-14.

139. OR. REV. STAT. §§ 197.005-.860 (1991).

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

141. *Id.* (citing TIGARD, OR., COMMUNITY DEV. CODE ch. 18.66 (ref. 1994)) [hereinafter CDC].

142. Petitioner Brief, *supra* note 129, at G-17 to -21 (citing CDC, *supra* note 141, ch. 18.86). The Action Area Overlay zone was repealed by Ordinance No. 91-30 (Oct. 8, 1991), but at the time of the application it required only dedication of the right of way, not construction of the bike path. Respondent Brief, *supra* note 125, at 12 (citing CDC ch. 18.86.040.A.1.b). In order to require construction of the bike path, the City had to find

tion, the City adopted a city-wide system of pedestrian and bike paths as part of its Congestion Management Plan.¹⁴³ The bike path routes were written into the general plan, and any new development on a property containing a planned bike path was required to dedicate that portion of the property for use as a bike path.¹⁴⁴ The general plan included a bike path cutting across the Dolans' property running parallel to Fanno Creek.¹⁴⁵

The City's Comprehensive Plan recognizes that automobile trips "will remain the most dominant source of transportation."¹⁴⁶ Although approximately forty miles of sidewalks or bike paths existed in Tigard in 1991, bikes were used primarily for recreation.¹⁴⁷ Existing bike paths were concentrated around schools and new subdivisions.¹⁴⁸ However, the plan did foresee the bicycle and pedestrian pathways possibly replacing some short automobile trips for shopping purposes.¹⁴⁹ The City's bike path plan supplemented the Washington County Bicycle Pedestrian Pathway Master Plan, which was adopted in 1974.¹⁵⁰ The major obstacle for implementing

that the development would "principally benefit" from the improvement. *Id.* (citing CDC, *supra* note 141, ch. 18.164.110.B). There was no such finding for the subject property. *Id.*

143. Respondent Brief, *supra* note 125, app. A at A-9 to -14.

144. *Id.* at 12.

145. *Id.*

146. *Id.* at A-4 (quoting City of Tigard's Comprehensive Plan, Transportation Assumptions II(1) at I-221).

147. *Id.* at A-6 (citing City of Tigard's Comprehensive Plan, Transportation Assumptions II(1) at I-256).

148. *Id.* (citing City of Tigard's Comprehensive Plan, Transportation Assumptions II(1) at I-221).

149. *Id.* at A-5 (citing City of Tigard's Comprehensive Plan, Transportation Assumptions II(1) at I-221).

150. *Id.* at A-9 to -10 (citing City of Tigard's Comprehensive Plan, Transportation Assumptions II(1) at I-267). The county commissioners finance bike paths through a one percent tax on retail gasoline sales. Possible bike path locations are evaluated by their potential:

1. To reduce hazards that exist on present roads;
2. To provide safe access to schools, recreation areas and major shopping areas;
3. To develop the possibility of walking to school rather than riding, thereby eliminating some school bus transportation;
4. To serve the greatest number of potential users;
5. To provide safety for walkers and bike riders to summer activities which require transportation by auto; and
6. []To establish pedestrian access to mass transportation.

Id. at A-10 (quoting City of Tigard's Comprehensive Plan, Transportation Assumptions II(1) at I-267 to I-268).

this master plan was the lack of public funds for acquiring right-of-ways.¹⁵¹ The bike path along Fanno Creek would connect the hardware store on Main Street with the Civic Center and the primary employment corridor along Hall Boulevard.¹⁵²

Fanno Creek floods seasonally in Tigard.¹⁵³ The City adopted a Master Drainage Plan in 1981, which contained improvements to the creek bed, including excavation next to Mrs. Dolan's site and restrictions on impervious construction adjacent to the creek.¹⁵⁴ Increased runoff from structures or paved lots would cause greater rates of flow during storms.¹⁵⁵ All property owners share the costs for these improvements, with those adjacent to the creek paying more for the greater benefit they realize.¹⁵⁶

The Dolans' proposed development was within the specified zoning for the site, and the City Planning Commission gave conditional approval subject to the requirements of the CDC.¹⁵⁷ These requirements specified that those portions of the Dolans' property falling within and adjacent to the 100-year storm floodplain of Fanno Creek be dedicated for a protective greenway.¹⁵⁸ Part of that greenway was to include a pedestrian and bike path in accord with the general plan.¹⁵⁹ The greenway exaction amounted to roughly ten

151. *Id.* at A-8 (quoting City of Tigard's Comprehensive Plan, Transportation Assumptions II(1) at I-258). A voter-approved bond issue in 1989 allotted \$364,000 for bike path construction. *Id.* at 11-12, 12 n.3 (citing City of Tigard's Public Facilities Plan at 16). A 1991 capital improvement plan allocated a further \$455,000 for pedestrian or bike path improvements. *Id.* (citing City of Tigard's Public Facilities Plan at 16).

152. *Id.* at 12.

153. *Dolan v. City of Tigard*, 854 P.2d 437, 439 (Or. 1993) (citing City of Tigard Planning Commission Final Order No. 91-09 PC at 13, 20-21, *reprinted in* Petition for Certiorari, *supra* note 126, at G-24 [hereinafter Commission Order]).

154. Respondent Brief, *supra* note 125, at 8.

155. *Id.* at 7.

156. *Id.* at 9 (citing CDC, *supra* note 141, chs. 18.84, 18.86, 18.164.100).

157. *Dolan v. City of Tigard*, 854 P.2d 437, 439 (Or. 1993), *rev'd*, 114 S. Ct. 2309 (1994).

158. The 100-year floodplain, as determined by the Army Corps of Engineers, consists of all land lying below 150 feet above sea level. Petition for Certiorari, *supra* note 126, at G-43. The city's greenway dedication requirement extends 15 feet from the floodplain onto the adjacent property. *Id.* The new hardware store would be built at 152.5 feet above sea level, thus potentially benefitting from all measures taken to reduce local flooding. *Id.* at G-9, G-43 to -44.

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

percent of the property.¹⁶⁰ The property owner generally bears the cost of constructing the bike path.¹⁶¹

The Dolans filed for a variance from these conditions.¹⁶² They contended that the dedication was a taking under both the Oregon and U.S. Constitutions.¹⁶³ The planned development necessitated building on part of the land required for dedication.¹⁶⁴ Additionally, they argued that no park existed for the bike path to access.¹⁶⁵ They did not propose other measures to mitigate the impact of their development.¹⁶⁶ The CDC permits variances only when a literal interpretation of the zoning would cause "an undue or unnecessary hardship."¹⁶⁷ Applying this standard, the Commission rejected the requested variance.¹⁶⁸ In doing so the Commission found it reasonable to assume that customers and employees could use the required bike path for both transportation and recreation.¹⁶⁹ The site plan included a bike rack.¹⁷⁰ Further, the Commission found that the bike path could "offset some of the traffic demand on . . . nearby streets and lessen the increase in traffic."¹⁷¹ The longterm plan for

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

161. Respondent Brief, *supra* note 125, app. B at B-63 (citing CDC, *supra* note 141, ch. 18.164.110.B).

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

163. The City never sought, nor had authority to seek, a transfer of the right of way in fee simple. The exaction sought a dedication of an easement. Respondent Brief, *supra* note 125, at B-8 (citing CDC, *supra* note 141, ch. 18.32.250.E2); see *Portland Baseball Club v. City of Portland*, 18 P.2d 811, 812 (Or. 1933) ("In this state the rule is that, where land has been dedicated or appropriated for a public street, the fee in the street remains in the original owner subject only to the public easement, and, upon the vacation of the street, it reverts to the owner of the abutting premises freed from the easement.").

164. Petition for Certiorari, *supra* note 126, at G-28 (citing City of Tigard Resolution No. 91-66).

165. Respondent Brief, *supra* note 125, app. E at E-4 (citing Site Development Review Application, Statement of Justification for Variance (Mar. 26, 1991)).

166. *Id.*

167. *Dolan*, 114 S. Ct. at 2314 (citing CDC, *supra* note 141, § 18.134.010).

168. *Id.*

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

170. *Id.*

171. Commission Order, *supra* note 153, at G-24. The City found that:

"[T]he dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site with a general retail sales use, at first, and other uses to be added later. It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreation needs. * * * In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing

development envisioned an extensive and continuous pathway system, which a variance that allowed for construction over the designated right-of-way would jeopardize.¹⁷² The City found that the proposed development would generate an additional 937 car trips per week.¹⁷³

The Commission also found that the dedication of the floodplain was reasonably related to the increased use of the site.¹⁷⁴ "The development, which creates the need, should be responsible for providing the City with the necessary data for making sound decisions. The burden is on the applicant to prove that a project will not adversely affect the environment or create undue future liabilities for the City."¹⁷⁵ Paving the gravel parking lot, combined with the almost doubled area of the roof, would increase storm water flow into Fanno Creek thereby adding to the City's flood control needs.¹⁷⁶

The City's Master Drainage Plan apportions costs to property owners as direct or indirect benefits.¹⁷⁷ Properties adjoining the

congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion."

Dolan v. City of Tigard, 832 P.2d 853, 855 (Or. Ct. App. 1992), *rev'd*, 114 S. Ct. 2309 (1994) (quoting Commission Order, *supra* note 153, at G-24).

172. The City's order suggested that all future requests for improvements in designated areas must provide exactions for the floodplain greenway and the bikepath:

"It is imperative that a continuous pathway be developed in order for the paths to function as an efficient, convenient, and safe system. Omitting a planned for section of the pathway system, as the variance would result in if approved, would conflict with Plan purposes and result in an incomplete system that would not be efficient, convenient, or safe. The requested variance therefore would conflict with the City's adopted policy of providing a continuous pathway system intended to serve the general public good and therefore fails to satisfy the first variance approval criterion.

"* * * * *

"As noted above, approval of the variance request would have an adverse effect on the existing partially completed pathway system because a system cannot fully function with missing pieces. If this planned for section is omitted from the pathway system, the system in this area will be much less convenient and efficient. If the pedestrian and bicycle traffic is forced onto City streets at this point in the pathway system because of this missing section, pedestrian and bicycle safety will be lessened."

Dolan, 854 P.2d at 445-46 (Peterson, J., dissenting) (quoting Commission Order, *supra* note 153, at G-26 to -27).

173. Petition for Certiorari, *supra* note 126, at G-14 to -15.

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

175. Respondent Brief, *supra* note 125, at A-19, A-21 (quoting TIGARD, OR., COMPREHENSIVE PLAN § 3.2 FLOODPLAINS).

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

177. Petitioner Brief, *supra* note 129, at 8-9.

creek bed receive the direct benefit from reduced flooding.¹⁷⁸ Other property owners benefit indirectly from the lack of flooded roads and the subsequent limitations on emergency services.¹⁷⁹ The City only required that the new construction not encroach upon the floodplain, which would limit the City's ability to make future improvements for flood control.¹⁸⁰ The City planned to construct and maintain a landscaped buffer between the new bike path and the commercial development.¹⁸¹

The Dolans appealed to the LUBA based on the lack of a nexus between the proposed development and the exaction.¹⁸² LUBA assumed the City's findings were supported by substantial evidence.¹⁸³ The City found that the larger store and parking lot would generate more car trips by customers and employees, and the Commission found a "reasonable relationship" between the increased traffic generated and the bike path, which would serve as an alternate form of transportation.¹⁸⁴ LUBA also found a reasonable relationship between the increased runoff caused by the new construction and the greenway exaction.¹⁸⁵

The court of appeals rejected the Dolans' argument that *Nollan* required an essential nexus between the impacts and conditions of development.¹⁸⁶ The supreme court failed to establish a standard

178. *Id.* at 9.

179. *Id.* at 8-9.

180. *Id.* at 10.

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

182. *Id.* at 2315.

183. *Id.*

184. Petition for Certiorari, *supra* note 126, at D-16 (citing *Dolan*, Or. LUBA No. 91-161). LUBA concluded that the reasonable relationship test was correct under both the Fifth Amendment of the U.S. Constitution and Article I, § 18 of the Oregon Constitution. *Id.* at D-11 (citing *Dolan*, Or. LUBA No. 91-161). LUBA explained "[t]he 'reasonable relationship' standard is somewhere between the more extreme standards followed by courts in a few jurisdictions which require that the need for a development exaction be 'specifically and uniquely attributable' to the proposed development, or that a development exaction merely have 'some relationship' to the proposed development.'" *Dolan*, 832 P.2d at 854 (quoting *Dolan*, Or. LUBA No. 91-161, quoting *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983)). The Ninth Circuit reaffirmed the reasonable relationship test after *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), in *Commercial Builders v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992).

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

186. *Dolan*, 832 P.2d at 855.

for the third inquiry in *Nollan*,¹⁸⁷ the relationship between the impact of the development and the exaction sought.¹⁸⁸ In rejecting the petitioners' demand for a more stringent standard under the Fifth Amendment, the court relied on *Commercial Builders v. City of Sacramento*¹⁸⁹ as the controlling case law in the Ninth Circuit.¹⁹⁰ The court found that the argument for a "substantial relationship" or "essential nexus" was based on language found in the second, not the third, prong of the *Nollan* test.¹⁹¹ The reasonable relation was satisfied by LUBA's finding that the bike path was reasonably calculated to alleviate traffic congestion and provide for greater nonvehicular access to the area.¹⁹² The court dismissed arguments that the exaction was an invasion of the property affecting it as a whole, or alternately that it denied all economically viable use of the land.¹⁹³

The Dolans appealed on the issue of the correct standard, arguing that an essential nexus or substantial relationship was required.¹⁹⁴ The Oregon Supreme Court affirmed the court of appeals' interpretation of the *Nollan* test.¹⁹⁵ The court reviewed the necessity that the land use regulation, in order to not effect a taking, had to substantially advance a legitimate state interest and not deny

187. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 838 (1987).

The Commission claims . . . that we may sustain the condition at issue here by finding that it is reasonably related to the public need or burden that the Nollans' new house creates or to which it contributes. We can accept, for purposes of discussion, the Commission's proposed test as to how close a "fit" between the condition and the burden is required, because we find that this case does not meet even the most untailed standards.

Id.

188. See *Dolan*, 832 P.2d at 854.

189. 941 F.2d 872 (9th Cir. 1991).

190. *Dolan*, 832 P.2d at 855.

191. *Id.* The Oregon Supreme Court determined that the "essential nexus" test in *Nollan* applied only to the relationship between the land use regulation implemented by the permit and the permit condition itself, the so-called second inquiry. That test did not apply to the relationship between the impact and the exaction, the third inquiry. See *Department of Trans. v. Lundberg*, 825 P.2d 641, 646 (Or. 1992), *cert. denied*, 113 S. Ct. 467 (1992).

192. *Dolan*, 832 P.2d at 856.

193. *Id.*

194. *Dolan*, 854 P.2d at 438.

195. *Id.* at 442-43.

the owner of an economically viable use of the property.¹⁹⁶ Since the Dolans had not challenged the City's findings, the court found an essential nexus between the increase in traffic congestion due to development of the site and the alternative forms of transportation.¹⁹⁷ Similarly, the exaction was held reasonably related to the expansion of the business.¹⁹⁸ The court also rejected the Dolans' claim that the exactions constituted a per se taking because the dedication would result in a permanent, physical occupation of their property.¹⁹⁹

The dissent agreed that the exaction served a legitimate state purpose,²⁰⁰ but found that the City's plan to complete its proposed system, by acquiring the easements, did not justify why the property owner should bear the burden.²⁰¹ If a mere showing of a legitimate public need was enough, then there was no need for the relationship prong, no matter what standard was applied.²⁰² Rejecting the "magic words" from each successive Supreme Court decision,²⁰³ the dissent held that "[i]f in fact the government needs to take part of a landowner's property because of intensified uses of the developed property, imposing the burden of showing precisely *why* the need in fact exists is a modest burden to place on the government. Such precision is lacking in this order."²⁰⁴

196. The *Parks* court, in rejecting the exaction, held there was no rational relationship to any public purpose related to the development's impacts. *Parks v. Watson*, 716 F.2d 646, 653 (9th Cir. 1983).

197. *Dolan*, 854 P.2d at 443.

198. *Id.*

199. *Dolan*, 854 P.2d at 441 n.8. In rejecting this argument, the court cited *Yee v. City of Escondido*, 503 U.S. 519 (1992), in which the Court held that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Dolan*, 854 P.2d at 441 n.8 (quoting *Yee*, 503 U.S. at 527). Since Mrs. Dolan could withdraw her application for a development permit, the occupation could only occur with her permission and therefore was not a per se taking. *Id.*

200. *Id.* at 445 (Peterson, J., dissenting).

201. *Id.* at 447 (Peterson, J., dissenting).

202. *Id.* (Peterson, J., dissenting).

203. *Id.* at 449 (Peterson, J., dissenting).

204. *Id.* (Peterson, J., dissenting).

B. *The U.S. Supreme Court*

Following her husband's death, Mrs. Dolan filed a petition for writ of certiorari.²⁰⁵ The Supreme Court granted certiorari to determine whether the nexus analysis required a more precise relationship between the burdens caused and the exactions sought.²⁰⁶ First, the Court noted in dictum that if the City had simply required Mrs. Dolan to dedicate the land without tying it to the redevelopment of the property, Tigard would have taken Mrs. Dolan's property in an inverse condemnation.²⁰⁷ But Chief Justice Rehnquist affirmed the police power of local government to restrict land use and reduce property values without compensation.²⁰⁸ The majority adopted the *Agins* test that a land use regulation is valid if it "substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" ²⁰⁹

The Court then distinguished these tests from the present case. Mrs. Dolan applied for a building permit to develop a single parcel, not for a change in zoning.²¹⁰ Nor did Mrs. Dolan appeal from a use restriction, but from a permit approval predicated on an exaction.²¹¹ Applying the *Nollan* test, the Court found the first prong—essential nexus—easily satisfied.²¹² Preventing the flooding of Fanno Creek and reducing traffic congestion through alternative modes are both legitimate public purposes that satisfy the essential nexus test between "legitimate state interest" and the exaction sought by the City.²¹³

In *Nollan* the Court found the essential nexus lacking, so it did not address the exact nature of the relationship between the exaction

205. Petitioner Brief, *supra* note 129, at ii.

206. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2312 (1994).

207. *Id.* at 2316. The Court noted that removing the right to exclude others from her property would deprive Mrs. Dolan of "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

208. *Id.*

209. *Id.* (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

210. *Id.*

211. *Id.*

212. *Id.* at 2317-18.

213. *Id.*

and the impact of the development.²¹⁴ To determine the applicable standard, the Court turned to state law.²¹⁵

1. Developing the test

a. any rational basis

The Court first examined a challenge to a Montana zoning ordinance requiring dedication of at least one-ninth of all proposed subdivisions, excluding roads, for public parks and playgrounds.²¹⁶ The property owner challenged this statute as an act of eminent domain under the guise of the police power.²¹⁷ The Supreme Court of Montana held that the standard of reasonableness used to evaluate the exercise of police power required an elastic and progressive application, not bound by the limits of precedent.²¹⁸ As in *Nollan* the court noted that the act of seeking approval of a subdivision plat was voluntary, and the City could impose any reasonable condition on the privilege of recording the plat.²¹⁹ Applying a strict standard of review, the court upheld the statute because (1) the plaintiff introduced no evidence rebutting the presumption of validity, and (2) any rational basis is all that is required to uphold a legislative act.²²⁰

The Montana court indirectly cited *Ayres v. City Council of Los Angeles*²²¹ for the proposition that a local government may require the developer of a subdivision to provide streets necessitated by the increase in activity due to the development.²²² The Yellowstone County regulation would have gone too far, however, if it required dedication of a major thoroughfare whose primary benefit was to the entire community instead of subdivision residents.²²³

214. *Id.* at 2317. *Nollan* recognized that: “[A] use restriction may constitute a “taking” if not reasonably necessary to the effectuation of a substantial government purpose.” *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 (1987) (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978)) (alteration in original).

215. *Dolan*, 114 S. Ct. at 2318-19.

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

217. *Id.* at 184.

218. *Id.* at 186.

219. *Id.* at 186-87.

220. *Id.* at 188.

221. 34 Cal. 2d 31, 207 P.2d 1 (1949).

222. *Billings Properties*, 394 P.2d at 188 (citing *Ayres v. City Council of Los Angeles*, 34 Cal. 2d 31, 207 P.2d 1 (1949)).

223. *Id.*

The Chief Justice rejected this standard, finding it “too lax to adequately protect petitioner’s right to just compensation if her property is taken for a public purpose.”²²⁴

b. specific and uniquely attributable

The Court next looked at a very exacting standard, first developed in *Pioneer Trust & Savings Bank v. Village of Mount Prospect*.²²⁵ In *Pioneer Trust* the plaintiff sought to record a plat subdividing the property into approximately 250 residential units.²²⁶ The plat conformed with all municipal requirements except that it failed to dedicate six and seven-tenths acres for public use.²²⁷

The Illinois Supreme Court had previously considered the statute for narrowly tailored exactions, once upholding a requirement that a subdivider install curbs and gutters along the street,²²⁸ and once striking down an in lieu fee provision for educational facilities.²²⁹ In the latter case the court referred to the distinction in *Ayres* while holding that “it does not follow that communities may use . . . [approval of a subdivision plat] to solve all of the problems which they can foresee.”²³⁰

In rejecting Mount Prospect’s condition precedent for approval of the plat, the *Pioneer Trust* court found that the village’s schools were already near capacity.²³¹ This was not a result of the planned subdivision.²³² Either the village could have developed more slowly, or the school system expanded more rapidly, so that the need for educational facilities would not be “specifically and uniquely attributable” to the planned subdivision.²³³ The court explained its standard:

If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then

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

225. 176 N.E.2d 799 (Ill. 1961).

226. *Id.* at 800-01.

227. *Id.* at 800.

228. *Petterson v. City of Naperville*, 137 N.E.2d 371 (Ill. 1956).

229. *Rosen v. Village of Downers Grove*, 167 N.E.2d 230 (Ill. 1960).

230. *Id.* at 234.

231. *Pioneer Trust*, 176 N.E.2d at 802.

232. *Id.*

233. *Id.*

the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power.²³⁴

The Court rejected this direct proportionality test, holding that the U.S. Constitution does not "require[] such exacting scrutiny."²³⁵

c. reasonable relationship

The Court next looked to the approach adopted by a majority of states, which required a "reasonable relationship" between the exaction and the impact.²³⁶ In *Simpson v. City of North Platte*,²³⁷ the Nebraska Supreme Court invalidated a city ordinance that required anyone seeking to erect or enlarge a structure to dedicate land for use as a public street to the full width required by the comprehensive plan.²³⁸ The Nebraska Supreme Court based its decision on the Nebraska takings clause: "The property of no person shall be taken or damaged for public use without just compensation therefor."²³⁹ Moreover, the court applied a "reasonable relationship" test.²⁴⁰ If the dedication had a nexus to the planned property use, it constituted a valid exercise of the police power.²⁴¹ If, however, the landowner's application was "merely being used as an excuse for taking property,"²⁴² then it was a compensable act of inverse condemnation.²⁴³ In order to be reasonable, the relationship had to be "substantial, demonstrably clear and present."²⁴⁴

Here the court found that the dedication constituted a form of "land banking" to preserve the open land for possible future extension of the dead-end street in question, a requirement unrelated

234. *Id.*

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

236. *Id.* at 2318-19.

237. 292 N.W.2d 297 (Neb. 1980).

238. *Id.* at 299.

239. *Id.* at 300 (quoting NEB. CONST. art. I, § 21).

240. *Id.* at 301.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* (quoting *181 Inc. v. Salem County Planning Bd.*, 336 A.2d 501, 506 (N.J. Super. Ct. Law Div. 1975)).

to the development of the site.²⁴⁵ The court found that the variances in the ordinance were too “severe and unusual” to rescue the ordinance.²⁴⁶

Similar reasoning led the Wisconsin Supreme Court to uphold in lieu fees assessed to a developer in *Jordan v. Village of Memomonee Falls*.²⁴⁷ Within the newly platted subdivisions, the village ordinance required the developer to dedicate land for schools, parks, and recreational needs.²⁴⁸ If the dedication was “not feasible or compatible with the comprehensive plan,”²⁴⁹ the ordinance assessed a fee of \$200 per residential site.²⁵⁰ The developers challenged the fee as an unconstitutional taking without compensation, but the court concluded that the municipality could condition plat approval upon the subdivider’s supplying all necessary improvements, including transportation, water, sewage, schools, parks, and playgrounds.²⁵¹ The court held that the “specifically and uniquely attributable” test that the Illinois Supreme Court applied in *Pioneer Trust*²⁵² was an acceptable yardstick if not interpreted to impose too great a burden of proof on the City,²⁵³ preferring a “reasonable connection” standard.²⁵⁴

Finding that in most instances the City could not prove that a particular subdivision uniquely generated a need for a new park or

245. *Id.* The New Jersey court rejected an exaction for future improvements. “Such dedication must be for specific and presently contemplated immediate improvements—not for the purpose of “banking” the land for use in a projected but unscheduled possible future use.” *Id.* (citing *181 Inc.*, 336 A.2d at 506).

246. *Id.*

247. 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966).

248. *Id.* at 444.

249. *Id.*

250. *Id.* The ordinance assessed \$120 per lot for schools and \$80 per lot for recreational facilities. *Id.*

251. *Id.* at 448.

252. 176 N.E.2d at 802.

253. *Jordan*, 137 N.W.2d at 447.

254. *Id.* at 448. The court stated the reasonableness test for the application of the police power:

The municipality by approval of a proposed subdivision plat enables the subdivider to profit financially by selling the subdivision lots as home building sites and thus realizing a greater price than could have been obtained if he had sold his property as unplatted lands. In return for this benefit the municipality may require him to dedicate part of his platted land to meet a demand to which the municipality would not have been put but for the influx of people into the community to occupy the subdivision lots.

Id.

school site, the court determined that the City could show that a group of subdivisions, over a period of years, cumulatively created a need for a park or school.²⁵⁵ In the absence of contravening evidence, the court found this cumulative effect sufficient to justify the exaction or an in lieu fee.²⁵⁶ Although the court held the exaction was reasonable, the Village could not exercise its police power under the Wisconsin Constitution²⁵⁷ unless expressly authorized by the legislature.²⁵⁸ If a subdivision was too small to justify dedication of land for a school, the court held that it was inequitable to completely release the subdivider from the obligation.²⁵⁹ The fee was neither a tax nor a special assessment, but rather an equalization fee that allowed equal treatment of all subdivisions, regardless of their size.²⁶⁰

The Minnesota Supreme Court upheld a similar subdivision exaction in *Collis v. Bloomington*.²⁶¹ The appeal was solely a facial challenge to a state enabling statute that authorized municipalities to condition subdivision approval on dedication of land for parks and playgrounds, and to the city ordinance that implemented the statute by requiring the dedication of ten percent of the proposed subdivision, or an in lieu fee.²⁶² The court upheld the ordinance under the federal Takings Clause and the corresponding section of the Minnesota Constitution.²⁶³ In adopting the *Jordan* test²⁶⁴ of a reasonable relationship between the dedication and the burden,²⁶⁵ the court noted that a subdivider is not "defending hearth and home against the

255. *Id.* at 447.

256. *Id.*

Possible contravening evidence would be a showing that the municipality prior to the opening up of the subdivisions, acquired sufficient lands for school, park and recreational purposes to provide for future anticipated needs including such influx, or that the normal growth of the municipality would have made necessary the acquisition irrespective of the influx caused by opening of subdivisions.

Id. at 448.

257. WIS. CONST. art. XI, § 3.

258. *Jordan*, 137 N.W.2d at 449-50 (citing WIS. STAT. ANN. § 236.45 (West 1987)).

259. *Id.*

260. *Id.* at 450.

261. 246 N.W.2d 19 (Minn. 1976).

262. *Id.* at 21.

263. *Id.* at 27-28. "Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured." MINN. CONST. art. I, § 13.

264. *Jordan*, 137 N.W.2d at 447.

265. See *Collis*, 246 N.W.2d at 26.

king's intrusion," but is a "manufacturer, processor, and marketer of a product . . . simply attempting to maximize his profits from the sale of a finished product."²⁶⁶ The court regarded a subdivision without streets, lights, storm drains, and other conveniences as a defective product, one that posed a greater threat to a municipality than defective consumer goods.²⁶⁷

The separate issue of the ten percent dedication caused greater concern.²⁶⁸ A subdivision of homes on large lots would create a far smaller burden on the city's infrastructure than high rise apartments constructed on the same property.²⁶⁹ Nonetheless, the court found that the language of both the ordinance and the enabling statute, which only proposed the ten percent as a general yardstick,²⁷⁰ allowed judicial review of the exaction and was therefore facially constitutional.²⁷¹

On a similar set of facts, the Texas Supreme Court upheld an in lieu fee as a condition to subdivision plat approval in *City of College Station v. Turtle Rock Corp.*²⁷² The ordinance required that the City collect fees to establish an account for acquisition or development of a neighborhood park.²⁷³ Unless the City spent these fees within two years, the ordinance required the City to grant the developers a refund.²⁷⁴ The developer, Turtle Rock, challenged the fees under the Texas Constitution's takings provision.²⁷⁵ The court recognized that "[t]here is . . . no one test and no single sentence rule. . . . The need to adjust the conflicts between private ownership of property

266. *Id.* at 25 (quoting John D. Johnston, Jr., *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871, 923 (1967)).

267. *Id.*

268. *Id.* at 27.

269. *Id.*

270. The ordinance stated that "as a general rule, it is reasonable to require an amount of land equal in value to ten percent of the undeveloped land proposed to be subdivided." *Id.* at 21 (citing BLOOMINGTON, MINN., CODE § 20.09 II B).

271. *Id.* at 27-28.

272. 680 S.W.2d 802 (Tex. 1984).

273. *Id.* at 804.

274. *Id.*

275. "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person" TEX. CONST. art. I, § 17.

and the public's interests is a very old one which has produced no single solution."²⁷⁶

The lower court had held all exactions for park land per se invalid since it did not believe parks were necessarily beneficial to a neighborhood.²⁷⁷ The exactions, therefore, lacked a "substantial relation to the safety and health of the community."²⁷⁸ The state supreme court held that in addition to this nexus requirement, a constitutionally valid exaction had to be reasonable, not arbitrary.²⁷⁹ In finding that the ordinance met both prongs, the court first relied on persuasive holdings from other states declaring park land dedication as a valid exercise of the police power.²⁸⁰ The lower court relied on an earlier decision holding such exactions unconstitutional,²⁸¹ but the supreme court distinguished that case as violative of the second prong.²⁸² The ordinance in question had no provisions requiring the City to spend the in lieu fee on land or improvements near the development—a benefit to the ultimate home buyers—nor did the ordinance place a time limit on the use of the fees exacted.²⁸³ Therefore, the exaction was unconstitutional as arbitrary and unreasonable; with no limits on how or when the City could spend the fees collected, the function was more a tax than an assessment under the police power.²⁸⁴ Since the dedication did not render the entire property "wholly useless" or cause "total destruction" of the economic value of the entire tract, there was no taking.²⁸⁵ The court summarizes its reasonable connection test as a balance between need and benefit that will ensure the subdivision receives a beneficial use of the exaction.²⁸⁶ The court cites as examples of evidentiary consider-

276. *College Station*, 680 S.W.2d at 804 (quoting *City of Austin v. Teague*, 570 S.W.2d 389, 391 (Tex. 1978)).

277. *City of College Station v. Turtle Rock Corp.*, 666 S.W.2d 318, 321 (Tex. Ct. App. 1984).

278. *Id.*

279. *College Station*, 680 S.W.2d at 805.

280. *Id.*

281. *Id.* (noting *Berg Dev. Co. v. City of Missouri City*, 603 S.W.2d 273 (Tex. Civ. App. 1980)).

282. *Berg Dev. Co.*, 603 S.W.2d 273 (finding the Missouri City ordinance invalid as unreasonable and arbitrary).

283. *College Station*, 680 S.W.2d at 805-06.

284. *Id.*

285. *Id.* at 806 (citing *Teague*, 570 S.W.2d at 393).

286. *Id.* at 807.

ations the “size of lots in the subdivision, the economic impact on the subdivision, [and] the amount of open land consumed by the development.”²⁸⁷

Requiring a deposit of exaction fees into the municipality’s general fund did not disturb the Utah Supreme Court in *Call v. City of West Jordan*.²⁸⁸ The court found that use of the funds for the stated purpose was assured by the good faith of the public officials, and that collection of funds for a specified purpose automatically creates a special trust within the general fund in favor of the designated benefit.²⁸⁹

The West Jordan ordinance required that the developer dedicate seven percent of the land in a subdivision, or its equivalent value in lieu, for flood control or public parks.²⁹⁰ The court upheld this provision, in addition to exactions for sewers and other improvements. The court justified its ruling by comparing the slums and ghettos of inner cities, which lack public parks, to the enriched life of those cities with numerous parks, plazas, recreational, and cultural areas.²⁹¹

In modern times of ever-increasing population and congestion, real estate developers buy land at high prices. From the combined pressures of competition and desire for gain, they often squeeze every lot they can into some labyrinthian plan, with only the barest minimum for tortious and circuitous streets, without any arterial ways through such subdivisions, and with little or no provision for parks, recreation areas, or even for reasonable “elbow room.” The need for some general planning and control is apparent, and makes manifest the wisdom underlying the delegation of powers to the cities²⁹²

In evaluating the dedication provision, the court reasoned that “the dedication should have some reasonable relationship to the needs created by the subdivision.”²⁹³ Although the ordinance would result in benefits to both the subdivision and the community of West

287. *Id.*

288. 606 P.2d 217 (Utah 1979).

289. *Id.* at 220.

290. *Id.* at 218.

291. *Id.*

292. *Id.* at 219.

293. *Id.* at 220.

Jordan, the court found that the ordinance met the reasonable relationship requirement.²⁹⁴

Finally, in *Parks v. Watson*,²⁹⁵ a developer, seeking vacation of platted streets within a proposed apartment project, challenged the Klamath Falls City Council's contingent dedication of a twenty-foot strip along the main thoroughfare.²⁹⁶ The developer was willing to pay a negotiated fee of one dollar per square foot for the vacated property, but the dispute turned on ownership of the easement.²⁹⁷ Parks agreed to grant an easement for purposes of widening the road.²⁹⁸ However, the city sought a dedication in order to acquire fee simple ownership of an existing geothermal well on the strip.²⁹⁹ The developer planned to use the well to heat the new apartment complex.³⁰⁰

The developer brought suit under the Civil Rights Act and sections one and two of the Sherman Act.³⁰¹ The civil rights action, in part, involved a takings claim.³⁰² The court held that a "condition requiring an applicant for a governmental benefit to forgo a constitutional right is unlawful if the condition is not rationally related to the benefit conferred."³⁰³ Finding that street vacation cases are analogous to subdivision exaction cases,³⁰⁴ the court rejected the city's action, finding no rational relationship between the vacation of the platted streets and the required transfer of ownership in the geothermal well.³⁰⁵

294. *Id.*

295. 716 F.2d 646 (9th Cir. 1983).

296. *Id.* at 649-50.

297. *Id.* at 649.

298. *Id.*

299. *Id.* at 650.

300. *Id.* at 649-50.

301. *Id.* at 649. The Civil Rights Act is codified at 42 U.S.C. § 1983 (1988) and the Sherman Antitrust Act is codified at 15 U.S.C. §§ 1-7 (1988). The antitrust claim charged the city's action was an attempt to monopolize the geothermal heating market. *Parks*, 716 F.2d at 650. The district court granted a motion for summary judgment on the grounds that the developer lacked standing because the developer could not establish an injury to its business or property. *Id.* at 657-58. The court of appeals remanded for consideration of harm not merely to Klamath's potential off-site geothermal heating business, but also the harm to the potential sale of energy to the planned apartment complex. *Id.* at 662.

302. *Parks*, 716 F.2d at 662.

303. *Id.* at 652.

304. *Id.* at 653.

305. *Id.*

Dissenting from the majority's reversal of the trial court's dismissal of the section 1983 claims, Judge Wallace found that aggressive negotiation for the transfer of government property was justified under *Honolulu Rapid Transit*.³⁰⁶ In *Honolulu Rapid Transit* a contract for the sale of the local bus company was upheld even though the City was not required to pay just compensation.³⁰⁷ Judge Wallace believed there was no takings issue involved, as the government may bargain aggressively "with 'due regard for [its] own interest.'"³⁰⁸ Judge Wallace dismissed the *Parks* majority's distinction that *Honolulu Rapid Transit* involved a condition directly related to the subject of the benefit.³⁰⁹ The majority not only agreed that the City was free to negotiate aggressively, but failed to object to Klamath Falls charging two and a half times more per square foot than it customarily did for street vacation.³¹⁰ The City could have simply charged enough for the street vacation to condemn the geothermal well with money left over.³¹¹ The City could similarly require the developer to construct street lights or other projects that would benefit the City directly.³¹² Thus, Judge Wallace rejected the distinction between geothermal wells and street lights and considered each concession equally valid under *Honolulu Rapid Transit* as an exercise of the government's role as a market participant.³¹³

2. Application to the Dolan site

In *Dolan* the Chief Justice found that a reasonable relationship standard was the most closely aligned with constitutional requirements.³¹⁴ To avoid confusion with the rational basis test of the Fourteenth Amendment, the Court coined the term "rough propor-

306. *Id.* at 665 (Wallace, J., dissenting) (citing *Honolulu Rapid Transit Co. v. Dolim*, 459 F.2d 551 (9th Cir.), *cert. denied*, 409 U.S. 875 (1972)).

307. *Honolulu Rapid Transit*, 459 F.2d at 552-53.

308. *Parks*, 716 F.2d at 665 (Wallace, J., dissenting) (quoting *Albrecht v. United States*, 329 U.S. 599, 604 (1947)).

309. *Id.* at 655.

310. *Id.* at 666-67.

311. *Id.* at 667.

312. *Id.*

313. *Id.*

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

tionality” for the new prong of its takings analysis.³¹⁵ The majority then shifted the traditional burden of proof from the applicant, requiring the municipality to demonstrate the rough proportionality between the dedication and the nature and extent of the proposed development.³¹⁶ While not requiring a “precise mathematical calculation,”³¹⁷ the Court did require the City to make “some sort of individualized determination.”³¹⁸

Next, the Chief Justice turned to the dedication required of Mrs. Dolan.³¹⁹ The Court conceded that the City had a legitimate interest in restricting development on the floodplain.³²⁰ The floodplain dedication was within the fifteen percent greenway space already required under the City’s ordinance.³²¹ However, the Court questioned the City’s demand for a dedication that would create a public right-of-way.³²²

While the City conceded that recreational access to the floodplain easement was merely ancillary to the primary goal of limiting destructive floods, the Court found no nexus to support the public easement.³²³ Chief Justice Rehnquist concluded that the City demanded more than a prohibition on building on the floodplain bordering Fanno Creek, the City wanted access for public use.³²⁴ This violated Mrs. Dolan’s valuable right to exclude others from her property.³²⁵ Commercial use of the property did not diminish the

315. *Id.* The term “rough proportionality” was reportedly coined by Justice Scalia during oral argument. Paul D. Kamenar, *A Quest for an Invigorated Takings Clause*, THE RECORDER, Aug. 26, 1994 (Supreme Court 1993-94 Term Supp.), at 7.

316. *Dolan*, 114 S. Ct. at 2319-20, 2320 n.8.

317. *Id.* at 2319.

318. *Id.*

319. *Id.* at 2320.

320. *Id.* The City’s interest arose from the increase in the impervious surface on the property—by paving the parking lot and increasing the square footage of the store—which would cause increased storm-water runoff from the site. *Id.*

321. *Id.*

322. *Id.*

323. *Id.* at 2320-21.

324. *Id.* at 2320.

325. *Id.* The Chief Justice cited *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In *Kaiser Aetna* the petitioner dredged a private lagoon and a channel through an adjacent beach to create a private marina. *Id.* at 165-66. The Court held that although connecting the new marina to the ocean had created a navigational servitude, thus subjecting future actions to approval by the Army Corps of Engineers, the servitude did not create a right of public access without just compensation. *Id.* at 179-80. While the public has free access to navigable waters, the owner of this formerly private pond could not lose the valuable

strength of this right.³²⁶ If the new construction impinged on an existing public greenway space, then the City could require Mrs. Dolan to dedicate land as a replacement greenway.³²⁷ But the Court held that the City had failed to establish a reasonable relationship between the public easement and the expansion of the hardware store.³²⁸

Next the Court accepted the City's finding that the development would increase traffic within the district at the rate of approximately 435 additional trips daily.³²⁹ The Chief Justice held that traditional dedications for relief from congestion such as "streets, sidewalks, and other public ways are generally reasonable."³³⁰ However, the Court determined that the City's finding that the bikepath *could* offset some of the traffic was insufficient to justify the exaction.³³¹ In remanding the case the Court concluded that "[n]o precise mathematical calculation is required, but the City must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway."³³²

3. Souter's dissent

Justice Souter found no need to expand on *Nollan's* essential nexus test, that an exaction must have a reasonable relationship to the adverse impact of the proposed development.³³³ The majority acknowledged that flood control was a sufficient justification for the

right to exclude others except by an act of eminent domain. *Id.* at 175-80. However, the Court did note that the government could have conditioned its approval on the petitioner's complying with measures that would promote navigation; however, it could only do so prospectively, not retrospectively. *Id.* at 179-80.

326. *Dolan*, 114 S. Ct. at 2321. The City contended that the public easement would not impair the value of the commercial property. *Id.* (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)). But the Court distinguished *PruneYard*, which required a major shopping mall to allow individuals to distribute pamphlets and solicit signatures on petitions because the mall could place reasonable time, place, and manner restrictions on the individuals. *Id.* Mrs. Dolan, however, would lose all right to control the actions of individuals if required to dedicate a public easement. *Id.* at 2320-21.

327. *Id.* at 2321.

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* at 2321-22.

332. *Id.* at 2322.

333. *Id.* at 2330-31 (Souter, J., dissenting).

City to require dedication of land bordering Fanno Creek.³³⁴ But in rejecting the exaction for public recreational facilities on the flood control easement, Justice Souter did not find that the majority was applying any proportionality test.³³⁵ The majority's test was actually the *Nollan* analysis, that the justification for the bike path hinged on the essential nexus between the traffic congestion caused by the redevelopment of the site and the bike path's ability to relieve that congestion.³³⁶

According to Justice Souter the City failed to meet the majority's nexus analysis because it used "could" instead of "would" when describing the bike path's potential offset of increased traffic congestion.³³⁷ Had Tigard found that the bike path *would* offset the increased traffic, even to some extent, it would have satisfied the relationship requirement.³³⁸ Reviewing the record, Justice Souter felt that the City had met this test by establishing in its Comprehensive Plan that "[b]icycle and pedestrian pathway systems will result in some reduction of automobile trips within the community."³³⁹ This finding satisfied the traditional test that exactions for street expansion are valid if they relieve increased congestion caused by planned development.³⁴⁰ Justice Souter concluded by rejecting the majority's shifting of the burden of proof to the municipality and its expansion on the *Nollan* test.³⁴¹ Almost as a postscript he added, "[t]he right test for the enunciation of takings doctrine seems hard to spot."³⁴²

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

335. *Id.* (Souter, J., dissenting).

336. *Id.* (Souter, J., dissenting).

337. *Id.* (Souter, J., dissenting).

338. *Id.* (Souter, J., dissenting).

339. *Id.* at 2331 (Souter, J., dissenting) (quoting Respondent Brief, *supra* note 125, at A-5 (quoting Tigard, Or., Comprehensive Plan at I-221)).

340. *Id.* (Souter, J., dissenting) (quoting *Pennell v. San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) ("[T]he common zoning regulations requiring subdividers to . . . dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion.")).

341. *Id.* (Souter, J., dissenting).

342. *Id.* (Souter, J., dissenting).

4. Stevens's dissent

Justice Stevens, joined by Justices Blackmun and Ginsburg, noted that the majority's decision would have a great impact.³⁴³ First, the Court agreed that both exactions—for flood control and traffic demand mitigation—fulfilled *Nollan's* essential nexus test.³⁴⁴ However, the two new hurdles posed—the rough proportionality between the harm caused and the benefit derived, and the shifting of the burden to the municipality—had no precedent in the dozen cases cited.³⁴⁵ The reasonable relationship test the majority cited is, for all intents and purposes, the essential nexus test, not the rough proportionality test adopted by the majority.³⁴⁶ The state court cases also emphasize the benefit the developer received in exchange for the dedication, a concept the Chief Justice overlooked.³⁴⁷ These same cases also look at the impact on the entire parcel, either a dedication of a minor percentage of the land, or its in lieu equivalent, rather than individual property rights from the whole bundle.³⁴⁸ None of the cases, for example, found the *Kaiser Aetna* right to exclude determinative, or even considered it.³⁴⁹ And even restrictions on that right to exclude fail to rise to the level of a constitutional taking “unless they ‘unreasonably impair the value or use’ of the property.”³⁵⁰ Justice Stevens concluded that essential nexus is the correct standard, and that the inquiry should go beyond that “only if the developer establishes that a concededly germane condition is so grossly disproportionate to the proposed development's adverse effects that it manifests motives other than land use regulation on the part of the city.”³⁵¹

Maintaining the Court's traditional burden on the petitioner, Mrs. Dolan failed to show that public recreational use of the easement created any burden on property used for a large hardware store.³⁵²

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

344. *Id.* at 2323 (Stevens, J., dissenting).

345. *Id.* (Stevens, J., dissenting).

346. *Id.* (Stevens, J., dissenting).

347. *Id.* at 2324 (Stevens, J., dissenting).

348. *Id.* (Stevens, J., dissenting).

349. *Id.* at 2324-25 (Stevens, J., dissenting).

350. *Id.* at 2325 (Stevens, J., dissenting) (quoting *PruneYard*, 447 U.S. at 82-84).

351. *Id.* (Stevens, J., dissenting) (footnote omitted).

352. *Id.* at 2326 (Stevens, J., dissenting).

Justice Stevens also found that the majority's word play—of “could” and “would”—that it used to deny the bikepath was a form of federal court micromanaging of state land use decisions that could—or would—cause a flood of new litigants.³⁵³

The dissent next challenged the Court's mixing of the substantive due process protections of the Fourteenth Amendment with the Takings Clause of the Fifth.³⁵⁴ In cases involving a physical invasion of property, combining the two has little effect.³⁵⁵ Regulatory takings cases pose a much greater risk of “potentially open-ended sources of judicial power to invalidate state economic regulations,”³⁵⁶ as in the line of cases following the *Lochner* decision.³⁵⁷

In conclusion Justice Stevens noted that uncertainty will always characterize predictions of the future impact of development on all aspects of urban life.³⁵⁸ The interests of private developers must give way to the greater public interest in mitigating or eliminating potential impacts.³⁵⁹ The burden should remain on the developer to demonstrate that exactions have “unreasonably impaired the economic value of the proposed improvement.”³⁶⁰ Thus, “[i]f 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.”³⁶¹

353. *Id.* (Stevens, J., dissenting).

354. *Id.* at 2326-27 (Stevens, J., dissenting).

355. *Id.* at 2327 (Stevens, J., dissenting).

356. *Id.* (Stevens, J., dissenting).

357. *Id.* (Stevens, J., dissenting) (citing *Lochner v. New York*, 198 U.S. 45 (1905)). Justice Stevens compared the *Dolan* majority's refusal to recognize the sufficient nexus between the proposed site development and increased flood and traffic problems with the *Lochner* majority's refusal to find a nexus between the regulation in question and the state's interest in protecting human health. *Id.* (Stevens, J., dissenting).

358. *Id.* at 2329 (Stevens, J., dissenting).

359. *Id.* (Stevens, J., dissenting).

360. *Id.* at 2330 (Stevens, J., dissenting).

361. *Id.* at 2329-30 (Stevens, J., dissenting).

IV. THE *DOLAN* TEST AND TRANSPORTATION CORRIDORS

Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.³⁶²

The *Euclid*³⁶³ Court could never have looked seventy years into the future to see the problems cities currently face. They would be unlikely to see "the wisdom, necessity and validity" of some modern exactions. Future courts will likely find the *Dolan* majority's limits on transportation "arbitrary and oppressive."³⁶⁴

The majority in *Dolan*³⁶⁵ accepted the floodplain exaction as reasonably related and roughly proportionate to the potential flooding caused by increased runoff from the more intensively developed site.³⁶⁶ Tigard can require Mrs. Dolan to leave the land as a greenway, undeveloped, but it can not require her to allow the City to use the parcel as a pedestrian and bike path.³⁶⁷ That would require proof from the City that the use of the bike path would roughly offset the increased automobile traffic generated by the larger hardware store.³⁶⁸

The City could have denied the permit instead of granting conditional approval,³⁶⁹ theoretically avoiding years of litigation. If cities deny applications of problematic developments, without acting arbitrarily or capriciously, until the developer proposes the dedica-

362. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926).

363. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

364. *Id.* at 387.

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

366. *Id.* at 2317-18.

367. *Id.* at 2320-22.

368. *Id.* at 2321-22.

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

tions the city seeks, then cities may avoid the *Dolan* complications altogether. Shifting the burden from the developer to the municipality may fundamentally affect the process, or it may simply generate greater expense—more experts and more studies. But each city should not have to prepare its own study on the ability of bike paths to reduce automobile traffic and congestion anymore than the Court would require each city to prepare an individual study on the ability of adult theaters to degrade neighborhoods.³⁷⁰ Tigard clearly established the positive effects of bike paths, and their ability to alleviate some of the negative impact of increased automobile use.³⁷¹

Mrs. Dolan did not contest the development fees Tigard imposed on her project.³⁷² The City's general plan required developers to pay for bus pads and other transportation enhancements if the development created a need for the improvements.³⁷³ Given that the new store would generate 435 additional car trips per day,³⁷⁴ had the Comprehensive Plan called for an extra traffic lane adjacent to the site, or a turn bay for ingress to and egress from the site, the Court would likely have upheld an exaction of as much land as sought for the bike path. But if the Court would allow an exaction for an automobile lane, it would need to expand the analysis to general traffic congestion created and all the possible ways to alleviate it. Cities need the flexibility to design creative local and regional solutions to growth, and the Court should not press them into seeking dedications for street expansion as the only relief for increased development.

370. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

371. See Amicus Brief on the Bicycle-Pedestrian Pathway Dedication by the Rails-to-Trails Conservancy, et al., *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (No. 93-518) [hereinafter *Rails-To-Trails Amicus Brief*]. The brief noted that projected population growth and existing traffic congestion contributed to the region's non-attainment status for ozone and carbon monoxide under the Clean Air Act, 42 U.S.C. § 7407(d) (1988). *Rails to Trails Amicus Brief*, *supra* at 6-8. The brief further cited statistics that more than 30 million Americans ride a bike regularly and that bicycling is faster than driving a car or riding a bus for trips under three miles. *Id.* at 14 (citing Michael Everett, *Consumer Demand for Bicycle Transportation in the United States*, 28 *TRAFFIC Q.* 585, 585 (1974)). In addition, the brief detailed the increase in shopping trips and commuting by bicycle after the construction of dedicated bike paths. *Id.* at 14-18.

372. *Dolan v. City of Tigard*, 854 P.2d 437, 439 (1993).

373. *Rails-to-Trails Amicus Brief*, *supra* note 371, at 11 (citing CDC, *supra* note 141, ch. 18.120.180.12 (1983)).

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

From Justice Holmes³⁷⁵ forward, the Court has implicitly acknowledged that takings law is based in policy, not a fixed calculation.³⁷⁶ The Court needs to allow flexibility for local city planners and transportation officials in designing remedies to the impacts of development. If the basis of land use regulation is nuisance law, if no one may use property so as to negatively impact the property of others, then takings law must begin with social responsibility.

V. SUSTAINABLE GROWTH AND TRANSPORTATION OPTIONS

The tragedy of the commons is that, in times of dwindling resources, each individual will increase, not decrease, use of those resources.³⁷⁷ Enclosure, first in Britain and later in the colonies, signalled an end to the common weal and a rise in the status of land as property, freely alienable.³⁷⁸ Enclosure brings about "a new ecological order."³⁷⁹ As with the land, the environment itself becomes a commodity.³⁸⁰

In 1987 the World Commission on Environment and Development issued a report, *Our Common Future* (The Brundtland Report).³⁸¹ The report posited a future in which elimination of

375. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

376. The Court in *Dolan* could only create a rough proportionality test. *Dolan*, 114 S. Ct. at 2319-20 ("No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the development."). Justice Souter found the definition of a taking elusive. *Id.* at 2331 (Souter, J., dissenting) ("The right case for the enunciation of takings doctrine seems hard to spot.").

377. The commons were the original open lands used communally for grazing and agriculture. This theory was explored by Garrett Hardin in *The Tragedy of the Commons*, 166 *SCIENCE* 1243-48 (1968), reprinted in *ECONOMIC FOUNDATIONS OF PROPERTY LAW* 2-11 (Bruce A. Ackerman ed., 1975).

378. *THE ECOLOGIST, WHOSE COMMON FUTURE: RECLAIMING THE COMMONS* (1993). The concept of the "commonwealth" lives on in the official designations of four states—Kentucky, Massachusetts, Pennsylvania, and Virginia—and one territory—Puerto Rico—as commonwealths. 6 *ENCYCLOPEDIA BRITANNICA* 166-67 (1972).

379. *THE ECOLOGIST*, *supra* note 378, at 60 (quoting Ivan Illich, *Silence is a Commons*, *COEVOLUTION Q.* (Winter 1983)).

380. *Id.*

381. *WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE*, (Oxford Univ. Press 1987). The work is commonly known as the Brundtland Report after the commission's chair, Norwegian Prime Minister Gro Harlem Brundtland.

poverty and decaying urban environments could only be achieved through worldwide growth.³⁸² A response to that report challenged the rate of growth in gross national product, estimated at five and nine-tenths percent per annum, as unsustainable environmentally.³⁸³ Holding it unlikely that the environment can sustain a doubling of the world's economy, let alone the five to ten times urged by the Brundtland Report,³⁸⁴ Robert Goodland urged that we must accelerate our technical improvements in resource productivity,³⁸⁵ a change that can only occur as a shift from a reliance on growth to sustainable progress.³⁸⁶

Sustainability has become the buzzword of the 1990s.³⁸⁷ As a society we must see our current levels of consumption as inherently unsustainable.³⁸⁸ Yet during the period 1960 to 1990, the percentage of workers commuting in private vehicles grew from sixty-eight to

Development, as used in this report, grew from post-World War II references to "underdeveloped nations." See, e.g., President Harry S. Truman, Inaugural Address (Jan. 20, 1949), in 5 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN 112, 114 (1964) ("[W]e must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas.").

382. *The Brundtland Report*, supra note 381, at 65.

383. ENVIRONMENTALLY SUSTAINABLE ECONOMIC DEVELOPMENT: BUILDING ON BRUNDTLAND 9-12 (Robert Goodland et al. eds., 1991).

384. *Id.* at 16.

385. *Id.* at 24.

386. *Id.* at 95.

387. J. Eugene Grigsby III, *Rules for "Sustainable Development" Must be Socially Inclusive*, L.A. TIMES, Aug. 21, 1994, at D2 (" 'Sustainable development' is a hot topic among architects, planners and a new breed of business leaders.").

In 1993 President Clinton established the President's Council on Sustainable Development, Exec. Order No. 12,852, 58 Fed. Reg. 35,841 (1993). The Vision Statement of the Council includes: "Protection of natural systems requires changed patterns of consumption consistent with a steady improvement in the efficiency with which society uses natural resources. . . . Sustainable development requires fundamental changes in the conduct or government, private institutions, and individuals." The goals of the task force on Energy and Transportation include reduced traffic congestion in urban areas and a decrease in per capita vehicle miles traveled. PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, INFORMATION PACKET (Mar. 1995).

Federal planning for sustainable growth includes the National Sciences and Technology Council. See NATIONAL SCIENCES AND TECHNOLOGY COUNCIL, BRIDGE TO A SUSTAINABLE FUTURE (1995); NATIONAL SCIENCES AND TECHNOLOGY COUNCIL, TECHNOLOGY FOR A SUSTAINABLE FUTURE: A FRAMEWORK FOR ACTION (1994).

388. In 1989 the United States produced one fifth of the world's total emissions of carbon dioxide from industrial processes. HUEY D. JOHNSON, GREEN PLANS: GREENPRINT FOR SUSTAINABILITY (1995).

eighty-eight.³⁸⁹ Vehicle occupancy rates have fallen during the same period for all travel uses, both business and pleasure.³⁹⁰ In 1990 the United States emitted thirty-five percent of the carbon dioxide generated by transportation.³⁹¹ As of 1986 the United States had the largest number of cars of any region of the world, as well as the greatest number of cars per capita.³⁹²

The traditional solution to traffic congestion has been to construct new roadways. This solution, however, is no longer viable in many situations because of financial constraints, environmental restrictions, community opposition to roadway expansion and changing traffic patterns. In fact, it is well established that construction of additional roadways often exacerbates congestion by making travel by automobile more accessible.³⁹³

Congressional intent to alter our direction is found in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA),³⁹⁴ briefly alluded to by the *Dolan* majority.³⁹⁵ ISTEA alters the national goals of paving roads to the horizon, found in the early Interstate Highway acts. Instead of interstates, we now have the "National Intermodal Transportation System." The policy statement begins:

It is the policy of the United States Government to develop a National Intermodal Transportation System that is economically efficient and environmentally sound, provides the foundation for the United States to compete in the global economy, and will move individuals and property in an energy efficient way.

....

389. COUNCIL ON ENVIRONMENTAL QUALITY, TWENTY-FOURTH ANNUAL REPORT 270 (1993).

390. *Id.* at 271.

391. UNITED NATIONS ENVIRONMENT PROGRAMME, *THE WORLD ENVIRONMENT 1972-1992* (Mostafa K. Tolba et al. eds., 1992).

392. *Id.* at 412.

393. Robert H. Freilich & S. Mark White, *Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America's Major Quality of Life Crisis*, 24 *LOY. L.A. L. REV.* 915, 926 (1991).

394. Intermodal Surface Transportation Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (codified as amended in scattered section of 23, 49, and other titles of the U.S.C.).

395. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2318 (1994).

... The National Intermodal Transportation System shall consist of all forms of transportation in a unified, interconnected manner, including the transportation systems of the future, to reduce energy consumption and air pollution while promoting economic development and supporting the United States' preeminent position in international commerce.

... The National Intermodal Transportation System must be operated and maintained with insistent attention to the concepts of innovation, competition, energy efficiency, productivity, growth, and accountability. Practices that resulted in the lengthy and overly costly construction of the Dwight D. Eisenhower System of Interstate and Defense Highways must be confronted and stopped.³⁹⁶

Section 1007 of ISTEA allows funds previously authorized for highway construction to be diverted to other projects, including "[c]arpool projects, fringe and corridor parking facilities and programs, and bicycle transportation and pedestrian walkways."³⁹⁷ Section 1033 allows use of National Highway System Funds, Federal Lands Highway Funds, and federal funds for bridge construction and maintenance for construction of bicycle transportation facilities and pedestrian walkways.³⁹⁸ Bicycle transportation facilities are defined as "new or improved lanes, paths, or shoulders for use by bicyclists, traffic control devices, shelters, and parking facilities for bicycles."³⁹⁹

A transportation corridor goes far beyond an interstate highway system, encompassing such alternative forms as airports, canals, or high-speed rail lines.⁴⁰⁰ At their best, such corridors are regional, the focus of a comprehensive plan to manage the increasing congestion which accompanies urban growth.⁴⁰¹

396. 49 U.S.C.A. §§ 5501(a)-(b) (West Supp. 1995).

397. 23 U.S.C. § 133 (Supp. V 1993).

398. *Id.* at § 217.

399. *Id.* at § 217(j).

400. Robert H. Freilich & Stephen P. Chinn, *Transportation Corridors: Shaping and Financing Urbanization Through Integration of Eminent Domain, Zoning and Growth Management Techniques*, 55 UMKC L. REV. 153, 165 (1987).

401. *Id.* at 167-68.

Bicycles are the most energy-efficient form of transportation, as well as one of the least polluting.⁴⁰² Oregon has long been a leader in bikepath/greenway development, with plans similar to the planned East Tujunga Wash-Los Angeles River Class I bikeway.⁴⁰³ Class I bikepaths—those not only dedicated to bikes but completely separate from the roadway—“significantly increase the percentage of bicycling and walking commuter and other utilitarian trips, improve safety, increase access, and promote intermodal travel.”⁴⁰⁴ Combining bike and pedestrian-friendly rights-of-way can greatly increase use of both options, relieving congestion on local arterials.⁴⁰⁵ After Chicago installed five Class I paths, commuter use of bikes rose from an area average of one percent to a local use of almost sixteen percent.⁴⁰⁶ In Portland, Oregon, more than 700 bicyclists purchased permits to allow bikes on buses and light rail trains during the first three months of the program.⁴⁰⁷ The planned Brooklyn-Queens Greenway has more than eighteen million dollars committed to develop a system linking thirteen parks, four lakes, museums, and recreational facilities in an uninterrupted path from the Atlantic Ocean to Long Island Sound.⁴⁰⁸

The City of Tigard has developed a comprehensive plan that links its downtown to the outskirts by way of a Class I bikepath.⁴⁰⁹ The route runs along Fanno Creek, cutting through Mrs. Dolan’s

402. Ryan Snyder, *Bicycles in Ecological Cities*, 4 EARTHWORD 6.

403. Larry Smith, *Combining Ecology and Transportation: The East Tujunga Wash-L.A. River Bikeway/Greenway*, 4 EARTHWORD 8.

404. FED. HIGHWAY ADMIN., *THE NATIONAL BICYCLING AND WALKING STUDY: TRANSPORTATION CHOICES FOR A CHANGING AMERICA* 21 (1994). There are three classes of bike paths:

Class I: Path for bicycles separated from motorized vehicles.

Class II: Bike lane on roads, usually designated by painted line and signs. Motorized vehicles are permitted to use bike lanes to make turns and to park, where it’s allowed.

Class III: Bike route shared by bikes and motor vehicles, designated by signs.

Julie Sheer, *Urban Riders: Bicycle Commuting in the Valley*, L.A. TIMES, Aug. 1, 1993, at B1 (Valley ed.).

405. Joel Woodhull, *Link Between Transit and Land Use: The Pedestrian*, 4 EARTHWORD 12.

406. *Id.*

407. *Id.* at 32.

408. CHARLES A. FLINK & ROBERT M. SEARNS, *GREENWAYS: A GUIDE TO PLANNING, DESIGN, AND DEVELOPMENT* 108 (1993).

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

property.⁴¹⁰ Studies in other communities have shown that development of Class I bikepaths has encouraged commuters and local shoppers to use the path instead of the family car. The benefits to the community range from less congestion and fuel consumption to improved air quality and a more healthy populace. The state and federal legislatures have acted to encourage such efforts; the executive branch is committed to discovering and employing alternatives in order to achieve a sustainable future. The Supreme Court should relax its new rough proportionality test to allow intermodal transportation solutions. If a municipality shows that a new development will increase traffic congestion, then the Court should allow flexibility in exactions that will encourage city planners to explore all possible solutions, not merely more roads and more highways.

VI. CONCLUSION

To the 1926 *Euclid* Court, apartment houses were a prospective nuisance that zoning could prevent from penetrating single family housing neighborhoods.⁴¹¹ Breweries, cedar trees, and low flying planes are only nuisances under specific circumstances.⁴¹² Yet each was closed, destroyed, or liable for damages in specific circumstances. We have long considered the car, most often the single occupant vehicle, as the epitome of transportation. But when stuck in a freeway traffic jam for hours, the auto seems as much a nuisance as a brick yard⁴¹³ or a gravel pit.⁴¹⁴

The courts must continue to safeguard private property from regulatory takings. But as demands on the common wealth of humankind, the environment, continue to grow, the absolute quantity and nature of the sticks in the bundle of property rights must undergo a fundamental change. The Court must consider expanding the opportunities for city planners to make our urban centers both livable and sustainable communities. When a proposed development will burden that community, the Court must allow a flexible approach to ameliorating that burden. Even if the development's impact can only be measured in number of car trips generated, the Court must allow

410. *Id.*

411. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

412. *See supra* notes 27-38.

413. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

414. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

the city to offset that increased congestion through all means at their disposal, from futuristic technologies down to humble bike paths.

David Ackerly

