DOLAN v. TIGARD: A FURTHER STEP TOWARD FULL RECOGNITION OF PROPERTY OWNER RIGHTS

In 1973 the State of Oregon enacted a comprehensive land use management program which required all cities and counties to adopt land use plans consistent with statewide planning goals.[1] Based on these requirements, the Portland suburb of Tigard developed a land use plan, which it codified in its Community Development Code (CDC). "The CDC require[d] property owners in [Tigard's] Central Business District to comply with a 15% open space and landscaping requirement . . . ."[2] This requirement limited the development of a land parcel, including all structures and paved parking, to 85% of its area.[3] The CDC also included a plan to create a pedestrian/bicycle pathway to alleviate traffic congestion in the central business district.[4] Any new development was required to facilitate this plan by dedicating land for the pathway where provided for in the plan.[5]

The CDC further included a Master Drainage Plan.[6] Part of this Drainage Plan sought to ensure that the floodplain of the Fanno Creek basin remain free of structures and be preserved as a greenway in order to minimize damage from flooding.[7]

The Petitioner, Florence Dolan, was the owner of a plumbing and electrical supply store located in the central business district.[8] Her store was located on the eastern side of a 1.67 acre land parcel.[9] Fanno Creek flows through the southwestern corner of the property and along part of its western boundary.[10] Dolan applied to the City Planning Commission for a permit to redevelop her property.[11] Her plans called for doubling

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1. Dolan v. Tigard, ___ U.S. ___, 114 S. Ct. 2309, 2313 (1994) (citing ORE. REV. STAT. §§ 197.005-197.860 (1991)).
2. *Id.* (citing CITY OF TIGARD, OR., COMMUNITY DEVELOPMENT CODE § 18.66 (1989)).
3. *Id.*
4. *Id.* (citing CITY OF TIGARD, OR., COMMUNITY DEVELOPMENT CODE § 18.86.040.A.1.b).
5. *Id.*
6. *Id.* (citing CITY OF TIGARD, OR., COMMUNITY DEVELOPMENT CODE §§ 18.84, 18.86 18.164.100).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*

the size of the store, paving a 39 space parking lot for the store, and the addition of another structure for complimentary businesses with its own parking area.[12] The City Planning Commission granted the permit request, subject to the conditions imposed by the CDC.[13] Specifically, Dolan was required to dedicate to the city the area of her property located within the Fanno Creek floodplain, and an additional fifteen foot strip of land next to the floodplain for use as a pedestrian/bicycle pathway.[14] These dedications amounted to 10% of Dolan's property and she would be allowed to include this area within the CDC's 15% open space requirement.[15]

Dolan requested variances from the CDC standards, claiming that "the proposed development would not conflict with the policies of the comprehensive plan."[16] The City Planning Commission denied her request, finding that there was a reasonable relationship between Dolan's proposed development and the requirements imposed upon her by the Commission.[17]

Dolan appealed this decision to the Land Use Board of Appeals (LUBA).[18] In this appeal she argued that the "dedication requirements were not related to [her] proposed development," and, therefore, amounted to an uncompensated taking of her property under the Fifth Amendment.[19] LUBA agreed with the City Planning Commission's finding that there was a reasonable relationship between the requirements and the proposed development and affirmed the Commission's decision.[20]

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12. *Id.* at 2313-14.
13. *Id.* at 2314.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 2314-15. Specifically, the Commission found that: (1) it would be reasonable to assume that users of the newly developed property would utilize the pedestrian/bicycle pathway for transport and recreation; (2) the pedestrian/bicycle pathway would lessen the increase in traffic congestion; and (3) by paving the parking lot, Dolan would increase the impervious surface area of the property, thereby increasing storm water runoff therefrom; thus, the required floodplain dedication was necessary to alleviate the increased storm water runoff from Dolan's property. *Id.* at 2315.
18. *Id.*
19. *Id.*
20. *Id.*

Dolan appealed to the Oregon Court of Appeals, arguing that the Supreme Court, in *Nollan v. California Coastal Comm'n*,[21] had rejected the "reasonable relationship" test and had instead adopted a stricter "essential nexus" test to determine if an uncompensated taking had occurred.[22] The Court of Appeals rejected this argument[23] and affirmed LUBA.[24]

The Oregon Supreme Court affirmed the decision of the Oregon Court of Appeals.[25] It rejected the contention that *Nollan* abandoned the reasonable relationship test,[26] and the Supreme Court found that the conditions imposed by the city had an essential nexus to the proposed development.[27] This essential nexus showed that there was a reasonable relationship between the conditions and the impact of the proposed development; therefore, there was no uncompensated taking.[28]

The Supreme Court granted certiorari[29] to resolve any conflict between *Nollan* and the decision of the Oregon Supreme Court.[30] Because there was an essential nexus between the exactions and Dolan's proposed development, the Court determined that it was required to extend its analysis beyond *Nollan* for the first time.[31] Based on its newly formulated "rough proportionality" test, the Court found that the city's required exactions had amounted to a compensable taking of Dolan's property.[32] *Dolan v. Tigard*, ___ U.S. ___, 114 S. Ct. 2309 (1994).

The Fifth Amendment states that "private property shall not be taken for public use, without just compensation."[33] The Fifth Amendment has been "made applicable to the states through the Fourteenth Amendment."[34] There are two types of government action

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21. 483 U.S. 825 (1987).
22. Dolan v. City of Tigard, 832 P.2d 853, 855 (Or. Ct. App. 1992).
23. *Id.* at 855.
24. *Id.* at 856.
25. Dolan v. City of Tigard, 854 P.2d 437, 438 (Or. 1992).
26. *Id.* at 442.
27. *Id.* at 443.
28. *Id.* at 443-44.
29. *Dolan*, 114 S. Ct. at 2309.
30. *Id*. at 2316.
31. *Id.* at 2317.
32. *Id.* at 2319-22.
33. U.S. CONST. amend. V.
34. *Dolan*, 114 S. Ct. at 2316 (citing Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 239 (1897) (based on the Fourteenth Amendment, the states cannot take private property for public benefit without compensation to the owner)).

which constitute a taking: regulation of land use[35] and physical appropriation.[36] In a physical appropriation, the government actually acquires the property.[37] Taking by land use regulation involves government action which regulates the use of one's land so as to deprive the landowner of certain property rights, uses of his property or some or all of the economic value of the property.[38] The intention of the takings clause is to prevent individuals from bearing alone a burden which is more appropriately born by the public.[39]

Nonetheless, in cases of land use regulations, the Supreme Court has sometimes upheld uncompensated takings as constitutional where a state or local government has engaged in legitimate land use planning activities.[40] "A land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'"[41] However, the Supreme Court has recently been more willing to find that government land use regulation constitutes a taking requiring compensation under the Fifth Amendment.[42]

In *Nollan v. California Coastal Comm'n*, the Nollans requested a permit from the California Coastal Commission (Commission) to replace the house on their beachfront lot with a larger house.[43] The Commission granted the permit subject to the condition that the Nollans dedicate a public easement through their property to facilitate public entry to the seaside.[44] The Nollans claimed that the Commission's actions had

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35. Also known as a "regulatory taking."

36. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 11.12, at 426-27 (4th ed. 1991); *see also* Jeffrey T. Palzer, *"Taking" Aim at Land Use Regulations:* Lucas v. South Carolina Coastal Council, 26 CREIGHTON L. REV. 525 (1993).

37. Palzer, *supra* note 36, at 525.

38. *Id.*; *see* NOWAK & ROTUNDA, *supra* note 36, at 427-31.

39. *Dolan*, 114 S. Ct. at 2316 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

40. *Id.* (citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (a zoning ordinance will not be held unconstitutional where it is substantially related to public health, safety or general welfare)); *see also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (the government may diminish property value to some extent without compensation; but, after such diminution reaches a certain magnitude, there must be compensation).

41. *Dolan*, 114 S. Ct. at 2316 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)) (Brackets in original).

42. Michael M. Berger, *Recent Takings and Eminent Domain Cases*, A.L.I.-A.B.A. (1993) (available on WESTLAW, C851 ALI-ABA 85); *see also* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S. Ct. 2886 (1992).

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

44. *Id.*

effectuated a taking.[45] The Commission argued that a taking had not occurred because the easement was required for a legitimate public purpose (i.e., it protected the public's ability to see the beach and assisted the public in overcoming its "psychological barrier" to use the beach created by shorefront development).[46] The Court found that there was a taking.[47] The Court assumed that protecting visual access to the ocean was a legitimate public interest,[48] but, there was no nexus between protecting visual access and the permit condition.[49] Without this essential nexus, "[t]he purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation."[50]

The Court has also held that temporary regulations over land may effectuate a compensable taking.[51] In *First English Evangelical Lutheran Church v. County of Los Angeles*, the County of Los Angeles had prohibited the plaintiff from building on its property for three years because it had been damaged by a flood.[52] The Court held that compensation may be due even if a taking is temporary,[53] stating that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[54]

In *Lucas v. South Carolina Coastal Council*,[55] another recent regulatory takings case, the petitioner, Lucas, had purchased two beachfront lots on which he had planned to build single family homes.[56] However, a subsequent act of the South Carolina Legislature dealing with coastal zone management prohibited any building on Lucas' lots, thereby stripping them of any economic value.[57] The Court found that because

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45. *Id.* at 829.
46. *Id.* at 835.
47. *Id.* at 842.
48. *Id.* at 835.
49. *Id.* at 837.
50. *Id.*
51. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).
52. *Id.* at 307.
53. *Id.* at 318.
54. *Id.* at 321.
55. ___ U.S. ___, 112 S. Ct. 2886 (1992).
56. *Id.* at 2889.
57. *Id.*

Lucas was denied all beneficial use of his property by the regulation, he was entitled to just compensation under the Fifth Amendment.[58]

In *Dolan v. Tigard*, the Court found that the City of Tigard had effectuated a taking of property from petitioner Dolan, requiring just compensation under the Fifth Amendment.[59] The majority opinion, written by Chief Justice Rehnquist,[60] reached this decision through a two-part analysis.[61] The Court used the second part of this analysis, the rough proportionality test, for the first time.[62] It had not been necessary to reach this step in *Nollan*.[63]

The first part of the analysis required a determination of whether an essential nexus existed "between the 'legitimate state interest' and the permit condition exacted by the city."[64] If such a nexus existed, then the second part of the analysis would require a determination of "the required degree of connection between the exactions and the projected impact of the proposed development."[65]

As in *Nollan*, the Court found that the purposes behind the city's regulations were legitimate state interests.[66] It noted that prevention of flooding and reduction of traffic congestion were typical of the legitimate public purposes it had upheld in prior cases.[67]

Unlike *Nollan*, the Court found that there was an essential nexus between these legitimate public interests and the conditions exacted by the city.[68] The Court stated that it was "obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100 year floodplain."[69] Dolan's pavement of her parking lot and expansion of her store would increase stormwater runoff, thereby increasing the need for flood prevention.[70] Likewise, a pedestrian/bicycle pathway would provide an alternate means

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58. *Id.* at 2900.
59. 114 S. Ct. at 2322.
60. Joined by Justices O'Connor, Scalia, Kennedy and Thomas.
61. *Dolan*, 114 S. Ct. at 2317.
62. *Id.*
63. *Id.*
64. *Id.* (citing *Nollan*, 483 U.S. at 837).
65. *Id.* at 2317.
66. *Id.* at 2317-18.
67. *Id.* (citing *Agins*, 447 U.S. at 260-62).
68. *Id.* at 2318.
69. *Id.*
70. *Id.*

of transportation, thereby reducing the increase in traffic congestion certain to come from increased development.[71]

Having found that an essential nexus existed, the Court was next required "to determine whether the degree of the exactions demanded by the city's permit conditions bear[ed] the required relationship to the projected impact of petitioner's proposed development."[72] To do this, it had to determine if the findings of the City of Tigard Planning Commission[73] were constitutionally sufficient to sustain the permit conditions under the Fifth Amendment "takings" clause.[74] To determine a standard of review for this issue, the Court looked to three different state court approaches.[75]

The Court first examined a standard which merely required generalized statements to find "the necessary connection between a required dedication and [a] proposed development."[76] These state court decisions granted great deference to the decisions of the legislatures.[77] The Court rejected this first approach and determined that such a standard was too lax to ensure adequate protection of a property owner's rights under the Fifth Amendment.[78]

The next standard the Court looked at was the "specific and uniquely attributable test,"[79] which has been adopted by a minority of

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71. *Id.*

72. *Id.* (citing *Nollan*, 483 U.S., at 834 (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127 (1978) ("'[A] use restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial government purpose'")).

73. See *supra* note 17.

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

75. *Id.*

76. *Id.* at 2318-19; *see also* Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964) (statute requiring property owner to dedicate part of his land for parks and playground purposes as a condition precedent to approval of subdivision plat was not a compensable taking); Jenad, Inc. v. Scarsdale, 218 N.E.2d 673, 679 (N.Y. 1966) (village planning board's requirement that a subdivider allot some of the land within his subdivision for park purposes (or pay a fee to the village in lieu of such allotment) as a condition precedent to approval of subdivision plats was allowable and not unconstitutional).

77. *Billings Properties, Inc*. 394 P.2d at 185 (a legislative act is presumed valid and will not be found unconstitutional unless it can be shown to be invalid beyond a reasonable doubt); *Jenad, Inc*. 218 N.E.2d at 675.

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

79. *Id.* (brackets omitted); *see also* Pioneer Trust & Savings Bank v. Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961) (village ordinance which required subdivider to dedicate part of his land for public use as a condition precedent to approval of subdivision plat, where the need for the public use was not specifically and uniquely attributable to the subdivision, was violative of the Fifth Amendment).

state courts.[80] This standard requires a precise correspondence between the exactions and the proposed development to show that a regulation on land use is not a taking.[81] This standard requires that the regulatory authority show "that its exaction is directly proportional to the specifically created need, [otherwise,] the exaction becomes 'a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations.'"[82] The Court also rejected this standard, believing that the Constitution did not require such a rigid inquiry.[83]

The final standard the Court examined was the reasonable relationship test, which it considered to be an intermediate between the two other standards.[84] This standard has been adopted by a majority of state courts.[85] Under this standard, the regulatory authority must show a reasonable relationship between the exaction and the impact of the proposed development.[86] A dedication required for the granting of a

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80. *Dolan*, 114 S. Ct. at 2319 n.7; s*ee also Pioneer Trust & Savings Bank* 176 N.E.2d at 802; J.E.D. Associates., Inc. v. Atkinson, 432 A.2d 12, 15 (N.H. 1981) (zoning regulation which required dedication to town of seven and one-half percent of land within a subdivision, without any consideration of the town's specific need for such land, was unconstitutional); Frank Ansuini, Inc. v. Cranston, 264 A.2d 910, 913 (R.I. 1970) (adopting the rule in Pioneer Trust & Savings Bank v. Mount Prospect); McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370, 374 (Ohio Ct. App. 1971) (conditioning the approval of subdivision plats upon dedication of a portion of land was constitutional where the burden such conditions place upon the subdivider was specific and uniquely attributable to his activity).

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

82. *Id.* (quoting *Pioneer Trust & Savings Bank* 176 N.E.2d at 802).

83. *Id.*

84. *Id.*

85. *Id.*; *see, e.g.*, Simpson v. North Platte, 292 N.W.2d 297, 301 (Neb. 1980) (city ordinance requiring dedication of part of property to the city as a precondition for obtaining a building permit, where the dedication was not directly occasioned by the proposed construction, was a compensable taking); Jordan v. Menomonee Falls, 137 N.W.2d 442, 447 (Wis. 1965) (ordinance which required dedication of land for school, park or recreational sites as a precondition for subdivision plat approval is constitutional where evidence reasonably establishes that the city will be required to provide more land for such sites as a result of approval of the subdivision); Collis v. Bloomington, 246 N.W.2d 19, 26 (Minn. 1976) (statute requiring dedication of a reasonable portion of subdivision property for parks and playgrounds, where "reasonable portion" meant that portion which the city would need to acquire as a result of approval of the subdivision, was constitutional); College Station v. Turtle Rock Corp., 680 S.W.2d 802, 805-07 (Tex. 1984) (where a local regulation, which required parkland dedication as a precondition for subdivision plat approval, was substantially related to the health, safety or general welfare of the public, and such regulation was reasonable, it did not constitute a compensable taking).

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

permit for development should be reasonably related to the needs resulting from that development.[87]

The Court adopted this reasonable relationship test as the proper standard, renaming it the rough proportionality test to avoid confusion with similar terms used in the analysis of the Equal Protection Clause of the Fourteenth Amendment.[88] While not calling for "precise mathematical calculation" under rough proportionality, the Court stated that a regulatory authority "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[89]

Applying this standard to the case at bar, the Court found rough proportionality lacking between Dolan's proposed development and both the floodplain and pathway dedications required by the City of Tigard.[90] With respect to the floodplain easement, the Court found it significant that the city required a public easement, rather than a private greenway.[91] The city could have simply required that Dolan refrain from building in the floodplain, but instead imposed upon her a public easement.[92] This imposition resulted in her loss of the right to exclude others from her property,[93] a basic and essential property right.[94] The loss of this right had nothing to do with flood control.[95]

On this point, the city asserted that Dolan's right to exclude the public was compromised to begin with because her property is commercial in character and thus open to the public.[96] The Court countered this argument by asserting that, under the dedication requirement, Dolan would still lose the right to control the time and the manner in which the public entered her property.[97] Further, the permanent easement the city sought to impose would not regulate Dolan's right to exclude, but completely eradicate it.[98]

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87. *Id.*
88. *Id.*
89. *Id.* at 2319-20.
90. *Id.* at 2320-22.
91. *Id.* at 2320.
92. *Id.*
93. *Id.*
94. *Id.* (citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).
95. *Id.*
96. *Id.* at 2321.
97. *Id.*
98. *Id.*

Regarding the pedestrian/bicycle pathway, the Court determined that the city had not met its burden of showing that the increase in traffic caused by Dolan's proposed development was reasonably related to the city's requirement that an easement be granted for such a pathway.[99] The fact that the city had made the finding that such an easement could reduce some of the increase in traffic due to the development was not sufficient to demonstrate such a reasonable relationship.[100] This vague statement was not the same as demonstrating that the easement would or was likely to offset the additional traffic caused by the proposed development.[101]

The majority opinion concluded by reiterating that the reduction of flooding hazards and of traffic congestion are admirable goals of land use regulation.[102] Nonetheless, regulatory authorities cannot shortcut the Constitution to achieve these goals.[103]

Two dissenting opinions were filed: the first written by Justice Stevens, with Justices Blackmun and Ginsburg joining,[104] and the second written by Justice Souter.[105] Justice Stevens was critical of the Court's second phase of analysis and the rough proportionality standard it applied.[106] He regarded the rough proportionality test as an unjustified "constitutional hurdle" blocking the way of local regulators,[107] and claimed that it ran counter to the traditional treatment of regulatory takings cases.[108]

Stevens then went on to attack the Court's reliance on the state court precedent in developing its rough proportionality test.[109] He maintained that while these cases did tend to support the Court's reaffirmation of the "essential nexus" test of *Nollan*, the Court was being "inventive" in forming the new rough proportionality requirement from them.[110]

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99. *Id.*
100. *Id.* at 2322.
101. *Id.* at 2322.
102. *Id.*
103. *Id.*
104. *Id.* at 2322.
105. *Id.* at 2330.
106. *Id.* at 2322-23.
107. *Id.* at 2323.
108. *Id.* at 2322.
109. *Id.* at 2323.
110. *Id.*

Also, Stevens doubted that the power to exclude was as important a property right as the majority claimed, especially in cases involving commercial property.[111] He stated that the required conditions in this case were merely the type of business regulations that previously were afforded a "strong presumption of constitutional validity."[112] The majority countered this argument by pointing out that simply calling a government action a "business regulation" could "not immunize it from constitutional challenge on the grounds that it violates a provision of the Bill of Rights."[113]

Stevens felt that the additional step beyond the *Nollan* analysis was unjustified.[114] He believed that the correct analysis in regulatory takings cases should concentrate on the essential nexus, (i.e., the first part of the Court's analysis here in *Dolan*), and reach beyond that only if the developer could show that the exactions were grossly disproportionate to the impact of the proposed development.[115]

Justice Stevens further found fault with the way the Court applied the rough proportionality test to the facts of the case.[116] He believed that the two defects the majority found in the city's case, even under its own rough proportionality standard, were no more than harmless errors.[117]

Additionally, Stevens claimed that the majority actually used a form of substantive due process analysis which had been rejected by earlier Courts.[118] Contrary to the majority view, Stevens believed that *Chicago, B. & Q.R. Co. v. Chicago*[119] did not make the Fifth Amendment applicable to the states; rather, it held that the Due Process Clause of the Fourteenth Amendment required compensation be made to a property owner when his property was taken by a state.[120] Thus, the Fifth Amendment's takings clause was supposed to be a limitation on

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111. *Id.* at 2324-25.
112. *Id.* at 2325.
113. *Id.* at 2320.
114. *Id.* at 2326.
115. *Id.* at 2325.
116. *Id.* at 2326.
117. *Id.* The specific defects Stevens was alluding to were: (1) the majority's conclusion that the record, while supporting a prohibition on Dolan's building on the floodplain, did not support the additional requirement that she donate it to the city, and (2) the city's failure to quantify the offsetting decrease in traffic produced by the pedestrian/bicycle pathway. *Id.*
118. *Id.*
119. 166 U.S. 226 (1897).
120. *Dolan*, 114 S. Ct. at 2326-27.

federal, not state power.[121] Justice Stevens thought that the Court's approach endowed it with a potentially unlimited source of judicial power to strike down state regulations it felt were unfair.[122] The majority flatly disagreed with Stevens' interpretation of *Chicago, B. & Q.R. Co. v. Chicago*.[123]

Justice Souter's dissent, like Stevens', attacked the way the Court applied its analysis to the facts of the case.[124] Souter felt that the city had shown an essential nexus between its requirements and the proposed development.[125] Based on that application, *Nollan* was satisfied. Therefore, the city should not have had to undergo the further burden of the rough proportionality test to show there was no compensable taking.[126]

With its decision in *Dolan*, the Court continues to move in the right direction. Its decisions in *Nollan*, *First English Evangelical Lutheran Church,* and *Lucas*, indicate that the Supreme Court is more willing than it had traditionally been to find that a land use regulation was a taking.[127] *Dolan* takes this trend further, holding that even where the land use regulation serves a legitimate public purpose and meets the essential nexus test of *Nollan*, it may still be a taking if the required exactions are not proportional to the impact of the proposed development.[128]

The Court reaches this point by extending the analysis it used in *Nollan*.[129] The analysis in *Nollan* ended once it was determined that no essential nexus existed between the exactions and the impact of the proposed development.[130] In *Dolan*, the Court, for the first time, analyzed a case in which there was such an essential nexus.[131] This decision makes it clear that the essential nexus requirement, by itself, is not enough to demonstrate that a taking has not occurred.[132] Further, the

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121. *Id.* at 2327 n.7 (citing Pumpelly v. Green Bay Co., 80 U.S. 166 (1871)).
122. *Id.* at 2327.
123. *Id.* at 2316 n.5.
124. *Id.* at 2330.
125. *Id.* at 2330-31.
126. *Id.* at 2331.
127. Berger, *supra* note 42, at 90.
128. *Dolan*, 114 S. Ct. 2319-20.
129. *Id.* at 2317.
130. *Id.* at 2317 (citing *Nollan*, 483 U.S. at 838).
131. *Id.* at 2317.
132. *Id*.

Court developed, based on state cases, a standard of rough proportionality to determine the required relationship within the essential nexus.[133]

Clearly, the Supreme Court's ruling in *Dolan* puts a greater burden on local regulatory authorities. They must now make specific, individualized findings to show that they have met the rough proportionality test.[134] Though, as the Court states, mathematical precision is not required, "conclusory statement[s] that the [exaction] could offset some of the traffic demand generated" will not be enough.[135]

The Court could have, and indeed considered, taking this even further.[136] It could have imposed the "specific and uniquely attributable" test (which it described as being too exacting).[137] This standard would require the regulatory authority to show that its exaction was directly proportional to the impact of the proposed development.[138] Such a standard would likely require precise mathematical calculations.

While this ruling does put a greater burden on local regulatory authorities, it nonetheless helps to protect individual private property owners—the very persons the Fifth Amendment takings clause meant to protect.[139] If the Fifth Amendment is to have any force at all, it must be enforced by the courts to its fullest extent.[140] The Court in *Dolan* pointed out cases where the First and Fourth Amendments had been vigorously enforced by the courts,[141] and asserted that there was no reason why the Fifth Amendment, also part of the Bill of Rights, should not also be so enforced.[142]

Bearing this issue in mind, the Court should have adopted an even tougher standard than its rough proportionality test. Had it adopted the specific and uniquely attributable test,[143] it would have afforded private property owners even greater protection. There is every reason to

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133. *Id.* at 2319.
134. *Id.* at 2320-21.
135. *Id.* at 2322.
136. *Id.* at 2319.
137. *Id.*
138. *Id.* at 2319.
139. *See supra* note 39 and accompanying text.
140. Berger, *supra* note 42, at 90.
141. *Dolan*, 114 S. Ct. at 2320 (citing New York v. Burger, 482 U.S. 691 (1982); Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y., 447 U.S. 557 (1980); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Air Pollution Variance Board of Colo. v. Western Alfalfa Corp., 416 U.S. 861 (1974)).
142. *Id*.
143. *See*, *supra* notes 29-82 and 136.

require a very high burden of proof on a government body when it seeks to deprive a citizen of a constitutional right.[144] Whatever environmental or other regulatory goals a community seeks to achieve, no matter how worthy, it should not attempt to attain such goals through unconstitutional means.[145] The dissent in *Dolan* remarked that as a result of the majority's decision "property owners have surely found a new friend today."[146] As long as local regulatory authorities seek to implement their policies on the backs of those property owners, they will continue to need that friend to protect their Fifth Amendment rights.[147]

The Court in *Dolan v. Tigard* extended the analysis it used in the *Nollan v. California Coastal Comm'n* takings case.[148] It found that a local regulatory authority must show that the exactions it requires of a property owner for issuance of a development permit must be roughly proportional to the impact of the owner's proposed development.[149] The essential nexus test of *Nollan* will no longer be enough to show that a taking has not occurred.[150] With the *Dolan* decision, the Court has justifiably strengthened its enforcement of the Fifth Amendment rights of property owners.

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144. *See Dolan*, 114 S. Ct. at 2322; Berger, *supra* note 42, at 89-91.

145. *Dolan*, 114 S. Ct. at 2322 (citing *Pennsylvania Coal Co*., 260 U.S. at 416); *see generally* Berger, *supra* note 42 (a general discussion of governmental abuse in takings cases).

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

147. Along with the Supreme Court's movement toward greater recognition of individual property rights, movements seeking greater rights for property owners have arisen in recent years. Property rights legislation has been introduced in state legislatures and the Congress. For discussions of these issues, see, e.g.: *Endangered Property Rights*, WALL ST. J., Sept. 12, 1994 at A16; Patrick Sullivan, *Regulatory Takings—the Weak and the Strong*, 1 MO. ENVTL. L. & POL'Y REV. 66 (1993); Marianne Lavelle, *The Property Rights Revolt: Environmentalists Fret as States Pass Reagan-Style Takings Laws*, NAT'L L.J. 1, May 10, 1993 at col. 2.

148. *Dolan*, 114 S. Ct. at 2317.

149. *Id.* at 2319-20.

150. *Id.* at 2317.