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Dolan v. City of Tigard, Takings Law, and the Supreme Court: Throwing the Baby Out with the Floodwater

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Dolan v. City of Tigard, Takings Law, and the Supreme Court: Throwing the Baby Out with the Floodwater

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I. INTRODUCTION

Unmindful of Emerson's warning that a "foolish consistency is the hobgoblin of little minds,"[1] the five justice majority in *Dolan v. City of Tigard*[2] has "stumbled badly"[3] in this important case. The Court imposed a new standard for determining the constitutional validity of land use regulations[4] and, for certain important aspects of the development permit application process, shifted the burden of proof from the landowner to the local permitting agency.[5] In its attempt to draw bright line rules, the Court has instead further muddied the waters of regulatory takings law.

The ramifications of the *Dolan* decision are incalculable. The new requirements will affect taxpayers, property owners, real estate developers, and local governments. In 1993 alone, approximately 1.6 million building permits were issued in the United States.[6] How many of these will be affected by *Dolan* this year? And next? How many building permits that otherwise would have been granted conditional approval will now be denied? How much additional litigation will be engendered as thousands of dialogues between property owners and regulators break down? What additional cost to society will regulatory compliance require? What economic inefficiency has been spawned by the new burden of proof? What further opportunities for malfeasance have been opened? This Article addresses these questions and, in doing so, shows that the new "rough proportionality" standard is erroneous both in its premise and in its application to the facts of *Dolan*.

Part II of this Article describes the factual and procedural background of the case and explores the preliminary constitutional issues. Part III examines the new takings law constitutional doctrine of "rough proportionality." In particular, it exposes the lack of precedent for this standard and the inadequate support provided by

1. RALPH W. EMERSON, *Self-Reliance, in* EMERSON'S ESSAYS: FIRST AND SECOND SERIES 30, 39 (1901).

2. 114 S. Ct. 2309 (1994). Chief Justice Rehnquist delivered the majority opinion, with Justices O'Connor, Scalia, Kennedy and Thomas joining in the decision. Justice Stevens dissented, joined by Justices Blackmun and Ginsburg. Justice Souter filed a separate dissent.

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

4. *See generally id.* at 2319-20 (delineating the majority's "rough proportionality" standard).

5. *See generally id.* at 2320 n.8 (explaining the shift of the burden of proof to government).

6. International Trade Administration, U.S. Dep't of Commerce, CONSTRUCTION REVIEW, Winter 1994, at 15, 23 [hereinafter CONSTRUCTION REVIEW].

the cases on which the majority relies. Part IV analyzes the application of "rough proportionality" to the facts of *Dolan* and determines that the Court's decision constituted an abuse of discretion. Part V takes an in-depth look at the most egregious aspect of the *Dolan* opinion: the practical impact of shifting the evidentiary burden of proof. It concludes that this shift contradicts decades of constitutional jurisprudence and that its practical effects—delay or denial of building permits—will result in staggering economic loss. Part VI evaluates the new doctrine by revisiting key cases and finding that each decision would have a different result had *Dolan*'s standard been applied. Finally, Part VII concludes by suggesting a better path for takings law and arguing that property rights advocates will regret their "victory" in *Dolan*. The author concludes that the only logical explanation for the result in *Dolan* was that the Court's decision was politically and ideologically predetermined.[7]

II. BACKGROUND OF *DOLAN V. CITY OF TIGARD*

A. *Factual and Procedural History*

The City of Tigard is a suburb of Portland, Oregon, with a population of 30,000. In compliance with statutory mandates from the State of Oregon,[8] Tigard developed a comprehensive land use plan to manage urban growth in an orderly fashion. To implement the plan, Tigard codified numerous zoning ordinances and other regulations consistent with that plan in its Community Development Code ("CDC").[9]

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7. Professor Lazarus shares this concern. In writing about Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), he declared:

> At least whenever a so-called "horrible" takings case has reached the Supreme Court, a full airing of the facts has revealed only adversarial smoke. The extreme cases have yet to materialize, which is why the Court in *Lucas* had to base its ruling on a hypothetical fact pattern. A political movement derived from anecdotal accounts of governmental abuses, rather than an actual case or controversy, is the root of the majority ruling in *Lucas*.

Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 1421 (1993) (citation omitted).

8. OR. REV. STAT. §§ 197.010, 197.175, 197.250 (1993) (in 1973, the Oregon legislature enacted a land use management program requiring all cities and counties to adopt comprehensive land use plans consistent with statewide planning goals).

9. *See* TIGARD, OR., COMMUNITY DEV. CODE, §§ 18.66, 18.86 (1983) [hereinafter CDC]. The Community Development Code mandates that property owners in areas zoned Central Business District comply with a 15% open space and landscaping requirement and facilitate city planning goals. Mrs. Dolan's property is located in the Central Business District's "Action Area" Overlay Zone. Tigard enacted the "Action Area" Overlay Zone to authorize the attachment of conditions to developments in order to provide for projected transportation and public facility needs. *Id.* § 18.86.040.

At the time of the case, the petitioner, Mrs. Florence Dolan, owned 1.67 acres of land fronting Main Street in the center of downtown Tigard. She operated a 9,700-square-foot plumbing and electrical supply store on the eastern side of this parcel;[10] the western edge and southwestern corner of the site bordered Fanno Creek,[11] well-known locally for its frequent flooding.[12] The creek was buffered by a one-hundred-year floodplain zoned for zero development.[13] Therefore, according to the Comprehensive Plan, Mrs. Dolan could not develop the portion of her property that lay within the floodplain.[14]

In 1992, Mrs. Dolan applied to the City for permission to build a new store, nearly twice as large as the existing one, on the southwestern portion of the site, and to pave thirty-nine parking spaces.[15] Her plan called for demolishing the existing store in stages as construction of the new store progressed. Later, she planned to build another structure and add more paved parking on the northeastern portion of the site.[16]

The City Planning Commission (Commission), acting in compliance with the CDC,[17] agreed to approve Mrs. Dolan's permit application upon two conditions: (1) that she dedicate to the City the portion of her property that fell within the one-hundred-year floodplain;[18] and (2) that she dedicate to the City a fifteen-foot-

10. Brief for the United States as Amicus Curiae Supporting Respondent at 4, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (No. 93-518) [hereinafter Brief for the United States]. This store is one of several that Mrs. Dolan owns and operates. Brief for Respondent at 1, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (No. 93-518) [hereinafter Brief for Respondent].

11. Brief for the United States, *supra* note 10, at 4.

12. Brief of Amicus Curiae Association of State Floodplain Managers in Support of Respondent at 13-14, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (No. 93-518) [hereinafter Brief of State Floodplain Managers].

13. TIGARD, OR., COMPREHENSIVE PLAN § 3.2 (1974).

14. *See* CDC, *supra* note 9, § 18.84.040.A.7 (requiring Tigard to condition approval of developments within and adjacent to the floodplain with the dedication of an easement in order to further the goal of controlling the flooding problems caused by additional development).

15. Brief for the United States, *supra* note 10, at 4.

16. *Id.*

17. *See* CDC, *supra* note 9, § 18.120.020.A (stating that major modifications are subject to a site development review). The site development review enables Tigard to acquire information on the necessity of additional flood control and traffic reduction measures; it then requires, where appropriate, mitigation of flood and traffic problems. *Id.* §§ 18.84, 18.120.090, 18.120.100, 18.164.030, 18.164.100.

18. *See id.* §§ 18.120.180, 18.120.180.A.8, 18.120.180.A.15 (stating that the City shall require dedication of open land area when development is allowed in and near the hundred-year floodplain and that all drainage plans must be consistent with the master drain-

wide strip of land adjacent to the floodplain.[19] The two dedications comprised approximately ten percent (roughly 7,000 square feet) of Mrs. Dolan's property.[20] The primary purpose of the first dedication was to enable the City, at its own expense, to dig a channel and take other steps to improve the storm drainage system along Fanno Creek.[21] Any portion of the dedicated property within the floodplain not used for this specific purpose was mandated for use as a public greenway.[22] The purpose of the second dedication was to enable the City to construct a portion of a planned pedestrian/bicycle pathway in order to mitigate the effects of additional automobile traffic on the City's already overburdened streets.[23]

Mrs. Dolan requested a variance from the conditions which the Commission imposed on her development permit. However, her request for a variance did not include information on the anticipated impacts of her proposed construction on drainage and traffic, nor did it suggest any alternative conditions.[24] Therefore, the Commission denied the variance based on two of its own findings. First, it found that the increase in impervious surface on Mrs. Dolan's property would cause additional stormwater runoff. When combined with increased runoff from the development of other properties in the drainage basin, this was expected to increase streamflow and exacerbate flooding along Fanno Creek.[25] Second, the Commission anticipated that the expansion of Mrs. Dolan's wholesale and retail operation would generate an additional 435

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age plan). The dedication was to be a permanent easement that would allow Tigard to proceed with mandated flood control measures involving the deepening and widening of Fanno Creek, and to have continuous access to the area for repair and maintenance. Brief for Respondent, *supra* note 10, at 8-10.

19. Brief for the United States, *supra* note 10, at 5.

20. *Id.* However, the Commission allowed Mrs. Dolan to use the dedicated property to fulfill the 15% open space and landscaping obligations of Tigard's zoning code. In addition, the City agreed to landscape and maintain the area bordering the dedicated land and the Dolan property. Mrs. Dolan was required to pay a traffic impact fee and a separate fee in lieu of having to build on-site facilities to prevent surface water runoff. Both of these fees were imposed by the County. *Id.*

21. Brief for Respondent, *supra* note 10, at 10.

22. The Commission denominated all of the dedicated property as "Greenway." Brief for the United States, *supra* note 10, at 5. The Tigard Park Plan requires the utilization of greenways in the Fanno Creek area for the combined purposes of storm drainage, recreation, and transportation. Brief for Respondent, *supra* note 10, at 9.

23. Brief for Respondent, *supra* note 10, at 10-12.

24. *Id.* at 4-6. The CDC requires such information relating to drainage and traffic impacts when making decisions on development approval. *Id.*

25. Brief of State Floodplain Managers, *supra* note 12, at 14.

automobile trips per weekday.[26]

Mrs. Dolan appealed the denial of the variance to the state Land Use Board of Appeals ("LUBA").[27] She claimed that the City's exactions were unrelated to her proposed development and that they therefore constituted an uncompensated taking under the Fifth Amendment to the United States Constitution.[28] LUBA disagreed, holding that the City's findings regarding its flood and traffic concerns established a "reasonable relationship" between Mrs. Dolan's request for a building permit and the City's conditions of approval.[29]

Both the Oregon Court of Appeals[30] and the Oregon Supreme Court[31] affirmed LUBA's decision. The Oregon Supreme Court based its decision on its interpretation of *Nollan v. California Coastal Commission*:[32] that "an exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve."[33] The Oregon Supreme Court determined that Tigard's conditions had an essential connection to the impact of the proposed development. Therefore, because the City met the reasonable relationship standard, there was no uncompensated taking.[34] Mrs. Dolan then appealed to the Supreme Court, which granted certiorari to resolve any inconsistency between its decision in *Nollan* and the Oregon Supreme Court's decision in *Dolan*.

B. *Preliminary Constitutional Issues*

On June 24, 1994, the Supreme Court decided *Dolan v. City of Tigard*,[35] overruling the Oregon Supreme Court and creating a new test for determining the constitutional validity of land use development exactions. However, before formulating the new requirement, the Court addressed some preliminary constitutional issues

26. Brief for the United States, *supra* note 10, at 6.

27. OR. REV. STAT. § 197.825(1) (1993) (charging the Land Use Board of Appeals with the initial review of local government land use decisions).

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

29. OR. REV. STAT. § 197.829 (1993) (establishing the criteria for analysis of local governments' comprehensive plans and land use regulations by the Land Use Board of Appeals); Parks v. Watson, 716 F.2d 646 (9th Cir. 1983) (establishing the "reasonable relationship" test in Oregon).

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

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

32. 483 U.S. 825 (1987).

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

34. *Id.*

35. 114 S. Ct. 2309, 2315-16 (1994).

in order to establish the foundation and justification for its new rule. These issues included whether the Takings Clause is the appropriate vehicle for examining development exactions; whether *Dolan* is distinguishable from other land use cases; and whether the doctrine of unconstitutional conditions should apply.

1. *The Takings Clause Versus Substantive Due Process.*

The threshold constitutional question the Court had to settle was whether this case was governed by the Takings Clause or by the substantive due process guarantee. Chief Justice Rehnquist, writing for the majority, asserted that the Takings Clause of the Fifth Amendment applies by way of the Fourteenth Amendment to all of the states. He cited *Chicago, Baltimore & Quincy Railroad Co. v. Chicago*[36] as authority for this proposition, but several other recent takings cases also furnish strong support for this position.[37] However, indicative of the deep division among members of the Court, Justice Stevens in his dissent challenged even this re-plowing of old ground, stating that *Chicago, B & Q* made "no mention of either the Takings Clause or the Fifth Amendment."[38] Rather, Justice Stevens suggested, *Chicago, B & Q* was grounded in substantive due process.[39] Although he conceded that "[l]ater cases have interpreted the Fourteenth Amendment's substantive protection against uncompensated deprivations of private property by the States as though it incorporated the text of the Fifth Amendment's Takings Clause,"[40] he argued that "[t]he so-called 'regulatory takings' doctrine that the Holmes dictum kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified."[41] Justice Stevens concluded that "[b]esides having

36. 166 U.S. 226, 236 (1897) ("The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation.").

37. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 829, 834, 841 (1987) (holding that imposition of a condition on a building permit that had no essential nexus to the legitimate governmental objective put forth as the reason for the condition violates the Fifth Amendment); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 481 n.10 (1987) (stating that the Fifth Amendment applies to the states through the Fourteenth Amendment); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978) (stating that the Fifth Amendment is made applicable to the states through the Fourteenth Amendment).

38. *Dolan*, 114 S. Ct. at 2327 (Stevens, J., dissenting).

39. *Id.* at 2327.

40. *Id.*

41. *Id.* The "Holmes dictum" to which Justice Stevens referred appears in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), in which Justice Holmes stated, "The

similar ancestry, both doctrines are potentially open-ended sources of judicial power to invalidate state economic regulations."[42] Justice Stevens apparently feared that the majority's reliance on the Takings Clause concealed a wolf in sheep's clothing—that the majority's interpretation of the Takings Clause represented a disguised return to the *Lochner* era.

During the *Lochner* era, the courts, in deciding challenges to state regulations, used the flexible substantive due process doctrine to apply heightened scrutiny to economic legislation, thus holding many exercises of state police power unconstitutional.[43] The Court later invalidated this unlimited source of judicial power, and the Takings Clause emerged as the governing doctrine in the context of regulatory takings.

The Takings Clause is the more specific constitutional commandment, and it allows for more flexible remedies. Professor McCarthy, in analyzing the two doctrines, advocates use of the Takings Clause:

> While deference to the legislature may not be the hallmark of developing takings jurisprudence, it may be at root the raison d'être for invoking the Takings Clause. But as we look at the matter today, it is not the only reason. The Court may be in this area, as in so many other matters, the stabilizer of the pendulum which historically swings from near-extreme to near-extreme. When government land regulation was minimal and largely undebatable, the Court was unlikely to uphold the landowner's challenge. When, as the pendulum has swung, government regulation has become dramatically more intrusive on the choices available to a property owner—indeed, when it has combined with the growing impact of private government—the Court has become more sensitive to the individual's need for counterweight. For both of

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"; *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 484 (1987) (explaining why this statement is dicta). Lochner v. New York, 198 U.S. 45 (1905) (invalidating an economic regulation on substantive due process grounds), is generally recognized as the high point in the Court's use of the substantive due process doctrine to check the states' ability to regulate economic activity.

42. *Dolan*, 114 S. Ct. at 2327 (Stevens, J., dissenting).

43. *See, e.g.*, Nectow v. City of Cambridge, 277 U.S. 183 (1928) (holding that a residential zoning ordinance inhibiting private land use for business and industrial development violates the Due Process Clause of the Fourteenth Amendment if the health, safety, convenience, or general welfare of the part of the city affected will not be promoted); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (establishing Holmes' severe economic loss test: the more drastic the diminution in value of the property, the more likely a taking is to be found). *But see* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding the constitutionality of zoning to prevent harmful uses).

these purposes, the subtleties of due process may not work.[44] Additionally, recent cases show that the use of substantive due process is disfavored and the Takings Clause is preferred as the appropriate constitutional doctrine for testing the validity of land use regulations.[45] The danger, however, lies in the content of the test used under the Takings Clause; that is, what level of scrutiny applies to government actions in the land use regulatory context. In *Dolan*, the majority inappropriately used a form of heightened scrutiny.

2. *Distinguishing* Dolan *from Cases Involving Land Use Regulations of General Applicability.*

Before moving to the justifications for applying a kind of strict scrutiny under the Takings Clause, the Court had to distinguish *Dolan* from a long line of cases involving zoning and other land use regulations of general applicability which applied a lower constitutional standard of review.[46] The majority gave two reasons why the government action at issue in *Dolan* should be treated differently: first, the City's decision was adjudicative rather than legislative; and second, the conditions imposed on the permit included the granting of easements, which the Court viewed as more intrusive than

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44. David J. McCarthy Jr., *Ruminations On Regulation and the Takings Clause, in* HOME RULE AND CIVIL SOCIETY 27, 73 (The Local Public Entity Study Organization No. 5, 1994) (citations omitted).

45. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (holding that a state law which denies a property owner all "economically viable use of his land" violates the Takings Clause); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (holding that state exercise of police power in land use regulation must further an appropriate governmental purpose to avoid violating the Takings Clause); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (holding that a state regulation requiring the preservation of the "support estate" of certain properties was not a violation of the Takings Clause); Agins v. City of Tiburon, 447 U.S. 255 (1980) (holding that a city zoning ordinance substantially advancing legitimate government goals without depriving the owner of all of the property's economic benefit does not violate the Takings Clause).

46. *See generally* Yee v. City of Escondido, 112 S. Ct. 1522 (1992) (finding no taking because the regulation did not constitute a permanent physical occupation of property); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (upholding state statute requiring 50% of coal beneath certain structures be kept in place to provide surface support because diminution of value of land was insufficient to constitute a taking); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (upholding a city action preventing electric company from using its property for a nuclear reactor site through rezoning and open space requirements since the landowner was not deprived of all beneficial use); Agins v. City of Tiburon, 447 U.S. 255 (1980) (upholding a city zoning ordinance which created density restrictions in residential areas since it did not deprive owner of all economic benefit); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (sustaining a zoning ordinance that created residential districts and business districts notwithstanding 75% reduction in land value).

mere limitations on use. As a result, the Court argued that the City's action should be subject to greater constitutional examination. However, both of these lines of reasoning are defective.

First, the Court argued that the decision whether to grant a building permit is an administrative one, and thus should be regarded as an "adjudicative decision,"[47] subject to greater scrutiny than legislative acts of general applicability. The Court reasoned that a building permit applies to a specific piece of property and therefore should be subject to a stricter test.[48] Zoning ordinances, on the other hand, are legislative acts of general applicability that should rightfully be afforded deference by the courts.[49]

This argument fails because in reality there are numerous cases involving ordinances of general applicability that by their terms require dedications in connection with approval of subdivision plats. Often, these decisions are indistinguishable in legal principle from cases involving building permit applications.[50] For example, there is no difference to the individual property owner between a regulation imposed by ordinance that exacts subdivision land for schools and parks, and a regulation imposed by building officials pursuant to land use legislation that exacts property for flood control. In fact, in this author's experience, the process of working with local officials to obtain a building permit has a salutary flexibility that zoning ordinances generally do not.

The Court's second argument for treating *Dolan* differently than other land use regulation cases was that the conditions required a dedication rather than a mere limitation on use. In the Court's view, this required a closer look at the City's actions.[51] The fallacy of this argument is that limitations on use can actually have a far greater impact on the property owner than permanent easements. For example, consider a comparison of *Dolan* with *Lucas v. South Carolina Coastal Council*.[52] In *Dolan*, although the landowner was required to dedicate ten percent of her property to the City, most of that was in the floodplain. In addition, the City promised

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

48. *Id.*

49. *Id.*

50. *See, e.g.*, Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) (upholding a general ordinance requiring either a dedication of seven percent of proposed subdivision land to the city or an equivalent cash payment to be used for flood control and/or park and recreation facilities for the benefit of city residents).

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

52. 112 S. Ct. 2886 (1992).

to improve the storm drainage system, an act that undoubtedly would benefit Mrs. Dolan. (Indeed, Mrs. Dolan never argued that she suffered any reduction in the value of her property.) In *Lucas*, however, the contested regulation imposed a limitation on use that essentially prohibited the landowner from building at all on his environmentally fragile beachfront property. This severe limitation on his use of the property resulted in its total diminution in value.[53] This comparison suggests that no greater constitutional protection is needed just because a conditional requirement on a building permit involves a dedication of land as opposed to a limitation on its use. Indeed, regulations limiting land uses can be far more draconian in their impact.[54]

3. *Unconstitutional Conditions.*

The Court faltered next by relying on and misapplying "the well-settled doctrine of 'unconstitutional conditions,' "[55] which posits that the government cannot impose conditions on benefits it confers in such a way as to infringe upon rights protected by the Constitution. This principle arose from two First Amendment cases,[56] but has been extrapolated to apply to Fifth Amendment takings cases as well.[57]

In applying the unconstitutional conditions doctrine in *Dolan*,

53. *Id.* at 2890.

54. The author is not suggesting that an actual physical taking should not require compensation. *See generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 (1982) (using the "permanent, physical invasion" test to find that even a small television cable installed against a building owner's wishes is a compensable taking); United States v. Causby, 328 U.S. 256 (1946) (holding that excessive noise and activity of military airfield deprived property owner of beneficial use of his land resulting in an involuntary easement being taken by the government and requiring compensation).

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

56. Perry v. Sindermann, 408 U.S. 593 (1972) (holding that failure to renew a professor's contract may violate the First Amendment if the employer based its decision on the professor's speech activities); Pickering v. Board of Educ. of Twp. High Sch. Dist., 391 U.S. 563 (1968) (holding that a school board may not dismiss a teacher for speaking critically of a school board policy).

57. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). This extrapolation is not without its critics, however. In *Dolan*, Justice Stevens asserted that the "unconstitutional conditions" doctrine is the wrong way to analyze *Dolan* and other takings cases because the analysis of what constitutes conditioning of a benefit in such a way as to "infringe constitutionally protected interests" is different in the free speech context than in the takings context. 114 S. Ct. at 2328 (Stevens, J., dissenting). Moreover, Justice Stevens pointed out that "the 'unconstitutional conditions' doctrine has . . . long suffered from notoriously inconsistent application; it has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question." *Id.* at 2328 n.12.

Rehnquist explained that one may not be required to surrender a constitutional right—in this instance the right to just compensation guaranteed by the Fifth Amendment—in return for "a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit."[58] Rehnquist's pronouncement invoked the doctrine of *Nollan v. California Coastal Comm'n*; however, *Nollan* did not focus on the discretionary benefit itself, but rather on the *impact* of the discretionary benefit.[59] In *Nollan*, the issue was not that the discretionary benefit—permission to build a new and larger house on the beach—was unrelated to the exaction of the coastline easement. Rather, the problem in *Nollan* was that the *impact* of the discretionary benefit—blocking the view to the beach and to the ocean—was unconnected to the permit condition. Similarly, in *Dolan* the discretionary benefit—permission to build a new and much larger store—has no logical relationship to the dedication of the easements for flood control and a bike path. However, the *impacts* of the discretionary benefit in *Dolan*—exacerbated flood problems and greater traffic congestion—are meticulously related to the permit condition. Therefore, Rehnquist's use of the doctrine of "unconstitutional conditions" is inapposite.

The Court then applied the *Nollan* "nexus test"[60] to the City's exactions. Very quickly and quite properly, the Court concluded that there was no nexus problem in *Dolan*.[61] Enhancing flood control and reducing traffic congestion are obviously, logically, and directly connected to the dedications required by the City. Preventing construction and building a drainage system in the floodplain are closely related to reducing flooding along Fanno Creek. Similarly, facilitating alternative modes of transportation is an essential element of mitigating traffic congestion.[62]

Mrs. Dolan's primary contention was that since the City failed

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

59. *Nollan*, 483 U.S. at 838.

60. The "nexus test" states that a condition on a building permit must have an essential nexus to the legitimate governmental objective put forth as justification for the condition. *Id.* at 841.

61. *Dolan*, 114 S. Ct. at 2317-18.

62. *See* OR. ADMIN. R. 660-15-000(12) (1983) ("A transportation plan shall (1) consider all modes of transportation including mass transit, air, water, pipeline, rail, highway, bicycle and pedestrian . . . ."); TIGARD, OR., COMPREHENSIVE PLAN [I-221] II (5) ("Bicycle and pedestrian pathway systems will result in some reduction of automobile trips within the community. These modes of travel could replace short vehicle trips for shopping purposes.").

to identify any "special quantifiable burdens"[63] caused by her new construction, or any "special benefits"[64] received by her, the required exactions were unjustified. The City's public use justification, which easily satisfied the *Nollan* nexus requirement, should have disposed of Mrs. Dolan's arguments. Instead, the Court elected to fashion a new constitutional doctrine for determining whether a taking has occurred. This new standard goes far beyond the "essential nexus" test articulated in *Nollan*.

III. ROUGH PROPORTIONALITY: THE NEW CONSTITUTIONAL STANDARD FOR REGULATORY TAKINGS

The new regulatory takings standard announced in *Dolan* requires that in addition to showing an essential nexus between the permit conditions and "legitimate state interests,"[65] the City's findings concerning the impacts of the project must be constitutionally adequate to justify the proposed conditions.[66] Relying entirely on state court decisions,[67] the *Dolan* majority chose "rough proportionality," a vague, ambiguous, and unquantifiable term, as the standard against which to measure constitutional adequacy. Rough proportionality represents a groundbreaking and disturbing development in Fifth Amendment takings jurisprudence. The new doctrine departs from established precedent and fails to resolve several critical questions.

The Court determined that a new standard was necessary to address the question, left open in *Nollan*, of "the required *degree of*

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

64. *Id.*

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

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

67. *See* Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976) (holding that a statute authorizing municipalities to require subdividers to dedicate land or pay equivalent fees for parks and playgrounds was a valid delegation of powers and within the scope of enabling legislation); Simpson v. City of North Platte, 292 N.W.2d 297 (Neb. 1980) (holding that a city ordinance requiring dedication of 40-foot right-of-way to be used at some indefinite time in the future was "land-banking" and violated the state constitution because there was no reasonable nexus with the property owner's projected construction); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984) (holding that the city had the power to enact and enforce an ordinance requiring either a park land dedication or a fee in lieu as a condition of approval of subdivision plat); Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) (upholding an ordinance requiring dedication of seven percent of proposed subdivision land to the city or payment of the equivalent of that value in cash to be used for flood control and/or park and recreation facilities for the benefit of the city's citizens); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965) (holding that an ordinance requiring dedication of land for school, park, or recreational sites as a condition of approval of subdivision plat was a reasonable exercise of the police power).

connection between the exactions and the projected impact of the proposed development."[68] After reviewing the City's findings regarding Mrs. Dolan's proposed development, the majority turned to "representative" state court decisions, claiming that "state courts have been dealing with this question a good deal longer than we have."[69] The state courts, however, disagreed on the appropriate standard, and were split among three different tests: (1) the rational nexus test; (2) the specific and uniquely attributable test; and (3) the reasonable relationship test. So the Court reviewed each of them. It found the rational nexus requirement of "very generalized statements as to the necessary connection between the required dedication and the proposed development . . . too lax" for the Fifth Amendment.[70] On the other hand, the Court found the "specific and uniquely attributable" test too exacting.[71] Instead, the Court adopted the intermediate "reasonable relationship" test used by the majority of states.[72] However, the Court replaced the term "reasonable relationship" with "rough proportionality," purportedly to clarify that the new test requires more than minimal scrutiny,[73] but in reality extending the new standard far beyond its origin.

In describing "rough proportionality," Rehnquist stated, "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 proposed development."[74] Had the Chief Justice left out two words—*and extent*—from his formulation, he would not have changed existing takings law; requiring a city's exaction to be *related in nature* to the construction's anticipated impact is merely a restatement of the *Nollan* essential nexus test. Distilled to its essence, the new constitutional requirement of "rough proportionality" becomes an exercise in quantifying the extent or degree of the connection between the imposed condition and the anticipated impact of the project.

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68. *Dolan*, 114 S. Ct. at 2317 (emphasis added).

69. *Id.* at 2318.

70. *Id.* at 2318-19.

71. *Id.* The "specifically and uniquely attributable" test was set forth in Pioneer Trust & Sav. Bank v. Village of Mt. Prospect, 176 N.E.2d 799, 802 (Ill. 1961) (stating that an exaction is permissible if the burden on the subdivider is specifically and uniquely attributable to his activity).

72. *Id.; see also supra* note 67.

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

74. *Id.*

However, the Court left several questions unanswered. For instance, it is unclear whether *any* presumption of constitutional validity attaches to legislative or administrative actions taken pursuant to laws validly enacted and executed with proper procedures,[75] even those that, like the exactions in *Dolan, have already passed the Nollan nexus test.* It is also unclear whether or not any *benefit* to the property owner should be taken into account in deciding if the action passes the new quantitative test. In *Dolan,* the Court focused solely on the loss of Mrs. Dolan's right to exclude the public from the dedicated property. The majority made no mention of the potential benefits to Mrs. Dolan: better flood control, reduced traffic congestion, and satisfaction of open space and landscaping requirements. Furthermore, in defining what constitutes distinct property for takings law purposes, the Court appeared to retreat from its earlier decisions in *Penn Central Transportation Co. v. City of New York,*[76] *Keystone Bituminous Coal Ass'n v. DeBenedictis,*[77] *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California,*[78] and *Andrus v. Allard.*[79] These cases established a ratio for determining whether a regulation constituted a taking in which the effect of the exaction on the landowner is the numerator and the landowner's total prop-

75. The City's actions in *Dolan* were taken pursuant to the CDC and followed all proper procedures. The City allows an applicant for a building permit to seek a variance in order "to gain changes to otherwise mandatory Code requirements" under CDC § 18.134. Brief for Respondent, *supra* note 10, at 14. In general, the variance device is "intended to provide for a site-specific, case-by-case analysis of special circumstances [surrounding a building plan or development] and to allow for modification of the standards to address those circumstances." *Id.* The City Council determined that Mrs. Dolan had failed to show that her variance request satisfied the required criteria for approval of her application. It is notable that Mrs. Dolan failed to allege any procedural error or irregularities as to the City Council's decision regarding her variance request. *Id.*

76. 438 U.S. 104 (1978) (holding that although owners were unable to develop the air space above the terminal, the value of the *entire* parcel, not just the air space, must be considered in determining whether a compensable taking has occurred).

77. 480 U.S. 470, 497 (1987) ("[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property . . . .").

78. 113 S. Ct. 2264 (1993) (stating that the relevant question is whether the part taken is the entire parcel in question or only a portion of it, and rejecting the takings claim even though the part of the property that was taken was taken completely, leaving no beneficial use for that portion).

79. 444 U.S. 51 (1979) (upholding the denial of the right to sell protected eagle parts obtained before the Bald Eagle Protection Act was enacted, because the bundle of rights must be viewed in its entirety and this regulation merely destroyed one strand in that bundle).

erty is the denominator.[80]

Dolan fallaciously replaces the "total property" component of the ratio with that portion of the property actually taken. Thus, under *Dolan,* a landowner will always argue that his or her entire property interest was taken without any reference to the portion of the property that remains unaffected by the regulation. This calculated break from precedent means that the *Dolan* majority would always find a taking when the regulation removes all economic value from any portion of the property.

In addition to redefining what comprises an owner's property for takings law purposes, the Court also gave no guidelines for measuring the quantitative aspect of the rough proportionality standard. It is clear that if a regulation deprives an owner of all economic benefit, just compensation must be paid.[81] However, after *Dolan,* it would seem that a building permit condition requiring a dedication for public use amounting to ten percent of a landowner's property could constitute an uncompensated taking. Ideologically driven, the Court arrived at this position irrespective of the real economic impact on the landowner;[82] irrespective of any benefits the landowner received in exchange for the condition; irrespective of the commercial nature of the undertaking, in which, unlike in *Nollan,* privacy is not so vital and public access is; and irrespective of the government's authority to deny a permit altogether rather than grant it with conditions.

In his dissent, Justice Stevens attacked the "doctrinal underpinnings"[83] of the majority's decision because the state cases relied on

80. *Cf.* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165, 1190-93 (1967). Michelman analyzes the impact of land use regulation on the diminution in value of property rights through a fractional expression. The loss in value of the affected property comprises the numerator and the value of the total rights that are invaded by regulation is the denominator.

81. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (holding that a state law prohibiting construction on a barrier island was a regulatory taking that denied the property owner all "economically viable use of his land" and required just compensation); Agins v. City of Tiburon, 447 U.S. 255 (1980) (holding that city zoning ordinances creating density restrictions in residential areas did not deprive owner of all economic benefit of the land and therefore did not constitute a taking); *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (holding that the city's landmark preservation statute, which prohibited Grand Central Terminal from building upward due to its status as a "landmark site," did not require just compensation because courts must focus on the interference of rights in the *entire* parcel).

82. Mrs. Dolan did not argue that the original dedication would have had a negative impact on the value of her property.

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

by the Court "either fail to support or decidedly undermine the Court's conclusions in key respects."[84] Unlike *Dolan*, these state cases all take into account gains, not just losses, to the property owner from the permit conditions. Additionally, rather than focusing on one portion of the property, the state cases look at the entire transaction and emphasize the relationship between the burden of the condition and the entire parcel. Moreover, the Supreme Court itself made it clear in *Keystone* that an exact correlation between burdens and benefits is not necessary:

> The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.[85]

The *Dolan* majority offered no more by way of justification for its new constitutional doctrine. Critical analysis reveals that the Court used certain state court cases as the constitutional foundation of its new requirement;[86] yet these cases do not come close to

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84. *Id.* at 2323.

85. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.21 (1987).

86. *See supra* note 67 and accompanying text. Interestingly, Rehnquist explicitly rejected the "specifically and uniquely attributable" test as primary support for the *Dolan* decision, stating that "[w]e think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm." *Dolan*, 114 S. Ct. at 2319. However, upon close examination, the five cases that Rehnquist cited as espousing the "specifically and uniquely attributable" standard are the strongest state cases that could have supported Rehnquist's new doctrine. Yet the following analysis shows that even these cases do not support "rough proportionality."

In Pioneer Trust & Sav. Bank v. Village of Mt. Prospect, 176 N.E.2d 799 (Ill. 1961), in which an ordinance required the dedication of at least one acre for each 60 building sites, the court declared that the exactions must be "specifically and uniquely attributable" to the need created by the proposed subdivision. But nowhere in the decision did the Illinois court say that the burden of proof should be on the village. The case was decided on an agreed set of facts showing only that the community's school facilities were near capacity. *Id.* However, Rehnquist, in *Dolan*, read this decision to require the local government to "demonstrate that its exaction is directly proportional to the specifically created need." *Dolan*, 114 S. Ct at 2319.

In J.E.D. Assoc., Inc. v. Town of Atkinson, 432 A.2d 12 (N.H. 1981), in which the court invalidated a blanket requirement of 7.5% of the subdivider's land for playground or other town use, there was no suggestion that it was the local government's burden to prove that the conditions attached to approval of the subdivision application were directly related to a specific need created by the proposed development.

In Divan Builders, Inc. v. Planning Bd. of Wayne, 334 A.2d 30 (N.J. 1975), which concerned off-site improvements on land not owned by the subdivider, the New Jersey Supreme Court properly required the planning agency to estimate, "with the aid of the municipal engineer and such other persons having pertinent information or expertise (a)

requiring what the Court now requires in *Dolan*. Moreover, at the heart of the new doctrine of "rough proportionality" is the need to quantify the extent of the connection between the imposed condition and the impact of the development; this quantification, as we

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the cost of the [off-site] improvement and (b) the amount by which all properties to be serviced thereby, including the subdivision property, will be specially benefited therefrom." *Id.* at 40. Thus, in order to determine how to finance the off-site improvement, *Divan* articulated the "fair share" method, based on the benefits the subdivider and various parties receive from the off-site improvement. *Id.* at 41. With respect to off-site improvements, the developer or subdivider may have no choice but to rely on information and facts obtainable only by the local government, especially where, as in most cases, the local government itself will be doing the construction. As a practical matter, putting this burden on local government is proper. But this is a far cry from requiring local government to justify conditions on building permits when the property owner is doing the construction on his or her own land. Therefore, Rehnquist's citation to this case as supporting the "specifically and uniquely attributable" standard is dubious.

In McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370 (Ohio 1971), the Ohio Court of Appeals reversed the denial of a subdivision application. The denial was predicated upon the city's demand for a land dedication in order to widen a road at the south end of appellant's property, while the subdivision was at the north end, some 700 feet away, and fronting on another street. The Ohio court quite properly said, "There is no logical basis . . . for this distortion of the meaning of the word 'subdivision.' " *Id.* at 373. Thus, the highway widening requirement was held to be "completely inapplicable and unrelated" to appellants' subdivision. *Id.* The court did say that a city may require a developer to "provide streets that are necessitated by the activity within the subdivision and . . . to assume any costs which are specifically and uniquely attributable to his activities." *Id.* at 374. However, this statement follows an explicit requirement that the subdivider must prove by a preponderance of the evidence that he or she has complied with all applicable state and city regulations governing submission to the Plan Commission. *Id.* Again, the facts of this case and the application of the law do not provide precedent for "rough proportionality." Instead, the facts merely demonstrate that the conditions failed to meet the *Nollan* nexus test.

In Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910 (R.I. 1970), the Rhode Island Supreme Court invalidated the city's requirement that at least seven percent of the land to be divided must be donated to the city for recreation purposes as a condition to final plat approval. However, it recognized that such voluntary donations have universally been upheld as a valid exercise by the legislature of its police power, and stated that the "natural result of subdivision . . . is an increased need in the community for recreation areas." *Id.* at 913.

The Rhode Island court also acknowledged that state supreme courts are divided as to how the donation requirement should be effectuated. For example, it noted that *Pioneer* held that the subdivider "may be required to donate only such portion of the land to be divided as may be needed for such public uses as will result from the activities specifically and uniquely attributable to him." *Id.* (citations omitted). On the other hand, most of the other state supreme court decisions have upheld the legislatively imposed percentage donation, and the burden then rests on the developer to prove that the imposed percentage is unreasonable. *Id.* (internal citation omitted). The Rhode Island court opted for the specifically and uniquely attributable standard, believing that the fixed percentage requirement would lead to inequities.

In summary, although the best possible support for "rough proportionality" comes from the logically related "specifically and uniquely attributable" test, *Divan* and *McKain* offer no real support for "rough proportionality," and *Pioneer*, *J.E.D.*, and *Ansuini* contradict *Dolan*'s shift in the burden of proof.

will see, is nothing more than prediction based on estimate. Furthermore, the Court eroded the established constitutional presumption of legislative validity. In addition, the Court refuted the very state cases on which it relied by disregarding the benefits derived by the property owner in exchange. Finally, the Court so narrowed the concept in the takings context of what constitutes a separate segment of property as to render the inquiry absurd. Altogether, the result is to invite potentially endless litigation in the future, much of which will be trivial. Tennyson's "silvery gossamers"[87] have greater weight than does "rough proportionality."

IV. THE APPLICATION OF ROUGH PROPORTIONALITY TO THE FACTS OF *DOLAN*

If the establishment of the "rough proportionality" standard is a misjudgment, its application to the facts of *Dolan* would have constituted clear reversible error had it been a lower court decision. The new test shifts the burden of proof to local officials to justify quantitatively the conditions they impose on building permits. In this case, both the floodplain easement and the pedestrian/bicycle path easement were casualties of a misguided attempt by the majority to apply bright line rules to circumstances better analyzed by balancing factors on a case-by-case basis.

A. *The Floodplain Easement*

The Chief Justice first addressed the floodplain easement exaction to determine whether the findings relied on by the City met the standard of "rough proportionality." Rehnquist conceded that Mrs. Dolan's proposed construction would increase the quantity and rate of stormwater run-off into Fanno Creek and that the City had the authority to prevent her from building in the floodplain.[88] He then added, "But the city demanded more—it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its Greenway system."[89] At this point in the decision, the Court throws the baby out with the floodwater. The City's purpose was not to prevent Mrs. Dolan from building in the floodplain—she never had such a right.[90] Instead,

87. ALFRED LORD TENNYSON, *In Memoriam A.H.H.*, *in* SELECTED POETRY OF TENNYSON 147, 155 (Douglas Bush ed., 1951).

88. Dolan v. City of Tigard, 114 S. Ct. 2309, 2320 (1994).

89. *Id.*

90. The land found in the 100-year floodplain is defined as "sensitive land." CDC,

the City wanted a dedicated easement so that it could take appropriate steps to improve the storm drainage system along Fanno Creek.[91] The City needed the easement so that it could later build a channel at its own expense. The fact that the Court, in such an important case, could fail to address the City's primary purpose for its exaction lends credence to the conclusion that the result was predetermined.

Assuming *arguendo* that the City did not make its case for dedication of the floodplain and the exaction was approved, it would still be, in Justice Stevens' words, "harmless error."[92] Since Mrs. Dolan could not use that portion of her land for construction in any event, she would have benefited from (1) using that land to satisfy the zoning code's fifteen percent open space requirement; (2) not having to pay taxes and insurance on that part of her land; and (3) not having to build, at her own expense, an on-site stormwater run-off catch basin or other facility to prevent surface water from flowing into the creek. In return, she would have given

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supra note 9, § 18.84.010.A ("Sensitive lands are lands potentially unsuitable for development because of their location within the 100-year floodplain, within natural drainage-way, within a wetland area, on steep slopes, or on unstable ground."). The permitted uses on sensitive lands are as follows:

> A. Except as provided by Subsection 18.84.015.B, the following uses are outright permitted uses within sensitive land areas:
>
> 1. Accessory uses such as lawns, gardens, or play areas, except in wetlands;
>
> 2. Agricultural uses conducted without locating a structure within the sensitive land area, except in wetlands;
>
> 3. Community recreation uses such as bicycle and pedestrian paths or athletic fields or parks, excluding structures, except in wetlands;
>
> 4. Public and private conservation areas for water, soil, open space, forest, and wildlife resources;
>
> 5. Removal of poison oak, tansy ragwort, blackberry, or other noxious vegetation;
>
> 6. Maintenance of floodway excluding rechanneling; and
>
> 7. Fences, except in the floodway area.

Id., § 18.84.015.A. "[A]ll other uses are prohibited on sensitive land areas." *Id.* § 18.84.015.E.

91. As the respondent noted in its brief:

> The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage would add to the need for public management of the Fanno Creek floodplain, the Commission finds that the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site.

Brief for Respondent, *supra* note 10, at 14 (citation omitted).

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

up the right to control the time and manner of excluding the public from only ten percent of her property. Meanwhile, she was doing everything in her power to attract the public to the other ninety percent of her property. In short, the cost to Mrs. Dolan was minimal relative to the benefits she received; surely this should satisfy the requirement of rough proportionality. As Justice Holmes aptly stated, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change . . . ."[93]

For the majority, the fatal defect arose in the City's stated purpose of using Mrs. Dolan's property along Fanno Creek for a greenway. As Rehnquist observed, "The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control."[94] Of course the City never said that: there is no logical connection between a public greenway and flood control. But his observation raises a nexus question that could have been decided easily under *Nollan*'s guidelines without introducing a new constitutional doctrine. On the merits, the City made it abundantly clear that the greenway purpose was incidental to the purpose of flood control.[95] Is the Court saying that every stated purpose for conditioned approval of a building permit has to satisfy the standard of rough proportionality? Should it not be quite enough that the City's primary purpose meets the requirement? In his dissent, Justice Souter argued that the incidental recreational use should "stand or fall with the bicycle path."[96]

B. *The Pedestrian/Bicycle Pathway*

The Court also misapplied its new constitutional doctrine to the pedestrian/bicycle pathway. The City estimated that Mrs. Dolan's new building would add 435 automobile trips per day to an already

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

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

95. Brief for Respondent, *supra* note 10, at 37-38. The City's brief states:

> Contrary to Petitioner's intimations, the City's findings make clear that the exaction requirement primarily addresses flooding problems in Fanno Creek. Under the City's plans, the greenspace and park benefits linked to the dedication are secondary to the flood control purposes motivating the condition. The easement dedication is necessary to address flooding concerns in the first instance. It is only upon the creation of such an easement dedicated to flood control that the City's park plans allows [sic] for joint recreational use, subordinating that use to flood control concerns.

Id. at 38 (footnotes and citations omitted).

96. *Dolan*, 114 S. Ct. at 2330 (Souter, J., dissenting).

heavily congested downtown.[97] If that number appeared high, Mrs. Dolan should have done her own traffic study and presented her own evidence. However, the Court's problem with the adequacy of this finding was that the City *only* said that the bicycle path, by providing an alternate mode of transportation, " '*could* offset some of the traffic demand.' "[98] Rehnquist concluded this point by stating, "No 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 beyond the conclusory statement that it could offset some of the traffic demand generated."[99] To which Stevens replied, "The Court's rejection of the bike path condition amounts to nothing more than a play on words";[100] and Souter added, "[T]he City loses based on one word ('could' instead of 'would')."[101]

And so the Takings Clause of the Fifth Amendment to the United States Constitution comes down to this: if the City had predicted how many of the projected 435 additional automobile trips would be reduced by cyclists and pedestrians using the new path, the imposed condition would have satisfied the Constitution. However, it is axiomatic in land use planning that alternative modes of transportation *will* reduce automobile traffic, and the Comprehensive Plan, pursuant to which the City was acting, so stated.[102] What would the Court have considered "roughly proportional," a reduction of ten automobile trips per day? Twenty? Has our Constitution really been reduced to this?

After *Dolan*, the Court requires predictions based on estimates. However, as Justice Stevens pointed out, the Court should not "micro-manage" the City's affairs.[103] In *Dolan*, the Court showed a complete lack of deference to a duly elected legislative body carrying out validly enacted laws in scrupulous adherence to proper procedures. Given the five "conservative" justices who comprised the *Dolan* majority, this rather extreme example of judicial activism is ironic, to say the least.

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97. *Dolan*, 114 S. Ct. at 2321 n.9 ("The city uses a weekday average trip rate of 53.21 trips per 1000 square feet. Additional Trips Generated = 53.21 × (17,600-9720).").

98. *Id.* at 2321-22 (emphasis added).

99. *Id.* at 2322.

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

101. *Id.* at 2331 (Souter, J., dissenting).

102. *See supra* note 62.

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

V. THE PRACTICAL IMPACT OF *DOLAN*'S SHIFT IN THE EVIDENTIARY BURDEN OF PROOF

Dolan's new takings formulation and shift in the evidentiary burden of proof will impose practical hardships on all parties involved in city planning and private building, and will result in massive economic loss.

The negative impact of *Dolan* is best illustrated by a step-by-step analysis of the building process. In almost all situations, the landowner/developer begins by engaging an architect and a civil engineer to conduct a study of the land and to ascertain community zoning and building code requirements.[104] The study first determines how many and what kind of houses or apartments will be allowed in the proposed project. Likewise, in a commercial real estate development, the study identifies the size and type of office building or shopping center permissible under pertinent land use regulations.[105] These architectural and civil engineering studies are unique to each parcel of land. Invariably, the cynosure of these initial studies is their impact analysis.[106] Given the unique character of each parcel of land and each proposed development, as well as the developer's need to ascertain as early as possible the cost of

104. This step is frequently taken prior to acquisition while the land is under option or during a study period that serves as a condition subsequent to the land acquisition contract.

105. The cases in this area fall into two basic factual categories: (1) the subdivision of land, usually for residential purposes, *see, e.g.*, Sederquist v. City of Tiburon, 765 F.2d 756 (9th Cir. 1985) (holding that zoning ordinance may prohibit the best and most beneficial use of the property); and (2) the proffer of a site plan for multi-family or commercial projects, *see, e.g.*, Nasierowski Bros. Inv. Co. v. City of Sterling Hts., 949 F.2d 890 (6th Cir. 1992) (holding that property owner has a property right in prior zoning classification); Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496 (9th Cir. 1990) (holding that landowner must establish that city's actions in denying building permits was arbitrary and irrational).

106. *Dolan* involved two major impacts, vehicular traffic and surface water runoff. Other typical development effects include pollution of air, water, and soil and increased demand for schools, parks, and recreation areas. *See generally* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (prohibiting construction in wetlands held to be a regulatory taking); Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) (remanding to determine the amount of loss of economic use and value as a result of denial of Clean Water Act permit for limestone mining under wetlands, and whether such loss is significant enough to comprise a regulatory taking); Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1992) (holding that EPA's placement of groundwater monitoring wells on private property, as part of its effort to combat groundwater pollution from an adjacent hazardous waste site, was a taking); South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646 (1st Cir. 1974) (holding that EPA's regional air quality transportation plan imposing a parking space freeze, which eliminated 1,100 parking spaces planned by a corporation, did not constitute a taking).

complying with regulations pertaining to anticipated impacts, it is the landowner who is in the best position to determine the impacts of his or her planned construction.

What purpose is served by shifting the evidentiary burden of proof away from the party who is supposed to know every inch of the land, its character and topography, its load-bearing capacity, its water tables, its quirks and "personality"? What purpose is served by shifting the burden away from the party who is in the best position to know the nature of development impacts and the most efficient methods of mitigating them?

There is a key time in the permitting process in every jurisdiction when the government must decide whether to approve the development, with or without conditions, and after which the city can no longer impose conditions on a new development. In housing projects, the crucial time is either the preliminary or the final plat approval. In other types of real estate developments, the decisive moment is either the preliminary or the final site plan approval. Following such approval, the building permit, which requires compliance with fire, safety, and other construction related matters, should be readily obtainable. The next step, preparation of the plat or site plan and the building permit application, involves the efforts of architects, engineers, contractors, appraisers, lenders, lawyers, accountants, and other professionals. This preparation takes a great deal of time, effort, money, and expertise, so it is necessary for the developer and the city to agree on the project and any conditions before the developer proceeds to this step. The entire impetus of the planned project emanates from the owner; therefore, it is the owner's responsibility to anticipate potential problems and their solutions. This is the "world" in which developers and other property owners apply for governmental approvals.

The subdivision plat or site plan typically is reviewed by a planning commission, which is an administrative body with the authority to recommend approval, conditional approval, or denial of the submission. Final approval is often reserved for the city council or other elected body. The approval process takes at best three months; for a major development it often requires six months, and may well drag on for a year or more. Most communities are strapped financially, and many local governments are understaffed. This is the governmental context of the approval process.

Enter *Dolan.* Already understaffed city engineering depart-

ments and planning commissions will become even more burdened. In the next twelve months, at least 1,600,000 applications for building permits will demand attention.[107] *Dolan* now requires local governments to make "some sort of individualized determination"[108] that any condition imposed on the approval of a permit, a plat, or a site plan be closely connected "both in nature and extent to the impact of the proposed development."[109] Who will be there to make the required findings? More city engineers? More city traffic consultants? More city environmental experts? The inevitable result will be denial, and if not denial, delay.

Denial of building permits that would otherwise be conditionally approved serves no one—not the public, for whom millions of jobs and hundreds of thousands of homes are the potential victims of non-development, and certainly not landowners, who will find property values depressed because of the added uncertainty associated with the ability to develop land to its highest and best use.

Delay is also insidious. Assume the following: (1) the average approval time will increase by three months; and (2) the average cost of land and other expenses incurred in the permitting process is $200,000 per parcel. Multiplying 1,600,000 building permit sites times $200,000 times the current interest rate (say, three months at eight percent per annum) equals $6,400,000,000 wasted. Further, this figure does not include project overhead or increases in cost of materials and labor, all of which add to economic inefficiency and fall ultimately on the consumer. Building permit, plat, and site plan delays and denials, the inevitable consequences of the *Dolan* decision, translate into staggering economic loss.

These economic concerns are just the beginning. Delay and denial will also spawn endless litigation. As local governments struggle to cope with the new evidentiary burden, every dissatisfied property owner becomes a potential plaintiff in a takings action. Why not? Now that it is the government's burden to prove the reasonableness of its imposed conditions, what does the property owner have to lose? American society will rue the day and pay the cost of the Supreme Court's rejection in *Dolan* of a long line of cases in which it was the property owner's burden to prove the unreasonableness of the exaction.[110]

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107. *See* CONSTRUCTION REVIEW, *supra* note 6, at 15, 23.

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

109. *Id.* at 2320.

110. *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (placing burden on owner to demonstrate that a regulation was a taking); Pennell v. City of San

How does the *Dolan* majority justify such fundamental changes in firmly entrenched constitutional presumptions involving the police power? In one breathtaking footnote the Chief Justice wrote:

> Justice Stevens' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city. See *Nollan*, 483 U.S. at 836.[111]

The quote and the reference to *Nollan* are the *only* justifications for the crucial shift in the evidentiary burden of proof. However, there is simply no language on page 836 of *Nollan*, nor anywhere else in the *Nollan* decision, that justifies the *Dolan* majority on this extremely important point!

Conditioning the application for a building permit on a single piece of land—what Rehnquist labeled the "adjudicative decision"—is nothing more than what municipalities have done countless times, particularly in subdivision situations. In the subdivision cases,[112] the fact that the condition may be required by an ordinance of general applicability, rather than being imposed as a condition on a specific building permit, hardly supports the disparate treatment accorded the City of Tigard. The City's conditions were mandated by the CDC[113] and correctly applied through the procedural mechanism of deciding whether to grant a requested variance.[114] Furthermore, over and over again, the cases have carefully

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Jose, 485 U.S. 1 (1988) (placing burden on the landlord to prove that city rent control ordinance constituted a taking); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (placing burden on coal company to prove that law requiring 50% of the coal beneath a certain structure be kept in place to provide surface support was a taking); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (placing burden on property owners); Agins v. City of Tiburon, 447 U.S. 255 (1980) (placing burden on landowners); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (placing burden on shopping center owner); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (placing burden on owner of Grand Central Terminal); Miller v. Schoene, 276 U.S. 272 (1928) (placing burden of proof on owners of trees cut down by state order); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (placing burden on real estate company); Mugler v. Kansas, 123 U.S. 623 (1887) (placing burden on unlawful manufacturer of intoxicating liquors to prove that prohibitory state liquor laws constituted a taking).

111. *Dolan*, 114 S. Ct. at 2320 n.8 (citation omitted).

112. *See supra* note 105.

113. *See* CDC, *supra* note 9, § 18.84.040.A.1-7.

114. *See* CDC, *supra* note 9, § 18.134.

refrained from shifting the burden of proof to the local government.[115] Even in the cases that found the ordinance or the condition to be invalid, the usual presumption of the constitutionality of police power action was left intact. Justice Souter, dissenting in the *Dolan* decision, wrote, "[I]t appears that the Court has placed the burden of producing evidence of relationship on the city, despite the usual rule in cases involving the police power that the government is presumed to have acted constitutionally."[116]

Justice Stevens agreed that the majority wrongly shifted the burden of proof. His concluding paragraph says it all and says it with poignancy:

> In our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms. When there is doubt concerning the magnitude of those impacts, the public interest in averting them must outweigh the private interest of the commercial entrepreneur. If the government can demonstrate that the conditions it has imposed in a land-use permit are rational, impartial and conducive to fulfilling the aims of a valid land-use plan, a strong presumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action's constitutionality. That allocation of burdens has served us well in the past. The Court has stumbled badly today by reversing it.[117]

VI. REVISITING PAST TAKINGS CASES IN LIGHT OF *DOLAN*

To illustrate the radical departure of the *Dolan* decision from established precedent, this section compares its holding to five landmark Supreme Court and state court decisions. Through this lens, the ill-conceived nature of *Dolan* is clear. Indeed, if the *Dolan* standard had applied to these five cases, each would have been overturned with a finding that the government unconstitutionally interfered with property rights and committed a taking. In short, analysis of these cases demonstrates that *Dolan* effectively reverses decades of sound federal and state takings jurisprudence—some of which, ironically, the *Dolan* majority purported to follow.

115. *See supra* note 110.

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

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

A. Dolan *Marks a Clear Departure from Supreme Court Precedent*

The dramatic changes imposed by *Dolan* are highlighted by examining three prior Supreme Court decisions. *Goldblatt v. Town of Hempstead*[118] stated that parties challenging the validity of a municipal ordinance have the burden of proving that the ordinance is unconstitutional. *Dolan* shifts this burden 180 degrees. *Hadachech v. Sebastian*[119] announced judicial deference to a city's exercise of its police power. *Dolan* abolishes this deference. *Keystone Bituminous Coal Ass'n v. DeBenedictis*[120] identified the entire property as the benchmark against which a taking should be measured. *Dolan* focuses only on the severed interest, thus rendering almost any land use restriction a taking. Each of these cases will be discussed in turn.

1. Goldblatt v. Town of Hempstead.

Goldblatt involved a town ordinance that affected only the appellants. The ordinance placed restrictions on certain kinds of dredging and pit excavations and required private property owners to obtain a permit in order to continue excavation activities.[121] Appellant property owners argued that the ordinance completely prohibited their business operations and thus constituted an uncompensated taking.[122] Applying a presumption of constitutionality, the Court held that no taking had occurred despite the fact that the ordinance deprived the appellant of the property's most beneficial use. Justice Clark, writing for a unanimous Supreme Court,[123] stated the issue thus:

> The question, therefore, narrows to whether the prohibition of further excavation below the water table is a valid exercise of the town's police power. The term "police power" connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of "reasonableness," this Court has generally refrained from announcing any specific criteria. The classic statement of the rule in *Lawton v. Steele* is still valid today: "To justify the state in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference;

118. 369 U.S. 590 (1962).
119. 239 U.S. 394 (1915).
120. 480 U.S. 470 (1987).
121. Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962) (citing HEMPSTEAD, N.Y., ORDINANCES, § 130, No. 16 (as amended Nov. 25, 1958)).
122. *Id.* at 591.
123. Justices Frankfurter and White took no part in the *Goldblatt* decision.

and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."[124]

Relying on *Lawton*, the court in *Goldblatt* held that reasonable interference in property rights by the government on behalf of public interests is justified, so long as the interference does not unduly oppress the individual.[125] In other words, *Goldblatt* presumed that the ordinance was constitutional and that the owner had the evidentiary burden of establishing any loss of property value.[126] Indeed, the government was not required to provide evidence about either the possibility of less severe remedies or the safety functions of the ordinance. In fact, Justice Clark postulated that the section of the ordinance prohibiting the deepening of a twenty-five-foot lake would have little, if any, effect on public safety.[127] But even if such a conclusion were drawn, it would not render the ordinance unreasonable because, as Justice Clark stated, "[F]or all we know, the ordinance may have a *de minimis* effect on appellants. Our past cases leave no doubt that appellants had the burden on 'reasonableness.' "[128]

Compare this established doctrine to the *Dolan* decision: *Dolan* ignored the essential element—that the government restrictions must "not [be] unduly oppressive upon individuals"[129]—and decided that as a general proposition, government interference is unjustified unless the government can prove a quantified public interest proportionate in both nature *and extent* to the property owner's potential loss.[130] In *Dolan*, no evidence existed as to the

124. *Id.* at 594-95 (quoting Lawton v. Steele, 152 U.S. 133, 137 (1894) (alterations in original) (citation omitted)).

125. *Id.* at 594 (explaining that "we find no indication that the prohibitory effect of Ordinance No. 16 is sufficient to render it an unconstitutional taking if it is otherwise a valid police regulation"); *see also* Walls v. Midland Carbon Co., 254 U.S. 300, 315 (1920) (holding that a state may, "in the interest of the community," limit a property right); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (reasoning that private interests in the way of progress "must yield to the good of the community"); Reinman v. City of Little Rock, 237 U.S. 171, 176 (1915) (holding that "it is clearly within the police power of the state . . . to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily, or with unjust discrimination"); Mugler v. Kansas, 123 U.S. 623, 662-63 (1887) (reasoning that it is within the police power of the State to regulate the manufacture and sale of intoxicating liquors).

126. *Goldblatt*, 369 U.S. at 592.

127. *Id.* at 595.

128. *Id.* at 596.

129. *Id.* at 595.

130. Dolan v. City of Tigard, 114 S. Ct. 2309, 2319-20 (1994).

real economic impact of the City's conditions on Mrs. Dolan, nor did she allege any financial harm caused by Tigard's exactions. Moreover, the Rehnquist decision failed to address obvious potential benefits to Mrs. Dolan emanating from the City's demands.

Clearly, *Dolan* alters established constitutional doctrine by shifting the burden of proof from landowner to government. If the *Dolan* holding had been applied in *Goldblatt*, the Town of Hempstead would have been required to establish the degree of connection between the ordinance's requirements and the impact of the company's dredging operations. That alone would have resulted in a finding of an unconstitutional taking because the ordinance was of dubious value as a safety measure. Nevertheless, Chief Justice Warren and Justices Black, Douglas, Harlan, Stewart, and Brennan all joined Justice Clark in holding that no taking had occurred. These disparate results can be explained simply: *Goldblatt* relied on constitutional precedent in assigning the burden of proof; *Dolan* did not.

2. Hadacheck v. Sebastian.

If the *Goldblatt* decision would give the *Dolan* majority heartburn, the earlier Supreme Court case of *Hadacheck v. Sebastian*[131] might well make them apoplectic. *Hadacheck* exemplified the Supreme Court's traditional deference to local governments' police power in regulating land use. In this case, the Court held that the City of Los Angeles could regulate certain activities on private property, even if those regulations rendered the property almost totally diminished in value.[132]

Mr. Hadacheck, the petitioner, purchased eight acres of land to build and operate a brick factory. Seven years later, the City of Los Angeles passed an ordinance making it unlawful to manufacture brick within his district.[133] Mr. Hadacheck argued that if the ordi-

131. 239 U.S. 394 (1915).

132. The petitioner owned an eight-acre parcel of land containing an especially valuable kind of clay usable in the manufacture of high quality brick. The petitioner made extensive excavations, erected kilns and other buildings, and installed expensive machinery in the process of establishing a thriving brick manufacturing business. His property for brick-making purposes was worth $800,000. For any other purpose its value was at most $60,000, because the extensive excavations would have made any other use of the land extremely difficult. In addition, the clay could not have been extracted and transported elsewhere for brick-making in any economically viable sense. *Id.* at 404-06.

133. At the time of the ordinance, Los Angeles covered more than 107 square miles. The particular district affected by the ordinance covered only three square miles, within which was located one other brick yard operator. *Id.* at 406.

nance were upheld, it would deny him all use of his property. He argued further that his business did not constitute a nuisance as it emitted no noises, no noxious odors, and only minimal smoke. During seven years of his brick-making operation, no nuisance-like complaints had been filed against his business. Moreover, in other districts in Los Angeles, brick yards were operating without similar regulation.[134] Finally, Mr. Hadacheck argued that the ordinance was unreasonable because "the means adopted are out of proportion to the danger involved."[135] Indeed, "[t]he danger may be slight and remote while the remedy—entire suppression—could not be more drastic."[136]

Nevertheless, the California Supreme Court found that the neighborhood around petitioner's property had been adversely affected by Mr. Hadacheck's brick yard. The evidence, "when taken in connection with the presumptions in favor of the propriety of the legislative determination,"[137] would not support invalidating the ordinance on the ground that it was arbitrary or discriminatory. Justice McKenna, writing for the Supreme Court, delivered a unanimous opinion upholding the decision of the California Supreme Court.

The Supreme Court based its holding on the primacy of the state's police power. It relied on *Reinman v. City of Little Rock*,[138] which held that a livery stable business could be declared a legal nuisance under the special circumstances of the case, even though not a nuisance per se.[139] Justice McKenna declared the police power to be "one of the most essential powers of government, one that is the least limitable."[140] He further emphasized that "[t]here must be progress, and if in its march private interests are in the way they must yield to the good of the community."[141] On these grounds, the Los Angeles ordinance in *Hadacheck* was held not to constitute a compensable taking.[142] Answering the argument that the ordinance denied the owner all economic benefit of his property, Justice McKenna emphasized that the prohibition was only on

134. *Id.* at 406-07.
135. *Id.* at 399.
136. *Id.* The petitioner also contended that carving out a three-square-mile district was irrational and therefore discriminatory. *Id.*
137. *Ex parte* Hadacheck, 132 P. 584, 586 (Cal. 1913).
138. 237 U.S. 171 (1915).
139. *Id.* at 176.
140. *Hadacheck*, 239 U.S. at 410.
141. *Id.*
142. *Id.* at 411.

the manufacture of bricks and not on the removal of the brick clay, even though the petitioner had alleged that the removal alone was not economically feasible.[143] Justice McKenna's final words in the *Hadacheck* opinion are illuminating:

> It may be that something else than prohibition would have satisfied the conditions. Of this, however, we have no means of determining, and besides we cannot declare invalid the exertion of a power which the city undoubtedly has because of a charge that it does not exactly accommodate the conditions or that some other exercise would have been better or less harsh. We must accord good faith to the city in the absence of a clear showing to the contrary.[144]

This language flies in the face of rough proportionality. Would that the *Dolan* majority had heeded these words before establishing its new constitutional doctrine!

Instead, undercutting state police power, *Dolan* places the onus on municipal governments to justify duly enacted ordinances and, further, to provide extensive documentation justifying their implementation. In effect, *Dolan* turns upside-down the hierarchy established in *Hadacheck* that the good of the community stands above private interests.

3. Keystone Bituminous Coal Association v. DeBenedictis.

In a third case, *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[145] the Supreme Court found no taking in the application of the 1966 Pennsylvania Bituminous Mine Subsidence and Land Conservation Act (the "Act").[146] The holding in *Keystone* turned on the identity and value of the property, or property right, allegedly taken by the Act.[147] The Court noted that "Pennsylvania recognizes three separate estates in land: The mineral estate; the surface estate; and the

143. *Id.* at 412.

144. *Id.* at 413-14.

145. 480 U.S. 470 (1987).

146. Bituminous Mine Subsidence and Land Conservation Act, PA. STAT. ANN. tit. 52, § 1406.2 (Supp. 1986) (encompassing a comprehensive program to prohibit mining that causes subsidence damage to public buildings, houses, or cemeteries existing on the date the Act was passed). Keystone, an association of coal mine operators, brought this case nearly 20 years later and attacked the Act on its face as an uncompensated regulatory taking.

147. *See* Andrus v. Allard, 444 U.S. 51 (1979) (holding that a denial of the most profitable use of property is not a taking because "a reduction in the value of property is not necessarily equated with a taking"); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (holding that a government may enact a law that affects economic values without effecting a taking).

'support estate.' "[148] The petitioner, Keystone, contended that by requiring it to leave twenty-seven million tons of coal in the ground, the Act destroyed the value of Keystone's support estate and therefore constituted a taking.

Justice Stevens, writing for the *Keystone* majority, declared, "[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property."[149] The court established a fraction with the value of the entire remaining property as the denominator and the value of the property affected by the regulation as the numerator. Analysis of this ratio required a definition of the unit of property, the value of which was to become the denominator of the fraction.[150] In *Keystone*, the denominator was "any reasonable unit of petitioners' coal mining operations and financial-backed expectations."[151] The numerator was that part of the twenty-seven million tons of coal left in the ground solely because of the Act.[152] Even the entire twenty-seven million tons represented less than two percent of petitioner's coal in place.[153] Thus, "[t]he 27 million tons of coal do not constitute a separate segment of property for takings law purposes."[154]

In his dissent, Rehnquist contended that the support estate was a separate estate under Pennsylvania law and was purchased as such. He argued that no further analysis is needed when "regulation extinguishes the whole bundle of rights in an identifiable segment of property."[155] Stevens countered, "The record is devoid of

148. *Keystone*, 480 U.S. at 478.

149. *Id.* at 497.

150. *See* Michelman, *supra* note 80, at 1192.

151. *Keystone*, 480 U.S. at 499.

152. *Id.*

153. *Id.* at 496.

154. *Id.* at 498. This ratio technique was also used in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). In that case, the plaintiff, owner of Grand Central Terminal, was prohibited by the New York City Landmarks Preservation Law from erecting an office building above the Terminal. The plaintiff argued that by not allowing it to build upward, the law constituted a taking of the "air rights" above the Terminal. The Supreme Court held that no taking had occurred, reasoning that in takings analysis, courts must focus on the interference of rights in the *entire* parcel, which in this case was the city tax block designated as a "landmark site." *Id.* at 131. Thus, the denominator was the city tax block and the numerator was the air rights. Like the rights to the underground coal in *Keystone*, the air rights alone did not constitute a distinct property. Similarly, in *Andrus*, Justice Brennan noted that "the destruction of one 'strand' of the bundle [of property rights] is not a taking, because the aggregate must be viewed in its entirety." 444 U.S. 51, 66 (1979).

155. *Keystone*, 480 U.S. at 517 (Rehnquist, C.J., dissenting).

any evidence on what percentage of the purchased support estates . . . has been affected by the Act."[156] Stevens adopted the conclusion of the Pennsylvania Court of Appeals that "as a practical matter the support estate is always owned by either the owner of the surface or the owner of the minerals."[157]

It is no coincidence that, seven years later in *Dolan*, Rehnquist writes for the majority and Stevens for the dissent. Mrs. Dolan's inability to control access to the greenway becomes tantamount to her loss of the right to exclude, which is one of the basic sticks in the bundle of property rights.[158] The *Dolan* majority ignored the commercial context and concluded—and herein lies the fallacy—that the regulated inability to control access over one-tenth of the property (most of which was in the floodplain anyway) constituted a separate segment of property for takings purposes. Thus, Rehnquist's narrow definition of the relevant property interest for takings analysis has prevailed, Stevens' opinion notwithstanding, nor Brennan's before him, nor Brandeis' before him.

B. *State Court Decisions Relied on by the* Dolan *Majority Fail to Provide Doctrinal Support*

Dolan cites *Nollan*[159] and state supreme court decisions[160] to advance the proposition that there must be an essential nexus between the condition imposed on a development and the police power justification for that condition. Then, by some mysterious process of judicial alchemy, the Court announces the dual requirement that the exaction must be related both in nature and *in extent* to the needs created by the requested construction and that both of these requirements must be proven by the governmental entity imposing the condition. This section argues that the state court cases cited in *Dolan* do not support the new "extent" requirement,

156. *Id.* at 501.

157. *Id.* at 500-01; *see also* Hugh G. Montgomery, *The Development of the Right of Subjacent Support and the "Third Estate in Pennsylvania,"* 25 TEMP. L.Q. 1, 21-22 (1951) (the support estate cannot be conveyed separately to a third party having no interest in the surface or mineral estate, but may be conveyed in conjunction with either the surface or mineral estate).

158. *See* Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187, 191, 206 (1992) (stating that the right to exclude protects the autonomy of the property owner and allows that person to have the exclusive right to possession within his or her privately owned property).

159. Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987).

160. *See supra* note 67.

and that at least two cases, *Jordan v. Village of Menomonee Falls*[161] and *Call v. City of West Jordan*,[162] came to exactly the opposite conclusion: that municipalities need *not* prove that the condition is "roughly proportional" to the new demands imposed by the development.

1. Jordan v. Menomonee Falls.

In *Jordan*, the village passed a land use ordinance prior to the property owners' acquisition of a 7.85-acre parcel purchased with the intention of subdividing the land into lots. Essentially, the ordinance required the dedication of enough acreage to satisfy open space requirements created by the new subdivision's need for school, park, and recreation land.[163] The amount of land to be dedicated was determined by the village based on national planning experience and average land values in the village. The dedication requirement was $200 worth of land per new lot, with the value to be established by appraisal. In lieu of the required land dedication, the ordinance gave the subdivider the option to pay a fee equal to $200 per lot.[164] The property owners paid the equalization fee under protest. Later, they sued for its return and won in the trial court. The village appealed.

In reversing and holding for the village, the Wisconsin Supreme Court first concluded that the pertinent state statute[165]

161. 137 N.W.2d 442 (Wis. 1965).

162. 606 P.2d 217 (Utah 1979).

163. *Jordan*, 137 N.W.2d at 444 (citing MENOMONEE FALLS, WIS., ORDINANCES § 8.02(1) (1959) ("8.02 Dedication of Sites. (1) Within the corporate limits of the Village, where feasible and compatible with the comprehensive plan for development of the community, the subdivider shall provide and dedicate to the public adequate land to provide for the school, park and recreation needs of the subdivision.")).

164. *Id.* (citing MENOMONEE FALLS, WIS., ORDINANCES §§ 8.02(2), 8.03(1), 8.03(2)):

> 8.02(2) The amount of land to be provided shall be determined on the basis of an amount equal in value to $200.00 per residential lot.... Such value shall be determined by the Village assessor on the basis of full and fair market value of the land....
>
> 8.03. Proportionate Payment in Lieu of Dedication.
>
> (1) Where such dedication is not feasible or compatible with the comprehensive plan, the subdivider shall in lieu thereof pay to the Village a fee equivalent to the value of the required dedication....
>
> A. $120.00 per residential lot... for the benefit of the school district ....
>
> B. $80.00 per residential lot... to be used for park and recreation area development....
>
> (2) Such fees shall be used exclusively for immediate or future site acquisition or capital improvement.

165. WIS. STAT. ANN. § 236.45 (West 1957):

sanctioned the land dedication and equalization fee aspects of the village's ordinance.[166] The court then addressed the property owners' argument that the ordinance amounted to an unconstitutional taking. The court began by examining an Illinois standard: " '[I]f the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible.' "[167] The Wisconsin court affirmed this formulation, provided that its application was not so narrow as to put an unreasonable burden of proof on local government:

> In most instances it would be impossible for the municipality to prove that the land required to be dedicated for a park or a school site was to meet a need solely attributable to the anticipated influx of people into the community to occupy this particular subdivision. On the other hand, the municipality might well be able to establish that a group of subdivisions approved over a period of several years had been responsible for bringing into the community a considerable number of people making it necessary that the land dedications required of the subdividers be utilized for school, park, and recreational purposes for the benefit of such influx. In the absence of contravening evidence this would establish a reasonable basis for finding that the need for the acquisition was occasioned by the activity of the subdivider. . . .
>
> We conclude that a required dedication of land for school, park, or recreational sites as a condition for approval of the subdivision plat should be upheld as a valid exercise of police power if the evidence reasonably establishes that the municipality will be required to provide more land for schools, parks, and playgrounds as a result of approval of the subdivision.[168]

Dolan, on the other hand, requires the government to make an "individualized determination" that the impact of the new construction and the exaction are closely related both in nature and in extent.[169] *Jordan* is one of the primary cases on which the *Dolan* majority relies. Yet *Jordan*'s sensitivity to the village's evidentiary burden, the minimal and generalized nature of that burden, the

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Local subdivision regulation.

(1) Declaration of legislative intent. The purpose of this section is to promote the public health, safety and general welfare . . . .

(2) Delegation of power. (a) To accomplish the purposes listed in sub. (1), any municipality . . . which has established a planning agency may adopt ordinances governing the subdivision or other division of land which are more restrictive than the provisions of this chapter.

166. *Jordan*, 137 N.W.2d at 446-47.

167. *Id.* at 447 (quoting Pioneer Trust & Sav. Bank v. Village of Mt. Prospect, 176 N.E.2d 799, 802 (Ill. 1961)).

168. *Id.* at 447-48.

169. *Dolan*, 114 S. Ct. at 2319-20.

emphasis on benefits received by the subdivider, and the application of the constitutional standard to the facts in the Wisconsin decision do not support Chief Justice Rehnquist's opinion. Had *Jordan* been reviewed by the *Dolan* Court, the village's ordinance would have failed the *Dolan* test and the Court would have found a compensable taking.

2. Call v. City of West Jordan.

The *Dolan* majority also relied on *Call v. City of West Jordan.* In *Call,* the Utah Supreme Court upheld the validity of a city ordinance stipulating that subdividers must dedicate seven percent of their land in the proposed subdivision or make a cash payment equal to that value, with such land or money to be used for the purposes of "flood control and/or parks and recreational facilities."[170] The landowners argued that the dedicated land, or its cash equivalent, would benefit the entire community, not just the residents of the new subdivision, and therefore was a taking.[171]

Using language that contravenes the basic requirements of "rough proportionality," the Utah Supreme Court said:

> We agree that the dedication should have some reasonable relationship to the needs created by the subdivision. But in the planning for the expansion of a city, it is obvious that no particular percentage of each subdivision, or of each lot, could be used as a park or playground in that particular subdivision; and likewise, that it could not be so used for flood control. But it is so plain as to hardly require expression that if the purpose of the ordinance is properly carried out, it will redound to the benefit of the subdivision as well as to the general welfare of the whole community. The fact that it does so, rather than solely benefiting the individual subdivision, does not impair the validity of the ordinance.[172]

The Utah Supreme Court also held that communities have significant discretion in determining the extent of the requirement:

> The question as to the percentage of the land in the subdivision (in this instance, 7 percent) to be committed to the public purpose is within the prerogative of the City Council to determine, and so long as it is within reasonable limits, so that it cannot be characterized as capricious or arbitrary, the courts will not interfere therewith.[173]

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170. Call v. City of West Jordan, 606 P.2d 217, 218 (Utah 1979) (citing WEST JORDAN, UTAH, AM. ORDINANCE No. 33 § 9-C-8(b) (1975).

171. *Id.* at 220.

172. *Id.* (footnotes omitted).

173. *Id.* at 221 (footnote omitted); *see also* Associated Home Builders of the Greater

This is a far cry from the *Dolan* requirement that "the city must make some sort of individualized determination that the required dedication is related both in nature *and extent* to the impact of the proposed development."[174] Therefore, to say that *Call* supports the new doctrine of "rough proportionality" transports the reader to Alice in Wonderland, where "[w]hen I use a word . . . it means just what I choose it to mean—neither more nor less."[175] Clearly, *Call* would have been reversed had it been decided by the *Dolan* Court.

C. *Past Cases Do Not Support the* Dolan *Decision*

Each of the three Supreme Court decisions discussed above contained a major constitutional proposition that was later altered by *Dolan*. *Goldblatt* exemplified the traditional burden of proof, crucial parts of which have been shifted by *Dolan; Hadacheck*, unlike *Dolan*, gave traditional deference to the city's exercise of police power; and *Keystone* clarified the formula for identifying a distinct segment of property for takings purposes, which was ignored in *Dolan*. The *Dolan* majority relied on two state supreme court cases, *Jordan* and *Call*, as the foundation for new takings jurisprudence; however, neither decision supports the new *Dolan* doctrine.[176] In all five of these cases, the *Dolan* majority would have changed the outcome. Clearly, it is the *Dolan* decision that cries out for reconsideration.

VII. CONCLUSION

With precious little compelling precedent, the Court imposes the new quantitative requirement of rough proportionality on all

East Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971) (upholding constitutionality of a city ordinance requiring a subdivider, as a condition on the approval of a subdivision map, to dedicate land or pay fees for the creation of a park or recreational area).

174. *Dolan*, 114 S. Ct. at 2319-20 (emphasis added).

175. LEWIS CARROLL, ALICE THROUGH THE LOOKING GLASS 94 (Random House 1946) (1872).

176. The *Dolan* decision was equally unsupported by three other state supreme court decisions cited by the majority: Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976) (upholding a city law requiring dedication of land or donation of money for parks because there was a reasonable relationship between the conditioned approval of the subdivision and the municipality's need for land); Simpson v. City of North Platte, 292 N.W.2d 297 (Neb. 1980) (invalidating a city ordinance requiring as a condition for building permit approval a grant of a "right-of-way" to the city to satisfy some future public purpose where no reasonable relationship or nexus existed); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984) (upholding constitutionality of a city ordinance requiring either dedication of parkland or money in lieu thereof when undertaking subdivision development since it was "substantially related" to the health, safety, and general welfare of the public).

levels of government in cases involving building permit applications. Examination of every state supreme court case cited and relied on by the *Dolan* majority reveals that none of these cases places on government the evidentiary burden of proof to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[177] Appallingly, these cases do not remotely support the constitutional foundation of the Court's new rough proportionality doctrine.

Oblivious to precedent,[178] the *Dolan* majority implies, by its silence, that neither the benefits to the property owner nor the true economic impact on the property owner from permit conditions are legally relevant in takings analyses. In addition, the Court narrows to an unrecognizable form the concept of a "distinct segment of property for takings law purposes."[179] Mrs. Dolan's inability to control certain hours of ingress and egress along the greenway triggers the imposition of the Court's new doctrine regardless of the fact that she wants as many people as possible to have access to all of her property during business hours. Ironically, all of the state cases cited by Chief Justice Rehnquist use the landowner's entire parcel as the denominator in their examination of the impact of the exaction. If the trend from *Penn Central* to *Keystone* to *Dolan* continues, the definition of a distinct segment of property for takings law purposes will dwindle to a mere nothingness.

The new doctrine is a judicial reach, which its application to the facts of *Dolan* clearly reveals. There is no question that Mrs. Dolan's new store would add more surface water runoff into Fanno creek. Nor is there any question that the required dedication would put the City in a position to mitigate the effects of the proposed construction. Rehnquist's crucial statement—"the city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control"[180]—is wrong. The City made it clear that public management was necessary and was mandated by the Comprehensive Plan, the Community Development Code, and the City's Master Drainage Plan, in order to reduce flooding along Fanno Creek.

Was the extent of the dedication roughly proportional in a

177. Dolan v. City of Tigard, 114 S. Ct. 2309, 2319-20 (1994).

178. *See supra* part III.

179. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498 (1987) (internal citation omitted).

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

quantitative sense to the anticipated impact of the new construction? Hopefully not! Ideally, the dedication would help the City to reduce far more floodwater than Mrs. Dolan's new construction would add to the creek.[181] Preventing this public benefit through the application of the "degree" component of "rough proportionality" illustrates the complete illogicality of the new quantitative requirement.

Regarding the bike path dedication, the City used its traffic study but failed to predict how many of the projected 435 extra automobile trips per day would be reduced by the bike path. It is self-evident that there would be a reduction in the amount of automobile traffic. The Comprehensive Plan says so. Land use planning experts say so. The constitutional validity of the state's exercise of its police power in takings cases has been reduced to a guessing game.

This Article has demonstrated that significant past state and federal regulatory takings cases would now be decided differently under *Dolan*'s formulation. Judicial "progress" is one thing, but after the decision in *Dolan*, it is hard to see where the Court, in future land use permit cases, will find that no compensable taking has occurred.

And that brings us to the shift in the burden of proof. Among all the negatives in the *Dolan* decision, this shift will have the most negative effect. Disregarding decades of deference to the states' exercise of their police power, the Court unleashes delay, denial, litigation, and incalculable economic waste, all of which add to the consumer's financial burden. And the Court does all of this in one footnote that is false in its asserted justification![182]

The property rights movement initially celebrated its victory in the *Dolan* decision, but these folks, along with the rest of America, may well end up regretting it. When federal agencies become paralyzed in the effectuation of national environmental policies; when local governments, many of whose debentures are already classified as "junk bonds," deny or delay responses to building permits because they do not have the financial resources to satisfy *Dolan*'s evidentiary requirements; when people everywhere realize that federal, state, and local governments will go bankrupt if the *Dolan* majority continues its present trend in takings jurisprudence (espe-

181. Perhaps Mrs. Dolan's development would add only a thimbleful of water. Dolan v. City of Tigard, 854 P.2d 437, 447 (Or. 1993) (Peterson, J., dissenting).

182. *See supra* note 111 and accompanying text.

cially in view of the threat of current congressional legislation calling for compensation to be paid whenever federal regulation diminishes private property values);[183] when taxes skyrocket to pay for all these "takings"; when new housing prices escalate because of the cost of the delays engendered by *Dolan*; when all of this happens, Oliver Wendell Holmes' aphorism[184] will be remembered with nostalgia, and property rights advocates, along with the rest of us, will yearn for the good old days.

One of the saddest aspects of the *Dolan* decision is that takings jurisprudence did not need another doctrine. *Penn Central, Agins, Loretto, Keystone, Nollan,* and *Lucas* were all in place and could have continued as decisional touchstones for a long time to come. The Court should return to a case-by-case analysis using Brennan's balancing criteria from *Penn Central,* the *Nollan* nexus test, and assessment of the real economic impact on the property owner. Above all, the Court should rescind the new evidentiary burden of proof in takings cases. Given the proper nexus, building permit conditions should be invalidated only in cases in which the property owner establishes that the exaction is arbitrary, discriminatory, or severely unreasonable.

Is there anything good to be said of the *Dolan* decision? An editorial in the Tampa Tribune indicates, if nothing else, that the decision was politically popular.[185] This is hardly surprising: the inescapable conclusion drawn from everything examined in this Article is that the *Dolan* decision was predetermined, ideologically and politically driven by the same constituency that cheered its outcome. Responding to the current political climate and disdaining deference to a hundred years of cases involving procedurally proper legislative and administrative actions, the Court in *Dolan* has embarked on the dangerous path of political, not constitutional, decisionmaking.

183. In response to such legislation, a Philadelphia real estate developer wrote: "Wetlands laws protect property values by keeping communities attractive and by buffering floods. . . . Under the new anti-regulation agenda, homeowners' property values are threatened. Also the sheer cost of paying property owners for their claims and the specter of continual litigation would dramatically undermine our environmental laws. So called property rights bills would not protect property but simply transfer control of property values from homeowners to large owners of undeveloped land." Dan Gordon, *In The Press: Developer Attacks Takings,* N.Y. TIMES, Mar. 15, 1995.

184. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change . . . ." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

185. *See Court Upholds Property Rights,* TAMPA TRIB., July 8, 1994, at 10.