
DOLAN V. CITY OF TIGARD:
PROPERTY OWNERS WIN THE BATTLE
BUT MAY STILL LOSE THE WAR

Local governments increasingly require exactions¹ from private property owners in exchange for permission to develop land.² Through these development exactions, local governments often require owners to dedicate portions of their properties to further municipal land use goals.³ Local governments justify development exactions as a means of offsetting community burdens created by the development.⁴ Development exactions, however, are sometimes merely a clever means

1. Webster's Dictionary defines "exaction" as: "the act or process of exacting [or] EXTORTION." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 431 (1986).

2. See Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, LAW & CONTEMP. PROBS., Winter 1987, at 51 (noting the expanding implementation of development exactions and impact fees); James C. Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, LAW & CONTEMP. PROBS., Winter 1987, at 85, 88 (stating that local governments have increasingly turned to impact exactions or impact fees as a means of financing the growing need for capital improvements); Charles Simon, *Who Bears the Cost*, LAW & CONTEMP. PROBS., Winter 1987, at 115 (describing development exactions as a "full-blown land use 'fad'").

3. See Nicholas V. Morosoff, Note, "Take My Beach, Please!": *Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. REV. 823 (1989). Development exactions may also take the form of development fees which require a cash payment rather than a land dedication.

4. See Morosoff, *supra* note 3, at 848 ("In theory, exactions are one way for municipalities to make private interests pay for, or subsidize, the community burdens that their developments create.").

for funding public benefits at the expense of a few property owners.⁵

Courts have long struggled to balance the competing interests of states and property owners.⁶ Although states possess considerable authority under their police power to regulate land use,⁷ the Fifth Amendment to the United States Constitution protects private property from being taken for public use without just compensation.⁸ With respect to development exactions, which may take private land for public benefit, courts must balance the impacts of the proposed land use and the local government's requirements.⁹ The Supreme Court's recent decision in *Dolan v. City of Tigard*¹⁰ requires exactions to be "roughly proportional" to the impacts of a proposed development¹¹ and places the burden of proving this "rough proportionality" on the governmental

5. Developers frequently challenge the constitutional validity of development exactions. See Morosoff, *supra* note 3, at 823 (stating that developers frequently claim "that exactions ordinances constitute takings of property without just compensation and/or deprive them of their property without due process of law"); see also Nicholas, *supra* note 2, at 88 (stating that impact exactions have frequently been met with controversy and litigation); John D. Johnston, Jr., *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871, 873 (1967) (noting that developers contest the legality of development exactions by claiming that "they are ultra vires, deprive the developer of his property without due process of law, or constitute a taking of private property for public use without compensation").

6. The regulatory takings issue first reached the Supreme Court in *Mugler v. Kansas*, 123 U.S. 623 (1887). In *Mugler*, the Supreme Court rejected a property owner's constitutional claim for compensation, despite the fact that a Kansas statute prohibiting the sale of alcohol denied him all use of his property. *Id.* at 668-69. The Court held that the statute was a valid exercise of the state's police power fairly adapted to a legitimate public purpose. *Id.* at 662-63.

7. The Supreme Court has long recognized the authority of state and local governments to engage in land use planning. See, e.g., *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); see also, Siemon, *supra* note 2, at 117 (noting that land use planning by local governments is now well accepted by the Supreme Court).

8. U.S. CONST. amend. V.

9. Courts must decide whether the required exaction, in relation to the proposed development's impacts, infringes on the property owner's constitutional rights. See, e.g., *Dolan v. City of Tigard*, 854 P.2d 437, 438 (Or. 1993). The issue before the court is whether city has demonstrated the required relationship between the conditions that it attached to its approval of petitioners' proposed land use and the expected impacts of that land use.

10. 114 S. Ct. 2309 (1994).

11. *Id.* at 2319.

entity requiring the exaction.¹²

Part I of this Recent Development reviews the various relational standards¹³ state courts have used to decide the constitutionality of development exactions. Part II describes the facts and procedural background of *Dolan v. City of Tigard*, illustrating a typical exactions controversy. Part III discusses the Supreme Court's analysis in *Dolan*. Part IV comments on the Court's new "rough proportionality" standard and its decision to place the burden of proof on the local government. Finally, Part V anticipates the future implications of *Dolan*.

I. OVERVIEW OF RELATIONAL STANDARDS

Beginning in 1922, the Supreme Court recognized that land use regulations that require property owners to give up too much for the public good are unconstitutional. In *Pennsylvania Coal Co. v. Mahon*,¹⁴ an owner of a surface estate sued the coal company that owned the mineral estate beneath the surface¹⁵ for threatening to mine coal in violation of a state regulation.¹⁶ The coal company responded that allowing the state statute to completely bar mining would violate the Fifth Amendment, and the Court held that the Constitution prevented the state from taking the coal company's property rights without compensation.¹⁷ The Supreme Court noted that without limits on a state's power to regulate land use, the Fifth Amendment would become moot.¹⁸ Specifically, Justice Holmes wrote: "While property may be regulated to a certain extent, if regulation goes too far it will be

12. *Id.* at 2319-20.

13. The author uses the term "relational standards" to mean: those standards that evaluate the relationship between exactions and impacts of a proposed development. The "relational standards" must be met to avoid unconstitutionality.

14. 260 U.S. 393, 415-16 (1922).

15. Pennsylvania common law recognized three separate estates in mining property: a surface estate, an estate in the minerals below, and an estate in the support of the surface. Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 563 (1984).

16. *Mahon*, 260 U.S. at 412. A Pennsylvania statute, the Kohler Act, prohibited the mining of coal beneath another person's property in such a manner as to cause the surface to sink. 1921 Pa. Laws 1198, § 1; see *Rose*, *supra* note 15, at 563.

17. *Mahon*, 260 U.S. at 414.

18. *Id.* at 415.

recognized as a taking."¹⁹

Despite Justice Holmes' early limitation of state police power, the Supreme Court has offered little guidance as to when a land use regulation "goes too far."²⁰ For seventy years, the Court did not address the requisite relationship between a development exaction and a development's impacts.²¹ Consequently, state courts diverge widely in the standards they use to determine the appropriate relational standard.²² Generally, state courts apply one of three standards: 1) judicial deference, 2) the "specific and uniquely attributable" test, or 3) the "reasonable relationship" test.

Courts that apply the judicial deference standard defer to a state legislature's determination of the appropriate relationship between impacts and exactions. *Billings Properties, Inc. v. Yellowstone County*²³ illustrates the judicial deference standard.²⁴ In *Billings*, the Planning Board for Yellowstone County rejected a developer's plans for a new subdivision because the plans failed to dedicate land for parks and playgrounds as required by statute.²⁵ The developer sued, claiming that the dedication requirement constituted a taking without compensation.²⁶ The court determined that unless the developer could rebut the statute's presumption of validity, the exaction requirement would stand because the state legislature had already found a need for parks.²⁷ The court

19. *Id.*

20. See E.F. Roberts, *Mining with Mr. Justice Holmes*, 39 VAND. L. REV. 287, 296 (1986) ("[T]he litmus for marking the point at which a regulation goes 'too far' has yet to be invented.").

21. The Supreme Court's two recent decisions, *Nollan v. California Coastal Comm'n*, discussed *infra* at notes 43-54, and *Dolan v. City of Tigard*, discussed *infra* parts II and III, are exceptions.

22. See *infra* notes 23-42 and accompanying text (discussing the various relational standards applied by state courts).

23. 394 P.2d 182 (Mont. 1964).

24. See Johnston, *supra* note 5, at 913 (noting that *Billings* "stands as an essay in judicial deference to legislative judgement"); Morosoff, *supra* note 3, at 865 (noting that *Billings* is the "leading case utilizing the judicial-deference approach").

25. *Billings*, 394 P.2d at 184. A Montana statute, § 11-602, subd. 9, MONT. REV. CODE (1947), required that one-ninth of the platted area of a development be forever dedicated to the public for parks and playgrounds. 394 P.2d at 184-85.

26. 394 P.2d at 184.

27. *Id.* at 188. The court had reasoned that when a development creates a specific need, it is not an unreasonable exercise of police power to charge the developer with the

held that the developer failed to meet its burden and deferred to the legislature, upholding the statute as a reasonable exaction under the police power.²⁸

Unlike the judicial deference standard, courts applying the “specific and uniquely attributable” standard scrutinize the relationship between exactions and development impacts.²⁹ The Supreme Court of Illinois developed this standard in *Pioneer Trust & Savings Bank v. Village of Mount Prospect*.³⁰ In *Pioneer Trust*, the Village of Mount Prospect refused to approve a proposed subdivision plat because the developer did not dedicate land for a school as required by local ordinance.³¹ The developer sued seeking approval of the plat without the dedication.³² The court held that the municipality could require the developer to bear only those costs that were “specifically and uniquely attributable” to the burdens created by the development.³³ The court found that development of the community as a whole, not the new subdivision, created the need for additional schools.³⁴ As a result, the court concluded that the Village’s dedication requirement was invalid.³⁵

Many courts have adopted the “reasonable relationship” test, which is an intermediate standard that requires local governments to demonstrate a “reasonable relationship” between the required dedication

burden of meeting that need. *Id.* at 187.

28. *Id.* at 188. The Supreme Court of Montana stated that the legislature’s determination would “not be disturbed by the judiciary unless evidence to the contrary preponderates against it.” *Id.*

29. See Morosoff, *supra* note 3, at 867 (commenting that the “‘specific and uniquely attributable’ test stands at the opposite end of the spectrum from the judicial-deference test”).

30. 176 N.E. 2d 799 (Ill. 1961).

31. *Id.* at 800-01. The Village of Mount Prospect established a land-use plan requiring developers to dedicate one acre for public use for each sixty residential buildings constructed or one-tenth of one acre for each acre of business or industrial buildings. *Id.*

32. *Id.* at 800.

33. *Id.* at 802.

34. *Id.* Exactions that required developers to finance needs created by the entire community, according to the court, amounted to a confiscation in violation of the Constitution. *Id.*

35. *Id.* The court determined that the need for new schools was not “specifically and uniquely attributable” to the construction of the new subdivision. *Id.* at 802.

and a development's impacts. *Simpson v. City of North Platte*³⁶ demonstrates one version of the "reasonable relationship" standard. The Simpsons applied to the City for permission to construct a restaurant on their undeveloped property.³⁷ The City refused to issue a building permit because the Simpsons failed to dedicate a forty foot roadway easement as required by city ordinance.³⁸ Balancing Nebraska's power to regulate land use with the land owner's property rights,³⁹ the court stated that a valid exaction must have "some reasonable relationship" to the proposed use of the property.⁴⁰ Because the City had no immediate plans to construct the street and had not required adjacent property owners to dedicate their land, the court concluded that the dedication requirement amounted to "land banking."⁴¹ Accordingly, the court concluded that the exaction exceeded the City's power to regulate land use.⁴²

State courts' conflicting tests created a need for the United States Supreme Court to develop a uniform relational standard. In *Nollan v. California Coastal Commission*,⁴³ the Supreme Court set the stage to select a relational standard in *Dolan v. City of Tigard*.⁴⁴ The Nollans owned property between two public beaches in Ventura County, California.⁴⁵ They decided to replace the dilapidated bungalow on their property with a new house and applied to the California Coastal

36. 292 N.W.2d 297 (Neb. 1980).

37. *Id.* at 299.

38. *Id.* at 299-300. North Platte City Ordinance No. 1962 provided that no building shall be erected on any lot unless half of the street adjacent to the lot had been dedicated in compliance with the City's comprehensive land use plan. *Id.* at 299.

39. The Nebraska Constitution contains a taking clause nearly identical to that of the United States. *Id.* at 300 (citing NEB. CONST. art. I, § 21).

40. *Simpson*, 292 N.W.2d at 301. The court noted that if a development exaction is merely an excuse for taking property when the landowner requests a permit, such a requirement is an improper exercise of eminent domain. *Id.*

41. *Id.*

42. *Id.* at 302.

43. 483 U.S. 825 (1987).

44. 114 S. Ct. 2309 (1994); see Morosoff, *supra* note 3, at 852 ("Nollan represents the Supreme Court's first encounter with the constitutionality of development exactions.").

45. 483 U.S. at 827. Faria County Park, an oceanside public park with a public beach lay a quarter-mile north of the Nollans' property. *Id.* Another public beach, locally known as "the Cove," lay 1,800 feet to the south. *Id.*

Commission for a development permit.⁴⁶ The Commission conditioned its approval on the Nollans granting public access across their property to facilitate travel between the two public beaches.⁴⁷ The Commission claimed that the Nollans' proposed house would reduce the public's view of the beach and erect a psychological barrier to public use of the beach while increasing private use.⁴⁸ The Nollans challenged the access requirement, claiming that it violated the Takings Clause of the Fifth Amendment.⁴⁹

The Supreme Court held that an "essential nexus" must exist between the exaction and a legitimate state interest.⁵⁰ The Court found it "quite impossible" to understand how requiring the Nollans to allow the public to walk across their property reduced the viewing obstacle created by their new house.⁵¹ Because the Court found no sufficient nexus between the access condition and a legitimate state interest,⁵² the Court concluded that the access requirement was unconstitutional.⁵³ The Court recognized that if a court finds a nexus, it must then analyze the "fit" between the exaction and the impacts of the proposed development.⁵⁴ The Court, however, did not define the parameters of that "fit."

46. *Id.* at 827-28.

47. *Id.*

48. *Id.* The Nollans' property extended seaward only to the mean high tide line. *Id.* at 828. Accordingly, that portion of the beach lying below the mean high tide line was public.

49. *Id.* The Nollans sought judicial redress from the Commission's decision, claiming that the access condition bore no reasonable relationship to any burden created by the proposed development and thus constituted a taking of private property without compensation in violation of the Fifth Amendment. *Id.*

50. *Id.* at 837. The Supreme Court reversed the California Court of Appeal, which had found that "only an indirect relationship" need exist between an exaction and a proposed development. *Id.* at 830. The California Court of Appeal concluded that a sufficient relationship existed between the required access condition and the burden created by the Nollans' proposed development. *Id.* at 830. Therefore, the California court found no constitutional obstacle to the Commission's access requirement. *Id.* at 830-31.

51. *Id.* at 838.

52. The Court impliedly recognized preserving the view of the beach as a legitimate state interest, but failed to see how the access condition related to that interest. *Id.*; see *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2317 (1994) (noting that, in *Nollan*, the Court had found visual access to the ocean to be a legitimate public interest).

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

54. *Id.* at 838.

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

The City of Tigard, Oregon, pursuant to state law and state land use goals, adopted a comprehensive land use plan.⁵⁵ To implement its plan, the City revised its zoning ordinance.⁵⁶ The revised ordinance required a dedication of land for greenways and pedestrian-bicycle pathways whenever someone developed adjacent to a flood plain.⁵⁷ The City's plan contained no provisions to compensate owners for the loss of their property.⁵⁸

John and Florence Dolan⁵⁹ owned a hardware store in the City of Tigard.⁶⁰ Fanno Creek, a small stream, ran along the back of the Dolans' property.⁶¹ To keep up with competition, the Dolans decided to expand their small business.⁶² Specifically, the Dolans planned to increase the size of their store and pave a new parking lot.⁶³ The Dolans applied to the City for the required building permit.⁶⁴ The City

55. That plan provided that the City would develop policies to retain a vegetative buffer along streams and other drainageways, to reduce flood damage and provide erosion control. Brief for Petitioner at 5, *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (No. 93-518). Furthermore, the plan required the City to review each development request in areas proposed for pedestrian-bicycle paths to determine the necessary easements or dedications. *Id.* at 6.

56. *Id.* at 6. The zoning ordinance is Title 18 of the City of Tigard's Community Development Code. *Id.*

57. Brief for Petitioner at 5-6, *Dolan* (No. 93-518).

58. *Id.* at 5.

59. Mr. Dolan died prior to the Supreme Court hearing the case. *Id.* at ii. As a result, the Supreme Court case was brought solely by Mrs. Dolan.

60. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2313 (1994). Tigard, Oregon has a population of 18,364 and is located just southwest of Portland, Oregon. RAND MCNALLY ROAD ATLAS (1991).

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

62. Brief for Petitioner at 3, *Dolan* (No. 93-518).

63. *Id.*

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

approved the Dolans' proposal on two conditions.⁶⁵ First, the City required the Dolans to dedicate all of their land within the creek's 100-year floodplain for a public greenway.⁶⁶ Second, the City required that the Dolans dedicate a fifteen-foot wide strip of land adjacent to the floodplain as a pedestrian-bicycle path.⁶⁷

The Dolans appealed the City's decision to the Oregon Land Use Board of Appeals (LUBA).⁶⁸ The Dolans argued that the City's dedication requirements were not sufficiently related to their expansion plans, and therefore constituted an uncompensated taking in violation of the Fifth Amendment.⁶⁹ The City claimed that the Dolans' expansion would increase storm water runoff⁷⁰ and vehicle congestion⁷¹ and that these adverse impacts justified the dedication requirements.⁷² Specifically, the City argued that the proposed greenway would facilitate

65. *Id.* at 2314. In addition to the two requirements discussed *infra*, the City Planning Commission originally required that the Dolans: 1) pay a \$14,256.02 traffic impact fee, 2) calculate the actual increase in surface water runoff due to the development and pay a "fee in-lieu of water quality" to mitigate the effects of that runoff, and 3) relocate the "footprint" of their proposed new store. Brief for Petitioner at 8 n.2, *Dolan* (No. 93-518). However, these requirements were not the focus of the Dolans' judicial appeals.

66. *Dolan*, 114 S. Ct. at 2314. The purpose of the greenway dedication requirement was to promote flood control on Fanno Creek. *Id.*

67. *Id.* The City required approximately 7,000 square feet of the Dolans' land, about 10% of their property. *Id.*

68. LUBA has exclusive jurisdiction over local government land use decisions and it is the first body to review them. ORE. REV. STAT. § 197.825(1) (1991). Brief for Respondent at 3 n.5, *Dolan* (No. 93-518).

The Dolans had previously challenged the City's exactions in the Oregon LUBA as violating the Federal Constitution. Brief for Petitioner at 7 n.1, *Dolan* (No. 93-518). LUBA denied the appeal, holding that the claim was not ripe because the Dolans failed to ask the City for a variance. *Id.* Subsequently, the Dolans applied to the City for a variance from the zoning regulations. *Id.* When the City denied their variance application, the Dolans appealed to LUBA again. *Id.* That appeal is the one discussed in the text.

69. Brief for Petitioner at 9 n.3, *Dolan* (No. 93-518).

70. Brief for Respondent at 14, *Dolan* (No. 93-518). The City maintained that the Dolans' plans to enlarge their paved parking area would increase the "impervious surface" of the property and thereby increase the storm water flow into Fanno Creek. *Id.*

71. *Id.* at 17. The City argued that by increasing the size of their store the Dolans would attract more customers, thereby increasing traffic congestion in the area. *Id.* at 18. Coincidentally, the pathway dedication also advanced the City's plans to develop a continuous pathway.

72. Brief for Respondent at 14, *Dolan* (No. 93-518).

flood control efforts on Fanno Creek⁷³ and that the bike path would offset increased traffic demands.⁷⁴ LUBA upheld the City's dedication requirements, finding a "reasonable relationship" between the Dolans' plans and the City's exactions.⁷⁵

The Oregon Supreme Court affirmed LUBA's decision.⁷⁶ The court combined the tests the City and the Dolans⁷⁷ proposed and determined that for an exaction to be "reasonably related" to an impact, it is essential to show a nexus between the two⁷⁸ Applying this test, the court concluded that the City's conditional dedication requirements did not violate the Constitution.⁷⁹

73. *Id.* at 17.

74. *Id.* at 18.

75. 22 Or. LUBA 617 (1992). The Oregon Court of Appeals affirmed the LUBA decision. *Dolan v. City of Tigard*, 832 P.2d 853 (Or. Ct. App. 1992). The court rejected the Dolan's contention that in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the Supreme Court of the United States had abandoned the "reasonable relationship" test in favor of a stricter "essential nexus" standard. 832 P.2d at 854-55.

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

77. The City argued that it need only show a "reasonable relationship" between the development's impact and the required exaction. *Dolan*, 854 P.2d at 441-42. The Dolans, relying on the Supreme Court's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), argued that the City must demonstrate an "essential nexus" between a legitimate state interest and the condition required by the regulating authority. *Dolan*, 854 P.2d at 441; *see supra* notes 45-54 and accompanying text (discussing *Nollan*).

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

79. *Dolan*, 854 P.2d at 444. The dissent weighed the relationship between the City's conditional exaction and the proposed development's impact more closely than the majority. *Id.* at 444-49 (Peterson, J., dissenting). The dissent noted that if an exaction is only an excuse for what is in fact a taking, the exaction is unconstitutional, even if some relationship exists between the development's impacts and the required exaction. *Id.* at 444. The dissent concluded that the City failed to meet its burden of establishing that the proposed development's burdens required the dedication of the Dolan's property. *Id.* at 449.

Importantly, both the majority and the dissent placed the burden of proving the necessary relationship on the City. *Id.* at 444; *see supra* note 9 and accompanying text (noting that the majority specifically framed the issue in a manner that placed this burden of proof on the City). The majority framed the issue as: "whether city has demonstrated the required relationship between the conditions that it attached to its approval of [the Dolan's] proposed land use and the expected impacts of that land use." *Dolan*, 854 P.2d at 438 (emphasis added).

III. "ROUGHLY PROPORTIONAL": THE SUPREME COURT'S ANALYSIS IN *DOLAN*

The Supreme Court weighed the competing interests of the state and the individual in *Dolan v. City of Tigard*.⁸⁰ The Court recognized that the purpose of the Takings Clause is to prevent government from forcing some individuals to bear public burdens which, in fairness, "should be borne by the public as a whole."⁸¹ The Court, however, also recognized the social necessity of allowing local governments to engage in land use planning.⁸² Balancing these competing interests, the Court concluded that development exactions are valid if they are related in nature and extent to the impacts of the proposed development.⁸³

To determine the proper relational test, the Court looked to the standards applied by state courts.⁸⁴ The Court criticized the judicial deference standard⁸⁵ because it failed to offer sufficient protection to an owner whose property was taken for a public purpose.⁸⁶ Likewise, the Court rejected the "specific and uniquely attributable" test,⁸⁷ asserting

80. 114 S. Ct. 2309 (1994).

81. *Id.* at 2316 (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

82. *Dolan*, 114 S. Ct. at 2316. The Court noted that if the City had simply required the Dolans to dedicate their land along Fanno Creek for public use, rather than conditioning its approval of a permit on the dedication, an unconstitutional taking clearly would have occurred. *Id.*

83. *Id.* at 2318. Prior to its analysis of the necessary relationship between the exaction condition and the impact of the proposed development, the Court concluded that a nexus existed between the City's legitimate interest of preventing flooding along Fanno Creek and limiting development within the creek's 100-year floodplain. *Id.* Similarly, the Court concluded that the pedestrian-bicycle path might further the City's legitimate interest of relieving traffic congestion. *Id.* See *supra* notes 43-54 and accompanying text (discussing *Nollan v. California Coastal Comm'n* and the "essential nexus" requirement). In *Nollan*, the Court did not need to address the necessary degree of relationship between impacts and exactions, because the required exaction lacked any nexus with the state's interest in preserving visual access to the beach and therefore was unconstitutional. *Nollan*, 483 U.S. at 838.

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

85. See *supra* notes 23-28 and accompanying text (discussing the judicial deference standard).

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

87. See *supra* notes 29-35 and accompanying text (discussing the "specific and uniquely attributable" standard).

that the Constitution does not require such exacting scrutiny.⁸⁸ The Court noted that a majority of state courts have adopted some form of the "reasonable relationship" test, and that this test best approximated the relationship required by the Constitution.⁸⁹ The Court fashioned the term "rough proportionality" to better describe the necessary relationship between exactions and a development's impacts.⁹⁰

Having determined the applicable standard, the Supreme Court evaluated the relationship between the City of Tigard's exaction and the development's impacts.⁹¹ The Court questioned why a public greenway easement was necessary to mitigate flooding on Fanno Creek.⁹² Furthermore, the Court faulted the City for not quantifying the extent to which the pedestrian-bicycle pathway would decrease traffic congestion.⁹³ The Court also recognized Mrs. Dolan's constitutionally-based right to exclude others from her property.⁹⁴ Concluding that the City had failed to prove that the pathway easement was sufficiently related to any prospective increase in traffic,⁹⁵ the Court held that the City failed to demonstrate a reasonable relationship⁹⁶ between the

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

89. *Id.* at 2319. See *supra* notes 36-42 and accompanying text (discussing the "reasonable relationship" standard).

90. 114 S. Ct. at 2319. The Court explained its choice of the term "rough proportionality" by noting that "reasonable relationship" seemed confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Id.* The Court stressed that "[n]o precise mathematical calculation" was required. *Id.* However, the local government 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." *Id.* at 2319-20.

91. *Id.* at 2320.

92. *Id.* The Court recognized that keeping the greenway free of development would limit the pressures on Fanno Creek; however, the Court went on to suggest that a private greenway would serve the City's interest in flood control just as well as a public greenway. *Id.*

93. *Id.* at 2321. The City found only that building the pathway *could* offset some of the increase in traffic congestion. *Id.*

94. *Id.* at 2320.

95. *Id.* at 2322. In its final paragraph, the majority commended the City's goals of controlling flooding and traffic congestion, but recognized that there are constitutional limits to the methods of accomplishing them. *Id.*

96. After supposedly replacing the "reasonable relationship" standard with the term "rough proportionality" because it better "encapsulates . . . the requirement of the Fifth Amendment . . .", 114 S. Ct. at 2319, the Court failed to mention "rough proportionality"

required floodplain easement and the impacts of Mrs. Dolan's expansion plans.⁹⁷

The dissent criticized the majority for not considering that the Dolans would receive some benefits from the City's proposed drainage plan.⁹⁸ Only when a property owner demonstrates that an exaction is "grossly disproportionate" to the proposed development's adverse effects, the dissent argued, should courts consider whether the City harbors motives other than land use regulation.⁹⁹ Furthermore, the dissent disagreed that the City should bear the burden of proving the necessary relationships.¹⁰⁰ Instead, the dissent asserted that the party challenging the state action should demonstrate that the exaction unreasonably exceeds the value of a proposed development.¹⁰¹

IV. ANALYSIS AND COMMENTARY

A. "Rough Proportionality"

The Supreme Court's new "rough proportionality" standard represents an equitable balance between the constitutional rights of property owners and the states' power to regulate land use.¹⁰² The

anywhere else in its opinion. Rather, the Court concluded that the City's exaction requirements did not bear "the required reasonable relationship" to the impacts of Mrs. Dolan's proposed development. *Id.* at 2321.

97. *Id.* at 2321. The Court noted that it was difficult to see how allowing the public to trample along Mrs. Dolan's floodplain was sufficiently related to the City's legitimate interest in flood control. *Id.* at 2320.

98. *Dolan*, 114 S. Ct. at 2324 (Stevens, J., dissenting). The dissent pointed out that the City's drainage plan to increase Fanno Creek's carrying capacity would offer significant benefits to adjacent landowners, including Mrs. Dolan. *Id.* The dissent further argued that a proper analysis should focus on the impact of the City's action on the entire parcel of the Dolan's property, rather than just the portion required for dedication. *Id.*

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

100. *Id.* at 2326. The dissent argued that a "strong presumption of validity should attach" to any conditions placed on a permit in furtherance of a valid land use plan. *Id.* at 2329-30.

101. *Id.* at 2330.

102. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1250 (1967) (commenting that the proper standard for evaluating compensation claims is a "workable, impersonal rule believed to approximate in a useful proportion of cases the same result that fairness would dictate").

Constitution's Framers,¹⁰³ the Supreme Court,¹⁰⁴ and scholars¹⁰⁵ agree that fairness lies at the heart of the Takings Clause. Fairness requires that the public should not be saddled with the adverse impacts created by those who develop their private property.¹⁰⁶ Fairness, however, also dictates that private property owners should not be forced to pay for civic projects benefiting the entire community. By requiring a "rough proportionality" between exactions and a development's impacts, the Supreme Court recognized that neither property owners nor the community should bear burdens more appropriately shouldered by the other.

The Court properly rejected the "judicial deference" standard.¹⁰⁷ This approach allows state legislatures, rather than courts, to determine the proper balance between a state's power to regulate land use and the rights of property owners.¹⁰⁸ Allowing state legislatures to determine the limits of their own power jeopardizes the protection afforded by the Fifth Amendment.¹⁰⁹ When faced with a choice, states may choose to

103. The framers thought it unfair that government could require individual property owners to dedicate their land for the benefit of the public as a whole. *See* *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.") (emphasis added).

104. *See* *Dolan v. City of Tigard*, 114 S. Ct. at 2316 (citing, with approval, *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

105. *See* *Michelman*, *supra* note 102, at 1171-72 (suggesting the basis for evaluating claims for compensation under the Takings Clause should be one of fairness); *Roberts*, *supra* note 20, at 293, 301 (noting that the issue is one of fairness); *Siemon*, *supra* note 2, at 120 (noting that a concept of fundamental fairness has shaped modern land use controls); *Morosoff*, *supra* note 3, at 840 ("Several scholars have argued that the basic concept behind the whole takings issue is one of fairness.").

106. *See* *Nicholas*, *supra* note 2, at 99 (asserting that "taxpayers should not be expected to subsidize new development").

107. *See* *supra* notes 23-28 and accompanying text (discussing judicial deference analysis).

108. *See* *Morosoff*, *supra* note 3, at 866 (commenting that the judicial deference standard leaves the determination of the necessary relationship to the very municipality that is imposing the exactions).

109. *See* *Roberts*, *supra* note 20, at 301 ("[T]he real problem . . . is whether state governments can be trusted to decide fairly whether the taxing public at large or private property owners ought to bear the cost of progress."); *Siemon*, *supra* note 2, at 124 (noting that exaction ordinances provide the potential for abuse and disparate treatment); *Morosoff*, *supra* note 3, at 839-40 (illustrating, by example, how states might use their police power

avoid paying compensation by taking property through an exercise of their police power rather than by eminent domain.¹¹⁰

The Court also properly rejected the “specific and uniquely attributable” standard because it is too rigid.¹¹¹ Exactions offer local governments an alternative to an outright development ban by allowing development to proceed while offering the municipality a mechanism for mitigating the project’s adverse impacts.¹¹² Requiring local governments to demonstrate such a strict relationship between impacts and exactions takes away needed flexibility.

Finally, the “reasonable relationship” standard’s nebulous language does not promote uniformity among courts.¹¹³ Without a more exact proportionality standard, state courts would be free to choose whatever

to avoid paying compensation).

110. See Roberts, *supra* note 20, at 291 (arguing that absent a firm takings doctrine, “the public . . . always will resort to the police power in lieu of the eminent domain power and the institution of private property itself will be in jeopardy”); see also *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961) (recognizing the natural tendency of states to extend their police power to avoid the compensation requirements of the Fifth Amendment).

111. See, e.g., *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442, 447 (Wis. 1965) (“In most cases it would be impossible for the municipality to prove that the land required to be dedicated for a park or school site was to meet a need solely and [uniquely] attributable to the [development of a new subdivision.]”), appeal dismissed, 385 U.S. 4 (1966). See Johnston, *supra* note 5, at 914 (noting that “specifically and uniquely attributable” standard presents an “almost unattainable standard of validity”); see also *supra* notes 29-35 and accompanying text (discussing the “specific and uniquely attributable” standard).

112. See Dolan, 114 S. Ct. at 2322 (Stevens, J., dissenting) (recognizing that development exactions offer property owners an opportunity to develop when the local government could outright ban the development because of its adverse impacts); Morosoff, *supra* note 3, at 851 (noting that development exactions permit development by requiring developers to make a contribution to cancel out their projects’ undesirable consequences); see also *Nollan*, 483 U.S. at 847 (Brennan, J., dissenting) (discussing the benefits of allowing states the flexibility to balance private and public interests by using exactions as a means of offsetting burdens created by development).

113. See generally John J. Delaney et al., *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, LAW & CONTEMP. PROBS., Winter 1987, at 139, 156 (concluding that the reasonable relationship test is a vague standard). As an illustration, the Oregon Supreme Court found that the exactions required by the City of Tigard were “reasonably related” to the impact of the proposed development. *Dolan v. City of Tigard*, 854 P.2d 437, 434-44 (1993). The Supreme Court disagreed. 114 S. Ct. at 2321. The more precise “rough proportionality” standard attempts to remove that incongruity.

degree of relationship they considered appropriate.¹¹⁴ Some courts might interpret the standard as requiring only the most tenuous relationship between impacts and exactions.¹¹⁵ Other courts might require a much stricter relationship. Because of its vagueness, the "reasonable relationship" standard is too unpredictable.

The Court's decision in *Dolan* properly balances a state's power to regulate land use and an individual's property rights. The decision also may be viewed as increasing the level of judicial scrutiny focused on development exaction schemes. The Court adopted the "rough proportionality" standard instead of the widely-used "reasonable relationship" standard because the Court was concerned with the proper level of judicial scrutiny.¹¹⁶ *Dolan* requires courts to scrutinize the relationship between required exactions and the adverse impacts of proposed developments. Such scrutiny is particularly appropriate when the local government has a direct financial interest in the outcome of the decision.¹¹⁷

B. *The Burden of Proof*

Few will dispute the fairness of the Court's requirement that exactions bear a "rough proportionality" to a development's impacts.¹¹⁸ On the other hand, placing the burden on local governments to prove that

114. See *Dolan*, 114 S. Ct. at 2316 (noting that the Fourteenth Amendment makes the Fifth Amendment's "Takings Clause" applicable to the states). As the City noted in its brief, ultimately, "the significance of any test depends less on its precise wording than on how courts apply it in practice." Brief for Respondent at 31 n.25, *Dolan* (No. 93-518).

115. The Oregon Supreme Court's cursory investigation into the relationship between the City of Tigard's exaction requirements and the impacts of the Dolans' proposed development demonstrates that the "reasonable relationship" standard may offer the property owner little protection in some jurisdictions. *Dolan*, 854 P.2d 443-44; see also *Wald Corp. v. Metropolitan Dade County*, 338 So.2d 863, 866 (Fla. Dist. Ct. App. 1976) (noting that the reasonable relationship test gives local governments "almost unlimited discretion"), *cert. denied*, 348 So.2d 955 (1977).

116. *Dolan*, 114 S. Ct. at 2319. The dissent also recognized that the Court's decision represents a heightened level of scrutiny. *Id.* at 2329 (Stevens, J., dissenting).

117. If the local government is allowed to "take" the property under its police power, it is not required to pay compensation. See generally Siemon, *supra* note 2 (arguing for strict judicial review of local impact exaction requirements).

118. Even Richard Lazarus, author of the brief for the City of Tigard, commented after the case that the "rough proportionality test in isolation is perfectly fair." Linda Greenhouse, *High Court, in a 5-4 Split, Limits Public Power on Private Property*, N.Y. TIMES June 25, 1994, at 1.

relationship will undoubtedly foster disagreement. The burden of proof issue split the Court in *Dolan*.¹¹⁹ The majority placed the burden on the City to prove a “rough proportionality” between its dedication requirements and the impacts of the proposed development.¹²⁰ The dissent disagreed, charging that the Court “stumbled badly” by abandoning the traditional presumption of constitutionality given to state statutes.¹²¹

The disagreement results largely from a difference in perspective. In its brief, the City of Tigard classified the exaction requirement as a legislative action.¹²² The City argued that, under a long line of precedent, state laws are entitled to a presumption of validity.¹²³ Accordingly, the City claimed that the party challenging the constitutionality of an exaction requirement bears the burden of proving its invalidity.¹²⁴ In contrast, the Supreme Court viewed the exaction requirement as an adjudicative determination rather than a legislative enactment.¹²⁵ As a result, the Court determined that the exaction requirement was not entitled to a presumption of validity.¹²⁶

The majority’s position on the burden of proof issue is consistent with its analysis of the relational standard issue. The Court required local governments to make an “individualized determination” concerning whether an exaction is related to the impact of the proposed development in both nature and extent.¹²⁷ Such determinations more closely resemble adjudications than legislative acts. Accordingly, the Court rejected the presumption of validity which traditionally accompanies

119. See *supra* part III (discussing the Supreme Court’s analysis in *Dolan*).

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

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

122. Brief for Respondent at 24, *Dolan* (No. 93-518).

123. *Id.*

124. *Id.* On the other hand, Mrs. Dolan cited little authority to support her argument that the burden should be placed on the City. She primarily relied on Justice Brennan’s dissent in *Nollan v. California Coastal Comm’n*, for the proposition that *Nollan* shifted the burden of proof to the state. Petitioner’s Reply to Brief for Respondent at 12, *Dolan* (No. 93-514) (citing *Nollan*, 483 U.S., at 841 (Brennan, J., dissenting)).

125. *Dolan*, 114 S. Ct. at 2320 n.8.

126. *Id.*

127. *Dolan*, 114 S. Ct. at 2321. Presumably state statutes that require flat percentage exactions (10% of a developer’s property, for example) would be unconstitutional in light of *Dolan*, because they require no “individualized determination.”

legislative acts because adjudicative decisions are not presumed valid. Placing the burden of proof on the local government accords with the opinions of most state courts, which have placed the burden of proof on the government entity requiring the exaction.¹²⁸

Moreover, the Court's approach to the burden of proof issue is reasonable. The party bearing the burden of proof in an exactions case faces a difficult task,¹²⁹ particularly when the impacts of a proposed development relate to the environment.¹³⁰ Nevertheless, the language of the Constitution is clear and unambiguous — "nor shall private property be taken for public use, without just compensation."¹³¹ Therefore, once a property owner "proves" her property has been taken without compensation, it is reasonable to require the State to demonstrate why compensation should not be paid.

V. FUTURE IMPLICATIONS

Is *Dolan v. City of Tigard*, as Justice Stevens commented, "unquestionably an important case?"¹³² Some consider *Dolan* an

128. Despite the dissent's comments to the contrary, the majority's placement of the burden on the local government is not "novel." *Dolan*, 114 S. Ct. at 2326 (Stevens, J., dissenting). Justice Stevens criticized the majority for "imposing a novel burden of proof on [the] city . . ." *Id.* See, e.g., *Dolan v. City of Tigard*, 854 P.2d 437, 444 (Or. 1993) (Peterson, J., dissenting) (noting that both the majority and dissent place the burden on the City to prove that the exaction serve a legitimate state purpose and that the exaction possessed the necessary relationship to the impact of the proposed development); *Simpson v. City of North Platte*, 292 N.W.2d 297, 302 (Neb. 1980) (stating that there was insufficient evidence on the record to find for the municipality); *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442, 447 (Wis. 1965) (stating that in order for an exaction to be valid the municipality must provide enough evidence to show that the needs addressed result from the development); *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961) (suggesting that the municipality failed to establish that the exaction requirement met the relevant relational standard).

129. See *Johnston*, *supra* note 5, at 914 (commenting that the burden of establishing the necessary relationship between exactions and a development's impacts are substantial).

130. See *Greenhouse*, *supra* note 118, at 1 (quoting Richard Lazarus, author of the brief for the City of Tigard, who commented that it is very hard to quantify risks like increased flooding and traffic congestion). Recognizing this difficulty, the Court lessened the local government's burden by emphasizing that precise mathematical calculations are not required. *Dolan*, 114 S. Ct. at 2319.

131. U.S. CONST. amend. V.

132. *Dolan*, 114 S. Ct. at 2322 (Stevens, J., dissenting) (recognizing that the "mountain of briefs" received by the Court indicated that much more was riding on the *Dolan* decision than the sixth of an acre lying behind Mrs. Dolan's hardware store).

important victory for property owners.¹³³ A closer look, however, suggests that the case affords less than perfect protection against excessive development exactions. First, local governments and property owners recognize that appealing exaction requirements to the courts is time consuming and expensive. This burden gives local governments considerable leverage.¹³⁴ Unless a dedication requirement is extraordinarily onerous, developers may choose to comply rather than suffer the delays, costs, and risks of judicial review.¹³⁵

Moreover, *Dolan's* language may allow local governments to circumvent its holding by recharacterizing their exaction conditions. Specifically, the Supreme Court distinguished the exaction in *Dolan* from those that are "essentially legislative determinations" and those regulations that are "simply . . . limitation[s] on . . . use."¹³⁶ It is also unclear whether *Dolan's* rough proportionality and burden of proof requirements apply to impact fees, as well as dedication requirements.¹³⁷

Lastly, a review of recent state court opinions suggests that lower courts may overlook or avoid *Dolan's* requirements.¹³⁸ While some

133. See *Dolan*, 114 S. Ct. at 2326 (Stevens, J., dissenting) (commenting that "property owners have surely found a new friend"); Greenhouse, *supra* note 118, at 6 (describing *Dolan* as a considerable victory for property owners).

134. See Richard F. Babcock, *Foreword*, LAW & CONTEMP. PROBS. Winter 1987, at 1, 2 (noting that because it costs "tens if not hundreds of thousands of dollars" and takes "three to four years" to get a judicial resolution regarding the validity of exaction requirements, the local government has considerable municipal leverage).

135. See Siemon, *supra* note 2, at 125 (noting that because litigating an impact exaction requirement costs thousands of dollars and takes up to a year, developers have no choice but to comply with the local government's requirement). *But cf.* CAL. CIV. PROC. CODE § 1036 (West 1980) (allowing reimbursement of a property owner's reasonable costs and attorney's fees if the owner establishes that the restriction on use is a compensable taking).

136. *Dolan*, 114 S. Ct. at 2316. In a footnote, the majority agreed with the dissent 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." *Id.* at 2320 n.8.

137. See *Ehrlich v. City of Culver City*, 114 S. Ct. 2731 (1994) (*vacating and remanding Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737 (Cal. Ct. App. 1993), in light of *Dolan*). The Supreme Court's disposition of this case suggests that *Dolan* may apply to development fees.

138. See, e.g., *Luxembourg Group, Inc. v. Snohomish County*, No. 33263-5-I, 1995 WL 4713 (Wash. Ct. App. Jan. 9, 1995) (finding unconstitutional a right-of-way exaction, but not reaching the *Dolan* balancing); *J.C. Reves Corp. v. Clackamas County*, LUBA No.

courts hold for the land owner,¹³⁹ others either persist in their old ways or attempt to avoid *Dolan*. In *Trimen Development Co. v. King County*,¹⁴⁰ for example, the Supreme Court of Washington upheld a county ordinance that conditioned plat approval on the payment of park development fees.¹⁴¹ Failing to apply *Dolan's* "rough proportionality" test, the Washington Supreme Court determined that the park development fee was "reasonably necessary"¹⁴² as a result of the proposed development.¹⁴³

Similarly, in *Home Builders Association of Central Arizona v. City of Scottsdale*,¹⁴⁴ an Arizona court failed to apply *Dolan's* "rough proportionality" test.¹⁴⁵ Instead, the court stated that a development fee

94-027, 1994 WL 700690 (Or. Ct. App. Dec. 14, 1994) (upholding, without detailed factual findings, an access condition); *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 490 S.E.2d 200, 202 n.3 (Ga. 1994) (declining to apply *Dolan* to a city ordinance requiring conditions of all parking lots); *Spring v. New Caanan Planning & Zoning Comm'n*, No. CV 135583, 1994 WL 669205 at *5 n.2 (Conn. Super. Ct. Nov. 14, 1994) (dismissing in a footnote, the land owner's *Dolan* claim because the commission "was acting in a legislative capacity"). *But see* *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. Ct. App. 1994) (applying *Dolan* to invalidate a development exaction); *Trimen Development Co. v. King County*, 887 P.2d 187 (Wash. 1994) (en banc); *Home Builders Ass'n of Central Ariz. v. City of Scottsdale*, 875 P.2d 1310 (Ariz. Ct. App. 1994); *R.R. Hensler v. City of Glendale*, 876 P.2d 1043 (Cal. 1994) (en banc).

139. *See, e.g., Schultz*, 884 P.2d 569.

140. 877 P.2d 187 (Wash. 1994) (en banc).

141. *Id.* King County Code § 19.38.020 states, in part, that plat approval "shall be contingent upon reservation or dedication of land for the open space and recreational needs of its residents or payment of a fee-in-lieu thereof . . ." *Id.* at 189.

142. Washington State Statute, WASH. REV. CODE § 82.02.020, required only that the exaction requirement be "reasonably necessary as a direct result of the proposed development . . ." 877 P.2d at 192.

143. *Trimen*, 877 P.2d at 194. Ironically, the Washington Supreme Court applied the "reasonably necessary" standard but cited *Dolan*, specifically noting its requirement of "rough proportionality" between required dedications and the impact of the proposed development. *Id.* The *Dolan* Court expressly rejected the "reasonable relationship" standard. *See supra* note 84 and accompanying text (discussing the Court's analysis in *Dolan*).

144. 875 P.2d 1310 (Ariz. Ct. App. 1994).

145. *Id.* In *Home Builders*, a group of developers brought an action challenging the validity a city ordinance imposing a water resource development fee on new developments. *Id.* at 1311. The developers claimed "that the fee did not offset costs associated with providing necessary public services to the developments, that the fee did not result in a beneficial use to the developments, that the fee did not bear a reasonable relationship to any burden imposed upon [the city], and that the fee discriminated against new

must be “reasonably related”¹⁴⁶ to the burden placed on the community by the proposed development.¹⁴⁷ Furthermore, the court appeared to revive judicial deference analysis, which *Dolan* expressly rejected.¹⁴⁸

Specifically, the court noted that it should “acquiesce in the legislative determination of all matters of fact unless [they are] clearly erroneous, arbitrary and wholly unwarranted.”¹⁴⁹

Lastly, in *R.R. Hensler v. City of Glendale*,¹⁵⁰ the Supreme Court of California avoided the *Dolan* holding altogether. A city ordinance precluded Hensler from developing forty percent of his property.¹⁵¹ Hensler sued, claiming that the regulation amounted to a taking of his property by inverse condemnation.¹⁵² The court held that the landowner was not entitled to judicial review of his constitutional claim because he failed to pursue an administrative remedy within the statutory limitation period.¹⁵³

CONCLUSION

Property owners are better off now than they were before *Dolan*.

homebuilders and new residents.” *Id.*

146. An Arizona statute, ARIZ. REV. STAT. ANN. § 9-463.05 (Supp. 1994), requires that development fees must bear a “reasonable relationship” to the burden of the proposed development. 875 P.2d at 1312.

147. Because the trial court had not decided whether the development fee bore a reasonable relationship to the burden placed on the city, the appellate court remanded for consideration of this issue. *Id.* at 1318. Interestingly, both the majority and dissent discussed the various relational tests adopted by different courts to evaluate development fees, but neither mentioned *Dolan* or its rough proportionality standard. *Id.* at 1313-25.

148. See *supra* notes 85-86 and accompanying text (discussing the Supreme Court’s express rejection of judicial deference analysis in evaluating development exactions).

149. *Homebuilders*, 875 P.2d at 1312 (citation omitted). The court further declared that the municipality need only show “some rational basis” for the amount of the fee in order to avoid it being “clearly erroneous, arbitrary and wholly unwarranted.” *Id.* at 1315.

150. 876 P.2d 1043 (Cal. 1994) (en banc); see also *Waters Landing Limited Partnership v. Montgomery County*, 650 A.2d 712 (Md. Ct. App. 1994) (holding *Dolan* inapplicable in the context of special development tax assessments).

151. *Id.* at 1047. The ordinance, enacted three years after the owner purchased the property, prohibited construction on major ridge lines within the city. *Id.*

152. *Id.*

153. *Id.* at 1060. CAL. GOV’T CODE § 66499.37 (West 1983) requires that any action challenging acts or decisions made pursuant to the Subdivision Map Act shall be commenced within ninety days after the date of such decision. 876 P.2d at 1059.

Dolan's "rough proportionality" requirement should prevent egregious violations of constitutional property rights. In addition, by placing the burden of proof on the municipality the Court reduced the steepness of a property owner's uphill struggle against excessive exactions. However, *Dolan* offers only limited protection. Because of the delays, costs, and risks of judicial appeal, developers may have little choice but to succumb to local governments' demands. Moreover, as the post-*Dolan* decisions suggest, state courts may avoid strict application of the Supreme Court's new standard. For these reasons, *Dolan* offers property owners considerably less than a complete victory.

*Keith Kraus**

* J.D. 1995, Washington University.