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ARTICLE

NOLLAN AND DOLAN: EXACTION PACKED ADVENTURES IN TAKINGS JURISPRUDENCE

by John P. Seibels, Jr.¹

The United States Supreme Court has decided more Fifth Amendment takings cases within the last fifteen years than it has in all the preceding seventy-five. The Court has launched an apparent quest to clarify its sometimes inconsistent decisions on takings claims and consequently has decided a series of significant cases in recent years. However, two such cases represent a departure from the Court's traditional takings analysis. The Court has instead substituted a new test for challenges to land use permits. This article discusses the evolution of traditional takings jurisprudence and how the Court has carved an exception to its prior law for challenges to permit-based land use restrictions.

The Just Compensation Clause of the Fifth Amendment provides "private property [shall not] be taken for public use, without just compensation."² The Clause does not limit the government's power to interfere with individual property rights, but rather guarantees compensation when an otherwise proper interference with private property amounts to a taking.³ The question of what constitutes a Fifth Amendment taking has proven a problem of considerable difficulty. Until recently, the United States Supreme Court has been unable to develop any set formula for determining when government interference with private property rights must be compensated as a taking.⁴

All government action requiring compensation may be categorized into three paradigms. First, the Just Compensation Clause applies to the government's power of eminent domain through the process of condemnation. Eminent domain allows the government to assert its dominion over any real property and convert it to public use for the public good. The Fifth Amendment conditions the government's power of eminent domain upon the payment of just compensation to the owner of the property that is taken.

Second, a Fifth Amendment taking may occur when the government impairs

¹ Associate, Holmes & Thomson, L.L.P., Charleston, S.C., B.A. 1988, University of Virginia; J.D. 1993, University of South Carolina.

² U.S. CONST. amend. V.

³ *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314-15 (1987).

⁴ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123-34 (1978).

individual property rights by the legislative exercise of its police power to restrict land use. The United States Supreme Court has struggled over the years with regulatory takings cases to determine when a land use regulation has burdened a private property owner so much as to require compensation. Whether a given restriction triggers the Fifth Amendment depends largely upon the particular circumstances of a case,⁵ and in its case-by-case analysis the Court has identified several factors that must be balanced.⁶

Finally, a Fifth Amendment taking may occur when a government permit allowing development or construction on private property contains a condition that impairs individual property rights. The United States Supreme Court has decided two cases since 1987 in which a property owner challenged the constitutionality of conditions placed upon a permit to develop real property.⁷ In reviewing the constitutionality of the permit conditions, the Court developed a new test distinct from its prior jurisprudence regarding land use regulations.⁸

The devil of the takings issue lives within the realm of legislative and permit-based land use regulation. The police power⁹ authorizes states and municipalities to protect the public health, morals, and safety.¹⁰ With the police power as justification, a municipality may achieve many of the same goals through legislative and permit-based land use regulation as it could achieve by eminent domain. For more than one hundred years, the Court has attempted to determine where the police power ends and the Just Compensation Clause begins. However, its analyses have produced inconsistent results.¹¹ In the last fifteen years, the Court has decided a historically greater number of regulatory takings cases in which the Court has endeavored to refine its takings jurisprudence. Although most takings decisions are the product of a balancing test, the Court's recent cases illustrate two circumstances under which the Court will find a regulatory taking regardless of a balancing analysis.¹²

⁵ *Id.* at 124.

⁶ See *infra* notes 43 through 54, and accompanying text.

⁷ *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987).

⁸ See *infra* notes 154 through 166, and accompanying text.

⁹ U.S. CONST. amend. X.

¹⁰ *Mugler v. Kansas*, 123 U.S. 623, 662 (1887).

¹¹ See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7 (1992). Compare *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (holding law that restricts subsurface extraction of coal effects a taking) with *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-502 (1987) (holding that a nearly identical law does not effect a taking).

¹² *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a permanent physical occupation of private property by the government or others is a Fifth Amendment taking, without regard to a balancing process); *Lucas*, 112 S. Ct. 2886 (1992) (holding a regulation that deprives property of all economically beneficial use constitutes a taking, unless the proscribed use was not part of the original title). See *infra* notes 63-71 and accompanying text.

I. The Just Compensation Clause: Lost and Found

The Court was on the verge of pronouncing an articulate takings formula when, in 1987, it reviewed the constitutionality of a California land use permit condition imposed by that state's Coastal Commission.¹³ Inexplicably, the Court discarded its traditional balancing test, applied in many zoning and other use restriction challenges, and devised a new test.¹⁴ In 1994, the Court applied its new test and added a new prong.¹⁵ This article will discuss the historical development of takings jurisprudence, the creation of the new test applied in land use permit challenges, and why the new test is unnecessary and unjustified under the Court's prior takings decisions.

In its early cases, the Court examined land use restrictions in light of the due process limitations of the Fourteenth Amendment.¹⁶ The due process limit on the police power was announced succinctly by the Court in *Lawton v. Steele*.¹⁷ The Court reviewed New York's authority to declare net fishing a public nuisance and authorize game wardens to seize, remove, and destroy fishing nets.¹⁸ Responding to the plaintiff fishermen's claim that the statute was unjustified, the Court held:

To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations.¹⁹

The Court then upheld the statute as a reasonable exercise of the state's police power to preserve its fisheries.²⁰

In *Mugler v. Kansas*,²¹ the Court after applying due process scrutiny, upheld a Kansas statute prohibiting the manufacture of alcohol.²² The plaintiff argued the regulation denied him all use of his brewery and therefore amounted to a Fifth Amendment taking. Employing due process analysis, the Court held the statute was a legit-

¹³ *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

¹⁴ *Id.* at 836.

¹⁵ *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

¹⁶ U.S. CONST. amend. XIV.

¹⁷ 152 U.S. 133 (1894).

¹⁸ *Id.* at 135.

¹⁹ *Id.* at 137.

²⁰ *Id.* at 143.

²¹ 123 U.S. 623 (1887).

²² *Id.* at 661-62.

imate exercise of police power and was fairly adapted to the legitimate public purpose of "protecting the community against the evils which confessedly result from the excessive use of ardent spirits."²³ Justice Harlan elevated the police power to a higher status than the Fifth Amendment's Just Compensation Clause, noting:

As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not — and, consistently with the existence and safety of organized society, cannot be — burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain²⁴

Although the Court expressly acknowledged that the value of the brewery property "[would] be very materially diminished"²⁵ by the enforcement of the statute, it held a valid use of the police power precluded any Fifth Amendment takings issues.²⁶

The Supreme Court reaffirmed the supremacy of Fourteenth Amendment due process over the Just Compensation Clause in *Hadacheck v. Sebastian*.²⁷ Hadacheck owned and operated a brickyard located upon a clay bed worth approximately \$800,000 for brick-making purposes and not exceeding \$60,000 for residential purposes. When he purchased the land, it was outside the limits of the City of Los Angeles, but was later annexed. Los Angeles enacted an ordinance making it unlawful for any person to establish or operate a brickyard within the city limits. After Hadacheck was arrested and charged with violating the ordinance, he filed a lawsuit charging the chief of police, Sebastian, with taking his property without compen-

²³ *Id.* at 662.

²⁴ *Id.* at 668-69.

²⁵ *Id.* at 667.

²⁶ *Id.* at 668-69.

²⁷ 239 U.S. 394 (1915).

sation.²⁸ Hadacheck's claim was analyzed pursuant to Fourteenth Amendment due process considerations. Under this theory, the Court found the ordinance was a rational exercise of the police power.²⁹ The Court gave no consideration to Hadacheck's massive loss of property value, and if there was any doubt regarding the Court's view of the police power, it was resolved by Justice McKenna when he wrote:

It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence *precludes any limitation upon it when not exerted arbitrarily*.³⁰

The Just Compensation Clause was never considered.

The Court finally discovered the Just Compensation Clause in 1922 when it decided *Pennsylvania Coal Co. v. Mahon*.³¹ In 1921, Pennsylvania enacted the Kohler Act which prohibited subsurface mining of anthracite coal if the mining would cause the surface to collapse or subside. Surface property owners sued Pennsylvania Coal in an effort to prohibit it from mining in violation of the Act. Pennsylvania Coal had acquired the subsurface coal rights by contract, and the surface holders acquired their estate with knowledge of the risk of subsidence.³² The surface estate holders admitted, and the Court acknowledged, that the statute destroyed previously existing property and contract rights.³³ The Court then framed the question as "whether the police power can be stretched so far."³⁴

Justice Holmes observed that the government could hardly operate if values incident to property could not be diminished without paying for every change in the general law:

As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the ques-

²⁸ *Id.* at 405-07.

²⁹ *Id.* at 409-10.

³⁰ *Id.* at 410 (emphasis added).

³¹ 260 U.S. 393 (1922).

³² *Id.* at 394.

³³ *Id.* at 413.

³⁴ *Id.*

tion depends upon the particular facts.³⁵

The Court then observed that the Kohler Act made it commercially impracticable to mine certain coal. The Act had the same constitutional effect as appropriating the coal deposits.³⁶ Under these circumstances, the Act could not be sustained as an exercise of the police power.³⁷ In striking down the Act, Justice Holmes stated that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."³⁸

The Just Compensation Clause thus was introduced as a limitation on police power. However, the Court gave very little guidance regarding how to apply the limitation. Justice Holmes recognized the question depends upon the particular facts of the case. One fact to consider is the extent of property value diminution. Without further guidance, courts were ill-equipped to evaluate the validity of land use regulations.

In 1926, the Court decided *Village of Euclid v. Ambler Realty Co.*³⁹ In *Euclid*, a property owner challenged a comprehensive zoning plan regulating and restricting the location of trades, industries, and residences. Seizing upon Justice Holmes's suggestion, the plaintiff, Amber Realty Company, presented evidence showing its property suffered a seventy-five percent diminution in value as a result of the zoning ordinance.⁴⁰ Instead of considering the extent of diminution, the Court applied its traditional due process analysis. The Court refused to deem the ordinance clearly arbitrary and unreasonable, or having no substantial relation to the public health, safety, morals, or general welfare.⁴¹ In approving the ordinance, the Court approved the general principle of zoning by district.⁴²

II. The Just Compensation Clause: Refined

A. *Penn Central*

In the fifty plus years following *Pennsylvania Coal*, the Court decided a wide variety of regulatory takings cases, but continued to review the challenges on a case-

³⁵ *Id.*

³⁶ *Id.* at 414.

³⁷ *Id.*

³⁸ *Id.* at 415.

³⁹ 272 U.S. 365 (1926).

⁴⁰ *Id.* at 384.

⁴¹ *Id.* at 395.

⁴² Note that in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Court held a property owner was deprived of his property when zoning laws placed the property into a residential class for which it could not be profitably used and where the residential classification would not promote the health, safety, convenience, and general welfare of the city.

by-case basis. The Court announced general statements of takings principles,⁴³ but by 1978, it acknowledged that regulatory takings appeals continued to be decided largely upon the particular circumstances of each case.⁴⁴ That year, the Court decided *Penn Central Transportation Co. v. City of New York*,⁴⁵ in which it exhaustively reviewed its prior decisions in search of governing principles in takings cases. After a review of takings jurisprudence, Justice Brennan identified several factors having particular significance to the Fifth Amendment balancing analysis.

First, the Court will examine the economic impact of a land use restriction on the property owner, particularly any interference with the owner's investment-backed expectations.⁴⁶ However, a regulation is not necessarily a taking even when it prohibits the most beneficial use of the property.⁴⁷

Second, the Court will consider the character of the governmental action.⁴⁸ For example, "government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute takings."⁴⁹ The Court balanced these general factors in its review of New York City's Landmarks Preservation Law which designated Grand Central Terminal a landmark. The Landmarks Law was enacted to protect historic landmarks and neighborhoods from destruction or alteration.⁵⁰ Construction plans for a skyscraper above Grand Central Terminal were rejected as inconsistent with the Landmarks Law.⁵¹ The Court decided the rejection did not effect a taking, noting the Law did not interfere with the owner's present use of the building and allowed such use to continue to generate a reasonable return on the owner's investment.⁵² The Court also observed the Landmarks Law did not necessarily prohibit the occupancy of any of the air space above the station because it was possible for the owner to add to the building if the addition would harmonize in scale, material, and character with the termi-

⁴³ See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (holding that the Fifth Amendment is "designed to bar government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole"); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (holding that there is no mechanical determination of where regulation ends and taking begins).

⁴⁴ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (citing *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) and *United States v. Caltex, Inc.*, 344 U.S. 149, 156 (1952)).

⁴⁵ *Id.* at 124.

⁴⁶ *Id.*

⁴⁷ *Penn Central*, 438 U.S. at 125 (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 592-93 (1962)); see also *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), *infra* at notes 27-30 and accompanying text; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), *infra* at notes 39-42 and accompanying text.

⁴⁸ *Penn Central*, 438 U.S. at 124.

⁴⁹ *Id.* at 128 (citing *United States v. Causby*, 328 U.S. 256 (1946) (holding government used claimant's property as part of government's flyway)).

⁵⁰ *Penn Central*, 438 U.S. at 111-12.

⁵¹ *Id.* at 116-17.

⁵² *Id.* at 136.

nal.⁵³ Finally, the Court found the Landmarks Law was substantially related to the promotion of the general welfare.⁵⁴

B. Categorical Takings

In the years following the *Penn Central* decision, the Court analyzed several regulatory takings cases in rapid succession.⁵⁵ In two seminal cases,⁵⁶ the Court found that two specific categories of property restrictions compelled compensation under the Fifth Amendment regardless of the Court's balancing test.

In *Loretto v. Teleprompter Manhattan CATV Corp.*,⁵⁷ the Court reviewed a New York law requiring building owners to allow installation of cable television facilities in their buildings. A landlord brought suit against a Manhattan cable television company that had installed cables on the landlord's building, alleging the company's installation was a trespass and, insofar as it relied upon state law, a taking without just compensation. The installation of television cables on the building involved a direct physical attachment of various cable equipment to the building, completely occupying space immediately above and on the roof and along the building's exterior wall.⁵⁸ Following a review of its prior takings decisions, the Court concluded that "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking."⁵⁹ A physical occupation is a taking regardless of whether the occupation is by the government or another party authorized by the government, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."⁶⁰ Finally, the Court emphasized that it had not pronounced a new rule. Instead, the Court had employed "[t]he historical rule"⁶¹ and merely reaffirmed "the traditional rule that a permanent physical occupation of property is a taking."⁶²

In *Lucas v. South Carolina Coastal Council*,⁶³ the Court highlighted a second discrete category of regulatory action which effects a Fifth Amendment taking with-

⁵³ *Id.* at 137.

⁵⁴ *Id.* at 138.

⁵⁵ See, e.g., *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Prune Yard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

⁵⁶ *Lucas*, 112 S. Ct. 2886 (1992); *Loretto*, 458 U.S. 419 (1982).

⁵⁷ 458 U.S. 419 (1982).

⁵⁸ *Id.* at 438.

⁵⁹ *Id.* at 427.

⁶⁰ *Id.* at 434-35.

⁶¹ *Id.* at 435.

⁶² *Id.* at 441.

⁶³ 112 S. Ct. 2886 (1992).

out the need for a case specific inquiry into competing factors. South Carolina's Beach-front Management Act⁶⁴ prohibited a landowner from erecting any permanent habitable structures on his beachfront lots. The landowner sued the Coastal Council alleging that even though the Act may be a lawful exercise of the state's police power, the ban on construction deprived him of all economically viable use of his property and therefore effected a taking under the Fifth Amendment.⁶⁵ The landowner did not challenge the state's findings that beachfront area is an extremely valuable public resource, and that the erection of new construction contributes to erosion and destruction of the beach which could be prevented by discouraging new construction in the area; nor did he challenge the state's power to enact legislation to protect its shoreline.⁶⁶ Instead, he demonstrated to the Court that the state's protective measures deprived him of all economic beneficial use of his beachfront lots.⁶⁷

On these facts, the Court announced its second categorical rule of takings: Where a land use restriction deprives a property owner of all economically beneficial use of his land, the Fifth Amendment requires compensation to the landowner without regard to the legislative justification for the regulation.⁶⁸ The state may sustain a regulation depriving land of all economically beneficial use without paying compensation to its owner only if the owner's title did not include the proscribed use interests. Therefore, any severe limitation on property use may not be legislatively decreed, but should adhere in the title itself through the state's law of property and nuisance.⁶⁹ The Court acknowledged the unlikelihood that state property law would prevent the erection of any productive improvements on the beachfront lots⁷⁰ and that the rule is justified because, from the landowner's perspective, a total deprivation of beneficial use is the equivalent of a physical appropriation.⁷¹

The Court's recent regulatory takings decisions provide an unequivocal rule for future takings analyses. The Court will find a Fifth Amendment taking where the restriction constitutes a permanent physical occupation by the government or others, or where the restriction deprives a property owner of all economically beneficial use of his land. All restrictions that cannot be so categorized are subject to the Court's balancing the character of the governmental action against the economic impact of the restriction on the individual property owner.⁷²

⁶⁴ S.C. CODE ANN. §§ 48-39-250 - 360 (Supp. 1994).

⁶⁵ *Lucas*, 112 S. Ct. at 2890.

⁶⁶ *Id.* at 2896-97.

⁶⁷ *Id.* at 2895-96.

⁶⁸ *Id.* at 2901.

⁶⁹ *Id.* at 2899-901.

⁷⁰ *Id.* at 2901.

⁷¹ *Id.* at 2894.

⁷² See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

In all regulatory takings cases after *Pennsylvania Coal Co. v. Mahon*,⁷³ the Court has held firm to its balancing test without providing useful guidance on how to apply it. Nevertheless, the test was applied with enough consistency over the years to enable the Court to announce categorical rules in *Lucas* and *Loretto*. We now know any restriction on either extreme of the scale constitutes a taking without regard to any other consideration. However, we do not know where within the balance the Court might find a taking.

A review of the noncategorical takings cases since *Pennsylvania Coal* reveals yet another consistent rule: the Court has never found a regulatory taking under any circumstances other than permanent physical occupations or denial of all economically beneficial use. Thus, for practical purposes, a legislatively enacted land use restriction does not effect a taking *unless* it denies owners all economically beneficial use of their property or results in a permanent physical occupation by the government or others. In other words, any restriction falling short of either of the above categories will not constitute a taking. The Court's categorical treatment of the effect of regulatory takings, and its trend of finding no taking outside of its stated categories, were thus settled when the Court confronted a permit-based land use restriction for the first time.⁷⁴

III. The Just Compensation Clause: Permit Exactions

Prior to 1987, each of the land use restrictions reviewed by the Court were legislative attempts to plan and control municipal growth⁷⁵ or more general attempts to promote public health and welfare.⁷⁶ The Court had never considered a permit-based land use restriction until *Nollan v. California Coastal Commission*.⁷⁷ The Nollans wanted to tear down a dilapidated bungalow on their California beachfront property and replace it with a three bedroom residence. A public park is located approximately a quarter-mile north of the Nollan's property, and another public beach area lies 1800 feet south of the lot. A concrete seawall separates the beach portion of the Nollan's property, which is bounded by the historic mean high tide line, from the rest of the lot. In accordance with California law, the Nollans applied

⁷³ 260 U.S. 393 (1922).

⁷⁴ *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Although the Court had not yet decided *Lucas*, it stated on several occasions that it would find a taking when owners are denied all economically beneficial use of their property. See *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

⁷⁵ See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Agins*, 447 U.S. 255 (1980).

⁷⁶ See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁷⁷ 483 U.S. 825 (1987).

to the California Coastal Commission for a development permit.⁷⁸ The Commission granted a development permit to the Nollans on the condition they allow the public an easement across a portion of their property bounded by the mean high tide line on one side and their seawall on the other side.⁷⁹

The Nollans objected to the condition and filed a petition for writ of administrative mandamus asking the Ventura County Superior Court to invalidate the access condition, arguing that the condition could not be imposed absent evidence their proposed development would have a direct adverse impact on public access to the beach. The court agreed and remanded the case to the Commission for a full evidentiary hearing.⁸⁰ The Commission made certain findings of fact including:

The new house would increase blockage of the view of the ocean, thus contributing to the development of "a 'wall' of residential structures" that would prevent the public "psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit." The new house would also increase private use of the shorefront. These effects of construction of the house, along with other area development, would cumulatively "burden the public's ability to traverse to and along the shorefront."⁸¹

The Commission also noted it had similarly conditioned all beachfront development permits along the same tract of land since the inception of its administrative authority. Based upon these findings, the Commission reaffirmed its imposition of the condition.⁸²

The Nollans filed a supplemental petition for a writ of administrative mandamus with the superior court, in which they argued that the access condition constituted a Fifth Amendment taking. The superior court struck down the condition on statutory grounds, finding the California Coastal Act of 1976⁸³ authorized the Commission to impose public access conditions on coastal development permits only where the proposed development would have an adverse impact on public access to the sea. The superior court ruled that the administrative record did not provide an adequate factual basis to support the public access condition.⁸⁴

The Commission appealed to the California Court of Appeals, which reversed the superior court. The court of appeals found the Coastal Act required a public ac-

⁷⁸ *Id.* at 828.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 828-29 (internal citations omitted).

⁸² *Id.*

⁸³ CAL. PUB. RES. CODE §§ 30000-30900 (West 1986).

⁸⁴ *Nollan*, 483 U.S. at 829.

cess condition as part of any permit for construction of a new house that would be ten percent larger than the existing dwelling. The court further held the public access condition would be constitutional "so long as a project contributed to the need for public access, even if the project standing alone had not created the need for access, and even if there was only an indirect relationship between the access exacted and the need to which the project contributed."⁸⁵ In the period between state court appeals, the Nollans built their new house.⁸⁶ The Nollans then appealed to the United States Supreme Court.

California's Coastal Act land dedication requirement, sometimes called an exaction, is a common technique for state and local governments to offset the public impact of increased development.⁸⁷ State law or local ordinances frequently require a developer not only to provide essential services to a new community, such as streets, sidewalks, water lines, and sewers, but also to dedicate a portion of their property for schools, parks, or other recreational purposes.⁸⁸ Permitting authorities are directed to issue permits in accordance with guidelines contained in enabling legislation. Permit-based land use regulation thus serves as the state or municipal vehicle to achieve legislatively identified values deemed worthy of protection. In the case of the Coastal Act, the Commission was instructed to avoid adverse impacts on public access to the sea.⁸⁹

States have wrestled with the validity of municipal dedication requirements for years.⁹⁰ Generally, state courts have upheld property dedication requirements as valid exercises of the police power where the new development creates a public need for the required exaction.⁹¹ However, in *Simpson v. City of North Platte*,⁹² the Nebraska Supreme Court struck down a dedication requirement that it found was not responsive to any specific needs created by the development. The City of North Platte adopted an ordinance prohibiting new or enlarging construction unless half of the street adjacent to the subject lot had been dedicated to the city.⁹³ In its analysis, the court acknowledged the competing interests of the police power and the Just Compensation Clause,⁹⁴ and held that, in the development exaction context:

⁸⁵ *Id.* at 830.

⁸⁶ *Id.*

⁸⁷ Jacqueline Bueno, *Making Developers Pay: Impact Fees Gain Favor*, WALL ST. J., May 3, 1995, at A1.

⁸⁸ A.S. Klein, Annotation, *Validity and Construction of Statute or Ordinance Requiring Land Developer to Dedicate Portion of Land for Recreational Purposes, or Make Payment in Lieu Thereof*, 43 A.L.R. 3d 862, 865 (1972).

⁸⁹ *Nollan*, 483 U.S. at 829.

⁹⁰ Klein, *supra* note 88, at 863.

⁹¹ See *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442 (Wis. 1965).

⁹² 292 N.W.2d 297 (Neb. 1980).

⁹³ *Id.* at 299.

⁹⁴ *Id.* at 300.

the distinction between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.⁹⁵

The Simpsons sought a building permit to construct a restaurant on their property. The City Planning and Engineering Department refused to review the building plans on the ground that the forty foot right-of-way had not been dedicated.⁹⁶ The Nebraska Supreme Court observed that the city planned to extend a roadway across the Simpsons' property, but that no such project was immediately contemplated. Furthermore, the city produced no evidence to indicate that the Simpsons' construction project would create additional traffic immediately requiring the proposed street project.⁹⁷ The court refused to enforce the ordinance, calling it a "land banking" operation with no nexus to the property's use. Without this nexus, the ordinance violated the Nebraska Constitution.⁹⁸

Many state challenges to permit restrictions follow a similar analysis. The validity of a restriction is determined by the existence of a nexus between the restriction and the expected impact of the permitted activity.⁹⁹ For whatever reason, states have not reviewed permit exactions pursuant to the Supreme Court's takings test. Had the Nebraska Supreme Court applied the Fifth Amendment takings analysis to the City of North Platte's dedication requirement, it could have skipped the nexus analysis and declared the requirement invalid under *Loretto v. Teleprompter Manhattan CATV Corp.*¹⁰⁰ A dedication of property to a municipality is nothing more than a permanent physical occupation by the government, which constitutes a compensable taking in every instance.¹⁰¹ Thus, the existence and sufficiency of any nexus between the dedication exaction and the impact of the development is immaterial to the analysis and unnecessary to the outcome.

⁹⁵ *Id.* at 301.

⁹⁶ *Id.* at 299-301.

⁹⁷ *Id.* at 301.

⁹⁸ *Id.*

⁹⁹ Klein, *supra* note 88, at 862.

¹⁰⁰ 458 U.S. 419 (1982).

¹⁰¹ *See id.* at 427-36.

A. A New Test

The Nollans' challenge to the California Coastal Commission's dedication requirement presented the United States Supreme Court with an opportunity to provide state courts with constitutional guidance on how to analyze property dedication exactions. Curiously, the Court engaged in a nexus-searching analysis. The Court agreed with the Commission's argument, without expressly deciding, that the Court could sustain the dedication condition by finding that the exaction was reasonably related to the public need or to the burden that the Nollans' new house would create or compound.¹⁰² The Commission argued that the Nollans' new house would interfere with visual access to the beach, which would create a psychological barrier to physical access. The new house would also increase the use of nearby public beaches. According to the Commission, a lateral easement across the Nollans' beach would alleviate these burdens.¹⁰³ The Court rejected the Commission's argument, finding no relation between the alleged burdens created by the Nollans' new construction and lateral access across their beach, stating:

It is quite impossible to understand how a requirement that people already on the public beaches are able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any 'psychological barrier' to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house.¹⁰⁴

The Court rejected the dedication condition as having absolutely no relation to the burden created.¹⁰⁵

By adopting a nexus requirement, the Court simultaneously created a new standard and disregarded an old standard of its takings jurisprudence. Clearly, the Commission's permit condition constitutes a categorical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*¹⁰⁶ A permanent easement for public access across one's land constitutes a permanent physical occupation by the government or others and is a compensable taking, regardless of whether the action achieves an important public benefit or has only minimal economic impact on the owner.¹⁰⁷ Had the Court analyzed *Nollan* under its traditional takings test, it could have reached the

¹⁰² *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 838 (1987).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 838-39.

¹⁰⁵ *Id.* at 839.

¹⁰⁶ 458 U.S. 419 (1982).

¹⁰⁷ *Id.* at 434-35.

same result without introducing the nexus requirement.

The Court's analytical approach to the exaction makes the *Nollan* decision more curious. The Court began by recognizing that the easement requirement is a permanent physical occupation of private property that constitutes a compensable taking under *Loretto*.¹⁰⁸ Although the Court could have ended its inquiry there, it then asked "whether requiring [the easement] to be conveyed as a condition for issuing a land-use permit alters the outcome."¹⁰⁹ The Court's statement suggests that it might overlook a categorical taking only if the condition, in *Nollan* the permanent physical occupation, bears the required nexus to a substantial government purpose. This notion was not only specifically rejected in *Loretto*,¹¹⁰ but the rejection was reaffirmed one page earlier in the *Nollan* opinion.¹¹¹

In discussing the need for a nexus between the stated burdens of the Nollans' development and the permit exaction, the Court moved further away from its traditional takings analysis. The Court states that a permanent condition serving the same legitimate purpose as a refusal to issue the permit "should not be found to be a taking if the refusal to issue the permit would not constitute a taking."¹¹² Justice Scalia then used two examples to illustrate his point. First, assuming the State of California was interested in protecting the public's ability to view the beach, the State could impose height and width limitations on new construction, so long as it could exercise its police power to forbid new construction altogether. Under these circumstances, the height and width limitations would serve the same purpose as a ban--preservation of visual access.¹¹³ As a second example, the Court stated that a condition would be constitutional

even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, *even a concession of property rights*, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise

¹⁰⁸ *Nollan*, 483 U.S. at 834.

¹⁰⁹ *Id.*

¹¹⁰ *Loretto*, 458 U.S. at 432-33.

¹¹¹ *Nollan*, 483 U.S. at 832-33.

¹¹² *Id.* at 836.

¹¹³ *Id.*

of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.¹¹⁴

Although the Court has frequently stated that a use restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial governmental purpose, it has never attempted to illustrate the degree of connection necessary between the regulation and the state interest.¹¹⁵ For this reason, Justice Scalia's reasoning must be closely analyzed.

The Court assumed that no taking would occur if California prohibited additional construction that would interfere with visual access to the ocean.¹¹⁶ According to Justice Scalia, if the state could prevent certain beachfront construction, then it could surely permit construction subject to a condition that abridges significant property rights. The condition need only bear the required relationship to the public purpose. Thus, the Court objected to the dedication exaction not because it constituted a permanent physical occupation, but because it bore no relation to the state's purpose of maintaining public access to its seashore.¹¹⁷

Justice Scalia's logic is persuasive within the context of the *Nollan* opinion, but it is not supported by the Court's prior decisions. Recall that the Commission's exaction was required by the Coastal Act,¹¹⁸ in the same manner as the State of New York once required landlords to permit installation of cable television facilities upon their apartment buildings.¹¹⁹ The New York law had the same practical impact upon New York apartment building owners as the Coastal Act had upon California beachfront property owners. If California beachfront property owners wish to enlarge their dwellings, they are required by statute to provide a public easement across the beach. If New York property owners wished to utilize their buildings as apartments, they were required by statute to provide cable television facilities. Traditional takings analysis indicates that both statutes attempt to take private property without compensation.

Nollan changes the analysis. The Court must put aside the permanent physical occupation question and first decide if the required nexus exists. The Court would have found a nexus under the facts of *Loretto*, because the cable requirement unquestionably bears a direct relationship to New York's "legitimate public purpose of

¹¹⁴ *Id.* at 836-37 (emphasis added).

¹¹⁵ *Id.* at 832-33.

¹¹⁶ Although it cited no authority, the Court's assumption is supported by its decision in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), where the Court found that New York City could prevent additions to Grand Central Terminal without providing compensation to its owners.

¹¹⁷ *Nollan*, 483 U.S. at 837.

¹¹⁸ *Id.* at 830.

¹¹⁹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 423 (1982).

'rapid development of and maximum penetration by a means of communication which has important educational and community aspects.'"¹²⁰ Further, the state is authorized to prohibit apartment rentals without cable access in the same way governments have prohibited the operation of breweries¹²¹ and brickyards.¹²² Therefore, if *Loretto* were decided under the *Nollan* analysis, New York property owners may not be entitled to compensation even though state law requires them to surrender part of their property to a permanent physical occupation by cable television apparatus.

In *Nollan*, the Court not only abandoned its traditional takings analysis in favor of a different test, but also arguably carved out an exception to "the traditional rule" that a permanent physical occupation of property is a taking without regard to whether it achieves an important public benefit.¹²³ Never before had the Court suggested that a permanent physical occupation would be exempt from the Takings Clause.¹²⁴ Although the Court had often cited the rule that a land use restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial government purpose,¹²⁵ the Court used the rule to invalidate a restriction only once before *Nollan*.¹²⁶

The most disappointing result of the *Nollan* decision is the Court's failure to provide any guidance for the application of its new test. The Court candidly admitted that it had never "elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter."¹²⁷ The Court suggests that the necessary relationship may be the most significant test of all, which, when satisfied, will allow the government to restrict property rights without triggering the Just Compensation Clause.¹²⁸ However, the Court failed to determine the requisite degree of relationship, or nexus, between the restriction and its purpose. The Court merely held that the easement exaction and the need for public access to the seashore "failed to meet even the most untailored standards."¹²⁹

¹²⁰ *Id.* at 425 (citing opinion of the New York Court of Appeals in the proceedings below).

¹²¹ *See* *Mugler v. Kansas*, 123 U.S. 623 (1887).

¹²² *See* *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

¹²³ *Loretto*, 458 U.S. at 435.

¹²⁴ *Id.* at 432.

¹²⁵ *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978)); *see also* *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

¹²⁶ *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (observing that zoning classification of plaintiff's property did not promote the health, safety, convenience, and general welfare of the city).

¹²⁷ *Nollan*, 483 U.S. at 834.

¹²⁸ *Id.* at 836-37.

¹²⁹ *Id.* at 838.

B. A New Prong

Seven years passed after *Nollan* before the Court heard another permit exaction case, but in 1994 the Court seized upon an opportunity to clarify its *Nollan* decision when it reviewed Florence Dolan's construction permit challenge.¹³⁰ Ms. Dolan owns an electric and plumbing supply store in Tigard, Oregon. The city's Community Development Code (CDC) and Master Drainage Plan (Drainage Plan) regulate land use in the area zoned as the Central Business District. The CDC and Drainage Plan are designed to encourage alternatives to automobile transportation in an effort to reduce traffic congestion, and to preserve floodplain areas as greenways to diminish the risk of flooding from Fanno Creek, which flows through downtown Tigard.¹³¹

Ms. Dolan applied to the city for a permit to redevelop her property, bordered on one side by Fanno Creek. She proposed to double the size of her store and pave a thirty-nine space parking lot.¹³² The CDC established the following standard for site development and approval:

Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the city shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.¹³³

Accordingly, the City Planning Commission required Ms. Dolan to dedicate a portion of her property lying within the 100-year floodplain for improvement of a storm drainage system along Fanno Creek. In addition, the Commission required that she dedicate an additional fifteen foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway.¹³⁴

Ms. Dolan sought a variance from the CDC standards. However, the Commission denied her request. In reaching its decision, the Commission made a series of findings probative on the *Nollan* issue regarding the relationship between permit exactions and the projected impact of Ms. Dolan's business expansion. The Commission found that "[i]t is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this devel-

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

¹³¹ *Id.* at 2313.

¹³² *Id.*

¹³³ *Id.* at 2314 (citing the City of Tigard Community Development Code).

¹³⁴ *Id.*

opment for their transportation and recreational needs.”¹³⁵ The Commission further found that the creation of a pedestrian/bicycle pathway system “could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion.”¹³⁶ Finally, the Commission found that the floodplain dedication was reasonably related to the increased development given that the “anticipated increased storm water flow from the subject property to an already strained creek and drainage basin [could] only add to the public need to manage the stream channel and floodplain for drainage purposes.”¹³⁷

Ms. Dolan appealed the Commission’s decision to the Land Use Board of Appeals on the ground that the exactions were not related to her proposed development, and therefore constituted compensable Fifth Amendment takings. The Land Use Board of Appeals determined that there was a “reasonable relationship” between the proposed development and the exaction, and upheld the permit conditions.¹³⁸ Highlighting the chief failure of the *Nollan* opinion, Ms. Dolan appealed to the Oregon Court of Appeals, arguing that the requisite connection between the exaction and the project was not “reasonable relationship” but a stricter standard she called “essential nexus.”¹³⁹ The court of appeals rejected her argument and upheld the permit conditions.¹⁴⁰ Ms. Dolan lost her appeal in the Oregon Supreme Court, which offered yet a third view on the *Nollan* nexus standard.¹⁴¹ The United States Supreme Court granted certiorari to resolve questions left open after *Nollan*.¹⁴²

As in *Nollan*, the Court acknowledged that the permit exaction amounted to nothing short of a government-imposed permanent physical occupation by the public, recognized as a taking by the Court’s prior cases.¹⁴³ For reasons unstated, the Court’s inquiry did not stop there. The Court then began its *Nollan* nexus inquiry, again suggesting that a government imposed physical occupation of private land is not a taking if an “essential nexus” exists between a legitimate state interest and the permit exaction.¹⁴⁴ Citing only *Nollan*, the Court divided the question into two parts: Is there any nexus between the exaction and the state interest, and if so, is there a sufficient degree of connection between the exaction and the projected impact of the land

¹³⁵ *Id.* (citing City of Tigard Planning Comm’n Final Order No. 91-09).

¹³⁶ *Id.* at 2315.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Dolan v. City of Tigard*, 832 P.2d 853 (Or. Ct. App. 1992), *aff’d* 854 P.2d 437 (Or. 1993), *rev’d* 114 S. Ct. 2309 (1994).

¹⁴¹ *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993) (holding an exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve).

¹⁴² *Dolan*, 114 S. Ct. at 2312.

¹⁴³ *Id.* at 2316.

¹⁴⁴ *Id.* at 2317.

use?¹⁴⁵

The Court decided *Nollan* on the first prong of its new inquiry by finding no nexus between seashore access and a lateral easement across the Nollans' property.¹⁴⁶ However, the Court easily found a nexus in *Dolan*, stating,

It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the Creek's 100-year floodplain. Petitioner proposes to double the size of her retail store and pave her now-gravel parking lot, thereby expanding the impervious surface on the property and increasing the amount of storm water run-off into Fanno Creek.

The same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation. In theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers.¹⁴⁷

Having found a nexus, the Court examined "whether the degree of the exactions demanded by the city's permit conditions [bore] the required relationship to the projected impact of petitioner's proposed development."¹⁴⁸ Because the Court had not previously addressed the question, it reviewed various standards devised by state courts. It found agreeable a "reasonable relationship" test employed by many state courts, but renamed it "rough proportionality."¹⁴⁹ In short, the dedication must have some reasonable relationship to the needs created by the development.¹⁵⁰ In this case, "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."¹⁵¹

Applying the new test to the City Planning Commission's permit exactions, the Court found that the ban on development within the floodplain was appropriate, because Ms. Dolan's development would increase the amount of impervious surfaces in the area, which would increase the risk of flooding. However, the risk of flooding was not affected by whether the undeveloped floodplain remained in Ms. Dolan's hands or was deeded to the city. Accordingly, the Court rejected the exaction to the extent it required Ms. Dolan to deed her property to the city for use as a public greenway, because the transfer of ownership of the property was not reasonably

¹⁴⁵ *Id.*

¹⁴⁶ *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

¹⁴⁷ *Dolan*, 114 S. Ct. at 2318.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 2319.

¹⁵⁰ *Id.* at 2319-20.

¹⁵¹ *Id.* (footnote omitted).

related to flood control.¹⁵² With regard to the pedestrian/bicycle pathway, the Court acknowledged that Ms. Dolan's larger retail facility would increase traffic. However, the Court found that the city did not meet its burden of demonstrating that the pedestrian/bicycle pathway would off-set the increased traffic. The city's "conclusory" finding that the pathway "could" off-set some of the generated traffic was insufficient to establish rough proportionality.¹⁵³

C. A New Result

As in *Nollan*, the Court decided *Dolan* based upon its new test despite its traditional takings jurisprudence. The line of takings decisions culminating in *Loretto*¹⁵⁴ illustrate that a government-imposed permanent physical occupation on private property, such as a public greenway and bike path, constitutes a compensable Fifth Amendment taking without regard to whether the exaction achieves an important public purpose. However, *Dolan* confirms that a permanent physical occupation in the form of a dedication is not a compensable taking if the dedication is rationally related to the effectuation of a substantial governmental purpose.¹⁵⁵

The *Dolan* rough proportionality test remains largely undefined. The existence of a nexus between the exaction and government purpose is a subjective decision by the Court. In *Nollan*, the Court found it "impossible to understand" how a lateral easement across a private beach would alleviate burdens on beach access caused by increased development.¹⁵⁶ In *Dolan*, the Court found it "obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the Creek's 100-year floodplain"¹⁵⁷ and that "[i]n theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers."¹⁵⁸ Based upon the *Dolan* language, one may wish to refer to the *Nollan* nexus requirement as the "in theory" test. The lateral access easement required in *Nollan* would, at least in theory, reduce the increased beach congestion attributed to beachfront development, but the Court did not agree. In short, neither *Nollan* nor *Dolan* clearly define the necessary connection.

The Court's emphasis on rough proportionality is entirely new. After finding a nexus, the Court stated that its "analysis requires us to determine" rough proportionality between the degree of the exaction and the projected impact of the de-

¹⁵² *Id.* at 2321.

¹⁵³ *Id.* at 2322.

¹⁵⁴ 458 U.S. 419 (1982).

¹⁵⁵ *Dolan*, 114 S. Ct. at 2303.

¹⁵⁶ *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 838-39 (1987).

¹⁵⁷ *Dolan*, 114 S. Ct. at 2318.

¹⁵⁸ *Id.*

velopment.¹⁵⁹ The Court cites *Penn Central Transportation Co. v. City of New York*¹⁶⁰ as the source of its duty¹⁶¹ to perform a rough proportionality inquiry. Implicitly acknowledging its unfamiliarity with the requirement, the Court proceeded to review state court decisions on the issue. Given the Court's 5-4 decision, rough proportionality, like nexus, is in the eye of the beholder.

The nexus and rough proportionality tests effectively trump the traditional takings rules refined by the Court since the turn of the century. Courts now must address as a preliminary issue whether a land use restriction substantially advances a legitimate state interest.¹⁶² If so, and if the restriction is roughly proportional to the public impact of the property owner's use, then the government may place restrictions upon private property which, under prior law, would be compensable takings.

The *Nollan* Court made no attempt to limit the scope of its holding. In *Dolan*, however, the Court attempts to limit its new test to adjudicative decisions to condition a building permit for an individual parcel.¹⁶³ The Court distinguishes its prior cases on the basis that "they involved essentially legislative determinations classifying entire areas of the city."¹⁶⁴ However, this is a distinction without a difference. The permit exaction reviewed in *Nollan* was statutorily required.¹⁶⁵ Similarly, the City Planning Commission of Tigard was required by the CDC to condition all permits for development within the floodplain on the dedication of a greenway and pedestrian/bicycle pathway.¹⁶⁶ While the Court in *Nollan* and *Dolan* indeed focused upon the adjudicative permit decision in each case, it ignored the fact that the permitting authorities were instructed by legislative determination to require the permit exactions in each circumstance.

The Court never indicated why a permit process should be reviewed differently from a legislative determination. Further, the *Nollan* and *Dolan* opinions contain no legal authority for such a proposition. A permit is nothing more than the execution of police power by an agency enabled and directed to act with authority granted by a legislature. Yet the Court determined that the restrictions in *Nollan* and *Dolan*, if

¹⁵⁹ *Id.* (emphasis added).

¹⁶⁰ 438 U.S. 104 (1978).

¹⁶¹ *Dolan*, 114 S. Ct. at 2318.

¹⁶² The Court has acknowledged various legitimate state interests. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (scenic zoning); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (landmark preservation); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (residential zoning).

¹⁶³ *Dolan*, 114 S. Ct. at 2320 n.8.

¹⁶⁴ *Id.* at 2316.

¹⁶⁵ The California Coastal Act required all coastal permits for the construction of a new house whose floor area, height, or bulk was more than 10% larger than that of the house it was replacing to be conditioned upon a grant of access. *Nollan v. California Coastal Comm'n*, 223 Cal. Rptr. 28, 31 (1986), *rev'd*, 483 U.S. 825 (1987).

¹⁶⁶ *Dolan*, 114 S. Ct. at 2313.

legislatively imposed, would constitute an uncompensated taking. When the same restrictions are enforced through the permitting process, compensation may not be required.

Therein lies the true impact of the *Nollan* and *Dolan* decisions. A government may legislatively accomplish many important land use goals, such as residential zoning and landmark preservation, without incurring the expense of condemnation and eminent domain. However, legislative regulation of private property will require compensation to private property owners if the regulation amounts to a permanent physical occupation of the property or if the owner is denied all economically beneficial use of his land. Under these circumstances, compensation is always required without regard to the government's purpose. *Nollan* and *Dolan* allow a needful government without means to avoid the compensation requirement altogether if it filters its property acquisitions through a permitting authority. The government may acquire property through a permit exaction if the acquisition is related to the government purpose and is responsive to a need created at least in part by the property owner.

CONCLUSION

The Court has abandoned its traditional takings analysis in favor of a new test applied to evaluate challenges to permit-based land use restrictions. When applied to the same set of facts, the traditional takings analysis and the nexus-rough proportionality test may yield different results. Without a stated justification, the Court seems intent on maintaining a distinction between legislative and permit-based land use regulation, so that the traditional analysis and the nexus-rough proportionality test will remain viable for the foreseeable future.

