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Chapter 11. Subdivision, Planned Unit Development, and Growth Management

§ 11:21. Constitutional limitations; the *Nollan*, *Dolan*, and *Koontz* cases

Three United States Supreme Court decisions have set standards for gauging the constitutionality of development exactions.

(1) *Nollan*

In the 1987 case of Nollan v. California Coastal Commission,[1] the Court struck down a Coastal Commission permit condition that required the Nollans to provide a public easement to pass across their beach, located between two public beaches, as a condition of replacing their small bungalow on a Pacific coast lot with a larger house. The Court invalidated the access-easement condition as a taking because it found a "lack of nexus" between the condition imposed and the original purpose of the building restriction, to provide uncompensated access to the beach.

A regulation abridging property rights through the police power, the Court said, would be supported by showing a "'substantial'" advancement of a "'legitimate state interest.'"[2] Though the Court indicated it had previously given a broad reading to a "legitimate state interest," it emphasized that it was "inclined to be particularly careful about the adjective [substantial] where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."[3]

Unpersuaded by the Commission's justifications (among them: claims that the easement would offset the "psychological barrier" to using the public beaches posed by the Nollans' new house), the Court characterized the condition as a way of avoiding payment of compensation, an "'out-and-out plan of extortion.'"[4]

Nollan catalogued, with approval, a string of state exaction decisions as being "consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts."[5] Among them were Pioneer Trust & Savings Bank v. Mount Prospect and Jordan v. Village of Menomonee Falls, the former a restrictive nexus test and the latter a mid-level "reasonableness" or "rational nexus" test.[6]

(2) *Dolan*

In 1994, in Dolan v. City of Tigard,[7] the Court ruled that a permit condition requiring the dedication of land in a 100-year floodplain as a greenway and an additional fifteen feet above the floodplain boundary as a public pedestrian/bicycle path was an unconstitutional taking because the city has failed to show a reasonable relationship between the exaction and the new development. The City of Tigard, a Portland, Oregon, suburb, had required Dolan to provide greenway dedication along Fanno Creek and the pedestrian/bike path easement as a condition of approving the expansion of her plumbing and electrical supply store. The proposed expansion would have nearly doubled the area, from 9,700 square feet to 17,600 square feet, and resulted in paving a formerly graveled parking lot with 39 spaces.

Under the "well-settled doctrine of unconstitutional conditions," said the Court, "the government may not require a person to give up a constitutional right in exchange for a discretionary benefit where the property sought has little or no relationship to

the benefit."[8] To evaluate a claim of an uncompensated taking, the Court ruled, it "must first determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city."[9] If a court finds that a nexus exists, then it must "decide the required degree of connection between the exactions and the projected impact of the proposed development."[10] The Court pointed out that, in *Nollan*, it had not reached the question of the degree of nexus because it had concluded that the connection "did not meet even the loosest standard."[11]

The Court considered the various tests adopted by state courts as to the necessary connection between the required dedication and the proposed development. Very generalized statements about the relationship, although approved in some states, were too lax, said the Court, to protect a property owner's right to just compensation if the property were taken for a public purpose. The Court also rejected the "'specifi[c] and uniquely attributable test'" in *Pioneer Trust*, discussed above, noting that, "[w]e do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved."[12] In a footnote, the Court commented that the test in *Pioneer Trust* had been adopted by a "minority of other courts," including one in Ohio, in McKain v. Toledo City Plan Commission (analyzed in Text § 11:20, Subdivision exactions—State constitutional limits on exactions).[13]

The intermediate "reasonable relationship" test adopted by a majority of state courts is closer to the norm required by the federal constitution, the Court said. Among the cases it cited as representative of this test was Jordan v. Village of Menomonee Falls.[14] But the Court declined to adopt that language because it was confusingly similar to the "rational basis" test describing a minimal level of scrutiny under the Fourteenth Amendment's Equal Protection Clause.

Instead, the Court selected the term, "rough proportionality," as "best encapsulat[ing] what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related in both nature and extent to the impact of the proposed development."[15]

Applying this test to Tigard's findings requiring the greenway and pedestrian/bike path dedication, the Court found that they did not pass constitutional muster. The city had justified the public greenway in part because it was necessary to manage the increased stormwater runoff from the added parking area. While it recognized preventing flooding and reducing traffic congestion to be legitimate public purposes, the Court dismissed the floodplain dedication as overreaching. "The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control."[16] To Dolan, the greenway dedication condition meant she would lose the ability to exclude others from her property, said the Court; yet "the city has not attempted to make any individualized determination to support this part of its request."[17] Nor had the city met its burden of demonstrating how the additional number of vehicle and bicycle trips generated by the development were reasonably related to the requirement of the dedication of the pathway easement. The city, said the Court, "simply found that the creation of the pathway 'could offset some of the traffic demand … and lessen the increase in traffic congestion.'"[18] While it didn't detail a specific analytical formula, the Court stressed that "the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."[19]

Reversing the Oregon Supreme Court, which had upheld the exactions, the United States Supreme Court remanded the case for further proceedings consistent with its opinion.

A dissent by Justice Stevens, joined by Justices Blackmun and Ginsburg, criticized the majority opinion's "fledgling test of 'rough proportionality'" as running contrary to traditional treatment of exaction cases and breaking "considerable and unpropitious new ground."[20] The new rule shifts the burden of proof to the city, said Stevens, which "must not only 'quantify its findings,'" and make "'individualized determination[s]' with respect to the nature and extent of the relationship of the conditions and the impact … but also demonstrate 'proportionality'."[21] Justice Stevens asserted that the "correct inquiry should instead concentrate on whether the required nexus is present and venture beyond considerations of a condition's nature or germaneness only if the developer establishes that a concededly germane condition is so grossly disproportionate to the proposed development's adverse effects that it manifests motives other than land use regulation on the part of the city."[22] He also objected to the majority opinion's focus on one strand of property interests, the power to exclude, rather than the entire parcel.

Dolan settles the question of what federal constitutional standard is to be applied to exactions by adopting the intermediate "rational nexus" test, whether the Supreme Court terms it so or not. But, as Attorney/Planner Eric Damian Kelly points out in

a perceptive commentary on the case, *Dolan* really applies only to *negotiated* exactions, not "formula-based exactions based on rational policy and reasonable data."[23] What the Court has "squarely struck down," Kelly has written, "is the negotiated exaction where the exaction is based on the needs of the city and not on the needs of the development."[24] He adds: "Does this suggest that local governments must use case-by-case impact statements as the basis for negotiated exactions? I think not. I think that the arbitrary nature of the negotiated exaction in this case was much of what troubled the majority, although it did not say so."[25] He observes that the city demanded that Dolan give up part of her land as a condition of using the rest of it. It is logical, says Kelly, that the government should assume a greater burden of proof "when it engages in the business of taking title to land than when it conducts its ordinary governmental function of regulation," as in the enactment of zoning codes and other police power measures.[26]

Dolan does not restrict all exactions. Routine dedications for streets, sidewalks, and other public ways intended to avoid excessive congestion from a proposed property use "are generally reasonable," according to the Supreme Court.[27] Moreover, as Kelly contends, generalized formulas—such as those used for impact fees, adopted as a matter of general legislative policy affecting the entire community or some rational sub-part of it—will probably satisfy the Court's requirement of an "individualized determination" of the "rough proportionality" of the impact and of the exaction.[28] Communities that "negotiate exactions on an ad hoc basis must reexamine their policies," he cautions, "because they are the ones at greatest risk from this decision."[29]

Nollan and *Dolan* are not subdivision cases, it should be emphasized.[30] The fact situations in both are different from conventional subdivision exactions. *Nollan* and *Dolan* involved single developments, not entire subdivisions, and the rebuilding and reconstruction of existing buildings on relatively small lots. (In *Nollan*, the use was a single-family residence, but in *Dolan* the use was retail, albeit on a 1.67-acre parcel.) The surrounding areas in *Nollan* and *Dolan* were largely built up, but that is usually not so with a subdivision's environs. In a typical residential subdivision, changes in land use occur not once, but many times on different lots, often in phases. Under these circumstances, it is usually easier to demonstrate the cumulative impact of development that would justify exactions (an exception can be made in the case of a regional shopping center or major industry built on one lot, but, because of its large scale, nonetheless has far-reaching impacts).

To a degree, Justice Stevens' dissent in *Dolan* recognized this. Stevens cited a law journal article on subdivision exactions that also distinguished between the burden placed on an individual homeowner as opposed to that placed on a business or businessperson:

> The subdivider is a manufacturer, processer and marketer of a product; land is but one of his raw materials. In subdivision control disputes, the developer is not defending hearth and home against the king's intrusion, but simply attempting to maximize his profits from the sale of a finished product. As applied to him, subdivision control exactions are actually business regulations.[31]

Justice Stevens protested the majority opinion's invalidation of the permit conditions imposed by the City of Tigard "in a case involving the development of *commercial* property"(emphasis supplied).[32] Stevens would treat the exactions associated with the development of a retail business as "a species of business regulation," entitled to a "strong presumption of constitutional validity."[33]

(3) *Koontz*

The *Nollan* and *Dolan* cases, discussed above, did not resolve all issues regarding development exactions. However, a 2013 decision by the United States Supreme Court, *Koontz v. v. St. Johns Water Management Dist*.[34] clarified the constitutional tests involved when a government demands either money or land from a land use permit applicant. The facts of this case are more fully discussed in Text § 10:5, The taking issue. In *Koontz*, the landowner brought an action in the Florida state courts against a water management district, alleging that the district's denial of land use permits unless he funded offsite mitigation projects on public lands amounted to a taking without just compensation. The U.S. Supreme Court agreed, holding that: (1) the water management district could not evade limitations of the unconstitutional conditions doctrine by conditioning approval of a land use permit on the landowner's funding of offsite mitigation projects on public lands, and (2) any "monetary exactions" as a condition of a land use permit must satisfy requirements that the government's mitigation demand have a rational nexus (the *Nollan* case) and a rough proportionality (the *Dolan* case) to the impacts of a proposed development.

In a perceptive commentary on *Koontz*, Professor David Callies pointed out that there are at least two clear implications of this decision. First, he observed that the Supreme Court specifically rejected the monetary vs. real property interest distinction in applying the *Nollan* and *Dolan* rational nexus and rough proportionality requirements that "almost certainly [apply] to mitigation fees charged to ameliorate the environmental effects of a proposed land development project. Proportionality in particular will be important here. We can logically expect more use of such fees in place of land parcel [i.e., fee simple dedication or easements] requirements because the former will be more easily constitutionally tailored to development-driven need." Further, Callies observed that this decision will apply to in-lieu fees, where the developer pays a fee to the local government, such as those for the acquisition and development of a park, and impact fees, both of which involve the local government using the monies for the acquisition and construction of public facilities. "There is no distinction between in-lieu fees, mitigation fees, and impact fees," he wrote, "since all are fees charged by the government as a condition for land development approval."[35]

Will this decision have a widespread impact in Ohio? The authors believe that because few Ohio communities use environmental mitigation fees (indeed, if at all, since there are no cases on the topic), in-lieu fees, or impact fees—all of which have been employed in rapidly growing areas elsewhere in the U.S—there will be scant impact.[36] Still, should a local government decide to employ such devices, it must commission studies that clearly establish the rational nexus and rough proportionality between the development and the fee charged and periodically update the fees.

Footnotes

1 Nollan v. California Coastal Com'n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Nollan* is also discussed at Text § 10:5, The taking issue.

2 Nollan v. California Coastal Com'n, 483 U.S. 825, 834-35 n.3, 107 S. Ct. 3141, 3147 n.3, 97 L. Ed. 2d 677 (1987) (citing Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980) ("substantially advance" language abrogated by, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005))).

3 Nollan v. California Coastal Com'n, 483 U.S. 825, 841, 107 S. Ct. 3141, 3151, 97 L. Ed. 2d 677 (1987).

4 Nollan v. California Coastal Com'n, 483 U.S. 825, 837, 107 S. Ct. 3141, 3149, 97 L. Ed. 2d 677 (1987) (quoting J. E. D. Associates, Inc. v. Town of Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981) (overruled on other grounds by, Town of Auburn v. McEvoy, 131 N.H. 383, 553 A.2d 317 (1988))).

5 Nollan v. California Coastal Com'n, 483 U.S. 825, 839, 107 S. Ct. 3141, 3150, 97 L. Ed. 2d 677 (1987).

6 Nollan v. California Coastal Com'n, 483 U.S. 825, 839-40, 107 S. Ct. 3141, 3150, 97 L. Ed. 2d 677 (1987) (citing Pioneer Trust and Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961) and Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442, 447-49 (1965), appeal dismissed, 385 U.S. 4, 87 S. Ct. 36, 17 L. Ed. 2d 3 (1966)).

7 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). *Dolan* is also discussed at Text § 10:5, The taking issue.

8 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2317, 129 L. Ed. 2d 304 (1994).

9 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2317, 129 L. Ed. 2d 304 (1994) (citing Nollan v. California Coastal Com'n, 483 U.S. 825, 836, 107 S. Ct. 3141, 3148, 97 L. Ed. 2d 677 (1987)).

10 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2317, 129 L. Ed. 2d 304 (1994) (citing Nollan v. California Coastal Com'n, 483 U.S. 825, 836, 107 S. Ct. 3141, 3148, 97 L. Ed. 2d 677 (1987)).

11 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2317, 129 L. Ed. 2d 304 (1994) (citing Nollan v. California Coastal Com'n, 483 U.S. 825, 838, 107 S. Ct. 3141, 3149, 97 L. Ed. 2d 677 (1987)).

12 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2319, 129 L. Ed. 2d 304 (1994) (citing Pioneer Trust and Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961)).

13 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2319 n.7, 129 L. Ed. 2d 304 (1994) (citing McKain v. Toledo City Plan Commission, 26 Ohio App. 2d 171, 176, 55 Ohio Op. 2d 313, 270 N.E.2d 370, 374 (6th Dist. Lucas County 1971)).

14 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2319, 129 L. Ed. 2d 304 (1994) (citing Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), appeal dismissed, 385 U.S. 4, 87 S. Ct. 36, 17 L. Ed. 2d 3 (1966)).

15 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2319-20, 129 L. Ed. 2d 304 (1994).

16 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2320, 129 L. Ed. 2d 304 (1994).

17 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2320-21, 129 L. Ed. 2d 304 (1994).

18 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2321-22, 129 L. Ed. 2d 304 (1994).

19 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2321-22, 129 L. Ed. 2d 304 (1994).

20 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2322, 129 L. Ed. 2d 304 (1994) (Stevens, J., dissenting, joined by Blackmun, J., and Ginsburg, J.).

21 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2325, 129 L. Ed. 2d 304 (1994).

22 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2325, 129 L. Ed. 2d 304 (1994).

23 Kelly, Supreme Court Strikes Middle Ground on Exactions Test, 46 Land Use Law & Zoning Digest, No. 7, 6, 9 (July 1994).

24 Kelly, Supreme Court Strikes Middle Ground on Exactions Test, 46 Land Use Law & Zoning Digest, No. 7, 6, 7 (July 1994).

25 Kelly, Supreme Court Strikes Middle Ground on Exactions Test, 46 Land Use Law & Zoning Digest, No. 7, 6, 9 (July 1994).

26 Kelly, Supreme Court Strikes Middle Ground on Exactions Test, 46 Land Use Law & Zoning Digest, No. 7, 6, 8 (July 1994).

27 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2321, 129 L. Ed. 2d 304 (1994).

28 E.D. Kelly, Supreme Court Strikes Middle Ground on Exactions Test, 46 Land Use Law & Zoning Digest, No. 7, 6, 9 (July 1994). Kelly cites, as an example of methodologies for impact fees, J.C. Nicholas, The Calculation of Proportionate-Share Impact Fees, Planning Advisory Service Report No. 408 (Chicago: American Planning Association, July 1988). Kelly also identifies, at 7, as a possible original source of the term, "rough proportionality" used by the Supreme Court, an article by Attorneys Fred Bosselman and Nancy Stroud. F.P. Bosselman & N. Stroud, Legal Aspects of Development Exactions, in Development Exactions, J.E. Frank & R. M. Rhodes, eds., ch. 4, 103 (Chicago: APA Planners Press, 1987) ("On balance, the trend of the law seems to offer wide support for an almost unlimited range of purposes as long as the purpose reflects a problem created to some degree by the particular development, the amount of the exaction bears some *rough proportionality* to the share of the problem caused by the development, and the exaction will be used to alleviate the particular problem created.") (emphasis supplied).

29 Kelly, Supreme Court Strikes Middle Ground on Exactions Test, 46 Land Use Law & Zoning Digest, No. 7, 6, 9 (July 1994).

30 This observation has been made by Professor Daniel Mandelker. See D.R. Mandelker, Land Use Law, 3d ed., § 9.13, 415 (Charlottesville, Va.: Michie, 1993).

31 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2324, 129 L. Ed. 2d 304 (1994), quoting Johnston,

Constitutionality of Subdivision Control Exactions: The Quest for a Rationale, 52 Cornell L.Q. 871, 923 (1967) (Stevens, J., dissenting, joined by Blackmun, J., and Ginsburg, J.).

32 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2324, 129 L. Ed. 2d 304 (1994).

33 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2324, 129 L. Ed. 2d 304 (1994).

34 Koontz v. St. Johns River Water Management Dist., 133 S. Ct. 2586, 186 L. Ed. 2d 697, 76 Env't. Rep. Cas. (BNA) 1649 (2013). For a further discussion of this case, see Blaesser and Weinstein, Federal Land Use Law & Litigation § 3:43 (2013 ed.); Blaesser, Discretionary Land Use Controls § 1:37 (2013 ed.).

35 Callies, *Koontz* Redux: Where We Are and What's Left, 65 No. 10 Plan. & Envtl. L. 7, 8 (2013).

36 See Text § 11:22, Impact fees; utility fees.

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