

1994

The Supreme Court's Heightened Review of Land Use Exactions in *Dolan v. City of Tigard*

Lynda L. Butler

William & Mary Law School, llbutl@wm.edu

Repository Citation

Butler, Lynda L., "The Supreme Court's Heightened Review of Land Use Exactions in *Dolan v. City of Tigard*" (1994). *Popular Media*. 55.

https://scholarship.law.wm.edu/popular_media/55

Copyright c 1994 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

https://scholarship.law.wm.edu/popular_media

**THE SUPREME COURT'S HEIGHTENED REVIEW
OF LAND USE EXACTIONS IN
*DOLAN V. CITY OF TIGARD***

by Lynda L. Butler*

On June 24, 1994, the United States Supreme Court decided *Dolan v. City of Tigard*, a case with potentially farreaching consequences for exactions and other land use regulations. 62 U.S.L.W. 4576 (June 24, 1994). In a 5-4 decision, the Court reversed and remanded an Oregon Supreme Court decision upholding conditions requiring the applicants of a building permit to dedicate portions of their land for a public greenway to minimize flooding and for a pedestrian/bicycle path to relieve traffic congestion. 854 P.2d 437 (Or. 1993), *rev'd*, 62 U.S.L.W. 4576 (June 24, 1994). The landowners in *Dolan* had applied for a permit to expand their commercial use of the land. *Id.* at 438. In reversing the Oregon Supreme Court decision to uphold the permit conditions, the United States Supreme Court held that the city did not meet its burden under takings law of demonstrating "the required degree of connection between the exactions and the projected impact of the proposed development." 62 U.S.L.W. at 4579, 4581.

Writing for the majority, Chief Justice Rehnquist set forth a two-part test for evaluating the legitimacy of the permit conditions under the takings principles of the United States Constitution. First, the Court must "determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city." *Id.* at 4579. If the Court finds that this nexus exists, then it must decide whether the "required degree of connection" exists "between the exactions and the projected impact of the proposed development." *Id.* According to the majority, the phrase "'rough proportionality' best encapsulates" what is necessary under this second part of the test and is close to the "reasonable relationship" test already adopted by a majority of state courts. *Id.* at 4580. The Court further explained that its "rough proportionality" standard did not require a "precise mathematical calculation," but it did mean that the city had to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* [footnote omitted].

In announcing the second part of its takings test, the Court recognized that it was going beyond its decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). As Rehnquist explained, the Court resolved the dispute in *Nollan* on the basis of the essential nexus standard, concluding that not even the loosest nexus standard was met in *Nollan*. *Dolan*, 62 U.S.L.W. at 4579. The *Nollan* Court therefore did not have to reach the second level of inquiry about the required degree of connection between the exactions and the projected impact of the proposed development. That second level of inquiry, by contrast, was critical to the resolution

*Ms. Butler is a Professor of Law at the Marshall-Wythe School of Law, College of William and Mary, in Williamsburg, Virginia, the editor of the *Fee Simple*, and a member of the Board of Governors of the Real Property Section of the Virginia State Bar.

of *Dolan*. It forced the Court to focus more precisely on the distinction between a valid exercise of the police power and an invalid exercise of eminent domain, asking whether, in the case before it, there was a sufficient connection between the permit conditions and the adverse effects of the proposed development. *See id.* at 4580.

In applying the first part of its test, the Court quickly found that the permit conditions met the essential nexus standard. The Court explained that the prevention of flooding and the reduction of traffic congestion qualified as legitimate public purposes and that an essential nexus existed between those public interests and the permit conditions. The nexus existed between the public interest of flood prevention and the condition limiting development within the floodplain (by requiring dedication of greenway space) because the proposed development would expand the impervious surface on the property and therefore increase stormwater run-off into the nearby creek. Furthermore, providing for alternative means of transportation (through the dedication of a pedestrian/bicycle pathway) would reduce traffic congestion by removing potential vehicles from the roads. *Id.* at 4579.

The permit conditions did not, however, meet the rough proportionality standard. Although the Court acknowledged that keeping the floodplain free from development would limit the pressures of the proposed development on the nearby creek, the Court did not understand how this fact justified the requirement that the landowner dedicate land in the floodplain to the public. Requiring a private greenway also would have furthered the public interest of flood prevention, but would have differed in one significant respect from the public greenway dedication requirement: the landowner would have retained the right to exclude, one of the most fundamental rights of property owners. Had the proposed development encroached on an existing public greenway, the city could have required the landowner to provide alternative greenway space for the public. But since such a situation did not exist in *Dolan*, the Court concluded that the city had failed to show the "required reasonable relationship" between the floodplain easement requirement and the proposed development. *Id.* at 4581.

The pedestrian/bicycle pathway requirement also did not have the required degree of connection to the proposed development. The Court recognized, as a preliminary matter, that "[d]edications for streets, sidewalks, and public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use." *Id.* In this particular case, however, the city had not met its burden of "demonstrating that the additional number of vehicles and bicycle trips generated by the . . . [proposed] development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement." *Id.* The city had simply found that the pathway "could offset some of the traffic demand." *Id.* To meet its burden, the city must provide some quantitative evidence to support its finding.

Besides imposing what appears to be a new requirement to measure the degree of connection between a condition and the impacts of a proposed development, the decision in *Dolan* also represents a clear shift in the allocation of the burden of proof from the landowner to government in at least some exaction cases. In evaluating land use regulations affecting economic interests in property, the Court traditionally has accorded government a presumption

of constitutional validity. *See id.* at 4583-84 (Stevens, J., dissenting); MANDELKER DANIEL R., JULES B. GERARD & E. THOMAS SULLIVAN, *FEDERAL LAND USE LAW* § 1.03 (1986 & Release #1, Feb. 1988) & § 6.06 (Release #4, Feb. 1991). The majority opinion in *Dolan* clearly denies the legitimacy of this presumption at least in those land use cases involving an adjudicative decision affecting a particular property owner — as opposed to land use cases involving generally applicable zoning regulations. 62 U.S.L.W. at 4580 n.8 (majority opinion). Instead, in those adjudicative cases, government bears the burden of justifying the exaction imposed on a particular tract of land by showing a rough proportionality between the exaction and the impacts of the proposed development. To meet this burden, government must demonstrate that it "ma[d]e some effort to quantify its findings" in support of the condition imposed on the particular landowner. *Id.* at 4581. Before *Nolan*, government generally had not been required to make such an individualized determination to justify economic regulation under the due process or takings clauses of the federal Constitution.

Justice Rehnquist provided two potentially important ways to distinguish and limit *Dolan*. In setting the stage for the articulation of the two-part test, Rehnquist stressed that *Dolan* differed from many of the Court's other takings decisions. First, *Dolan* was different because it involved an adjudicative decision to condition a permit application on an individual parcel; other cases, in contrast, involved challenges to "essentially legislative determinations" having general applicability. *Id.* at 4578. Second, the permit conditions in *Dolan* required the landowner to "deed portions of the property to the city" and did not simply limit the property's use. *Id.* The Court recognized that in cases lacking these two elements a land use regulation generally is valid under the takings clause if it substantially advances legitimate state interests and does not deny an owner economically viable use. *Id.*

While Rehnquist's discussion of *Dolan*'s distinguishing factors suggests that *Dolan* will have limited impact, the Court's subsequent action in vacating a California decision and remanding it for reconsideration in light of *Dolan* suggests otherwise. In that decision the owner of an unsuccessful private tennis club proposed to demolish the club and build townhouses instead. The city was willing to allow the change in use if the property owner paid an amount to mitigate the loss of recreational facilities, as well as an art fee to offset the opportunity for the creation of cultural and artistic assets lost because of development. *See Ehrlich v. City of Culver City*, 19 Cal. Rptr. 2d 468 (1993), *vacated*, 114 S.Ct. 2731 (1994). The Court's action suggests that many land use regulatory decisions could now fall within the scope of *Dolan*. As long as a landowner is challenging how a regulation has been applied and as long as the regulatory process involved a compromise allowing development if certain conditions were met, the challenge would appear to involve the type of adjudicative decision identified by Rehnquist as his first distinguishing factor. Further, the Court's vacation of the California decision suggests that the second distinguishing factor — the deeding of property — may not be necessary.