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**DOLAN v. CITY OF TIGARD: LAND USE EXACTIONS
AFTER NOLLAN v. CALIFORNIA COASTAL COMMISSION**

by Lynda L. Butler*

On March 23, 1994, the United States Supreme Court heard oral arguments in *Dolan v. City of Tigard*, a takings case involving conditions attached to approval of a building permit. No. 93-518, 62 U.S.L.W. 3689 (U.S. Apr. 19, 1994). In *Dolan v. City of Tigard*, the Oregon Supreme Court held that conditions requiring the applicants of a building permit to dedicate portions of their land for storm drainage improvement and for a pedestrian/bicycle path did not constitute an unconstitutional taking because the conditions bore an essential nexus to the development of the property and therefore were reasonably related to the impact of the development of the property. 854 P.2d 437 (Or. 1993), *cert. granted*, 114 S. Ct. 544 (1993). The landowners in *Dolan* applied for a permit that would allow them to expand the use of their land. 854 P.2d at 438. The conditions were imposed under a city code provision allowing the imposition of conditions to development in order to provide for projected transportation and public facility needs. *Id.* The issues on appeal to the United States Supreme Court concerned the appropriate relationship that the government had to demonstrate between the conditions imposed on development and the state interest--that is, between the government exaction and the impact of development.

The Oregon court, in upholding the conditions under the takings clause, rejected the applicants' argument that the United States Supreme Court had, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), abandoned the "reasonable relationship" test in favor of a more stringent standard of "substantial relationship" or "essential nexus."¹ As the state court explained, the Supreme Court in *Nollan* had noted that its nexus approach was "'consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts.'" *Dolan*, 854 P.2d at 442 (quoting *Nollan*, 483 U.S. at 839). Although the Court in *Nollan* had stated that constitutional problems would exist if a condition imposed in place of a development ban "utterly fail[ed] to further the end advanced as the

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¹The United States Supreme Court, in *Nollan*, concluded that the condition imposed by the California Coastal Commission on the owners of a beachfront lot in exchange for permission to rebuild was not even reasonably related to a legitimate state interest. The condition had required the lotowners to grant the public lateral access across their lot to enable the public to pass to and from public beach areas located to the north and south of the lot. Writing for the majority, Justice Scalia concluded that the permit condition failed to promote any of the public interests purportedly served by the condition of public access. Those interests included preserving the public's visual access to the beach, minimizing psychological barriers to using public beaches created by intensified coastal development, and limiting beach congestion resulting from development. See 483 U.S. at 828-29, 838-42.

justification" for the ban and had referred to this relationship as an "essential nexus," 483 U.S. at 837, the Oregon court did not interpret that passage as requiring a more stringent nexus test. Rather, as the Oregon court explained, the passage indicated that "for an exaction to be considered 'reasonably related' to an impact, it is essential to show a nexus between the two." *Dolan*, 854 P.2d at 443. A condition will be reasonably related to an impact, under the Oregon court's reading of *Nollan*, if the condition "serves the same purpose that a denial of the permit would serve." *Id.*

Questions presented for review by the Supreme Court focused on the Oregon court's interpretation and application of *Nollan*.² The first question concerned whether *Nollan* requires a "'substantially related' degree of judicial scrutiny of exaction and its 'essential nexus' to impacts of proposed development, rather than [the] 'reasonably related' degree of scrutiny used by [the] Oregon Supreme Court." *Dolan*, 62 U.S.L.W. 3301 (U.S. Oct. 26, 1993). The second question asked whether the state court erred in holding a legally sufficient nexus existed if the findings made by the local government imposing the conditions demonstrate "only potential increase in intensity of use, rather than bona fide impact directly caused by development." *Id.*

The Supreme Court's resolution of the questions presented by *Dolan* hopefully will clarify much of the uncertainty surrounding the *Nollan* opinion. On the one hand, *Nollan* appears to heighten the test for establishing a valid police power regulation. Although that test traditionally involved a substantive due process inquiry into whether the regulation was reasonably related to valid police power objectives,³ the Court in *Nollan* appears to use a different nexus test in evaluating the legitimacy of a regulation under the takings clause. After describing the takings test as requiring the regulation to "'substantially advance[] legitimate state interests,'" *Nollan*, 483 U.S. at 834 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)), Justice Scalia explains in a footnote that this standard is indeed "different" from the due process nexus test, *id.* at 834 n.3. On the other hand, other aspects of *Nollan* suggest that a more limited interpretation is

²Petitioners did not present any question concerning the treatment by the Oregon Supreme Court of the petitioners' physical takings argument. In a footnote the state court had rejected petitioners' argument that the city's dedication conditions resulted in a permanent physical occupation of a portion of their land and therefore amounted to a per se taking. The court explained that occupation of petitioners' land would occur only with their permission. Petitioners, in other words, could avoid physical occupation of their land by withdrawing their permit application. Relying on the Supreme Court's decision in *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992), the Oregon court stressed that a physical taking can occur only when government "'requires the landowner to submit to the physical occupation of his land.'" *Dolan*, 854 P.2d at 441 n.8 (emphasis in original) (quoting *Yee*, 112 S. Ct. at 1528).

³See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-88, 395-97 (1926); *Sellon v. City of Manitou Springs*, 745 P.2d 229, 232-33 (Colo. 1987); *County of Pine v. State*, 280 N.W.2d 625, 629-30 (Minn. 1979); *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271, 281-82, 192 S.E. 881, 885 (1937), *appeal dismissed*, 302 U.S. 658 (1937); *Reesman v. State*, 445 P.2d 1004, 1007 (Wash. 1968). See generally ROGER CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 9.2 (1984) (discussing the police power, the due process clause, and the takings clause).

appropriate. As the *Dolan* court noted, for example, the majority in *Nollan* describes its nexus approach as consistent with the approach of most other courts, *see id.* at 839-40, and stresses that its test has, for years, applied in the takings field, *see id.* at 834. Additionally, the majority in *Nollan* concluded that the public access condition imposed on the lotowners could not even be justified under a reasonable relationship test. *Id.* at 838-42. Finally, the Court in *Nollan* was especially concerned about the fact that the permit condition required an "actual conveyance of property," which creates a "heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." *Id.* at 841. The Supreme Court's handling of *Dolan* hopefully will resolve the debate about the precedential effect of *Nollan*.