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Where's Dolan? Exactions Law in 1998

Jonathan M. Davidson

Ronald H. Rosenberg
William & Mary Law School, rhrose@wm.edu

Michael C. Spata

Recent Developments in
Land Use, Planning and Zoning Law

"Where's *Dolan*?": Exactions Law in 1998

Jonathan M. Davidson

Attorney and Mediator, Tallahassee, Florida;
J.D., Washington University (St. Louis), 1978;
M.R.P., University of North Carolina at Chapel Hill, 1973;
A.B., Case Western Reserve University, 1970.

Ronald Rosenberg

Professor of Law, College of William and Mary, Williamsburg, Virginia;
J.D., University of North Carolina, 1975;
M.R.P., University of North Carolina, 1974;
B.A., Columbia University, 1971.

Michael C. Spata

Deputy County Counsel, Tulare County, California;
LL.M., University of San Diego, 1990;
J.D., Western State University, 1976;
B.A., University of Maryland, 1973.

FOLLOWING A THREE-YEAR FLURRY OF DECISIONS interpreting the landmark 1994 ruling in *Dolan v. City of Tigard*,[1] recent cases interpreting the Supreme Court's "rough proportionality" test are harder to find than *Waldo*®.[2] Among decisions through the first quarter of 1998, there are no interpretations of *Dolan's* requirement of an approximate mathematical correlation between a development exaction and the impact of development. Beyond dicta from the U.S. Court of Appeals for the Ninth Circuit,[3] there is also little evidence of an advance in the Califor-

1. 512 U.S. 374 (1994). For discussion of *Dolan* and subsequent federal and state case law, *see generally* Jonathan Davidson & Adam U. Lindgren, Nollan/Dolan, *Show Me the Findings*!, 29 URB. LAW.. 427 (1997); Daniel J. Curtin, Jr., Jonathan M. Davidson & Adam U. Lindgren, Nollan/Dolan: *The Emerging Wing in Regulatory Takings Analysis*, 28 URB. LAW.. 789 (1996); and Daniel J. Curtin, Jr. & Jonathan M. Davidson, *Life After* Dolan: *Review of the Cases*, 27 URB. LAW.. 874 (1995).

2. This is a reference to the popular comic and puzzles, *Where's Waldo*®?, created by Martin Handford.

3. *See* Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997), discussed *infra* at notes 62 to 66 and accompanying text.

nia/Arizona view that legislatively adopted exactions programs fall beyond the reach of this test. Rather, cases over the past year are most notable for drawing distinctions from *Dolan's* factual and legal applicability. Amid the unanticipated litigation lull, this annual report reflects on the current state of exactions case law and considers the potential impact of federal constitutional developments on local ordinance drafting.

I. Post-*Dolan* Exactions Law: A Roughly Proportional Status Report

When *Dolan v. City of Tigard* first added the as-applied element to the "nexus" requirement established by *Nollan v. California Coastal Commission*,[4] litigators and commentators[5] struggled to decipher when, where, and how the rough proportionality test would apply. The 1987 *Nollan* decision established that there must be a linkage between a development exaction and a legitimate state interest.[6] Once this *Nollan* "nexus" test is met, *Dolan* brought on a second tier of inquiry in 1994: the relationship between specific land-use permit conditions and anticipated impacts of the proposed development requiring that this correlation reflect a measure of intensity that is roughly proportional.[7] Prior to this year's pause in reported cases, courts have applied *Dolan's* standard of rough proportionality with varied levels of scrutiny. Georgia's determination that the test does not apply to landscaping requirements for parking lots was denied *certiorari* by the U.S. Supreme Court.[8] Prevalently, courts invoking the test have deferred to local planning analysis and findings provided there is evidence of supporting analysis and individualized findings.[9] A more inventive interpretation

4. 483 U.S. 825 (1987).

5. *See, e.g.*, David S. Ardia, Dolan v. City of Tigard: *Takings Doctrine Moves Onto Unpaved Ground*, 24 REAL EST. L.J. 195 (1996); John Delaney, *What Does It Take to Make a Take? A Post-*Dolan *Look at the Evolution of Regulatory Takings Jurisprudence in the Supreme Court*, 27 URB. LAW.. 55, 69 (1995); James H. Freis, Jr. & Stefan V. Reyniak, *Putting Takings Back into the Fifth Amendment: Land Use Planning After* Dolan v. City of Tigard, 21 COLUM. J. ENVTL. L. 103 (1996); Nancy E. Stroud & Susan L. Trevarthen, *Defensible Exactions After* Nollan v. California Coastal Comm'n *and* Dolan v. City of Tigard, 25 STETSON L. REV. 593 (1996); Daniel A. Crane, *Comment, A Poor Relation? Regulatory Takings After* Dolan v. City of Tigard, 63 U. CHI. L. REV. 199 (1996).

6. *Nollan*, 483 U.S. at 837.

7. *Dolan*, 512 U.S. at 391, 114 S. Ct. at 2319.

8. *See* Parking Ass'n of Georgia, Inc. v. City of Atlanta, 450 S. E.2d 200 (Ga. 1994), *cert. denied*, 115 S. Ct. 2268 (1995) (ordinance with specific landscaping requirements for parking lots not subject to review under the "rough proportionality" test of *Dolan*).

9. *See, e.g.*, F & W Assocs. v. County of Somerset, 648 A.2d 482, 487 (N.J. Super. Ct. App. Div. 1994) (nexus for road improvements exaction need not be mathematically precise); Grogan v. Zoning Bd. of Appeals, 633 N.Y.S.2d 809, 810–11

of rough proportionality is evidenced in the Illinois appellate decision in *Amoco Oil Company v. Village of Schaumberg*.[10] That decision reversed a conditional rezoning after intensive scrutiny of local planning and engineering reports.[11] The Oregon appellate court in *Art Piculell Group v. Clackamas County*[12] went so far as to overturn the local hearing officer's specific fact-finding on the location of water, sewage, and drainage pipes as part of its rough proportionality inquiry into road dedication conditions attached to subdivision approval.[13]

Federal and state judiciaries have also grappled with questions of the timing and applicability of the *Dolan* test. Clearly, the factual context of *Dolan* would make conditions attached to individual land development permits within its purview.[14] The rough proportionality test has also been applied to dedications and exactions linked to subdivision approvals,[15] rezoning,[16] and annexation.[17] Outside the direct land-use context,

(N.Y. App. Div. 1995) (deferring to town's individualized determination in sustaining a scenic and conservation easement's purposes and application); Sparks v. Douglas County, 904 P.2d 738, 746 (Wash. 1995), *rev'g*, Sparks v. Douglas County, 863 P.2d 142 (Wash. App. 1993) (sustaining required dedication of rights-of-way for road improvements where county had documented existing road deficiencies and had calculated increase in traffic and the specific need for dedications based upon impacts of the proposed subdivisions).

10. 661 N.E.2d 380, 382–84 (Ill. App. 1995). While Illinois has a long-established test for exactions requiring that the impacts be specifically and uniquely attributable to the exaction, *see* Pioneer Trust & Sav. Bank v. Mt. Prospect, 176 N. E. 2d 799 (Ill. 1961), the *Schaumberg* court clarified that it was deciding this matter under the *Dolan* rough proportionality test for federal constitutionality. 661 N.E.2d at 387, n. 5.

11. *Schaumberg*, 661 N.E.2d at 392–93. The invalidated conditions required dedication of approximately 20% of the property for road improvements to reconstruct a convenience store with gas pumps. *Id.*

12. 922 P.2d 1227 (Or. App. 1996).

13. *Clackamas County*, 922 P.2d at 1234. This decision stated that "a single erroneous finding that plays a significant role in the government's effort to show rough proportionality can in itself be the basis for reversing the government decision." *Id.* at 1233. *See also* Goss v. City of Little Rock, 90 F.3d 306, 310 (8th Cir. 1996) (city's conditional rezoning requiring land dedication for expansion of adjacent highway remanded in light of "sparsity of the record").

14. *Dolan* involved conditions placed on a development permit for expansion of a hardware store including required dedications for a bikepath and floodway. *Dolan*, 512 U.S. at 377–82; *cf.* Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1995) (Wyoming wildlife management law limiting number of hunting licenses that landowners could obtain for certain species distinguished *Dolan* as physical invasion case).

15. *See, e.g.*, Art Piculell Group v. Clackamas County, 922 P.2d 1227 (Or. App. 1996); Sparks v. Douglas County, 904 P.2d 738, 746 (Wash. 1995) (subdivision plat approval); Hoepker v. City of Madison Plan Comm'n, 563 N.W.2d 145 (Wis. 1997) (subdivision conditions).

16. *See, e.g.*, Goss v. City of Little Rock, 90 F.3d 306 (8th Cir. 1996) (conditions attached to rezoning); Amoco Oil Co. v. Village of Schaumberg, 661 N.E.2d 380 (Ill. App. 1995) (conditions attached to a zoning application for a special use permit).

17. *See Hoepker*, 563 N.W.2d at 151(invalidating subdivision condition requiring municipal annexation).

courts have considered the applicability of the test to housing preservation programs[18] and to the support of public art.[19]

Substantial precedent also indicates that a legislative enactment imposing developer exactions may shield government from a *Dolan*-based attack.[20] However, this legislative armor may be pierced once the exaction is administered on a case-by-case basis. In *Ehrlich v. City of Culver City*,[21] the California Supreme Court found *Dolan* inapplicable to a generally applicable public art fee,[22] then invoked the rough proportionality test for a recreational impact fee as applied to a single property. It then remanded that matter because that record was devoid of any individualized findings.[23] The Arizona *Scottsdale* decision also distinguished *Dolan* when it sustained an ordinance adopting a water service fee applicable to all new development at the building permit stage.[24] It is notable, though, that the Arizona court devoted a substantial portion of its opinion to referencing supporting studies that addressed water resource needs, methodologies for calculating fees, and the comprehensive program that led to enactment of the fee.[25]

Responding to another potential extension of *Dolan's* impact, the Washington State Supreme Court recently rejected a substantive due process argument that the adjudicatory nature of environmental permit issuance makes the rough proportionality takings test applicable.[26] In particular, the court concluded that the holding in *Dolan* which required shifting the burden of proof to the government to justify an exaction

18. *See, e.g.*, Lambert v. City and County of San Francisco, 67 Cal. Rptr. 2d 562 (Cal. App. 1997); Arcadia Dev. v. City of Bloomington, 552 N.W. 2d 281, 286 (Minn. Ct. App. 1996) (*Dolan* inapplicable to local ordinance requiring mobile home park owners to pay relocation costs to displaced residents upon closing of the park); Sintra, Inc. v. City of Seattle, 935 P.2d 555 (Wash. 1997) (concurring and dissenting opinions).

19. Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996).

20. *See* Homebuilders Ass'n v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997) (*Dolan* does not apply to water service fee ordinance); Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996) (distinguishing recreation and public art fee ordinance provisions from as-applied context); McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995) (holding *Dolan* inapplicable to a municipal ordinance which conditioned building permits and plat approval on payment of impact fees); Waters Landing L.P. v. Montgomery County, 650 A.2d 712, 724 (Md. 1995) (distinguishing *Dolan* in part because development impact tax was legislative act).

21. 911 P.2d 429 (Cal. 1996).

22. *Ehrlich*, 911 P.2d at 450.

23. *Id.* at 448.

24. *City of Scottsdale*, 930 P.2d at 995.

25. *Id.* at 997-1000.

26. Christianson v. Snohomish Health Dist., 946 P.2d 768, 769-70 (Wash. 1997), concerned the denial of an environmental construction clearance permit for expansion of a mountain cabin based on the adequacy of a septic system.

did not automatically apply to other land-use adjudications.[27] The record before the court reflected an extensive inquiry into applicable state environmental regulations by the hearing examiner.[28] The Washington court distinguished between substantive due process and takings law. Here, the appellants did not argue that a property interest was deprived. Moving on to substantive due process, the court found that the government purposes in the prevention of contamination of ground and surface water quality if the substandard septic system were approved, were adequate to meet this latter constitutional standard.[29]

II. Regulatory Leveraging in the Land Development Context: "I'm Not *Dolan*!"

Concern with governmental regulatory leveraging, consistent with directives of *Nollan* and *Dolan*, has been a focus of recent cases before the Wisconsin and New Jersey Supreme Courts. Both cases involved the constitutionality of conditions imposed on developmental approval and addressed the fairness of allocating general community costs on land developers and, consequently, newcomers to the locality.[30] Other state and federal decisions involving subdivision approval conditions in Washington indicate greater deference to governmental discretion. However, none of these cases directly applies the rough proportionality element of *Dolan*'s constitutional test.

In *Hoepker v. City of Madison Plan Commission*,[31] the Supreme Court of Wisconsin considered the case of a sixty-two-unit residential subdivision approval made subject to a series of conditions imposed by the City of Madison. The landowners, the Hoepkers, sought review on two of the conditions which required them: (1) to agree to a city annexation of the land covered by the preliminary subdivision plat and (2) to reconfigure their plat in order to provide for an open space corridor. The lower Wisconsin courts had ruled that the city could not condition plat approval on annexation, but that it could impose the open

27. *Id.* at 774.
28. *Id.* at 771-72.
29. *Id.* at 777.
30. These decisions extend a theme present in constitutional theory at least since Armstrong v. United States, 364 U.S. 40, 49 (1960), that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness, and justice, should be borne by the public as a whole." Imbedded within this line of thought is an opposition, on constitutional terms, to "regulatory leveraging" where government approval mechanisms are used to extort community benefits from individual land owners.
31. *City of Madison*, 563 N.W.2d at 145.

space corridor condition. However, the state's supreme court took a different view.

On the first question, the *City of Madison* court held that the city could not condition its subdivision plat approval on the annexation of the parcel. The city had justified this requirement to ensure that the full range of urban services could be provided to the development in a timely fashion according to the city's "established regulations, practices, policies, and procedures."[32] While acknowledging the important public policy reasons for permitting development approval based, in part, on agreement to annexation, the court rejected this ground based on the inconsistency of the local requirement with state annexation policy and standards set forth in Wisconsin statutes.[33] Thereafter, subdividers and localities may agree to annexation prior to the granting of development approval, but that agreement must be voluntary.[34]

The Wisconsin Supreme Court considered next whether the city's requiring an open space corridor be identified on the subdivision plat and reserved for possible public acquisition for up to five years could be a potential "temporary regulatory taking." The lower appellate court had ruled that the *Dolan* precedent did not apply to the facts at hand, because *Dolan* involved conditional development approval based on the donation of land as opposed to the reservation of land in this case.[35] In *Madison*, the owner was only required to delay use of the land rather than convey it to the locality.[36] The Wisconsin Supreme Court did not rely on this distinction in disposing of this issue. Rather, the court determined that the plaintiff's taking claim was not yet "ripe" for decision since there was no final location of the open space corridor and, therefore, no exact knowledge of regulatory impact on the landowner.[37]

While there has been no judgment on the merits, the *Madison* decision is significant for raising the possibility that a condition imposing a reservation or delay on the development of land could constitute a taking even if for a temporary period. The Wisconsin court has merged the ideas contained in the U.S. Supreme Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*[38] with

32. *Id.* at 148.
33. *Id.* at 151.
34. *Id.*
35. *Id.* at 149.
36. *City of Madison*, 563 N.W.2d at 149.
37. *Id.* at 153.
38. 482 U.S. 304 (1987).

those in the *Nollan* and *Dolan* series of cases. *City of Madison* also indicates that the wide use of the long-term reservation technique may soon become the focus of later cases. The fact that the local government might eventually pay compensation for the open space corridor might not save the reservation. However, significant analytical questions remain to be resolved in deciding such issues, including: what is the relevant property interest being taken in the temporary taking situation; what is the spillover effect of delaying development of the protected parcel to the remaining land; and how would the "rough proportionality" calculation of *Dolan* be applied in the temporary taking context?

In the New Jersey Supreme Court case of *Swanson v. Planning Board of the Township of Hopewell*,[39] a concurring opinion expresses particular concern that the unrestricted imposition of exactions would convert community planning into a nontransparent, case-by-case series of freewheeling municipal/landowner deals. The *Hopewell* dispute arose from the familiar setting of the conditional rezoning process where a land developer sought a rezoning to allow a residential subdivision. Negotiations between the land developer and the locality resulted in an agreement where the landowner promised to pay up to $1.7 million for the construction of a sewer pumping station and force main which would serve not only the subdivider's 117 acre parcel but also the 121 existing homes in the adjacent Princeton Farms development.[40] The legal challenge presented in this case originated from a citizen's attack on the lawfulness of the subdivision approval pursuant to the earlier agreement.[41]

A concurring opinion by Judge Stein agreed with the court's refusal to hear the matter, but added a strong statement supporting exaction proportionality in the interest of preserving the integrity of public land planning and regulatory processes. The concurrence framed the issue as one of municipal authority: was this an illegal exaction unauthorized by the laws of the state of New Jersey? The three justice opinion concluded that neither the New Jersey Municipal Land Use Law nor the local-improvements statute would have justified the imposition of disproportionate sewer improvement costs upon the land developer.[42]

Although never explicitly mentioning either the *Nollan* or the *Dolan*

39. *Hopewell*, 692 A.2d 966 (1997).

40. *Hopewell*, 692 A.2d at 967. This agreement contained many provisions favorable to the developer's interest including a special provision immunizing the proposed residential subdivision against future, otherwise applicable, changes in the existing zoning ordinance design standards. *Id.*

41. *Id.* at 967.

42. *Id.* at 968.

opinions, the New Jersey opinion emphasized that a subdivider could only be compelled to supply the portion of an off-site improvement cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision. It then emphasized the need for predictability and judicial reviewability of exactions noting that the legislature had acted to "circumscribe the power of planning boards by requiring that the power be exercised in conformity with standards set forth by ordinance."[43] The danger addressed by the court was not that unfair exactions would be imposed on reluctant land developers, but rather that local officials would have "an impermissibly broad range of discretion in exacting off-site improvements."[44] That is, municipal discretion could be exercised in favor of property owners and developers willing to subject themselves to monetary or land exactions.

This curious flip-side of the usual exaction case presents argument for uniformity and limits as a means of regulating local government dealmaking. As the opinion in *Hopewell* noted,

> . . . the kind of free-wheeling bidding under review is grossly inimical to the goals of sound land use regulation. The intolerable spectacle of a planning board haggling with an applicant over money too strongly suggests that variances are up for sale. This cannot be countenanced. Proceedings in which this has occurred are irremediably tainted and must be set aside.[45]

The views expressed in the *Hopewell* concurrence portray exactions, even if acquiesced to, as improper incentives impermissibly tainting municipal actions on development applications.

In comparative deference to local discretion, an intermediate Washington appellate decision, *Snider v. Board*,[46] focused on a condition for approval of a subdivision plat that would require government acquisition of a right-of-way from a third party rather than from the principal property.[47] The court distinguished the factual context from *Dolan* because this contingency would require Walla Walla County to independently initiate eminent domain proceedings apart from its subdivision control powers.[48] Here, Mr. Snider could not point to a direct infringement on his property as a basis for a takings claim.[49]

In *Macri v. King County*,[50] the Ninth Circuit Court of Appeals de-

43. *Id.* at 970.
44. *Hopewell*, 692 A.2d at 970.
45. *Id.*
46. Snider v. Board, 932 P.2d 704 (Wash. App. 1997).
47. *Id.* at 708–09.
48. *Id.* at 709.
49. *Id.* at 708.
50. 126 F.3d 1125 (9th Cir. 1997).

ferred to Washington State compensatory remedies in its dismissal of a § 1983 action. In that case, the county had denied a preliminary plat application because of inadequate access to the proposed eleven-unit cul-de-sac subdivision. Ironically, the county hearing examiner's recommendation that was adopted relied on a general county ordinance allowing denial of an application if provision is not made for "the public health, safety, and welfare," and rejected the planning department's "informal 'rule of thumb' to generally limit the number of lots which could be developed in an area with only one access road."[51]

III. *Dolan* and Housing Conversion Programs— More Exceptions to the Rule

Recent discussions of the applicability of the constitutional rough proportionality test focus on monetary exactions and compensation issues in relation to housing programs. In *Lambert v. City and County of San Francisco*,[52] the California intermediate appellate court averted *Dolan* in reviewing provisions designed to protect existing residential hotel units from conversion into more profitable tourist units. Following the required San Francisco zoning procedures, owners of the Cornell Hotel applied to the city's Planning Commission for a conditional use permit to undertake a conversion of its residential units.[53] The Commission denied the permit, finding that the proposed use was neither desirable nor necessary, would be injurious to personal and property interests in the neighborhood and the community, and would be inconsistent with the policies and objectives of the city's Master Plan. This denial resulted in the lawsuit challenging the city's action on the permit.

The California Court of Appeal analyzed the case from two perspectives. First, it concluded that neither the San Francisco Planning Code nor the HCO effected a taking of property either on their face or as applied to the specific elements of the *Lambert* case. In general, the fact that the regulations furthered legitimate governmental interests and did not deprive landowners of the economically viable use of their

51. *Macri*, 126 F.3d at 1127.

52. 57 Cal. App. 4th 1172, 67 Cal. Rptr. 2d 562 (Cal. Ct. App. 1997).

53. At the outset the hotel contained 24 residential units and 34 tourist units. Under relevant code provisions, a hotel owner desiring to convert existing residential hotel units to tourist units must obtain both a conditional use permit under the planning code and permission under San Francisco's Hotel Conversion Ordinance (HCO). City permission to convert the units may be given only if the owner replaces the units or agrees to pay the costs of constructing similar units. This latter requirement demanded a one-to-one replacement for each converted unit. *Lambert*, 67 Cal. Rptr. 2d at 565, 57 Cal. App. 4th at 1175.

property convinced the court to sustain the local government rules. Along the same lines, the appellate panel ruled that the denial of the conditional use permit did not constitute a taking either because Lambert was attempting to secure approval to change the land use of the parcel, and, therefore, had no property right to the requested change. In addition, the court found substantial evidence supporting the city's position involving issues of affordable housing preservation, prevention of traffic congestion, and limited parking. These and other reasons justified denial of the permit since they furthered legitimate governmental interests.[54]

The appellate court sidestepped Lambert's central evidentiary contention that the City Planning Commission would have issued the conditional use permit if he had paid the city $600,000, representing the cost of rebuilding an equal number of housing units being removed by way of the hotel conversion. For hotel conversions, this one-to-one replacement feature was imposed pursuant to the HCO and constituted a prerequisite to the issuance of the conditional use permit.[55] Apparently the court was aware of the troublesome constitutional character of the housing replacement charge, but it chose to avoid the question by focusing upon the legitimate grounds for denying the conditional use permit.

While the California court recognized that the *Nollan/Dolan* line of cases required a heightened standard of review, it concluded that such scrutiny was not demanded in the case before it. Since Lambert's conditional use permit request was turned down solely on the basis of "legitimate" local government planning factors, the court reasoned that it need not consider the case under the *Nollan/Dolan* or *Ehrlich* constitutional principles. A strongly worded dissenting opinion would have applied the analysis from these case decisions and would have found for the Lamberts.[56]

The *Lambert* case represents an example of a court straining to avoid considering the city's housing replacement policy in terms of a development condition or an exaction. The court even revealed a degree of discomfort with its own position when it stated that,

> [w]hile it is somewhat disturbing that San Francisco's concerns about congestion, parking and preservation of a neighborhood might have been overcome by payment of significant sum of money, the fact remains that San Francisco did not demand

54. *Id.* at 567–72.
55. *Id.* at 572.
56. *Id.* at 573.

> anything from Lambert as a condition of a use permit. It simply denied the permit outright.[57]

This statement suggests a significant degree of inconsistency in the court's holding-while it approved of the permit denial based on legitimate governmental concerns, it saw the city willing to waive those important considerations upon the payment of a substantial fee. Such a waivable policy induces skepticism about the reality of the suggested public purposes supposedly being advanced by the ordinance. The decision ignores the explicit HCO one-to-one replacement requirement and refuses to apply the prevailing and applicable constitutional analysis to it. Such an unwillingness would seem to indicate a lack of confidence in the constitutionality of the provision. With review granted by the California Supreme Court, these issues are likely to be resolved.

An analogous debate between concurring and dissenting Washington State Supreme Court justices transpired over whether *Dolan's* rough proportionality test should be applied to Seattle's rescinded Housing Preservation Ordinance. The majority opinion in *Sintra, Inc. v. City of Seattle*[58] rested on the issue of the applicability of interest and punitive damage awards under Seattle's former Housing Preservation Ordinance.[59] However, a concurring opinion by Chief Judge Durham[60] took specific issue with a dissent by Judge Talmadge, who would apply *Dolan* to the monetary damage measure of the ordinance's impact on the property owner.[61]

A federal Ninth Circuit ruling also rejected the applicability of *Dolan's* heightened scrutiny to an ordinance providing for conversion of leasehold interests in condominium units into fee interests. *Richardson v. City and County of Honolulu*[62] addressed this unique law and regulations, which offered eminent domain compensation for affected property owners. The federal appellate court rejected the argument that the ordinance should be subject to the rough proportionality test.[63]

The majority decision in *Honolulu* distinguished the ordinance at issue, which incorporated an eminent domain procedure to compensate landowners affected by the condominium conversions, from a regula-

57. *Id.* at 569.
58. 935 P.2d 555 (Wash. 1997).
59. *Id.* at 558.
60. *Id.* at 570–74 (Durham, C.J., concurring).
61. *Id.* at 578–82 (Talmadge, J., dissenting in part).
62. 124 F.3d 1150 (9th Cir. 1997).
63. *Richardson*, 124 F.3d at 1153.

tory takings context where compensation is not anticipated.[64] It determined that continued deference to legislative enactment, as affirmed in *Hawaii Housing Authority v. Midkiff*,[65] remains the applicable law.[66]

IV. *Dolan's* Impact on Drafting Local Exaction and Impact Fee Ordinances: A Public Agency Practical Perspective

One major lesson derived from *Nollan/Dolan* and their decisional progeny is that public agencies, particularly cities and counties,[67] must draft with greater care local ordinances that impose exactions and development impact fees.[68] Adequate comprehensive plans[69] and capital im-

64. *Id.* at 1157-58.

65. 467 U.S. 229 (1984).

66. *Richardson*, 124 F.3d at 1157-60. A dissenting opinion suggests that the *Lucas-Nolan-Dolan* trio should be extended to allow heightened scrutiny of compensatory regulation ordinances. *Id.* at 1166-68 (O'Scannlain, J., dissenting in part).

67. Although *Nollan* involved the imposition of an exaction (access easement dedication) by a state agency, the preponderance of case law in this constitutional fray embraces legislative and adjudicative action taken by cities and counties. For background, *see* J. KUSHNER, SUBDIVISION LAW AND GROWTH MANAGEMENT § 6.08 (1997).

68. For acknowledgment of this view from public and private sector quarters, *see* Daniel J. Curtin, Jr., *Takings in the Land-Use Arena after* Lucas *and* Dolan: *How Far Is Too Far in Imposing Exactions?*, *in* TAKINGS—LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 83, 103 (D. Callies, ed. 1996) (public sector view); and Bley, Dolan: *Ramifications for Developers*, 4 CAL. LAND USE & ENV'T FORUM 85, 88 (Spring 1995) (private sector view). From a state statutory perspective, Arizona expressly requires cities, towns and counties to comply with the *Nollan/Dolan* cases, *see* 3A ARIZ. REV. STAT. ANN. §§ 9-500.13, 11-810 (West Supp. 1997). Regulatory takings in the *Nollan/Dolan* area are classified as a "title take," as opposed to a "physical occupation take" or an "economic take." For discussion of this doctrinal classification of regulatory takings, *see* Robert H. Freilich & Elizabeth Garvin, *Takings after* Lucas: *Growth Management, Planning, and Regulatory Implementation Will Work Better Than Before*, *in* AFTER *LUCAS*: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 53, 54-61 (D. Callies, ed. 1993) (defining a "title take" as "a restriction on the use of property that significantly interferes with the incidents of ownership"; a "physical take" as "a physical occupation authorized by government"; and an "economic take" as "the failure of a regulation to advance a legitimate state interest [or] the absence of any permanent [economic] value remaining for the property taken as a whole"). A "title take" has a better chance of being recognized in court because of the comparatively stricter constitutional standards with which public agencies must comply to survive a "title take." *See generally* John J. Delaney, *What Does It Take to Make a Take? A Post-*Dolan *Look at the Evolution of Regulatory Takings Jurisprudence in the Supreme Court*, 27 URB. LAW. 55, 69 (1995) (arguing that regulatory exactions (e.g., conveyance/dedication of property and development impact fees) will be subjected to "higher than minimal scrutiny, with the burden of proof being upon the government instead of the property owner").

69. *See* Robert H. Freilich & David W. Bushek, *Public Improvements and the Nexus Factor: The Takings Equation after* Dolan v. City of Tigard, *in* EXACTIONS, IMPACT FEES AND DEDICATIONS 3, 13-14 (R. Freilich & D. Bushek eds., 1995) [herein-

provement programs[70] can be viewed as twin pillars of a rationally based exaction and impact fee ordinance. The absence of either or both of these bases can expose the ordinance itself, or its implementation for a site-specific development project, to a *Nollan/Dolan* constitutional attack.[71]

Consequently, in a figurative sense, public agencies can obtain substantial constitutional insurance by taking the time to pay the premiums for adequate land-use, environmental, and engineering planning that documents the public needs and impacts that are intended to be addressed by a local exaction and impact fee ordinance.[72] In this way, defenders of an ordinance or development decision can refer the court to the planning and programming studies that provide the extended rationale for the imposition of exactions and impact fees.

In connection with preparing an exaction or impact fee ordinance,[73] the drafter should (1) identify the purpose of the exaction/impact fee; (2) demonstrate a reasonable relationship between the exaction/impact

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after "EXACTIONS"] and Davidson, *Concurrency, Cost Allocation, and Comprehensiveness in Adequate Public Facilities Regulations*, *in* 1992 ZONING & PLANNING LAW HANDBOOK 283, 292-99 (K. Young ed.).

70. *See* Morgan, Duncan, McClendon & Standerfer, *Impact Fee Ordinances: A Guide to Legal Requirements and Administrative Standards*, *in* 1987 ZONING & PLANNING LAW HANDBOOK 275, 293-302 (N. Gordon ed.).

71. Likely grounds for challenge include that there is no rational basis for the ordinance or there is no reasonable relationship (essential nexus) between the project condition (exaction/impact fee) and the impact to be mitigated by that condition.

72. Robert H. Freilich & Terry D. Morgan, *Municipal Strategies for Imposing Valid Development Exactions: Responding to* Nollan, *in* EXACTIONS, *supra* note 69, at 21, 27-31.

73. As a practical matter, the drafter of the local exaction/impact fee legislation must come to grips with certain fundamentals, which include, but are not limited to, the following:

> SECTION 1, Exaction/Impact Fee Ordinance (Short Title, Findings, Intent, Authority, Definitions, Applicability of Exaction/Impact Fee, Imposition of Exaction/Impact Fee, Establishment of Development Subareas, Development Potential by Subarea, Capital Improvement Program by Subarea, Impact Fee Coefficients by Subarea, Administration of Exaction/Impact Fee, Bonding of Excess Facility Project, Refunds, Appeals, Effect of Exaction/Impact Fee on Zoning and Subdivision Regulations, Exaction/Impact Fee as Additional and Supplemental Requirement, Variances and Exceptions, and Credits);
> SECTION 2, Liberal Construction;
> SECTION 3, Repealer;
> SECTION 4, Severability; and
> SECTION 5, Effective Date.

For an excellent discussion of this type of ordinance, *see* Leitner & Strauss, *A Municipal Impact Fee Ordinance, Based on the Standard Development Impact Fee Enabling Statute, with Commentary*, *in* DEVELOPMENT IMPACT FEES: POLICY RATIONALE, PRACTICE, THEORY & ISSUES 142 (A. Nelson ed., 1988). *See also* Martin L. Leitner & Susan P. Shoettle, *A Survey of State Impact Fee Enabling Legislation*, 25 URB. LAW. 491 (1993).

fee and the purpose for which it is imposed; (3) identify all sources and amounts of funding anticipated to complete financing of incomplete public improvements; (4) designate the approximate dates on which such funds are expected to be deposited into the appropriate fund or account; and (5) direct that such funds be deposited into a separate account for the identified impact fee.[74]

When drafting the legislative findings demonstrating the reasonable relationship between exaction/impact fee and the purpose for which it is imposed, it is critical that the findings not be conclusory. Instead, the findings should articulate specific facts that justify the need for the exaction or the impact fee and should refer to land-use, environmental, and engineering reports designed to document the justification for the exaction/impact fee. One should avoid the temptation to cluster the discussion of the reasonable relationship between the exaction/impact fee and the purpose for which it is charged with several different exactions/impact fees. Isolate the findings discussion for each exaction/impact fee. This will avoid confusion in the adoption process, as well as in the judicial process, if necessary.[75] Finally, a public hearing, even if not mandatory before adoption, should be held to give reasonable notice and opportunity for community input to the proposed exaction/impact fee ordinance.

V. Reflections on the Current Quiet: Issues Resolved or Icebergs Ahead?

In this smooth-sailing year, it may be prudent to survey explanations for the relative absence of reported cases addressing the scope and application of *Nollan* and *Dolan's* developing federal constitutional law of exactions. First, it is possible that few litigants are seeking to challenge municipal and other local government development exaction practices because they believe that those practices comply with the constitutional parameters of the U.S. Supreme Court decisions and that legal attack would be costly and futile. Improved local government documentation of the costs of development may also deter potential plaintiffs

74. These components are derived from California legislation. *See, e.g.*, CAL. GOV'T CODE §§ 66000, *et seq.* (West 1997 & Supp. 1998). *See also* David L. Callies, Dolan v. City of Tigard: *One Year Later*, 4 CAL. LAND USE & ENV'T FORUM 79, 84 (Spring 1995) (suggesting, in part, that local government must "develop defensible quantification measures" for the exactions imposed). For an example of state enabling legislation that shows how to quantify development impact fees, *see* Idaho Code §§ 67-8201 *et seq.* (Michie Supp. 1997).

75. For further discussion on drafting findings, *see* Michael C. Spata, *Project Exactions and the* Nollan *Case*, APA SAN DIEGO PLAN. J. 5, 6 (Feb. 1989). *See also* Jonathan M. Davidson & Adam U. Lindgren, Nollan/Dolan, *Show Me the Findings!*, 29 URB. LAW. 427 (1997).

from challenging the governmental unit. If the amount of the exaction is relatively certain and underlying methodologies are clearly demarked, the regulated party may conclude that a challenge is not cost-effective. Especially with regard to financial exactions, the incorporation of these costs into project sales prices might restrain the desire to litigate the constitutional validity of the exaction.

In some jurisdictions, the absence of reported exaction cases might also herald the development of new governmental techniques achieving the same purposes as exactions. For instance, financial development charges may be characterized as excise taxes or privilege taxes.[76] Other localities may rely to a greater degree on the use of nonproperty transfer techniques such as setback and buffer zones to provide for land preservation and protection without a land exaction.

Conversely, there may be a chilling effect on assertive or expansive exactions by governments wary of federal constitutional challenges. The prospect of defending a takings challenge based on alleged temporary or permanent infringements may lead to increased capitulation, or perhaps to a negotiated development that is more compromising than that initially proposed by planning staff. The element of state compensatory remedies, emboldened by the *Dolan* ruling, may also temper required dedications or monetary exaction demands.

Finally, potential challengers could believe that although local government exaction methods violate the rules set out in the *Nollan* and *Dolan* cases, resorting to the state court remedies would be unproductive due to those courts' reluctance to interpret expansively the sweep of the cases. State courts may ignore federal constitutional holdings in their opinions and rely on state law principles to rule on the same issues. However, the Supreme Court's ruling in *Suitum v. Tahoe Regional Planning Agency*[77] does appear to establish federal grounds for ripeness of takings claims short of exhausting all local (or state) administrative remedies. Whether or not this ripeness portends impending titanic clashes over government exactions, it is logical to surveil the stillness in case law for timely detection of submerged issues.[78]

76. Telephone Interview with David W. Bushek, Attorney with Stinson, Mag, & Fizzell, Kansas City, Mo. (Apr. 21, 1998).

77. 117 S. Ct. 1659 (1997) (holding that property owner did not need to exhaust remedies through transferable development rights program for takings claim to be ripe).

78. *See, e.g.*, Del Monte Dunes at Monterrey, Ltd. v. City of Monterrey, 95 F.3d 1422, 1434–35 (9th Cir. 1996) (affirming district court jury verdict and temporary damage award of $1.450 million for extensive conditions placed on subdivision application for 37.6 acres of oceanfront property), *cert. granted*, Monterrey v. Del Monte Dunes at Monterrey, Ltd., 60 U.S.L.W. 3635 (Mar. 31, 1998).