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Recent Developments: Dolan v. City of Tigard: Conditional Land Use Permits Requiring Dedication Must Meet Two Prong Test of Essential Nexus and Rough Proportionality or Requires Compensation under Fifth Amendment

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Dolan v. City of Tigard:

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In a five to four decision, the United States Supreme Court in *Dolan v. City of Tigard*, 114 S. Ct 2309 (1994), held that in addition to the showing of an essential nexus between a land use permit and a legitimate state interest, there must also be a “rough proportionality” between the permit condition and projected impact of the land use. The ruling signaled the Court’s unwillingness to ignore the guarantees secured by the Fifth Amendment to the United States Constitution in an era of increasing land use regulatory schemes.

The action originated when Florence Dolan applied for a permit to double the size of her plumbing supply store. The City Planning Commission (“The Commission”) granted the permit subject to its Community Development Code (“CDC”) which required, *inter alia*, that Dolan dedicate a portion of her property, which lay in a floodplain, for a flood control greenway and a pedestrian/bike trail. The area in question approximated roughly ten percent of Dolan’s property, which she could rely upon to meet the fifteen percent open space and landscaping requirement mandated by the City’s zoning scheme.

Dolan applied for, and was refused, a variance from the CDC conditions. The Commission found that the larger facility would create more traffic in the area and that a pedestrian/bike trail could offset some of the congestion. The Commis-

sion further found that since the intensified development would also increase stormwater runoff into a nearby stream already strained by other sources of drainage, the dedication requirement was sufficiently related to Dolan’s plans to further develop the site.

Dolan appealed to the Land Use Board of Appeals (“LUBA”) on the grounds that the City’s dedication requirement was not reasonably related to her proposed development and constituted a Fifth Amendment taking. However, LUBA found a reasonable relationship between the proposed development and both the pedestrian/bike trail and greenway. The Oregon Court of Appeals affirmed, finding that the permit conditions were reasonably related to the impact of the expansion of Dolan’s business. The United States Supreme Court granted certiorari.

The Court began by noting that the Fifth Amendment of the United States Constitution, through the Fourteenth Amendment, requires states to compensate landowners when their land is appropriated for public use for the sole reason that government should not be able to force some people to bear burdens, which, in all fairness, should be borne by the public as a whole. *Id.* at 2316 (citing *Armstrong v. United States*, 364 U.S. 40 (1960)). However, the Court acknowledged that government could hardly go on if diminution of property values incident to a change in the law

required compensation, (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1926)), and a land use regulation does not effect a taking if it “‘substantially advances a state interest’ and does not ‘deny an owner economically viable use of his land.’” *Dolan* at 2316 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). Simply put, in order for a government to condition a permit on the dedication of land to the state, there first must be an essential nexus between the legitimate state interest and permit condition. *Id.* at 2317. (citing *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987)). If no such relationship exists, “under the well-settled doctrine of ‘unconstitutional conditions,’ a government may not require a person to give up a constitutional right—here the right to be compensated—in exchange for a discretionary benefit conferred by the government” *Id.* Notably, the Court agreed with those below that the necessary nexus existed between the dedication requirement and the legitimate state interest in flood prevention and traffic reduction. *Id.*

Turning to the question left open in *Nollan v. California Coastal Comm’n*, the Court pointed out that in addition to determining whether the essential nexus requirement was met, it was further necessary to ascertain whether the permit condition bore the necessary relationship to the impact of Dolan’s proposed expansion project. *Dolan* at 2317-18. Noting that

a use restriction may constitute a taking if not reasonably necessary to the accomplishment of a substantial governmental purpose, the Court pointed out that both the City’s and the Commission’s findings were nothing but conclusory statements and, without more, insufficient to support a dedication requirement in a city zoning permit. *Id.* at 2318.

After rejecting state court decisions which required only generalized statements of connection or very exacting causal analysis, the Court felt that a rough proportionality should exist between the required dedication and the impact of the proposed development. *Id.* at 2318-20. Turning to the facts before it, the majority noted that the City’s zoning requirement already required Dolan’s property to remain fifteen percent undeveloped and could not understand how a public greenway could better prevent flooding than a private one. *Id.* at 2320. Of course, as to Dolan, her inability to exclude others meant a loss of one of the most fundamental of property rights. *Id.* (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). Further, the City only indicated that the bike/pedestrian trail *could* offset traffic conditions due to the expansion, not that it *would*, and made little effort to quantify its conclusion(s). *Id.* at 2321-22 (emphasis added). In sum, the Court concluded that while “[n]o mathematical calculation is required . . . 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.” *Id.* at 2319-20. However laudable land use planning may be, the constitutional guarantee of compensation cannot be short-circuited. *Id.* at 2322.

In a spirited dissent, Justice Stevens, with whom Justices Blackmun and Ginsburg joined, criticized the majority for going beyond the essential nexus requirement established in *Nollan* and found the Court’s rough proportionality requirement “remarkably inventive.” *Id.* at 2323. Further, the dissent noted that previous takings cases focused on the entire parcel in question and not merely the portion subject to the taking and that the right to exclude others is merely one of a number of rights associated with property. *Id.* at 2324-25, 2329.

The dissent further split from the majority by pointing out that the ruling seriously departs from the “traditional presumption of constitutionality” when states act pursuant to their police powers by “imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan.” *Id.* at 2326. Under the guise of substantive due process, Justice Stevens expressed concern that the majority was attempting to reassert a superlegislative power not seen since the *Lochner* era. *Id.* at 2329.

In a lone dissent, Justice

Souter asserted that the Court applied a test no different than that announced in *Nollan v. California Coastal Comm'n. Dolan*. at 2330. Rather than showing any lack of proportionality between the permit condition and adverse effect, Justice Souter opined that the Court simply found a lack of any rational connection between the public greenway and flood control, and believed this to be nothing more than the "essential nexus test" announced in *Nollan. Id.*

A victory for property rights advocates, *Dolan v. City of Tigard* assures landowners that they alone will not have to bear the burden of comprehensive land use schemes. While the public has a strong interest in obtaining sensitive lands to protect the environment and provide for recreation, the Fifth and Fourteenth Amendments to the United States Constitution require compensation be paid for lands acquired for public use. Acknowledging the

pervasiveness of land use regulation in Maryland, *Dolan* will, in all likelihood, result in an increase in litigation and force local governments to make individual determinations with regard to landowners saddled with potentially unfair permit conditions.

- Robert Schulte

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