Dolan v. California Coastal Commission

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I. INTRODUCTION

Fifth Amendment takings law has undergone many changes in recent years. Specifically, several recent Supreme Court cases have altered the traditional "balance" between a compensable taking and an uncompensable use of the government's police power. Before examining the impacts of these recent changes, this Note will review the traditional Fifth Amendment takings analysis and the additions to the rubric that have taken place in recent years, specifically in the area of land use exactions. The primary focus of this Note will be on Dolan v. City of Tigard,1 which was decided by the United States Supreme Court during the 1994 term. After examining the Dolan decision, this Note will hypothesize Dolan's effects on natural resource protection by applying the case's holdings to the regulations governing the California Coastal Commission (hereinafter "Commission").

II. TAKINGS ANALYSIS

A. The Fifth Amendment

The Fifth Amendment to the United States Constitution is one of the most frequently invoked Constitutional protections. It is commonly cited when dealing with "incorporation" of the Bill of Rights2 or in the criminal arena when discussing double jeopardy or self-incrimination.3 In land use law, however, only the last clause of the Fifth Amendment, the "takings" clause, applies: "nor shall private property be taken for public use, without just compensation."4 This provision is applied to the states through the Fourteenth Amendment.5 Many, if not most, takings controversies involve constitutional limitations on the power of local governments and municipalities to regulate land uses.6

Private land is often requisitioned7 for public use by state and local governments without triggering the Fifth Amendment takings prohibition. Such use is allowed under the guise of the government's police power, which, general-
ly speaking, allows governments to legislate for "the health, safety, and morals of the public."8 Traditional zoning regulations have been justified by invoking this power.9 Wetland preservation,10 flood plain regulation,11 and landmark preservation12 are other valid exercises of the government's police power that are generally not considered takings under the Fifth Amendment. Thus, overburden-
some land regulation is considered a taking, but a proper exercise of the government's police power generally is not. As stated by Justice Holmes, "[t]he general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."13

By placing the government's police power and a compensable taking on a continuum, Justice Holmes established the framework for over seventy years of case law, regulation, and litigation. An obvious question follows from his statement: when does a valid exercise of the government's police power become so overburdensome that it transforms into a taking? The line has shifted over time, lending credence to Justice Clark's thirty-year-old observation: "there is no set formula to determine where regulation ends and taking begins."14 In the past ten years, the Supreme Court still has not set a formula, but it has laid out certain elements essential to takings cases.

9. See, e.g., Euclid v. Ambler Realty Co., 272 U.S. 375 (1926). Zoning had its origins in the prevention of nuisances by determin-
ing In advance where certain land uses should take place. In 1922, the U.S. Department of Commerce developed the Standard Zoning Enabling Act, a model which was later implemented by several states. In Euclid, the Supreme Court for the first time held that zoning was Constitutional. Six years later, the Court limited its position by holding that zoning which was applied arbitrarily or capriciously or for a confiscatory purpose violated Constitutional prohibitions. Nectow v. Cambridge, 277 U.S. 183 (1928).
ment that just compensation be paid for a taking of private property. CAL. CONSTIT. ART. I, § 14.
17. If the entire parcel is taken, fair market value as of the time of the action is used. When only a portion of a parcel is taken, valuation is more difficult. Section 1002 of the Uniform Eminent Domain Code provides one method for determining what compen-
sation is just: compensation is the greater of the value of the property taken or the difference between the fair market value before and after the taking. Most states award the value of the taken portion plus damages to the portion not taken less any special benefits missing from the taken land. Robert R. Wright, Land Use in A NURSHELL 149–50 (3d ed. 1994). California's provisions for providing just compensation can be found at CAL. CIV. PROC. CODE § 1230.010 (West 1994).
18. This is the situation Justice Holmes referred to in Pennsylvania Coal Co. v. Mahon, 260 U.S. at 415. In The Taking Issue, the authors briefly discuss how English and United States colonial practices led to the evolution of this continuum concept. Fred Bosselman et al., THE TAKING ISSUE 316–22 (1973).
19. For simplicity's sake, the term "taking" will be used to refer to regulatory takings as well as physical occupations throughout the remainder of this Note.
20. 438 U.S. 104 (1978). Penn Central was a challenge of New York City's Landmarks Preservation Law, N.Y.C. ADMIN. CODE ch. 8-A § 205-1.0. The statute designated Grand Central Terminal as a his-
torical landmark which prevented the plaintiff land owner from lev-
eling the Terminal and building a high-rise on the property. The Court found that no taking had occurred because the plaintiff could continue to profitably use the terminal. Additionally, plaintiffs were given Transfer of Development Rights (hereinafter "TDRs") under the Law, which allowed them to develop in another area where they would have otherwise been precluded from so doing. Id. at 108–115.
21. Id. at 125.
the plaintiffs did not contest that the “objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal.”

Second, “the economic impact of the regulation on the claimant, and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations are of course relevant considerations.” In Pennsylvania Coal, Justice Holmes, writing for the Court, struck down a statutory prohibition against mining under occupied buildings because upholding the statute would have resulted in a substantial “diminution in value” to the land.

Over sixty years after Pennsylvania Coal, the Court formulated a different test to determine the economic impact of the regulation: the “reasonable economic use” test. Under this test, land owners did not have the right to the most beneficial use of the land. Rather, they had the right to reasonable use of the property. Of course, debate ensued over what constituted a “reasonable use” of property after regulation.

Finally, courts could examine “the character of the governmental action. A ‘taking’ was more readily found when the interference with property could be characterized as a physical invasion by the government.” One example of such a physical invasion occurred when the government granted public access to a portion of private land. Determining whether a government regulation constituted a physical invasion became an important and much-debated issue during recent Supreme Court terms and helped shape some of the modern trends in takings law, as discussed below.

Lower courts, guided by the more traditional Supreme Court decisions, worked within a framework for determining when a regulatory taking had occurred. In 1987, however, the methods the courts used to examine land use regulations changed.

C. Modern Shifts

During the early- to mid-1980s, the Supreme Court decided a trio of cases that established prerequisites for a land owner’s initiating inverse condemnation actions against a government entity. Before such an action can proceed, the land owner must file a development plan application with the appropriate governmental agency and exhaust all administrative remedies available to them. Scholars have noted that these cases failed to resolve the issue of whether compensation was an appropriate remedy in regulatory takings cases.

In Keystone Bituminous Coal Ass’n v. DeBenedictis, the Supreme Court rejected the idea of conceptual severance. “[I]n deciding whether a particular governmental action has effected a taking, this Court focuses both on the character of the action and on the nature of the interference with rights in the parcel as a whole.” The Court also reaffirmed the nuisance.

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22. Id. at 129.
23. Id. at 124.
25. Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470 (1987). The Court upheld the state subsidence restrictions in Keystone, because the statute at issue required that 30% of the coal remain in the ground. This requirement “protected the public interest in health, the environment, and the fiscal integrity of the area.” Id. at 488. Thus, the statute was attempting to abate a common nuisance and constituted a valid exercise of the police power.
26. Id. at 485.
30. When the federal government attempted to grant public access to a private Hawaiian pond that had been converted into a bay, the Supreme Court found that a taking had occurred. Kaiser- Aetna v. United States, 444 U.S. 164 (1979).
34. An inverse condemnation action, as the name suggests, is an action brought by a private citizen against a government, asserting that the government’s actions have resulted in a taking of the individual’s property for which just compensation is due.
35. Thus, land owners must request a variance, conditional use permit, or otherwise avail themselves of any exclusions from the local or regional government’s general plan. Practitioners know from experience that the tediousness of jumping through so many administrative hurdles will cause them to “mitigate, not litigate.” REPORT No. 416, supra note 33, at 9.
36. Id.
38. Conceptual severance is a theory which holds that when examining the impact of a regulation on land, administrative agencies and courts should consider the effect of the regulation on a particular portion of the property.
exception to regulatory takings analysis. Scholars have posited that this case left the relationship of the nuisance exception to traditional takings analysis uncertain, but did little to change traditional takings law. That change began in earnest with First English Evangelical Lutheran Church v. County of Los Angeles.

First English involved a twenty-one acre parcel of land, purchased in 1957, situated along Mill Creek, in the Angeles National Forest. Twelve acres of the plot were used by the church as a campground until 1978, when a flood overran the banks of the creek and wiped out the site. When a fire destroyed much of the upstream forest the previous year, the area had become a flood hazard. In 1979, Los Angeles County enacted an interim flood ordinance that, among other things, precluded the plaintiff from rebuilding where the campsite had once stood. First English Church brought suit alleging a Fifth Amendment taking. After the California Court of Appeal invalidated the ordinance, the U.S. Supreme Court granted certiorari.

The Supreme Court assumed that the Los Angeles interim ordinance amounted to a regulatory taking of the plaintiff’s property: “the Los Angeles Ordinances have deprived appellant of all reasonable use of its property for a considerable period of years...”. The Court then determined that invalidation of the ordinance was an insufficient remedy and held that land owners were entitled to receive money damages as compensation for temporary takings. First English also affirmed the two-part test set out in Agins to determine whether a land use regulation was unconstitutional.

On remand, the California Court of Appeal summarized the scope of the Supreme Court’s decision: “[t]he United States Supreme Court in First English made it abundantly clear the Court was deciding the remedies issue — and only that issue. The majority specifically held it was not deciding appellant had stated a cause of action.” The California Court of Appeal decided that First English Church had not stated a cause of action for two reasons. First, the ordinance fit the “public safety exception” to the takings rule, because it sought to prevent death and injury. Second, the Church was not deprived of all uses of its property, because it could still build “accessory buildings” within the affected area.

In 1992, the Supreme Court decided Lucas v. South Carolina Coastal Council. Lucas was a land developer who had purchased lots along South Carolina’s coast to build single family homes. In 1988, the State Legislature had enacted the Beachfront Management Act, which rendered Lucas’ land “valueless” by not letting him build until 1990. Lucas sued, seeking damages for the temporary regulatory taking he suffered from 1988 until 1990. Justice Scalia, writing for the Court, stated “when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good...he has suffered a taking.” However, even in those situations, a land owner will not be compensated for uses that were not inherent in his title, because those will be considered nuisances.

California courts have limited the holdings of

40. See supra note 25.
43. Id. at 307.
44. First English Evangelical Lutheran Church v. County of Los Angeles, 479 U.S. 807 (1986).
45. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. at 322.
46. Id. at 319. Temporary takings were defined by the majority as “regulatory takings which are ultimately invalidated by courts” id. at 310. The three dissenting justices argued that the preservation of life and property was at the heart of the police power, and thus floodplain regulations of this type could never amount to a taking. Id. at 326-28 (Stevens, J., dissenting). Justice Stevens further noted that temporary takings can be seen as conceptual severance on a temporal scale. Id. at 328-35 (Stevens, J., dissenting).
47. Id. at 336 (Stevens, J., dissenting). This test was summarized by the Court: ‘A land use regulation does not effect a taking if it ‘substantially advances legitimate state interests’ and does not ‘deny an owner economically workable use of his land.” Dolan v. City of Tigard, 114 S. Ct. at 2316 (quoting Agins v. City of Tiburon, 447 U.S. at 260).
49. The court stated, “[t]he interim ordinance in question substantially advanced the preeminent state interest in public safety and did not deny appellant all use of its property.” First English Evangelical Lutheran Church v. County of Los Angeles, 210 Cal. App. 3d at 1367.
50. “Accessory uses” include “swimming pools [and] parking lots.” Id. at 1371. “What First English can no longer do is rebuild the bunkhouses and similar permanent living structures which might house the potential victims of a future flood...” Id.
52. Id. at 2889.
55. Id. at 2895.
First English and Lucas considerably such that a property owner who retains the right to exclude others and the right to sell property is not denied all use of the property. When looking at the effect of a regulation on a land owner’s property, “the focus on the inquiry is on the uses of the property which remain.” Thus, government regulations are much less likely to be considered regulatory takings in California than in many other jurisdictions.

III. NOLLAN: BEGGING THE DOLAN QUESTION

For the purpose of analyzing Dolan’s possible effects on the Commission, the most important Supreme Court case is Nollan v. California Coastal Commission.

A. The Road to the Supreme Court

Mr. and Mrs. Nollan were lessors of a small beachfront lot in Ventura County, California. Their option to purchase the lot was conditioned upon demolishing an existing 504 square foot bungalow and replacing it with a larger house. Before building the new structure, the Nollans sought a building permit from the appropriate authorities. The Commission granted the permit, but conditioned the approval on the Nollans’ recording an easement across their property. The Nollans challenged the Commission’s easement requirement as a violation of their Constitutional rights prohibiting the taking of private property.

The Ventura County Superior Court, responding to the Nollans’ writ of administrative mandamus, remanded the case to the Commission, which held a full public hearing, pursuant to its regulations, and reaffirmed its prior decision. The Commission found that building the new, larger structure on the property would contribute to “the development of a wall of residential structures that would prevent the public psychologically from realizing a stretch of [public] coastline exists nearby...” Further, the Commission argued that it had already conditioned the permits of all other similarly situated land owners in the area. The Nollans appealed the Commission’s administrative findings, and the Superior Court ruled that enlarging the structure did not create a burden on public access to the sea sufficient to justify an uncompensable taking.

The Commission appealed, and the California Court of Appeal reversed on two grounds. First, the court held that § 30212 of the California Coastal Act required a permit from the Commission whenever a new house “whose floor area, height or bulk was more than 10% larger than that of the house it was replacing be conditioned on a grant of access.” The Superior Court had found that a grant of access was necessary only “when the proposed development would have an adverse impact on public access to the sea.” Second, relying on Grupe v. California Coastal Commission, the court held that an indirect relationship between the exaction and the overall effect on access that the project contributed to was sufficient for the conditioned permit to be deemed Constitutional. The Supreme Court granted certiorari to decide the Constitutionality of the permit’s condition.

B. The Supreme Court’s Decision

Justice Scalia, writing for the majority, held that conditioning a permit upon the granting of an easement to the public could not be considered a Constitutional taking. The Court found the easement to be a “permanent physical occupation” by the public. This finding was based, in part, on the tract. Fourteen more permits were issued before the Commission could condition permits, and three others had no shorefront land. Id. at 829.

58. Id.
60. Section 30600(a) of the California Public Resources Code states: “In addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, on or after January 1, 1977, any person wishing to perform or undertake any development in the coastal zone...shall obtain a coastal development permit.” Cal. Pub. Res. Code § 30600(a) (West 1994). The coastal zone includes, generally, any land within 1,000 yards of the mean high tide line of the Pacific Ocean. Cal. Pub. Res. Code § 30103(a) (West 1994).
62. Id.
63. The Commission conditioned forty-three of sixty plots in

259
majority's feeling that the Court's cases "uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."71

The Court restated the standards used to determine whether or not a regulation amounted to a taking: "[w]e have long recognized that land use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land."72 Justice Scalia went on to state that the Court had not decided what type of connection between the regulation and the interest would be necessary to "substantially advance" the state interest.73 The Court assumed that the Commission's reasoning in conditioning the permit fit the constitutional "test",74 and that, therefore, the Commission could have denied the Nollans' permit "unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking."75

Justice Scalia reasoned that if the Commission could deny a permit under the state's police power, then it could condition one.76

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater but granted dispensations to those willing to contribute $100 to the state treasury.77

Justice Scalia then concluded: "[i]n short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use, but 'an out-and-out plan of extortion.'"78

The Court held that the easement granted to the public to mitigate interference with visual access to the beach "does not even meet the most untailored standards."79 Further, the Court stated that California was the only United States jurisdiction that did not treat exactions of this type as compensable takings.80

Thus, despite the majority's statement to the contrary, it appears that the Court did not truly adopt the Commission's reasoning as to how to further the goal of providing public access to the beach. Rather, the Court held, in effect, that to "substantially advance" a legitimate state interest, there must be an "essential nexus" between that interest and the condition imposed. Thus, it seems that the standard used in Nollan could be rewritten as: "a valid exercise of the police power must substantially advance the right state interest." Justice Scalia conceded that the Commission's belief that a continuous strip of publicly accessible beach along the coast...may well be...a good idea,....but if [the Commission] wants an easement across the Nollans' property, it must pay for it.81

IV. DOLAN v. CITY OF TIGARD

For the next several years, state courts attempted to discern the impact of Nollan. In Oregon, this uncertainty was manifested in Dolan v. City of Tigard.

A. The Controversy

Mr. and Mrs. Dolan owned a 1.67-acre plot of land in downtown Tigard, Oregon.82 The land, which was the site of a 9,700 square foot electric and plumbing supply store,83 bordered Fanno Creek, which was known to flood periodically.84 The plot was within the city's central business district and was subject to an "action area" overlay zone.85 This zone implemented "the policies of the Tigard

preventing congestion on the public beaches."86

71. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 434–35. This line of thinking was criticized by Justice Stevens in his dissent in Delan. See infra text accompanying notes 145–148. Justice Scalia seemed to contradict himself later in the opinion when he mentioned that the Commission could have allowed a public viewing spot on the Nollans' land. See infra text accompanying note 229.


73. Nollan v. California Coastal Commission, 483 U.S. at 835.

74. The reasons included protecting the public's ability to see the beach, assisting the public in overcoming the psychological barrier to using the beach created by a developed shorefront, and
Community Development Code [hereinafter “CDC”] [and allowed the] city to attach conditions to the development in order to provide for projected transportation and public facility needs. 65

The Dolans wanted to expand their business and add larger parking facilities. Their plans consisted of two phases. Phase one called for constructing a new 17,600 square foot building, demolishing the old structure, and expanding the parking lot. 87 In phase two, construction of a second building and additional parking were planned. 88 The Dolans argued that the proposed development would lead to higher runoff due to the increases in impervious surfaces, the requisite “reasonable relationship” was present to justify the dedication requirements were not related to the proposed development. 97 The Dolans did not challenge the connection between the legitimate public purposes put forward by the Planning Commission and the specific conditions imposed on the permit. 93 The LUBA accepted the findings of the City Council 99 and asked only whether those findings supported its actions. 100 The LUBA concluded that, since the proposed development would lead to higher runoff due to the increases in impervious surfaces, the requisite “reasonable relationship” was present to justify the floodplain dedication. 101 Likewise, the LUBA held that the bicycle path dedication was reasonably related to alleviating the impacts of the increase in traffic that would result from the Dolans’ new business being significantly larger than their current one. 102

B. Procedural History

The Dolans appealed the Planning Commission’s decision to the Tigard City Council [hereinafter “City Council”], which approved the order. 99 Next, the Dolans appealed to the state Land Use Board of Appeals [hereinafter “LUBA”], 95 arguing that the dedication requirements were not related to the proposed development. 97 The Dolans did not challenge the connection between the legitimate public purposes put forward by the Planning Commission and the specific conditions imposed on the permit. 93 The LUBA accepted the findings of the City Council 99 and asked only whether those findings supported its actions. 100 The LUBA concluded that, since the proposed development would lead to higher runoff due to the increases in impervious surfaces, the requisite “reasonable relationship” was present to justify the floodplain dedication. 101 Likewise, the LUBA held that the bicycle path dedication was reasonably related to alleviating the impacts of the increase in traffic that would result from the Dolans’ new business being significantly larger than their current one. 102

In requiring these conditions, the City of Tigard Planning Commission (hereinafter “Planning Commission”) addressed the concerns expressed by the Dolans. Dolan v. City of Tigard, 854 P.2d at 438.

86. Id. Tigard, pursuant to Oregon’s land use program, Or. Rev. Stat. §§ 197.005–860 (1991), developed and implemented the CDC, a comprehensive plan. Dolan v. City of Tigard, 114 S. Ct. 2309 (1994). According to CDC, land owners within the Central Business District must leave 15% of their land as open space. Id.


88. Id.

89. Id.

90. Id. at 439.

91. Id.

92. Id. at 438 n.3 (quoting from Tigard’s permit decision). The Oregon Supreme Court noted that the dedication comprised approximately 10 percent of the Dolans’ property. Dolan v. City of Tigard, 854 P.2d at 438 n.3.

93. Id. at 438.

94. Id. at 439, 445–46. The Dolans argued that the proposed development would not conflict with the general plan. They did not attempt to avoid the dedication by mitigating in another manner, which they could have done under the Tigard Community Development Code. Dolan v. City of Tigard, 114 S. Ct. at 2314. The constitutionality of the city’s variance provisions was not addressed by the U.S. Supreme Court. Id. at 2315 n.4.

95. Dolan v. City of Tigard, 854 P.2d at 440.


98. Id.

99. Id.

100. Dolan v. City of Tigard, 22 Or LUBA 617, 626 n.9 (1992).


102. Dolan v. City of Tigard, 22 Or LUBA at 627. In its decision, LUBA noted that the land the Dolans were asked to dedicate was a link in the Comprehensive Pedestrian/Bicycle Pathway Plan adopted by the City of Tigard. Id.
The Dolans appealed the LUBA's decision to the Oregon Court of Appeals, which ruled against the Dolans. The court interpreted Nollan as retaining the reasonable relationship test, holding that the Supreme Court had not replaced the test with a tougher "essential nexus" test.

The Dolans next took their appeal to the Oregon Supreme Court. The court addressed the argument that a "reasonable relationship" standard was constitutionally deficient, such that there must be an "essential nexus" or "substantial relationship" between the impacts of the development and the dedication requirements. The court held that the reasonable relationship test was still the standard and equated it with the "essential nexus" language used by the U.S. Supreme Court: "Nollan, then, tells us that an exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve.

The court found an essential nexus between the pathway and the proposed development because of the increase in traffic that would accompany the Dolans' new building. Likewise, since the development would increase the site's impervious surface area, the floodplain dedication was also upheld.

The court dismissed the Dolans' secondary argument in a footnote:

petitioners also argue that, because city's dedication conditions would require permanent physical occupation of a portion of their property, they amount to a per se taking. That argument is not well taken. Such dedication conditions are not per se takings, because the occupation may occur only with the owner's permission. Petitioners may avoid physical occupation of their land by withdrawing their application for a development permit.

In dissent, Justice Peterson argued that, beyond showing that the exactions serve a legitimate state purpose, the exacting body must show that the granting of the permit probably will create specific problems, burdens, or conditions that theretofore did not exist, and that the exaction will serve to alleviate the specific problems, burdens, or conditions that probably will arise from the granting of the permit. More than general statements about increased traffic or public safety are required to support, as permissible regulation, what otherwise would be a taking.

Justice Peterson then examined the Planning Commission's findings to see if it had met this burden. He concluded that the Planning Commission's Final Order did not adequately show that the new development created the need for the pathway exactions: "[t]he findings of fact that the bicycle pathway system 'could offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system will, or is likely to, offset some of the traffic demand." Justice Peterson himself summarized his position best: "All that these findings establish is that there will be some increase in the amount of storm water runoff from the site. A tenuous? The Constitution requires more than that.

C. The Supreme Court's Decision

Arguing that the City of Tigard had not adequately justified its exactions, the Dolans made one final appeal, this time to the United States Supreme Court. In early 1994, the Court granted certiorari, and the case was argued on March 23, 1994. Chief Justice William Rehnquist delivered the decision of the Court on June 24, 1994, with Justices O'Connor, Scalia, Kennedy, and Thomas joining in the majority's opinion. The Court's goal, in Rehnquist's words, was "[t]o resolve a question left open by our decision in Nollan v. California Coastal Commission of what is the required degree of connection between the exactions imposed by the city and the projected impacts of
the proposed development." 119

In its opinion, the Court first drew a parallel between the Dolan and Nollan cases: "[w]hile the question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred." 120 A dedication is a taking because it deprives Dolan of her right to exclude others. 121

The Court then distinguished Dolan in two respects from several seminal land use cases. 122 First, the Court noted that Dolan's permit approval was an adjudicative decision regarding an individual parcel of land, rather than a legislative decision that affected a more generalized area. 123 Second, Tigard asked Dolan to "deed portions of the property to the city," rather than seeking to limit the use to which she could put the parcel. 124 This request, according to the Court, violated the doctrine of "unconstitutional conditions." 125

The Court first decided that there was an essential nexus between the legitimate state interests and the permit conditions, 126 thereby satisfying the test enumerated in Nollan.

Not fully satisfied with the Nollan analysis, however, the Court then considered "the required degree of connection between the exactions and the projected impact of the proposed development." 127 Rehnquist noted that three different standards have been adopted by the states to address this issue of causation: New York and Montana require "very generalized statements" connecting the exaction and impact; 128 Illinois, New Hampshire, New Jersey, and Ohio require that the impacts be "specifically and uniquely attributable" to the proposed use for the dedication to be valid; 129 and, Nebraska, Texas, and Wisconsin are among the states utilizing some variation of the intermediate "reasonable relationship" test. 130

Eschewing all of these formulas, the Court created and adopted a new "rough proportionality" test. 131 Meeting this "rough proportionality" test requires that "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." 132 In so doing, however, "[n]o precise mathematical calculation is required...." 133 The Court viewed this new heightened level of scrutiny as being necessary to bring the takings clause of the Fifth Amendment into conformity with the rest of the Bill of Rights: "[w]e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." 134 The Court further decided that, in adjudicative decisions such as the one at bar, the government and its agencies should bear the burden of

119. Id. at 2312 (citations omitted).
120. Before the case reached the U.S. Supreme Court, Florence Dolan's husband passed away. From this point on, therefore, petitioner will be referred to in the singular.
121. Id. at 2316.
122. Id. The right to exclude others has been one of the most frequently invoked inherent rights in property ownership used by the Court in recent years. See supra text accompanying notes 29-31.
124. Dolan v. City of Tigard, 114 S. Ct. at 2316. 2
125. Id.
126. Id. According to this doctrine, the government cannot require a person to give up constitutional rights in exchange for a discretionary benefit. Id. Justice Stevens argued that this "well-settled doctrine" is far from "well-settled." Id. at 2328 n.12 (Stevens, J., dissenting).
127. "Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld." Id. at 2317-18 (majority opinion) (citing Agins v. City of Tiburon, 447 U.S. at 260-61 ).
128. Dolan v. City of Tigard, 114 S. Ct. at 2317. The Court remarked that this was left open in Nollan as a moot question. Id.
129. Id. at 2318. The two cases cited by the Court are:...
justifying the dedication.136

The Court did not dispute the contention that keeping the floodplain area free from development would ease the impacts of Dolan's proposed use.137 However, the Court saw no justification for requiring the greenway to be public, rather than private, and felt that the Planning Commission had made no determinations to justify a public greenway.138 The City of Tigard argued that the creation of a recreational easement was an incidental result of the required dedication, but the Court found this infringement on Dolan's right to exclude the public to be impermissible.139 Justice Rehnquist noted that, if the greenway had preexisted on Dolan's land and the store expansion had interfered with that greenway, then the City of Tigard could have required her to provide alternative greenway space.140

The City of Tigard estimated that Dolan's proposed development would result in 435 additional automobile and bicycle trips per day.141 After noting that dedications to offset these types of impacts are generally accepted, the Court declared that the Planning Commission's findings provided inadequate support for imposing such dedications in the instant case.142 Recalling Justice Peterson's statement in the dissent of the Oregon Supreme Court decision, the Court held that a finding that the expansion of Dolan's store "could offset some of the traffic demand" was insufficient.143

Justice Stevens authored a dissent, in which Justices Blackmun and Ginsburg joined. After reiterating that Tigard could have denied Dolan's permit outright as long as the denial was not arbitrary,144 Justice Stevens asserted that the majority had misinterpreted the cited cases.145 Drawing a parallel between Dolan and the subdivider in Jordan v. Menomonee Falls,146 Stevens noted that the Court never mentioned the benefit that Dolan would gain from the floodplain dedication: a decreased likelihood that her own plot would flood.147 In addition, Stevens noted that the cited state cases and numerous Supreme Court cases, rejected the idea of conceptual severance.148 Stevens also felt that the petitioner did not show what impact the dedications would have "on the value or profitability of her planned development."149 Stevens proposed that the essential nexus test is insufficient only when the exaction is grossly disproportionate to the development's impacts.150 Finally, the dissent noted the difficulty in estimating the impacts of a particular development project and the problems inherent in having courts second guess local governments.151

If the Court proposes to have the federal judiciary micro-manage state decisions of this kind, it is indeed extending its welcome mat to a significant new class of litigants. Although there is no reason to believe that state courts have failed to rise to the task, property owners have surely found a new friend today.152

Justice Souter also dissented in a separate opinion, arguing that "the Court [did] not apply [its] test to these facts, which do not raise the question the Court addresses."153 Souter also felt that the majority put too much emphasis on the incidental recreational use that would result from the dedicated land and that Tigard never attempted to justify that use as related to flood control.154 Justice Souter further argued that the Court misapplied Nollan and that, if satisfaction of the "essential nexus" test does not end the inquiry, then Dolan's dilemma was not the proper vehicle to change the law.155

136. Id. at n.8. However, where a landowner seeks to challenge legislative decisions, such as zoning regulations, the burden remains on the challenging party. Id.

137. Id.

138. Id.

139. Id. at 2320–22.

140. Id. at 2321.

141. Id.

142. "[O]n the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement." Id.

143. Id. at 2321–22.

144. Id. at 2322 (Stevens, J., dissenting).

145. Id.

146. Jordan v. Menomonie Falls, 137 N.W.2d at 448; see also supra note 131.

147. Dolan v. City of Tigard, 114 S. Ct. at 2294 (Stevens, J., dissenting). This idea, known as "average reciprocity of advantage," was discussed by the Court in Pennsylvania Coal, Euclid, and many other land use cases.


149. Dolan v. City of Tigard, 114 S. Ct. at 2325 (Stevens, J., dissenting).

150. Id.

151. Id. at 2325–26, 2328–29.

152. Id. at 2326.

153. Id. at 2330 (Souter, J., dissenting).

154. Id.

155. Id. at 2331. Justice Souter also mentioned in a footnote that the permit conditions were not adjudicative in nature as the majority proposed; the only adjudication was the Dolan's variance request. Id. at 2331 n.1.
D. Reactions to Dolan

Before the Court issued its final decision in Dolan, land use attorneys were already noting its potential impacts.156 In fact, one scholar went so far as to "assist" the Court in deciding the controversy.157

In the first four months after the decision was published, at least a dozen legal articles were written on Dolan.158 Many of these published commentators had positive reactions.159 Texas Lawyer featured a reaction to Dolan in its column "The Layman's Eye."160 The author, William Murchison, unabashed in his support for the decision, called Dolan "the most important judicial victory for economic liberty since the 1930s; in fact, it's the first since then to recognize that economic liberty might be on the same level as other cherished freedoms."161 Murchison expressed the view that, in recent years, governments went overboard regulating private property rights,162 a wrong that the Dolan decision corrected.

It is clear that most land use lawyers, as well as lay people educated in land use law, have strong opinions on the Dolan decision. However, it is unclear what impact the decision will have. Although only time (and additional statutes and case law) will tell, Paul D. Kamenar, the executive legal director of the Washington Legal Foundation, suggested that the impacts of Dolan will be far-reaching:163

"It would be a mistake to read Dolan narrowly...limiting its applicability only to those development exactions requiring dedications of property. The principle enunciated applies equally to conservation easements and mitigation requirements typically required by federal and state governments for wetland development and other environmental programs.164

If Professor Kamenar's view becomes a reality, Dolan would impact nearly every state and local government in the United States and will radically change the way in which governments acquire land for a public purpose. People on all sides of the issue will need to rethink their land use strategies in the wake of Dolan.

V. THE CALIFORNIA COASTAL COMMISSION

A. A Brief History

In 1976, the California State Legislature passed the California Coastal Act of 1976.165 The Act created the Commission, which took the place of the California Coastal Zone Conservation Commission, an entity that had been created through a voter initiative.166

The jurisdiction of the Commission covers the "coastal zone," which, generally speaking, runs along the California coast from Oregon to Mexico.167 The zone extends seaward to the extent of California's jurisdiction and inland usually 1,000 yards from the mean high tide line of the sea.168

156. See, e.g., Richard C. Reuben, Takings at Issue in Land Appeal: Property Rights Advocates Bowed By High Court's Decision to Grant Cert, ABA JOURNAL, May 1994, at 20.

157. Douglas Kmiec, Clarifying the Supreme Court's Takings Cases: An Irreverent but Otherwise Unassailable Draft Opinion In Dolan v. City of Tigard, 71 IND. U. L. REV. 525 (1994). In the Article, Professor Kmiec, tongue in cheek, ridiculed the names of recent takings cases, the Supreme Court's law clerks, and the justices themselves. At the same time, however, he correctly predicted that the Court would place the burden of proof on the City of Tigard to demonstrate that the exactions were not a taking. Professor Kmiec further anticipated the proportionality issue that led the Court to remand the case, although not the exact language of the new standard. Id. at 334.


159. See, e.g., Goldstein & Goldstein, supra note 158. The authors are self-professed condemnation practitioners, and, while the article shows their bias, it provides a fine review of the decision.

160. Murchison, supra note 158.

161. Id.

162. Id.

163. Kamenar, supra note 158. Mr. Kamenar filed an amicus brief on behalf of Florence Dolan.

164. Id.

165. CAL. PUB. RES. CODE § 30000 (West 1994) (hereafter "Act").


167. CAL. PUB. RES. CODE § 30103(a) (West 1994).

168. Id. The Commission has maps filed with the county clerk of each coastal county which exactly describe the coastal zone. Ca.
In passing the Act and establishing the Commission, the Legislature declared that: "the California coastal zone is a distinct and valuable natural resource;"169 protecting California's natural resources is a "paramount concern;"170 using the police power is necessary to protect the coastal zone;171 and "existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state...."172

The Legislature further enumerated five main goals of the Act and the Commission. First, the Act should "[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources."173 Second, it should balance conservation and utilization of coastal zone resources.174 Third, it should "[m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners."175 Fourth, it should give preferential treatment to coastal-related developments on the coast.176 Finally, it should encourage state and local involvement in coastal zone issues.177 The Act is to be liberally construed to achieve these ends.178

The Commission achieves the above goals through a variety of methods. It disseminates information about the California coast to local governments and private citizens through the coastal resource information center and the guide to coastal resources.179 The Act imposes a duty on local governments to prepare local coastal programs containing, among other items, a public access component;180 these local programs must be approved by the Commission.181 The Commission also has authority to issue permits for certain activities that will take place within the coastal zone, including permits for development within the zone.182 The Dolan decision most immediately affected this last function.

The Legislature envisioned utilizing the pre-existing permit framework of local governments to further the land use goals of the Act,184 upon approval of local coastal programs by the Commission.185 The Commission itself would only issue permits when local governments had not yet enacted approved programs and in three other enumerated situations.186 Any person wishing to develop within the coastal zone would need a permit from the Commission, rather than a local government entity, only when the proposed development (1) was to occur "between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance,"187 (2) was to be located on "tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, stream, or within 300 feet of the top of the seaward face of any coastal bluff,"188 or (3) was a major public works project or major energy facility.189

Thus, while the Dolan decision may impact all development within the coastal zone, the Commission itself will only be affected in these three situations or when a local government's coastal program has not yet been approved by the Commission.

B. The Permit Process

Since the Dolan decision dealt with exactions resulting from development permit applications, it
is necessary to examine the Commission's permit process.

Chapter Three of the Act sets out the types of developments within the coastal zone that require the approval of the Commission. Section 30210 opens with a paraphrase of Section 4 of Article X of the California Constitution and states that "maximum access...and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse."191

Section 30211 requires that "new development" not interfere with the public's right of access to the sea. To further this goal, the Act mandates access from the "nearest public roadway to the shoreline," unless such access interferes with public safety, military security, protection of coastal resources, or agriculture or unless there is already adequate access.193

Certain developments are exempted from designation as "new developments" and therefore do not require permits. Rebuilt seawalls that are not relocated seaward of the previous seawall are exempt. Structures rebuilt after a natural disaster, demolished and rebuilt single-family residences, and other improvements that do not intensify the use of a structure, move it seaward, or block or impede public access are also exempt, provided that the new building does not exceed "either the floor area, height or bulk of the former structure by more than 10 percent."198 Section 30610 lists other building activities that do not require permits unless the Commission "determines that the activity will have an adverse impact on lateral access along the beach."199

The Act controls new commercial, residential, or industrial developments by requiring that they be near pre-existing developments, and, further, new developments are limited by a concern for the visual and scenic qualities of coastal areas. The Act declares that new developments should maintain or enhance public access to the coast. There are six listed possible means of achieving this goal, including facilitating transit service, providing commercial facilities that will minimize the use of coastal access roads, providing non-automobile circulation within the development, and other methods that, presumably, will require some form of dedication or exaction.

The Act has special provisions for industrial development that, generally speaking, attempt to minimize the effects of such uses within the coastal zone.

Any developments not in conformity with the provisions of sections 30200–30265.5 of the Act will be denied a coastal development permit. Permits for developments between the sea or shoreline of a body of water within the coastal zone and the nearest public road must "include a specific finding that the development is in conformity with the public access and public recreation policies of Chapter three (commencing with section 30200)." Anyone engaging in development within the coastal zone without a permit is subject to civil penalties.

C. Remedies for Denied Permits

The Act also provides enumerated remedies for aggrieved parties. Denied permit applications are subject to judicial review by filing a writ of mandate within 60 days of the final decision. Not only can the individual appeal, but "any person who, in

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191. CAL. PUB. RES. CODE § 30210 (West 1994).
192. CAL. PUB. RES. CODE § 30211 (West 1994).
193. CAL. PUB. RES. CODE § 30212(a) (West 1994). The cornerstone of the Act is to provide public access to the coastline. Chapter 6, Article 3, of the Act, the Coastal Public Access Program, explains how the Coastal Commission works with local governments to develop a plan to further this end. CAL. PUB. RES. CODE §§ 30530–534 (West 1994).
194. CAL. PUB. RES. CODE § 30212(b)(4) (West 1994).
195. CAL. PUB. RES. CODE §§ 30212(b)(1), 30610(g) (West 1994).
196. CAL. PUB. RES. CODE § 30212(b)(2) (West 1994).
197. CAL. PUB. RES. CODE § 30212(b)(3) (West 1994).
198. CAL. PUB. RES. CODE §§ 30212(b)(1)–(4), 30610(g) (West 1994).
199. CAL. PUB. RES. CODE § 30212(b)(5) (West 1994). These exemptions include, among other activities, certain improvements to single family residences, improvements to other structures that will not adversely impact the environment or access or change a structure's use, and repair and maintenance of certain structures or areas. CAL. PUB. RES. CODE § 30510 (West 1994).
200. CAL. PUB. RES. CODE § 30250 (West 1994).
201. CAL. PUB. RES. CODE § 30251 (West 1994).
203. CAL. PUB. RES. CODE § 30252 (West 1994).
204. CAL. PUB. RES. CODE §§ 30261–265.5 (West 1994).
205. CAL. PUB. RES. CODE § 30604(a) (West 1994).
206. CAL. PUB. RES. CODE § 30604(c) (West 1994).
208. CAL. PUB. RES. CODE §§ 30920–911 (West 1994). The enumerated remedies are in addition to, not in lieu of, remedies available at law. CAL. PUB. RES. CODE § 33350 (West 1994).
209. CAL. PUB. RES. CODE § 30301 (West 1994). The writ should be filed in accordance with CAL. CIV. PROC. CODE § 1094.5 (West 1994).
person or through a representative, appeared at a public hearing of the Commission may also appeal. Further, the Commission can intervene in an action between an aggrieved person and a local government entity. Any person believing that the Commission failed to properly discharge its duties under the Act is entitled to bring an action against the Commission to enforce those duties.

VI. ANALYSIS OF DOLAN’S IMPACT ON THE COMMISSION

In Dolan, the Court noted that, since the City of Tigard made “an adjudicative decision to condition [Dolan’s] application for a building permit on an individual parcel, ... the burden properly rest[ed] with the city to justify the conditions.” Thus, when the Commission makes an adjudicative decision to condition a permit, it bears the burden of meeting the tests laid out in the Agins, Nollan, and Dolan decisions. A dedication, or exaction, must substantially advance legitimate state interests by having: (1) an “essential nexus” between a legitimate state interest and the permit condition; and (2) a “rough proportionality” between the impacts of the proposed permit and the dedication sought. In Nollan, the Supreme Court assumed that the Commission’s conditioned permits were based upon a legitimate state interest, so only the relationship of the dedication to the proposed development had to be determined. In short, the Commission must be more precise than ever in determining why a dedication is necessary.

The Commission’s Administrative Regulations describe the requirements for a permit application. After review, the executive director of the Commission makes a final recommendation through “specific written findings, including a statement of facts and legal conclusions, as to whether the proposed development conforms to the requirements of the California Coastal Act of 1976.” The staff also issues a written recommendation, which is then voted upon by the Commission. After Dolan, more than ever, these findings must explicitly lay out specific impacts and explain how the dedication will alleviate the impacts caused by the development both in kind and degree. While it is unknown what depth of analysis will be sufficient, Dolan makes it clear that a showing that the dedication could offset limitations on access or views is insufficient. Since the Commission has been in existence for nearly twenty years, and many, if not most, plots of coastal land are developed to some degree, the Commission should have adequate information in its archives on existing access conditions to aid it in these causation determinations. However, should the Commission feel that it is unable to meet the additional burden established in Dolan, it can still deny coastal zone development permits altogether.

There has been no clear statement by the California courts as to what is required by the “rough proportionality” test of Dolan. In fact, of the two relevant appellate cases that have arisen since Dolan, one does not mention Dolan and the other has not been published. Both cases involved fees demanded by a city as a condition of permit approval. Ehrlich concerned a mitigation fee and an in lieu art fee, while Jones dealt with the propriety of impact fees. In both cases, the courts upheld the fees. In Jones, the fees were upheld because the study’s findings met the “rough proportionality” test of Dolan. It is possible that these two cases are distinguishable from the Dolan case and the Commission’s situation because they involved fees, rather than actual dedications of land. Given the emphasis of the Court in Dolan on the public’s physical invasion of the petitioner’s land, this interpretation seems reasonable. One thing is certain, how-

214. See supra text accompanying note 74.
220. See, e.g., Dolan v. City of Tigard, 114 S. Ct. at 2320-21.
221. Id.
222. See Nollan v. California Coastal Commission, 483 U.S. at 835-836.
ever, these decisions further the trend of the California courts to support land use regulations and accommodate the Commission.226

It is possible that Dolan will have a different impact on the Commission depending on which of the Commission's enumerated goals227 the Commission is attempting to achieve with a particular dedication. For example, the Court in Nollan stated that since the Commission could deny a permit to the Nollans under the state's police power, it could condition their permit, as long as the condition furthered the same end as the denial.228 Thus, requiring a public viewing spot on the Nollans' property to protect the public's right to view the coast would be Constitutional, despite the fact that such an easement would constitute a permanent physical occupation of the Nollans' land.229 Unless Dolan is interpreted to make a physical occupation the deciding factor in determining whether a land use regulation is a taking, and nothing in the decision suggests that this is so, this option should remain a viable one, provided that the viewing spot, or height or width limitation,230 meets the rough proportionality test of Dolan, and the owner is not denied economically viable use of his land.231

If the Commission is trying to further its goal of providing public access to the coast, justifying the exaction may be more difficult. In Dolan, the Court agreed that preventing building in the floodplain would aid in minimizing the impacts from runoff.232 However, the Court found no reasons for making the floodplain greenway area public rather than private because this distinction did not affect the area's runoff.233

Dedications ensuring access to the coastline are different, because they directly conflict with the goal of the Commission and can only be remedied through a physical occupation. If a person wishes to build on a parcel and thereby block public access to the beach, then the only way to uphold the stated goals of the Commission is to require that a portion of the land be dedicated for public access. Had the Nollans been asked to leave the strip of property running parallel to the beach as open space, albeit privately owned by them, it would in no way further the Commission's goal of protecting public access to the coast. Again, if the dedication conflicts with the Agins test, a taking occurs and just compensation is due. In any case, the Commission will need to be careful in justifying its exactions through its findings.

In Dolan, the Court noted that, "[i]f [Dolan's] proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public, either on her property or elsewhere."234 Here the Commission's situation differs from the City of Tigard's. It is conceivable that the prior determinations of the Commission that have laid out access paths to the coast, possibly through the development of an access plan, pursuant to Chapter 6, Article 3 of the Act, qualify certain areas as "existing" access paths, and require developers who encroach on this access to mitigate.235

One result is nearly certain to arise in the wake of the Dolan decision: an increase in litigation over development permits. Since Dolan unequivocally stated that an administrative regulating body has the burden of justifying its exactions,236 developers will be more likely to challenge the sufficiency of the Commission's findings by appealing denied permits. Well-supported findings that meet the additional hurdle of the Dolan decision should mitigate the costs of this litigation, but, due to the heightened level of scrutiny, the findings themselves may now cost the Commission more money, effort, and time to generate. While it is certain that there will be some increase in costs as a result of higher volume of litigation, the magnitude of such costs, and their effects on California taxpayers, if any, remains to be seen.

VII. CONCLUSION

In the wake of Dolan, the analysis courts will use to determine when land exactions become takings can be briefly summarized. When a land owner applies for a building permit, the appropriate
agency or governmental body may deny the permit, grant the permit, or grant the permit subject to conditions. An agency or government body may deny a permit if doing so is within the government's police power and does not remove all of the land's value.

Following Agins, a government entity may condition the permit only if the conditioned permit substantially advances legitimate state interests and if it does not deny an owner economically viable use of his or her land, which seems unlikely to occur in California.237

To satisfy the first prong of the Agins test (i.e., that the permit substantially advances legitimate state interests), the government entity seeking the exaction must demonstrate two things. First, there must be an "essential nexus" between a legitimate state interest and the permit condition; the condition cannot utterly fail to further the end advanced as the justification for the prohibition.238 Second, the entity must show a "rough proportionality" between the impacts of the proposed land use and the dedication sought.239 While no precise mathematical calculation is required in making this second determination, it is necessary to determine that the required dedication is related both in nature and extent to the anticipated impact.240

The Commission remains one of the state's more important protectors of natural resources, as well as one of the nation's most ambitious and successful programs. Despite the uproar that Dolan caused, the case's impacts on the Commission do not appear to be substantial.

First, there are only a limited number of situations where a land developer needs to obtain a permit from the Commission itself. Second, if the Commission does become involved, solid administrative findings supported by the particular facts of the application should be sufficient to justify many exactions, despite there having been no indication of exactly what level of scrutiny Dolan mandates. The Commission must now be concerned not only with the nature of the proposed development's impact on the goals of the Act, but the extent to which the development frustrates or limits those goals. Third, Nollan supports the idea that the Commission can limit development dimensions, or even require a view site on a development to protect the public's right to view the coast. Fourth, while providing for public access inherently involves a dedication of land, situations where access plans pre-exist any new developments are arguably distinguishable from the Dolan. However, since the Commission has the burden of justifying any exactions it demands as