Nollan and Dolan: The End of Municipal Land Use Extortion - A California Perspective

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I. Introduction

The Fifth Amendment\(^1\) of the United States Constitution provides that “private property [shall not] be taken for public use, without just compensation.”\(^2\) The Fifth Amendment reflects the thinking of the founders that property rights are the natural by-product of liberty,\(^3\) deserving broad protection.\(^4\) Indeed, the framers viewed the preservation of property rights as “the principal purpose of government.”\(^5\) While the command of the Fifth Amendment appears clear enough, in practice the U.S. Supreme Court has struggled to define its precise scope, as the multitude of cases on the subject demonstrate.

A central and recurring theme in all takings cases is the tension between the Fifth Amendment’s just compensation requirement and the exercise of the police power.\(^6\) Traditionally, police power regulations have been sustained where the state “could rationally have decided” that the measure adopted might achieve the State’s objective.”\(^7\)

In its watershed decision of Nollan v. California Coastal Commission,\(^8\) however, the U.S. Supreme Court signaled its intention to apply heightened scrutiny to takings claims.\(^9\)

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1. U.S. Const. amend. V.
2. Id. The Fifth Amendment was made applicable to the states through the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. E.g., Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 239 (1897).
4. Id. at 39.
5. Id.
8. Id.
9. See infra text accompanying notes 221-26. See also William A. Falik & Anna C. Shimko, Recent Development in “Takings” Jurisprudence: The “Takings” Nexus — The Supreme Court Chooses a New Direction in Land-Use Plan-
Specifically, *Nollan* held that a permit condition will constitute a taking unless it is shown that an essential nexus exists between the development condition and the purpose for imposing the condition.\(^\text{10}\) Alternatively stated, the condition placed on the development permit must serve the same purpose that a legitimate denial of the development permit would.\(^\text{11}\)

The trend toward higher scrutiny of police power regulations of land use is clearly evidenced by the Court’s most recent takings decision, *Dolan v. City of Tigard*.\(^\text{12}\) In *Dolan*, the Court answered an important question that *Nollan* left unresolved — namely, once an essential nexus is proven, “what is the required degree of connection between the exactions imposed . . . and the projected impacts of the proposed development.”\(^\text{13}\) The *Dolan* Court adopted a standard it termed “rough proportionality.”\(^\text{14}\) This test mandates an individual determination, made by the governmental entity, whether the land use regulation is roughly proportionate to the impact the development will have on the community.\(^\text{15}\)

Following *Nollan*, however, California courts and the Ninth Circuit Court of Appeals have taken a restrictive approach to the essential nexus test, applying it only to possessory, as opposed to regulatory, takings claims.\(^\text{16}\) With the adoption of the rough proportionality standard in *Dolan*, a question arises as to how California courts and the Ninth Circuit will apply this newly minted test.

This comment examines whether California courts and the Ninth Circuit should continue to apply the possessory-regulatory takings distinction, or whether all takings claims should be evaluated according to the analysis provided in *Nollan* and *Dolan*.

The background section first examines the difference between possessory and regulatory takings, and the standards

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\(^{10}\) *Nollan*, 483 U.S. at 836-37.

\(^{11}\) *Id.*

\(^{12}\) 114 S. Ct. 2309 (1994).

\(^{13}\) *Dolan*, 114 S. Ct. at 2312.

\(^{14}\) *Id.* at 2319.

\(^{15}\) *Id.* at 2319-20.

\(^{16}\) See infra part II.D.
the Court has used to evaluate each.\textsuperscript{17} This comment then briefly analyzes U.S. Supreme Court jurisprudence in the regulatory takings area prior to \textit{Nollan},\textsuperscript{18} followed by an analysis of \textit{Nollan} itself\textsuperscript{19} and how courts in California and the Ninth Circuit have interpreted that decision.\textsuperscript{20} Next, this comment provides an overview of the California-Ninth Circuit regulatory takings standard,\textsuperscript{21} followed by a critique of \textit{Dolan}.\textsuperscript{22} The analysis section finds little support for the narrow approach taken by California courts and the Ninth Circuit regarding regulatory takings claims, given the language and rationales behind recent U.S. Supreme Court takings jurisprudence, and cautions against further use of the reasonable relationship test for evaluating regulatory takings.\textsuperscript{23} This comment proposes that California courts and the Ninth Circuit apply the \textit{Nollan-Dolan} analysis to all takings claims, not just those involving real property.\textsuperscript{24}

\section*{II. BACKGROUND}

California courts and the Ninth Circuit have limited application of the \textit{Nollan} essential nexus test to possessory takings claims.\textsuperscript{25} With the arrival of the U.S. Supreme Court’s newest takings decision, \textit{Dolan v. City of Tigard},\textsuperscript{26} land use commentators in California are questioning whether the rough proportionality standard mandated by \textit{Dolan} applies to all takings claims, or just those involving possessory claims, as the California-Ninth Circuit approach would suggest.\textsuperscript{27} Therefore, it is important to first understand the difference between possessory and regulatory takings.\textsuperscript{28}

\begin{itemize}
  \item \textsuperscript{17} See infra part II.A.
  \item \textsuperscript{18} See infra part II.B.
  \item \textsuperscript{19} See infra part II.C.
  \item \textsuperscript{20} See infra part II.D.
  \item \textsuperscript{21} See infra part II.E.
  \item \textsuperscript{22} See infra part II.F.
  \item \textsuperscript{23} See discussion infra part IV.
  \item \textsuperscript{24} See discussion infra part V.
  \item \textsuperscript{25} See infra part II.D.
  \item \textsuperscript{26} 114 S. Ct. 2309 (1994).
  \item \textsuperscript{27} See Charles V. Berwanger et al., Dolan v. City of Tigard: The United States Supreme Court’s Sequel to Nollan v. California Coastal Commission, 17 \textsc{Real Prop. L. Rep.} 245, 248-50 (1994); Stephen K. Cassidy et al., Lessons from Dolan: The Latest Word on Property Rights, \textsc{Cal. Real Prop. J.}, Summer 1994, at 1, 4.
  \item \textsuperscript{28} Certain broad principles appear to govern all takings claims, however. An often repeated rationale given for the Takings Clause is that it "bar[s] Gov-
A. *The Difference Between Possessory and Regulatory Takings*

An historical examination of U.S. Supreme Court takings jurisprudence reveals two broad types of takings — possessory and regulatory.\(^29\) Each will be examined in turn.

1. **Possessory Takings**

The most obvious examples of possessory takings are when on-site dedications of property are required from developers\(^30\) or when the power of eminent domain is used.\(^31\) One commentator has defined a possessory taking as a physical intrusion or occupation of private property by the government or an authorized third person.\(^32\) The U.S. Supreme Court, in *Loretto v. Teleprompter Manhattan CATV Corp.*,\(^33\) issued a clear rule as to what constitutes a possessory taking.

In *Loretto*, a New York law required a landlord to permit a cable television company to install cable equipment upon his property.\(^34\) The Court held that where a governmental action involves a permanent physical occupation of property, a taking will be found 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."\(^35\) The Court’s rationale was that a permanent physical occupation destroys the owner’s “bundle” of property from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).


\(^30\) On-site dedications involve dedications of land within a development to the municipality for the construction of needed infrastructure like streets, sidewalks, utilities, etc., or the construction of such infrastructure by the developer which is then dedicated to the community. Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 479-80 (1991).

\(^31\) Eminent domain is “[t]he power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of public character.” BLACK'S LAW DICTIONARY 523 (6th ed. 1990). The power of eminent domain may not be exercised “without just compensation to the owners of the property which is taken.” Id.

\(^32\) See, e.g., Karl Manheim, Tenant Eviction Protection and the Takings Clause, 1989 WIS. L. REV. 925, 939.

\(^33\) 458 U.S. 419 (1982).

\(^34\) *Loretto*, 458 U.S. at 421.

\(^35\) Id. at 434-35.
Additionally, the Court held that the size of the permanent physical occupation is irrelevant in determining whether or not a taking has occurred.37

2. Regulatory Takings

The U.S. Supreme Court has given no definitive rule as to when a regulatory taking occurs. Justice O'Connor, in Yee v. City of Escondido,38 distinguished takings involving a physical occupation of property from those in which the government regulates the use of the property, such that “the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest [sic] that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.”39

One commentator has defined a regulatory taking as that occurring “through the impact of a governmental statute, ordinance or regulation,” rather than the permanent physical occupation of property.40 The essence of a regulatory taking claim is that some governmental regulation of property has so invaded the right of the property owner to use or dispose of his or her property that the regulation has effectively taken the property, or at least an interest in the property.41

For purposes of the proposal advanced by this comment, the term “regulatory taking” will refer to instances where

36. Id. at 435 (citing Andrus v. Allard, 44 U.S. 51, 65-66 (1979)). First, the Court believed that a permanent physical occupation deprives property owners of their right to possess the occupied space and exclude others from possessing or using the occupied space. Id. Second, a permanent physical occupation forever denies owners control of the use of the property. Id. at 436. Lastly, the Court reasoned that while owners may still have the legal right to dispose of their property following a permanent physical occupation, such right will be of little value since a purchaser's rights will be just as diminished as the seller's. Id.

37. Id. at 436. Indeed, the taking in Loretto involved only the attachment of plates, boxes, wires, bolts and screws to the roof and exterior wall of plaintiff's building. Id. at 438.


41. Pollo, supra note 3, at 86. Professor Berger notes that a regulatory taking will lie where governmental regulation of property so adversely affects the owner's use of the property that it is “taken in the constitutional sense.” Berger, supra note 40, at 1134.
various land use regulatory devices employed by governmental bodies are challenged, including off-site dedications,\(^\text{42}\) fees-in-lieu-of-dedication,\(^\text{43}\) impact fees,\(^\text{44}\) special assessments,\(^\text{45}\) linkages\(^\text{46}\) and set-asides.\(^\text{47}\)

B. Pre-Nollan Regulatory Takings Analysis

1. The Holmes Formula

The U.S. Supreme Court long ago recognized that non-physical appropriations of property are subject to constitutional challenge under the Takings Clause.\(^\text{48}\) In the first of many regulatory takings cases to come, the Court announced in *Pennsylvania Coal Co. v. Mahon*\(^\text{49}\) that a property regulation will constitute a taking if it "goes too far."\(^\text{50}\) This hornbook rule, implied by Justice Holmes, was based on the balancing of private and public interests.\(^\text{51}\) Although, as Holmes

\(^{42}\) Off-site dedications require the dedication of land or construction of improvements outside the development itself. Been, *supra* note 30, at 480.

\(^{43}\) Here, the municipality gives the developer the option of paying a fee instead of requiring the dedication of land and/or improvements. *Id.*

\(^{44}\) Impact fees charge developers for the costs that the municipality will incur in providing public services to the development. *Id.* Impact fees can be levied upon nearly every kind of development, in contrast to fees-in-lieu-of-dedication, which typically apply to subdivisions only. *Id.*


\(^{46}\) Linkages condition commercial or office space development on "the developer's provision of facilities or services for which the development will create a need, or that the development will displace." Been, *supra* note 30, at 480. Linkages have been used to fund "low-income housing, mass transit facilities, day care services, and job-training and employment opportunities." *Id.* at 480-81.

\(^{47}\) Set-asides require developers to offer low and moderate income residents a certain percentage of their units at affordable prices, or else pay in-lieu fees to an affordable housing fund. *Id.* at 481.

\(^{48}\) See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2892 (1992) (referring to *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922)) (explaining that meaningful enforcement of the Takings Clause places other property regulations under constitutional limits); see also *id.* at 2900 n.15 (explaining that the Fifth Amendment can be read to encompass regulatory deprivations of property).

\(^{49}\) *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

\(^{50}\) *Id.* at 415.

\(^{51}\) *Id.* at 413.
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recognized, there is an implied limitation of the police power on the enjoyment of private property rights,\(^5\) he stated that "the implied limitation must have its limits, or the contract and due process clauses are gone."\(^5\) Unfortunately, Holmes' pronouncement included no rules for determining just when a regulation would constitute a taking by going too far.\(^5\)

2. The Agins Two-Prong Test

Following Pennsylvania Coal, the Supreme Court struggled to establish guidelines for determining when a land use regulation goes too far and becomes a taking. In a brief but important decision, the Court in Agins v. City of Tiburon\(^5\) established two broad tests for determining when a regulatory taking occurs. Specifically, the Agins Court held that where an "ordinance does not substantially advance [a] legitimate state interest[ ]... or denies an owner economically viable use of his land," a taking will be found.\(^6\) An examination of Supreme Court jurisprudence both before and after Agins reveals that most takings cases can be classified into either of these two broad categories. Since Nollan and Dolan both fall under this substantial advancement of legitimate state interests prong,\(^5\) this comment will first briefly examine the denial of economically viable use test.

a. Denial of Economically Viable Use of Land

While the Agins Court did not specifically apply the denial of economic use prong to the facts of the case,\(^5\) other

\(^{52}\) Id.

\(^{53}\) Id.

\(^{54}\) As Justice Holmes stated regarding his rule, "this is a question of degree — and therefore cannot be disposed of by general propositions." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922). See Craig A. Peterson, Recent Development in "Takings" Jurisprudence: Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches, 39 HASTINGS L.J. 335, 339 (1988) (noting that Holmes failed to provide guidelines for determining when a regulation goes too far).

\(^{55}\) 447 U.S. 255 (1980).

\(^{56}\) Agins, 447 U.S. at 260.

\(^{57}\) See infra text accompanying notes 81, 161.

\(^{58}\) Since the appellants in Agins never sought approval of their development under the zoning ordinance in question, the sole issue was whether the enactment of a zoning ordinance was a taking, which was answered in the negative. Agins, 447 U.S. at 259-60. Although the Court recognized that the open space ordinance did limit development of appellants' parcel, it noted that the
recent Supreme Court cases have examined this test in detail.

Though prior to the *Agins* decision, the Court in *Penn Central Transportation Co. v. New York City* 59 recognized that denial of the economically viable use of one's land may constitute a taking. 60 Among the key factors identified by the *Penn Central* Court for determining when a taking occurs are "[t]he economic impact of the regulation" and "the extent to which the regulation has interfered with distinct investment-backed expectations." 61

In *Penn Central*, the owner of Grand Central Terminal was denied permission to build a high-rise building above its terminal, under a New York City landmark preservation law. 62 *Penn Central* unsuccessfully argued to the Court that the law constituted a taking of its valuable air rights above the terminal. 63 *Penn Central* also argued that the law significantly diminished the value of the terminal as a whole. 64

More recently, in *Lucas v. South Carolina Coastal Council*, 65 the Court formulated a takings rule for when all economic use of real property has been sacrificed. 66 Justice Scalia held that where a land use regulation denies a property owner of virtually all economic use of his or her property, a taking occurs. 67 The property owner in *Lucas* had purchased two beachfront lots that were zoned for construction of single-family residences. 68 Subsequent to the purchase, the Coastal Council issued a regulation having the effect of permanently banning any development of Lucas' beachfront property. 69 Lucas alleged an uncompensated taking, contending the regulation effected a "complete extinguishment of his property's value." 70 The Court agreed. 71

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ordination did not "prevent the best use of appellants' land" or hinder the pursuit of "their reasonable investment backed expectations." *Id.* at 262.

61. *Id*.
62. *Id.* at 116-17.
63. *Id.* at 130.
64. *Id.* at 131.
67. *Id*.
68. *Id.* at 2890.
69. *Id.* at 2889-90.
70. *Id.* at 2890.
The rationale given for the takings rule in *Lucas* is that confiscatory regulations,\(^7\) from the landowner's perspective, are the equivalent of a physical appropriation.\(^8\) Justice Scalia noted that confiscatory regulations carry the risk "that private property is being pressed into some form of public service under the guise of mitigating serious public harm."\(^9\)

The only exception to the takings rule in *Lucas* applies when a regulation essentially duplicates rights that either adjoining landowners or the state would have under its nuisance laws in any event.\(^7\)

It is important to note that Lucas did not challenge the ordinance as being an invalid exercise of the police power.\(^7\) Rather, he relied solely on the argument that his property's economic value had been completely extinguished.\(^7\) This is to be contrasted with those takings claims that allege not a deprivation of economic use of property, but a failure of the land use regulation to substantially advance a legitimate state interest.

**b. Substantial Advancement of Legitimate State Interests**

The second method to establish a regulatory taking is to prove the regulation in question fails to "substantially advance legitimate state interests."\(^7\) Previous support for this test came from the *Penn Central* case, where the Court noted that land use regulations may constitute a taking "if not reasonably necessary to the effectuation of a substantial public purpose . . . ."\(^7\)

Before *Nollan*, the Court was silent as to how *Agins*’ substantial advancement of legitimate state interests prong

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72. The Court defined confiscatory regulations as those “that prohibit all economically beneficial use of land.” *Id.* at 2900.

73. *Id.* at 2894.

74. *Id.* at 2895.

75. *Id.* at 2900-01. To illustrate, Justice Scalia gave the example of a nuclear power plant owner who is directed to remove the plant because it sits near an earthquake fault. *Id.* at 2900-01. In such a case, the owner would not be entitled to compensation. *Id.* While such a regulation might eliminate the only economically productive use of the land, the use itself was impermissible under state nuisance law in the first place. *Id.*


77. *Id.*


should be applied. However, the Court's decision in Nollan has been interpreted, by both California courts and academics, as clarifying the substantial advancement test for establishing a regulatory taking. An examination of Nollan and its essential nexus test follows.

C. The Nollan Decision

1. The Facts

In Nollan, the landowners leased a small beachfront bungalow and decided to exercise their option to purchase the property, which was conditioned on their promise to demolish the bungalow and replace it with another structure. The Nollans submitted a permit application to the California Coastal Commission, proposing to replace the existing bungalow with a three-bedroom house. The Commission approved the permit, subject to the condition that the Nollans grant a public easement across their property. The easement, to be bounded by the Nollans' seawall on one side and the mean high tide line on the other, was designed to allow public access between a county park and a public beach, which lie north and south of the Nollans' property, respectively. The Nollans appealed to the U.S. Supreme Court, alleging the access condition constituted an uncompensated taking.

Justice Scalia's majority opinion began by noting that a taking would have undoubtedly occurred had the State of California simply demanded a public easement across the Nollans' property, instead of conditioning their permit upon

80. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) ("Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' . . . .").
81. See Blue Jeans Equities West v. City of San Francisco, 4 Cal. Rptr. 2d 114, 117 (Ct. App.), cert. denied, 113 S. Ct. 191 (1992) ("Nollan has been construed as refining the first prong of the Agins test 'to require that the regulation advance the precise state interest which avowedly motivated it.'") (quoting Long Beach Equities, Inc. v. County of Ventura, 282 Cal. Rptr. 877, 884 (Ct. App. 1991), cert. denied, 112 S. Ct. 3027 (1992)); see also Falik & Shimko, supra note 9, at 379 ("Nollan gives new vitality to the other Agins prong — lack of a legitimate state interest which is substantially advanced by the regulation at issue.").
82. Nollan, 483 U.S. at 828.
83. Id.
84. Id.
85. Id.
86. Id. at 831.
acquiescence to the access condition.\textsuperscript{87} Given this, the majority asked whether requiring conveyance of the easement as a condition precedent for issuance of the development permit changed the analysis in any way.\textsuperscript{88} The Court pointed out that while the substantial advancement of legitimate state interests test of \textit{Agins} lacked determinative standards, "a broad range of governmental purposes and regulations" had satisfied the requirement in the past.\textsuperscript{89}

The Court then began its examination of the access condition and the purported reasons for imposing the condition on the Nollans.\textsuperscript{90} The Commission argued the easement was necessary to "protect[ ] the public's ability to see the beach, assist[ ] the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and prevent[ ] congestion on the public beaches."\textsuperscript{91} According to Justice Scalia, these reasons alone would have been sufficient to entitle the Commission to deny the building permit outright if the new house substantially interfered with the purposes given.\textsuperscript{92} The Court went on to list various development conditions that would be constitutional if they in fact served the same legitimate police power objectives that would justify a permit denial.\textsuperscript{93}

However, the Court found the specific permit requirement chosen by the Commission, the lateral access easement, to be unconstitutional.\textsuperscript{94} As its rationale, the Court noted the "lack of nexus between the condition and the original purpose of the building restriction . . . ."\textsuperscript{95} The Commission had re-

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{87} \textit{Nollan}, 483 U.S. at 831.
\item \textsuperscript{88} \textit{Id.} at 834.
\item \textsuperscript{89} \textit{Id.} at 834-35. As examples, the Court cited \textit{Agins v. City of Tiburon}, 447 U.S. 255 (1980), where a scenic zoning law was sustained. \textit{See Agins}, 447 U.S. at 260-62. Also, the Court referred to \textit{Penn Cent. Transp. Co. v. New York City}, 438 U.S. 104 (1978), where the Court approved the effects a landmark preservation law had on a high-rise development. \textit{See Penn Cent.}, 438 U.S. at 138.
\item \textsuperscript{90} \textit{Nollan}, 483 U.S. at 835-39.
\item \textsuperscript{91} \textit{Id.} at 835.
\item \textsuperscript{92} \textit{Id.} at 835-36. Justice Scalia mentioned such a permit denial might constitute a taking if it drastically interfered with the Nollans' use of their property. \textit{Id.} at 836.
\item \textsuperscript{93} \textit{Id.} at 836. Examples of such legitimate conditions given by the Court included height, width, or fence limitations, or even the provision of a viewing spot on the Nollans' property. \textit{Id.}
\item \textsuperscript{94} \textit{Id.} at 838.
\item \textsuperscript{95} \textit{Nollan}, 483 U.S. at 837.
\end{itemize}
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quested a beachfront easement across the Nollans’ property in return for approval of a building permit.96 However, the reasons advanced by the Commission in support of the easement97 lacked any nexus to the permit condition itself.98 The Court explained:

It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans’ property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any “psychological barrier” to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans’ new house. We therefore find that the Commission’s imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes.99

2. The Essential Nexus Test

For a land use regulation to be constitutionally valid, Nollan requires an essential nexus between the regulation and the purported reasons for the regulation, the purposes themselves being sufficient to deny issuance of the permit.100 Where there is no essential nexus between the regulation and the reasons advanced therefor, an inference is created that the governmental body is trying to obtain an interest in property without paying for it.101 The Court concluded that if the Commission wanted an easement across the Nollans’ prop-

96. Id. at 827-28.
97. Id. at 834.
98. Id.
99. Id.
100. Nollan, 483 U.S. at 837. Justice Brennan’s dissent criticized the essential nexus test as “demand[ing] a degree of exactitude that is inconsistent with our standard for reviewing the rationality of a State’s exercise of its police power . . . .” Id. at 842-43 (Brennan, J., dissenting).
101. Id. at 837 (“[T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement . . . without payment of compensation.”) (quoting J.E.D. Assoc., Inc. v. Atkinson, 452 A.2d 12, 14-15 (N.H. 1981), overruled by Auburn v. McEvoy, 553 A.2d 317 (N.H. 1988)). Id. See also Surfside Colony, Ltd. v. California Coastal Comm’n, 277 Cal. Rptr. 371, 375 (Ct. App. 1991) (“The [Nollan] [C]ourt held there must be a substantial connection, or ‘nexus’ between the public burden created by the construction and the necessity for the easement. Without such a connection, there is an inference the government is simply trying to expropriate property without paying for it.”).
erty, the Fifth Amendment required just compensation to be paid to the Nollans for their loss of property.\textsuperscript{102}

D. Interpreting Nollan

Following \textit{Nollan}, California appellate courts and the Ninth Circuit took a decidedly restrictive approach to the essential nexus test, applying it only to claims of possessory takings.\textsuperscript{103} Following is a brief examination of these cases.

1. The Ninth Circuit Approach

The Court of Appeals for the Ninth Circuit interpreted the essential nexus test in \textit{Commercial Builders v. City of Sacramento}.\textsuperscript{104} In that case, the City of Sacramento passed an ordinance conditioning the issuance of permits for job creating nonresidential developments on the payment of a low-income housing fee.\textsuperscript{105} The fee was justified by city-wide findings, based on a consulting firm study of the need for low-income housing, that nonresidential development attracts new employees to Sacramento, creating a demand for more housing in the city.\textsuperscript{106} The fees were paid pursuant to a formula and then deposited into a housing trust fund to help finance low-income housing.\textsuperscript{107} Commercial Builders challenged the ordinance as an unconstitutional taking under the Fifth Amendment.\textsuperscript{108}

Commercial Builders argued that while the ordinance addressed a legitimate interest of the city, the means used were impermissible.\textsuperscript{109} They felt the burden for funding low-income housing had been placed on nonresidential developers without enough evidence of proportionality between the fee charged and the developers' contribution to the low-income housing problem.\textsuperscript{110}

The Ninth Circuit sustained the ordinance, pointing to the consulting firm study and concluding that the burden

\textsuperscript{102} \textit{Nollan}, 483 U.S. at 842.
\textsuperscript{103} \textit{See infra} part II.D.
\textsuperscript{104} 941 F.2d 872 (9th Cir. 1991), cert. denied, 504 U.S. 931 (1992).
\textsuperscript{105} \textit{Commercial Builders}, 941 F.2d at 873.
\textsuperscript{106} \textit{id}.
\textsuperscript{107} \textit{id}.
\textsuperscript{108} \textit{id}.
\textsuperscript{109} \textit{id}.
\textsuperscript{110} \textit{Commercial Builders}, 941 F.2d at 873.
placed on the developers bore "a rational relationship to a public cost closely associated with [the] development."\textsuperscript{111}

Alternatively, Commercial Builders asserted the essential nexus test of \textit{Nollan} mandated heightened scrutiny of development conditions, pointing out that the Court there held "such conditions must not only be ones that the government might 'rationally have decided' to employ for a given legitimate public purpose; they must also substantially advance such a purpose."\textsuperscript{112} The Ninth Circuit rejected this notion, stating that \textit{Nollan} had not "chang[ed] the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land."\textsuperscript{113}

In a vigorous dissent, Judge Beezer argued the ordinance had "little or no causal connection to [the] development."\textsuperscript{114} Further, he criticized the consulting firm study as "demonstrat[ing] at best a tenuous and theoretical connection between commercial development and housing needs."\textsuperscript{115} Judge Beezer characterized the ordinance's fee system as "transfer payments" exercised under the taxing power but cloaked as an exercise of the city's police power, all at a time of mounting budget deficits.\textsuperscript{116}

\textbf{2. The California Approach}

California appellate courts have also limited the scope of \textit{Nollan}'s essential nexus test to possessory, not regulatory takings. In \textit{Blue Jeans Equities West v. City of San Francisco},\textsuperscript{117} an office, retail, and condominium developer submitted a permit, which was approved subject to the payment of a transit impact development fee.\textsuperscript{118} The issue before the court

\begin{itemize}
  \item \textsuperscript{111} \textit{Id.} at 874 (emphasis added).
  \item \textsuperscript{112} \textit{Id.} (quoting \textit{Nollan v. California Coastal Comm'n}, 483 U.S. 825, 834 \& n.3 (1987)). Commercial Builders argued that unlike the rational relationship test, the essential nexus test would operate to invalidate the ordinance. \textit{Id.} Specifically, Commercial Builders claimed the low-income housing fee could only be found constitutional if their development was shown to be responsible for an increase in need for low-income housing. \textit{Id.} As will be shown, Commercial Builders' objection would have been more fitting to the rough proportionality analysis of \textit{Dolan}. See infra text accompanying note 301.
  \item \textsuperscript{113} \textit{Commercial Builders}, 941 F.2d at 874.
  \item \textsuperscript{114} \textit{Id.} at 877 (Beezer, J., dissenting).
  \item \textsuperscript{115} \textit{Id.} (Beezer, J., dissenting).
  \item \textsuperscript{116} \textit{Id.} (Beezer, J., dissenting).
  \item \textsuperscript{117} 4 Cal. Rptr. 2d 114 (Ct. App.), cert. denied, 113 S. Ct. 191 (1992).
  \item \textsuperscript{118} \textit{Blue Jeans Equities West}, 4 Cal. Rptr. 2d at 115-16. The fee was mandated by local ordinance and provided that developers of new downtown build-
of appeal, answered in the negative, was whether the essential nexus test of Nollan applied to the transit impact fee.\textsuperscript{119}

In its holding, the Blue Jeans court wrote "that any heightened scrutiny test contained in Nollan is limited to possessory rather than regulatory takings cases."\textsuperscript{120} The court based this result on the following language in Nollan:

\begin{quote}
[O]ur cases describe the condition for abridgment of property rights through the police power as a "substantial advancing" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.\textsuperscript{121}
\end{quote}

From this text, the court of appeal was sympathetic to the interpretation that "the Nollan strict scrutiny approach is limited to unconstitutional conditions and possessory takings cases."\textsuperscript{122}

Several other California appellate court cases follow the distinction between possessory and regulatory takings and the applicability of the essential nexus test.\textsuperscript{123}
E. The California and Ninth Circuit Regulatory Takings Standard

Since California courts and the Ninth Circuit have applied Nollan's essential nexus test to possessory takings claims only, what standard have they put forth for claims of regulatory takings? The next section examines this question.

1. California's Regulatory Takings Standard

   a. In General

California courts recognize that when a landowner alleges a possessory taking, Nollan's essential nexus test applies. However, where a regulatory taking is asserted, "California courts have continued to apply a looser version of the reasonable relationship nexus test ...." The constitutionality of land use regulations in California via the reasonable relationship test was established in the landmark case of Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek. In that case, the California Supreme Court upheld a statute giving cities and counties the power to condition subdivision approvals on the dedication of land or payment of in-lieu fees for parks or recreational purposes.

Associated Home Builders argued the statute could be constitutionally applied only if "the need for additional park and recreational facilities [was] attributable to the increase in population stimulated by the new subdivision alone ...." The California Supreme Court rejected this challenge, stating the amount of land or fees required need only bear a reasonable relationship to the use of park and recreational facilities by future subdivision residents. In so holding, the California Supreme Court relied on an earlier exaction decision which allowed future public needs and potential population factors, rather than actual development created

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125. Cassidy et al., supra note 27, at 4.
127. Associated Home Builders, 484 P.2d at 608-10.
128. Id. at 610.
129. Id. at 612.
impacts, to be used in formulating development conditions.\textsuperscript{131} The \textit{Associated Home Builders} court noted it would have upheld the statute, regardless of previous case law, "on the basis of a general public need for recreational facilities caused by present and future subdivisions."\textsuperscript{132} Based on this language, the \textit{Associated Home Builders} reasonable relationship test has been interpreted as requiring "only an indirect relationship" between development exactions and the "need to which the project contributes."\textsuperscript{133}

The use of California's reasonable relationship test was aptly demonstrated in \textit{Grupe v. California Coastal Commission.}\textsuperscript{134} In that case, the plaintiff challenged a requirement that a landowner dedicate a beachfront access easement as a condition to a development permit.\textsuperscript{135} Relying on the principles announced in \textit{Associated Home Builders} that only an indirect relationship need exist between exaction and development burden, the \textit{Grupe} court upheld the condition.\textsuperscript{136} The extent of "indirectness" allowable under the reasonable relationship test is apparent given the court of appeals' acknowledgement that the landowner's development project, standing alone, "[did] not create[ ] the need for access."\textsuperscript{137}

The most recent use of California's reasonable relationship test for determining regulatory takings claims was in \textit{Ehrlich v. City of Culver City.}\textsuperscript{138} There, a developer challenged a $280,000 recreation mitigation fee and a $33,220 in-lieu art fee, both conditions precedent to approval of a devel-

\begin{itemize}
\item \textsuperscript{131} \textit{Associated Home Builders}, 484 P.2d at 610 (emphasis added).
\item \textsuperscript{132} \textit{Id.} (emphasis added).
\item \textsuperscript{133} \textit{Grupe v. California Coastal Comm'n}, 212 Cal. Rptr. 578, 587 (Ct. App. 1985). \textit{See} Cassidy et al., \textit{supra} note 27, at 4 ("[T]he project need not be solely responsible for creating the impact and the condition may remedy more than the project's share of the burdens.").
\item \textsuperscript{134} \textit{Grupe}, 212 Cal. Rptr. at 578.
\item \textsuperscript{135} \textit{Id.} at 581.
\item \textsuperscript{136} \textit{Id.} at 589.
\item \textsuperscript{137} \textit{Id.} at 590.
\item \textsuperscript{138} 19 Cal. Rptr. 2d 468 (Ct. App. 1993), cert. granted and vacated, 114 S. Ct. 2731 (1994). The day after issuing its \textit{Dolan} decision, the Court reversed and remanded \textit{Ehrlich} to be reheard in light of \textit{Dolan}. \textit{See} Paul D. Kamenar, Nollan, Dolan and Beyond, RECORDER, Sept. 15, 1994, at 7.
\end{itemize}

The remanded version of \textit{Ehrlich} was decided on December 23, 1994, but the decision was not published. On March 16, 1995, the California Supreme Court granted review of the case. \textit{Ehrlich} v. City of Culver City, No. 93-842, 1995 Cal. LEXIS 1959. A decision is pending as of this writing.
The court of appeal upheld the development conditions, refusing to apply the essential nexus test of Nollan and relying instead on the reasonable relationship test.

b. Limiting the Broad Scope of California’s Regulatory Takings Standard

The main limitation on the reasonable relationship test for assessing regulatory takings claims is where no such relationship exists at all. For example, one court struck down a condition to a building permit requiring the landowners to dedicate fourteen percent of their property to correct the alignment of a street. In that case, it was held that no nexus existed at all between the dedication condition and the purported traffic burden created by the development, pointing to an environmental impact report that concluded the landowner’s development would not create “significant traffic problems in the area.”

Additionally, Government Code section 66001.

As will be shown, while this statute appears to codify the holdings of Nollan and Dolan, in practice it only marginally

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139. Ehrlich, 19 Cal. Rptr. 2d at 470.
140. Id. at 476, 482.
142. Id. at 328. A similar result was reached in Liberty v. California Coastal Comm’n, 170 Cal. Rptr. 247 (Ct. App. 1980), where a permit condition requiring the developer to record a deed restriction to provide free public parking until 5:00 p.m. every day for thirty years was invalidated. Id. at 249-50. The Liberty court reasoned:

Where the conditions imposed are not related to the use being made of the property but are imposed because the entity conceives a means of shifting the burden of providing the cost of a public benefit to another not responsible for or only remotely or speculatively benefiting from it, there is an unreasonable exercise of the police power.

Id. at 254 (citations omitted).
143. CAL. GOV'T CODE § 66001 (West 1983 & Supp. 1995). Government Code § 66001(a) requires the governmental entity to determine how a reasonable relationship exists between the use of a development fee or need for a particular public facility and the type of development project on which the fee is imposed. Government Code § 66001(b) mandates that local agencies determine how a reasonable relationship exists between the amount of the fee and the cost of the public facility, or portion thereof attributable to the development paying the fee.
expands the duties imposed on municipalities in issuing exactions.¹⁴⁴

2. The Ninth Circuit Regulatory Takings Standard

The reasonable relationship test is also followed by the Ninth Circuit in assessing regulatory takings claims. In Commercial Builders v. City of Sacramento,¹⁴⁵ a housing fee ordinance was sustained because it was "sufficiently related to the legitimate purpose it [sought] to achieve."¹⁴⁶ According to the Ninth Circuit, a permit condition will constitute a taking only "where the condition lack[s] any rational relationship to the project for which the permit was sought."¹⁴⁷

Given the narrow interpretations of Nollan and the judicial deference given nonpossessory land use regulations, the question becomes whether California courts and the Ninth Circuit will continue the possessory-regulatory takings dichotomy in interpreting the U.S. Supreme Court's latest takings decision, Dolan v. City of Tigard.¹⁴⁸

F. The Dolan Decision

Dolan addressed the question left open by Nollan, that once an essential nexus has been established between development conditions and the purported reasons for the conditions, "what is the required degree of connection between the exactions imposed . . . and the projected impacts of the proposed development[?]"¹⁴⁹ In other words, has the land use regulation gone too far by requiring some interest in land or the payment of a fee that is not in rough proportion to the burden the development has on the community.

1. The Facts

Florence Dolan, the owner of a plumbing and electric supply business, applied to the City of Tigard for a redevelop-
ment permit, proposing to significantly expand the size of her store and pave the parking lot. 150

Pursuant to Oregon state law, the City of Tigard had enacted a Community Development Code (CDC), containing comprehensive statewide land use planning criteria. 151 Tigard’s CDC required property owners in the Central Business District to leave fifteen percent of their property as open space. 152 Additionally, the CDC required new developments to dedicate land for bicycle/pedestrian pathways. 153 Finally, Tigard adopted a master drainage plan that suggested various flood prevention and mitigation improvements to Fanno Creek, which flows through the southwest corner of Dolan’s property. 154

With these regulations in mind, Tigard granted Dolan’s permit application, subject to two conditions. 155 First, the city required Mrs. Dolan to dedicate all her property lying within the 100-year Fanno Creek floodplain as a public greenway, amounting to ten percent of her property. 156 Second, Dolan was required to dedicate an additional fifteen foot strip of land next to the floodplain as a pedestrian/bicycle path. 157 The dedications could be used by Dolan to satisfy the open space requirement. 158

The development conditions were sustained by the city, the Land Use Board of Appeals, the Oregon Court of Appeals, and the Oregon Supreme Court, on the basis that a reasonable relationship existed between the dedications and the impact of the proposed development. 159

As it did in Nollan, the Court first recognized that had Tigard simply required the dedications outside of the permit approval context, a taking would have occurred. 160 Moreover, the Court stated that the development conditions had not deprived Dolan of viable economic use of her property, putting

150. Id. at 2313.
151. Id.
152. Id.
153. Id.
155. Id. at 2314.
156. Id.
157. Id.
158. Id. at 2314.
160. Id. at 2316.
the case squarely within Agins' substantial advancement of legitimate state interests prong.\textsuperscript{161}

The Court began its analysis by determining whether Tigard's development conditions satisfied the essential nexus test.\textsuperscript{162} As to the greenway, the Court found a nexus, noting the city wanted to limit development within the Fanno Creek area to prevent flooding.\textsuperscript{163} In this case, paving the parking lot would increase stormwater run-off into the creek.\textsuperscript{164} Likewise, a nexus was found between reducing traffic congestion and providing a bicycle/pedestrian pathway.\textsuperscript{165}

2. The Rough Proportionality Test

This brought the Court to its second consideration, "whether the degree of the exactions demanded by the city's permit conditions [bore] the required relationship to the projected impact of petitioner's proposed development."\textsuperscript{166} In its search to formulate an appropriate rule, the Court turned to the wealth of state court decisions on the matter.\textsuperscript{167}

The Court rejected as too permissive the standard followed by some states requiring only general formulations "as to the necessary connection between the required dedication and the proposed development."\textsuperscript{168} Chief Justice Rehnquist feared such an easily met standard would fail to protect the right of property owners to receive just compensation if their property was taken for public use.\textsuperscript{169}

Similarly, the Court rejected as too exacting the specific and uniquely attributable test, which requires direct proportionality between the land use regulation and the need for such regulation.\textsuperscript{170}

\begin{itemize}
\item \textsuperscript{161} \textit{Id.} at 2316 n.6.
\item \textsuperscript{162} \textit{Id.} at 2317.
\item \textsuperscript{163} \textit{Id.} at 2318.
\item \textsuperscript{164} \textit{Dolan,} 114 S. Ct. at 2318.
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} \textit{Id.} at 2318-19.
\item \textsuperscript{168} \textit{Id.} at 2318.
\item \textsuperscript{169} \textit{Dolan,} 114 S. Ct. at 2319.
\item \textsuperscript{170} \textit{Id.} According to the Court, in those states following the specific and uniquely attributable test, if the governmental entity cannot show direct proportionality between the exaction and the specifically created need, there is a confiscation of private property under the guise of the police power. \textit{Id.} The Court felt the Constitution did not require such high scrutiny, considering the interests involved. \textit{Id.}
The Dolan Court chose to adopt the intermediate position, known as the reasonable relationship test, as the constitutional standard for takings analysis.\(^{171}\) This test attempts to distinguish between proper police power regulations and improper uses of the eminent domain power.\(^{172}\) It does so by asking whether some reasonable relationship exists between the regulations and the proposed property use, as opposed to regulations which serve as an excuse to take private property simply because the landowner is seeking a license or permit.\(^{173}\)

However, the Court was concerned with confusing its new standard with the rational basis test used for Equal Protection Clause claims, "which describes the minimal level of scrutiny."\(^{174}\) Therefore, the Dolan majority adopted the term rough proportionality as "best encapsulat[ing] what we hold to be the requirement of the Fifth Amendment."\(^{175}\) Applying the rough proportionality test to the facts, the Court found both of the City of Tigard's development conditions unconstitutional.\(^{176}\)

As to the greenway, the Court agreed that limiting floodplain development by Mrs. Dolan would reduce the possibility of Fanno Creek overflowing.\(^{177}\) However, the Dolan majority felt the greenway condition went too far, because it not only prevented floodplain development but also required dedication of Dolan's property to the city.\(^{178}\) Dedicating the property, the Court pointed out, would eviscerate Dolan's right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property."\(^{179}\)

\(^{171}\) Id. ("We think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed.").

\(^{172}\) Id. (quoting Simpson v. North Platte, 292 N.W.2d 297, 301 (Neb. 1980)).

\(^{173}\) Id. at 2319 (quoting Simpson v. North Platte, 292 N.W.2d 297, 301 (Neb. 1980)).

\(^{174}\) Dolan, 114 S. Ct. at 2319. The Court's desire to avoid applying minimal constitutional scrutiny to takings claims is congruent with Justice Scalia's statement in Nollan, that the standards for due process or equal protection claims are "quite different" from the takings requirement that the regulation substantially advance legitimate state interests. Nollan v. California Coastal Comm'n, 483 U.S. 825, 836 n.3 (1987).

\(^{175}\) Dolan, 114 S. Ct. at 2319.

\(^{176}\) Id. at 2320-22.

\(^{177}\) Id. at 2320.

\(^{178}\) Id.

\(^{179}\) Id. (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).
With this in mind, the Court failed to see how flood control was improved through a public, nondeveloped greenway versus a private one.  

Similarly, the Court found no rough proportionality between the pedestrian/bicycle pathway easement and the burden on traffic congestion created by the development.  

While the Court recognized that Dolan’s new store would increase traffic in downtown Tigard, it would not allow the pathway easement to be enforced based solely on the “conclusory statement that [the bicycle/pedestrian pathway] could offset some of the traffic demand.”

3. **Shifting Burdens and Individualized Determinations**

In what may become the most critical part of the opinion, the *Dolan* Court decided to place the burden of demonstrating rough proportionality on the city. The Court stated, “[n]o precise mathematical calculation is required, but 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.” The Court justified this departure from traditional land use regulatory challenges in that in *Dolan*, “the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.”

Thus, with respect to the greenway, the Court held the city had failed to make any individual determination as to why a public, rather than private, floodplain easement was necessary to prevent flooding. Likewise, the Court felt the

181. *Id.* at 2321-22.
182. *Id.* at 2321. The city estimated Dolan’s expanded store would create 435 additional trips per day. *Id.*
183. *Id.* at 2322 (emphasis added). The Court noted that Tigard’s finding that the pathway could offset some traffic demand is very different from a finding that the pathway would, or would be likely to, offset traffic demand. *Id.* (quoting Dolan v. City of Tigard, 854 P.2d 437, 447 (Or. 1993) (Peterson, J., dissenting)).
184. *Id.*
186. *Id.* at 2320 n.8.
187. *Id.* at 2320-21.
city needed to "quantify its findings" to support the dedication of a pedestrian/bicycle pathway easement.\textsuperscript{188}

III. THE PROBLEM IDENTIFIED

Since \textit{Nollan v. California Coastal Commission}\textsuperscript{189} has been limited to claims of possessory takings by California courts and the Ninth Circuit,\textsuperscript{190} the arrival of \textit{Dolan v. City of Tigard}\textsuperscript{191} has left California's land use community wondering how the rough proportionality standard will be interpreted.

This comment examines whether the possessory-regulatory distinction in takings claims should be continued in the judicial explications of \textit{Dolan} that are sure to come. At the heart of this question is the validity of the narrow approach taken toward the Court's essential nexus test, and the advisability of continued use of the California-Ninth Circuit regulatory takings standard, given the language and rationales behind recent U.S. Supreme Court takings jurisprudence, including its most recent decision in \textit{Dolan}.

IV. ANALYSIS

Clearly, the land use regulations in \textit{Nollan} and \textit{Dolan} both involved physical dedications of land.\textsuperscript{192} How then is it possible to advance the proposition that the \textit{Nollan}-\textit{Dolan} takings standards should apply to nonpossessory takings claims? This section examines the validity of the possessory-regulatory analysis adhered to by California appellate courts and the Ninth Circuit, paying close attention to what \textit{Dolan} appears to say about this distinction. This comment then examines the possessory-regulatory division in light of the rationales behind recent Supreme Court takings jurisprudence.

A. Nollan and Dolan as a Dual Takings Standard

As a preliminary matter, it is appropriate to briefly consider whether the essential nexus standard of \textit{Nollan} and rough proportionality test of \textit{Dolan} should be considered together in analyzing takings claims. There is evidence to suggest these two tests operate together as a functioning unit.

\begin{itemize}
  \item \textsuperscript{188} \textit{Id.} at 2322.
  \item \textsuperscript{189} 483 U.S. 825 (1987).
  \item \textsuperscript{190} \textit{See supra} part II.D.
  \item \textsuperscript{191} \textit{Dolan}, 114 S. Ct. at 2309.
  \item \textsuperscript{192} \textit{See supra} text accompanying notes 84-85, 155-58.
\end{itemize}
In its holding in Dolan, the Court stated that the City of Tigard would have to make an “individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” At least one commentator has interpreted this language as referring to both the essential nexus and rough proportionality standards.

Additionally, it should be mentioned that the Dolan Court first applied the essential nexus test to the facts of the case, rather than simply announcing its new rough proportionality standard and applying it. This seems to lend itself to the interpretation that the Nollan-Dolan analyses should be considered together in evaluating takings claims.

B. Misinterpretations of Nollan

California appellate courts have based their refusal to apply the essential nexus test to regulatory takings claims on specific language in Nollan that apparently makes the possessory-regulatory distinction itself. After noting that successful police power regulations of property require a substantial advancement of a legitimate state interest, Justice Scalia, in Nollan, indicated the Court would be “particularly careful” when the requirement to satisfying a land use regulation involves the conveyance of real property. According to the Court, such a condition entails the “heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.”

Based on this language, it is difficult to comprehend how the essential nexus test is limited solely to possessory takings claims. It would appear the Court is making a simple statement that where dedications of property are at stake, proof of a substantially advanced state interest requires especially careful analysis of the essential nexus. The language of Nollan simply does not support the notion that regulatory tak-

194. E.g., Kamenar, supra note 138, at 7. “[T]he exactions must be ‘related both in nature [under Nollan’s ‘essential nexus’ test] and extent [under Dolan’s ‘rough proportionality’ test] to the impact of the proposed project’ rather than based on generalized findings . . . .” Id.
195. See supra text accompanying notes 162-65.
196. See supra text accompanying notes 120-23.
198. Id.
ings claims require no essential nexus analysis at all, as the California and Ninth Circuit approach would suggest.

California's possessory-regulatory takings distinction is further based on the misconceived notion that "most legal scholars have concluded the Nollan strict scrutiny approach is limited to . . . possessory takings cases." California appellate courts apparently missed the scholarly commentary following Nollan, indicating that the essential nexus test applies to all regulations of property, not just those involving physical deprivations.

Furthermore, there is alternative case law suggesting that the essential nexus test applies to all government conditions on property use. Following Nollan, the New York Court of Appeals invalidated as an unconstitutional taking a New York City ordinance aimed at preventing homelessness. The ordinance prohibited owners of single-room occupancy (SRO) properties from demolishing, altering, or converting such properties. Also, the owners of such properties were mandated to restore all units to a habitable condition and rent them at controlled rates for an unspecified period.

199. Blue Jeans Equities West v. City of San Francisco, 4 Cal. Rptr. 2d 114, 118 (Ct. App. 1992) (emphasis added). Interestingly, one of two legal scholars cited by the Blue Jeans court in support of its position stated only that "perhaps" Nollan's essential nexus test is limited to possessory takings. Manheim, supra note 32, at 950. The other commentator acknowledged that one possible application of the essential nexus test would be to strike down "linkage or impact fee requirement[s] imposed on commercial developers," which are clearly nonpossessory land use regulations. Nathaniel S. Lawrence, Means, Motives and Takings: The Nexus Test of Nollan v. California Coastal Commission, 12 Harv. Envtl. L. Rev. 231, 262-63 (1988).

200. See Martha Minow, The Supreme Court 1986 Term, 101 Harv. L. Rev. 10, 247 (1987). The Court's decision in Nollan "indicates that all regulations will now be subjected to a level of scrutiny far higher than the Court previously has used in assessing claims of regulatory takings." Id. (emphasis added). "The Court thus articulated a standard of heightened scrutiny for regulations challenged under the takings clause." Id. at 249.

201. Falik & Shimko, supra note 9, at 392-93.


203. Id. at 1060.

204. Id. at 1060-61.
While the end of preventing homelessness was found to be well within the city's police power, the Court invalidated the means employed, as there was no constitutionally sufficient nexus between the development ban and the homeless problem.

Lastly, the language from at least one California appellate case indicates that it is conditions on land use in general, not just those involving possessory exactions, that invoke the essential nexus test. In that case, the appellate court read *Nollan* as requiring "a substantial relationship between the public burden posed by proposed construction and conditions imposed by the government to permit that construction." This reference to government conditions in general, without differentiating between possessory and regulatory conditions, seems to imply the applicability of *Nollan* to both types of exactions.

C. Dolan's Disapproval of the Possessory-Regulatory Distinction

While the Court in *Dolan v. City of Tigard* did not go beyond its decision to specifically address whether the rough proportionality standard should be limited to possessory takings claims only, there are reasons to suggest that the Court would have its new standard apply to all takings claims.

1. Conditions in General

First, specific language in the opinion suggests it is land use conditions in general, not just physical exactions, that invoke the rough proportionality standard.

205. Id. at 1071.
206. Id. at 1068. While the city claimed that preventing homelessness was the purpose of the law, one of the city's own studies acknowledged that the SRO conversion ban "would do little to resolve the homeless crisis." Id. The court of appeals therefore concluded that the essential nexus between the conversion ban and the homeless problem was "indirect at best and conjectural." Id. at 1069.
208. Id. at 376 (emphasis added). Later in the case, the appellate court again stated that "*Nollan* requires a 'close connection' between the burden and the condition." Id. at 378 (emphasis added).
210. See Berwanger et al., supra note 27, at 249.
The Dolan majority, in defending its decision to place the burden on the city to justify the required exactions, noted that “the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel.”212 The failure of the Court to delineate between possessory and regulatory conditions has led one observer to conclude that Dolan’s rough proportionality standard applies to “‘conditions’ in general, not just those conditions that are limited to the exacting of a possessory interest.”213

This reading of Dolan is further supported by the fact that the Court was well aware, through amicus briefs, of the cases limiting Nollan to possessory takings claims.214 The Court had ample opportunity to join the possessory-regulatory distinction fray, but chose not to.

Adherents to the possessory-regulatory takings dichotomy may attempt to find solace in particular portions of the Dolan opinion that on the surface may appear to validate the limited approach taken by the Ninth Circuit and California’s appellate courts. Most notable is the Court’s remark that “the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.”215 However, as one commentator has suggested:

The significance . . . of that discussion appears not to be an adoption of the distinction by the Ninth Circuit and the California courts of appeal between regulatory and possessory takings; rather, the discussion raises the issue that the city failed to justify on an individualized basis, the requirement that Mrs. Dolan dedicate a fee interest instead of some lesser interest that would serve the same public purpose without depriving her of the right to exclude.216

212. Id. (emphasis added).
213. E.g., Berwanger et al., supra note 27, at 250.
214. See Brief for the Georgia Public Policy Foundation and Southeastern Legal Foundation, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (No. 93-518), LEXIS, Genfed Library, Briefs File. (“Since the Nollan ruling, courts have been split as to its implications. Some courts have either ignored Nollan or reduced its application to physical takings, thus holding Nollan inapplicable to cases involving regulatory takings.”); see also Brief for National Association of Home Builders et al., Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (No. 93-518), LEXIS, Genfed Library, Briefs File.
216. Berwanger et al., supra note 27, at 250.
Thus, while the *Dolan* Court did not explicitly disapprove of the possessory-regulatory takings distinction, such a conclusion may be inferred from the language of the opinion itself.

2. *Remanding* Ehrlich v. City of Culver City

Subsequent procedural action taken by the Supreme Court also indicates a proclivity on the part of the Court to apply the *Dolan* analysis to regulatory takings claims.

A day after issuing its decision in *Dolan*, the Court reversed and remanded *Ehrlich v. City of Culver City*,[217] to be decided in light of *Dolan*.[218] *Ehrlich* dealt with a regulatory takings challenge,[219] a fact of which presumably the Court was well aware. The very act of granting certiorari, reversing, and remanding such a case to be decided in light of *Dolan*, seems to indicate a willingness on the part of the Court to apply the rough proportionality standard to regulatory, as well as possessory takings challenges.[220]

D. A Higher Standard of Review for Takings

The California-Ninth Circuit reasonable relationship approach to regulatory takings[221] is also constitutionally suspect, given the fact that Supreme Court takings jurisprudence has evidenced a higher standard of review for takings claims than for other constitutionally based challenges.[222]

In *Nollan*, Justice Scalia took to task Justice Brennan’s claim that the Court was changing the standard of review for police power regulations.[223] Justice Scalia stated:

> [O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation “substantially advance”

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218. See supra note 138.
220. See Berwanger et al., supra note 27, at 250. “The *Dolan* majority’s disposition of the *Ehrlich* decision leads to the conclusion that regulatory takings cases also require heightened scrutiny.” *Id.*
221. See supra part II.E.
222. See infra text accompanying notes 223-35.
the "legitimate state interest" sought to be achieved . . .
not that "the State 'could rationally have decided' that the
measure adopted might achieve the State's objective . . . ." [T]here is no reason to believe (and the language of our
cases gives some reason to disbelieve) that so long as the
regulation of property is at issue the standards for takings
challenges, due process challenges, and equal protections
challenges are identical . . . .

The Court's command that takings claims require a
higher standard of review goes back to Penn Central, where
the Court noted that land use restrictions "may constitute a
'taking' if not reasonably necessary to the effectuation of a
substantial public purpose . . . ." The idea that a land use
regulation must substantially advance state interests in or-
der to avoid the payment of just compensation under the
Fifth Amendment is evidenced in many recent takings opin-
ions by the Court.

Thus, in order to assure that a land use regulation sub-
stantially advances a legitimate state interest, the Court de-
mands that a higher standard of review, namely the essen-
tial nexus and rough proportionality tests, be used when a land-
owner asserts a taking. Most importantly, when describ-
ing the heightened scrutiny that will be used to evaluate tak-
ings claims, Justice Scalia in Nollan declined to differentiate
between possessor and regulatory takings. Arguably
then, this high standard of review mandated by Nollan ap-
plies to all takings claims, not just those involving a physical
dedication of land.

Notwithstanding those cases limiting Nollan to posses-
sory takings, at least one California court has recognized
the heightened scrutiny that the Fifth Amendment de-
mands. This opinion also declined to adopt the possessor-

224. Id. at 836 n.3 (citations omitted).
226. See Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994); Lucas v. South
   Carolina Coastal Council, 112 S. Ct. 2886, 2894 (1992); Yee v. City of Escon-
   dido, 503 U.S. 519, 534 (1992); Pennell v. City of San Jose, 485 U.S. 1, 18 (1992)
   (Scalia, J., dissenting); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480
227. Dolan, 114 S. Ct. at 2319-20; Nollan, 483 U.S. at 837.
228. Nollan, 483 U.S. at 836 n.3.
229. See supra part II.D.
230. See Surfside Colony, Ltd. v. California Coastal Comm'n, 277 Cal. Rptr.
   371, 377 (Ct. App. 1991) ("Nollan . . . changed the standard of constitutional
regulatory distinction when describing the heightened scrutiny to be used in evaluating takings claims.\textsuperscript{231}

Commentary following \textit{Nollan} also indicates that the reasonable relationship test is inappropriate when evaluating takings claims.\textsuperscript{232}

Seemingly, what California courts and the Ninth Circuit have created is a two-tier system of justice for takings claims. While possessory takings claims have received the heightened standard of review mandated by \textit{Nollan}\textsuperscript{233} (and perhaps in the future by \textit{Dolan}), regulatory takings are judged according to the easily satisfied reasonable relationship test.\textsuperscript{234} Meanwhile, the Supreme Court has implicitly indicated that all takings claims are subject to heightened scrutiny.\textsuperscript{235} Thus, continued adherence by California courts and the Ninth Circuit to what is essentially a due process standard of review in regulatory takings cases is constitutionally unwarranted.

E. \textit{The Public Should Pay}

Finally, the fundamental notion that public burdens should be funded by public, rather than private, funds undercuts the continued validity of using the rational relationship test to evaluate regulatory takings claims.\textsuperscript{236}

1. \textit{The Purpose of the Fifth Amendment}

The overall purpose of the Fifth Amendment’s Takings Clause was eloquently described by the Court in \textit{Armstrong v.}

\begin{footnotes}
\item 231. Id.
\item 232. \textit{See} Berwanger et al., \textit{supra} note 27, at 248 (explaining \textit{Nollan}’s holding as requiring heightened judicial review for takings challenges); Falik & Shimko, \textit{supra} note 9, at 390 (“[T]he scrutiny the Court will utilize in reviewing land-use decisions is more than the traditional, rational basis approach . . . .”);
\item 234. \textit{See} discussion \textit{supra} part II.D-E.
\item 235. \textit{See} discussion \textit{supra} part IV.B-D.
\item 236. \textit{See} discussion \textit{infra} part IV.E.1-4.
\end{footnotes}
The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation 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.

This important rationale behind the Takings Clause has often been repeated by the Court. However, some commentators now argue that the burden of funding public needs is increasingly being shoved unfairly onto the development community.

Take, for example, the low-income housing fee in Commercial Builders v. City of Sacramento. There, the city failed to make any individual findings as to how the proposed development would exacerbate, if at all, the low-income housing shortage. Rather, application of the ordinance was based on broad, city-wide findings that nonresidential developments create a need for more low-income housing.

Similarly, in Ehrlich v. City of Culver City, the city imposed a $33,220 in-lieu art fee, based on an ordinance which made only a surface-level inquiry into the extent to which the specific project would impact the arts in Culver City.

238. Armstrong, 364 U.S. at 49.
240. See infra note 264.
242. Commercial Builders, 941 F.2d at 873. See infra note 301, explaining why the low-income housing fee would be found unconstitutional under the individualized, rough proportionality analysis mandated by Dolan.
243. Commercial Builders, 941 F.2d at 873.
244. 19 Cal. Rptr. 2d 468 (Ct. App. 1993), cert. granted and vacated, 114 S. Ct. 2731 (1994).
245. The Art in Public Places Program was based on the following findings: (c) As development and revitalization of the real property within the city continues, the opportunity for creation of cultural and artistic resources is diminished. (d) As this development and revitalization continues as a result of market forces, urbanization of the community results. (e) As these opportunities are diminished and this urbanization occurs, the need to develop alternative sources for cultural and artistic
These cases represent an increasing use of the permit power to extract money from private individuals for general public purposes. Not only is this fundamentally unfair, it is unconstitutional under modern takings jurisprudence. Application of the Nollan-Dolan analysis to all takings claims will force governmental entities to pay for, through general funds, the needs of the public that are not legitimately created by the development. As Judge Beezer noted in his Commercial Builders dissent:

The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities — a problem caused by society at large — has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to abandon the guiding principle of the Takings Clause that "public burdens . . . should be borne by the public as a whole," this is the only manner that our Constitution permits.

2. The Danger of Using the Reasonable Relationship Test in Analyzing Regulatory Takings Claims

Long ago in Pennsylvania Coal v. Mahon, Justice Holmes issued a rather ominous warning about the qualified right under which private property is enjoyed. Explaining that the protections of the Fifth Amendment were qualified by the police power, Holmes remarked that "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." While Holmes' premonition may be a bit extreme, the type of land

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Id. at 480. See infra note 301, explaining why the in-lieu art fee would be found unconstitutional under the individualized, rough proportionality analysis mandated by Dolan.

246. See supra text accompanying notes 236-38.
248. 260 U.S. 393 (1922).
250. Id.
use regulations that regulatory takings challenges encompass do pose a serious threat to private property rights. One commentator has identified two specific dangers posed by land use exactions.\textsuperscript{251} 

\textbf{[E]}xactions allow municipalities to redistribute wealth by charging the developer more than the costs of the harm that the development is causing, and transferring that overcharge to others; and exactions may encourage the government to overregulate in order to give itself a way of raising money or other benefits. The dangers are related, in the sense that overregulation is nothing more than redistributing wealth.\textsuperscript{252}

Another danger associated with continued adherence to the reasonable relationship test is the possibility of municipalities exacting large development fees in order to condemn and purchase the property in question via eminent domain.\textsuperscript{253}

Some observers might be led to believe that these concerns are overstated, given the language of Government Code section 66001.\textsuperscript{254} As written, this statute appears to codify the holdings of \textit{Nollan} and \textit{Dolan}.\textsuperscript{255} In practice, however,
section 66001 represents, at best, a marginally higher standard of review than the reasonable relationship test of Associated Home Builders.\textsuperscript{256}

For example, the court of appeal in Ehrlich sustained various development fees under a Government Code section 66001 challenge.\textsuperscript{257} While the court of appeal did identify the purpose and proposed use of the $280,000 recreation mitigation fee,\textsuperscript{258} its reasonable relationship analysis required by Government Code section 66001(a) was lacking.\textsuperscript{259} Additionally, case law indicates that California courts view the language of section 66001 as, at most, a slightly higher standard than the Associated Home Builders reasonable relationship test.\textsuperscript{260}

\begin{itemize}
\item \textsuperscript{256} See supra text accompanying notes 125-33.
\item \textsuperscript{257} Ehrlich v. City of Culver City, 19 Cal. Rptr. 2d 468, 478-81 (Ct. App. 1993), cert. granted and vacated, 114 S. Ct. 2731 (1994).
\item \textsuperscript{258} Id. at 479.
\item \textsuperscript{259} Government Code § 66001(a) requires a reasonable relationship between the type of development project subject to the fee, and the fee's use and need for the public facility. CAL. GOV'T CODE §§ 66001(a)(3)-(4) (West 1983 & Supp. 1995) Here, the fee was to be used for replacement recreational facilities. Ehrlich, 19 Cal. Rptr. 2d at 479. However, there was substantial evidence indicating that the need for replacement recreational facilities was questionable, including the court's own admission that the fee was not the result of the project's burden on the community. Id. at 473-76. See infra text accompanying notes 276-80.
\item \textsuperscript{260} Government Code § 66001 "appear[s] to expand slightly on the reasonable relationship test previously used by [the] courts." Ehrlich, 19 Cal. Rptr. 2d at 479 (emphasis added) (citing Garrick Dev. Co. v. Hayward Unified Sch. Dist., 4 Cal. Rptr. 2d 897, 905 (Ct. App. 1992)). In a similar vein is Balch Enter. v. New Haven Unified Sch. Dist., 268 Cal. Rptr. 543 (Ct. App. 1990). Balch dealt with a challenge to a school facilities fee pursuant to Government Code § 65995. See CAL. GOV'T CODE § 65995 (West 1983 & Supp. 1995). Subdivision (b)(2) of Government Code § 65995 requires a reasonable relationship between school facility fees, community needs, and development-created school facility needs. In interpreting what reasonable relationship means, the Balch court stated that the phrase refers to "the constitutional standard of Associated Home Builders ... and its progeny, [and] it should be construed to demand no more than is constitutionally required." Balch Enter., 268 Cal. Rptr. at 549 (citing Associated Home Builders v. City of Walnut Creek, 484 P.2d 606 (Cal.), appeal dismissed, 404 U.S. 878 (1971)). The court of appeal went on to note that the Associated Home Builders standard requires only an indirect relation between exaction and development, or an incidental contribution between the project and the need for a particular exaction. Id. Although in a slightly different context, the language of Government Code § 65995 is nearly identical to that of Government Code § 66001. Compare CAL. GOV'T CODE § 65995 (West 1983 & Supp. 1995) with CAL. GOV'T CODE § 66001 (West 1983 & Supp. 1995). As both deal with development fees, presumably Balch Enterprises' interpretation of reasonable relationship also applies to Government Code § 66001. If this is the
Finally, even giving the generous assumption that Government Code section 66001 codifies the holdings of Nollan and Dolan in any practical way, it would appear that the statute does not codify Dolan's requirement that public agencies engage in individualized determinations before requiring development exactions.\footnote{261}

Clearly, nonpossessory land use regulations involve serious risks that caution against further use of the easily met reasonable relationship test for assessing regulatory takings claims. However, the economic pressures faced by municipalities in California today make such a voluntary move unlikely.\footnote{262}

3. **Municipal Revenue Shortfalls and Land Use Extortion**

   a. **In General**

   The principal reason why California courts and the Ninth Circuit have continued to use the reasonable relationship test for evaluating regulatory takings claims is the economic reality faced by municipalities. As Judge Beezer observed in his *Commercial Builders* dissent,\footnote{263} municipalities today face tight budget constraints due to decreased federal funding and decreased local tax revenue.\footnote{264} The response has been to "stretch the use of exactions to the breaking case, then Government Code § 66001 essentially adds nothing to California's reasonable relationship test for evaluating regulatory takings.

   \footnote{261. In Garrick Dev. Co. v. Hayward Unified Sch. Dist., 4 Cal. Rptr. 2d 897, 907 (Ct. App. 1992), the court of appeal rejected an argument that Government Code § 66001 requires a local agency to present site-specific information when establishing the required nexus between development fees and the development. The court stated that since Government Code § 66001(a) refers to the "type" of development, the statute does not apply to particular projects that are the subject of development fees. *Id.* See also Berwanger et al., *supra* note 27, at 251 ("It does not appear, however, that public agencies have construed [Government Code § 66001] to require the 'individualized,' development-specific analysis mandated by Dolan.").}

   \footnote{262. See *Commercial Builders v. City of Sacramento*, 941 F.2d 872, 876-78 (9th Cir. 1991) (Beezer, J., dissenting), cert. denied, 504 U.S. 931 (1992).}

   \footnote{263. *Id.*}

   \footnote{264. *Id.* at 877. See also William H. Ethier & Howard J. Weiss, *Development Excise Taxes: An Exercise in Cleverness and Imagination*, LAND USE L. & ZONING DIG., Feb. 1990, at 3 ("Municipalities are searching for new means of financing services and capital improvements because of increasing judicial scrutiny and state and federal cutbacks on financial resources.").}
point."\textsuperscript{265} \textit{Ehrlich v. City of Culver City}\textsuperscript{266} stands as a classic example of police power use gone awry.\textsuperscript{267}

b. \textit{The Ehrlich Case}

The developer in \textit{Ehrlich} sought to build thirty deluxe townhouses where a private tennis club and recreational facility stood.\textsuperscript{268} The City of Culver City originally denied the permit application,\textsuperscript{269} but later approved the project, subject to the payment of a $280,000 recreation mitigation fee and a $33,220 in-lieu art fee.\textsuperscript{270}

The Second District Court of Appeal upheld the recreation fee against Ehrlich's takings challenge, stating it was "rationally related" to a governmental purpose.\textsuperscript{271} Here, the purpose was to "mitigate the effect of the loss of land restricted to community recreational use."\textsuperscript{272}

The recreational facility had been privately operated throughout its existence, and it was conceded at trial that the developer was under no duty to operate a recreational facility for the public.\textsuperscript{273} The court of appeal rejected this public-private distinction because "[t]he property was restricted to community recreational facilities."\textsuperscript{274} However, the property in question was zoned commercial, with only a plan for the development of a recreational facility.\textsuperscript{275} Thus, while the

\textsuperscript{265} \textit{Commercial Builders}, 941 F.2d at 877 (Beezer, J., dissenting). Ironically, the original purpose of development exactions was to prevent the problems municipalities faced with developers constructing developments without providing needed public improvements, then leaving the city to pay the bill. See Smith, supra note 45, at 5-6. However, the use of exactions "has been transmuted into a device by which municipalities are shifting to private land developers the cost of facilities and social programs for the general public that local government can no longer afford." \textit{Id.} at 28. \textit{See generally} Ethier & Weiss, supra note 264 (arguing against a new form of land use regulation: development excise taxes).

\textsuperscript{266} 19 Cal. Rptr. 2d 468 (Ct. App. 1993), cert. denied and vacated, 114 S. Ct. 2731 (1994).

\textsuperscript{267} "The \textit{Ehrlich} case illustrates how egregiously 'extortion' has been practiced by land use regulators and sanctioned by the California courts." Kamenar, supra note 138, at 7.

\textsuperscript{268} \textit{Ehrlich}, 19 Cal. Rptr. 2d at 471.

\textsuperscript{269} The denial was based "on the ground that the land-use restrictions provided needed recreational facilities for the City." \textit{Id.}

\textsuperscript{270} \textit{Id. See supra} text accompanying notes 139 & 244-45.

\textsuperscript{271} \textit{Ehrlich}, 19 Cal. Rptr. 2d at 476.

\textsuperscript{272} \textit{Id.} at 475.

\textsuperscript{273} \textit{Id.} at 472.

\textsuperscript{274} \textit{Id.} at 476.

\textsuperscript{275} \textit{Id.} at 471.
property was limited to commercial use, it remains to be seen how a plan to develop a recreational facility forever cast the property into a recreational use, as the court of appeal suggested.

Furthermore, there was conflicting evidence as to the need for a recreational facility. The opinion states that the purpose of the fee was to “mitigate[e] the effect of the loss of land restricted to community recreational use.” While the Ehrlich court pointed to a feasibility study indicating that a considerable demand for recreational facilities did exist, the developers “had been unable to operate the existing facility at a profit over a number of years.” Additionally, the court of appeal observed that “the mitigation fee was not imposed as a condition relating to the development project’s burden on the community for increased community services, such as community recreational facilities.” Both of these findings seriously place into question the need for replacement recreational facilities.

However, in an effort to appease the city, the developer in Ehrlich donated to the city their movable equipment from the tennis club, even agreeing to build four tennis courts for the city in exchange for approval of the development. Nevertheless, the project was still conditioned upon payment of the $280,000 fee.

The trial court saw through the city’s exaction scheme, condemning the recreation fee as “an effort to shift the cost of providing a public benefit to one no more responsible for the need than any other taxpayer.” While the use of eminent domain was a possibility, the trial court noted “the City would then of course have had to pay for the land. Here, instead of taking land for which it would have had to pay, the

276. Ehrlich, 19 Cal. Rptr. 2d at 473-76.
277. Id. at 475.
278. Id. at 473.
279. Id. at 475.
280. Id. at 476. Therefore, the supposed benefit that the developer received from payment of the mitigation fee was not the use of replacement recreational facilities, since the court admitted the project would not place a burden on the community for such facilities. Rather, “[t]he mitigation fee was imposed to compensate the City for the benefit conferred on the developer by the City’s approval of the townhome project . . . .” Id.
281. Ehrlich, 19 Cal. Rptr. 2d at 471.
282. Id.
283. Id. at 472.
City proposes to take not land but money. This is equally impermissible."284

_Ehrlich_ stands as a case study of the common dilemma faced by developers in California. Cash-strapped municipalities, in a commendable effort to provide public services, are increasingly turning toward various nonpossessory development exactions as a source of funding public needs.285 Unfortunately, the situation is approaching extortionate levels. While the developer in _Ehrlich_ chose to fight the city's conditions, that response is the exception, not the norm.286

4. The Typical Developer Response

Professor Babcock has effectively summarized the problem faced by developers when their projects are conditioned with various exactions:

[O]ne can imagine the initial reaction of the "extractee" — outrage. In each case he surely went to his attorney and asked two questions: (1) How long will it take to get a final answer in court if we challenge this condition?; and (2) How much will it cost?

The answers probably were: (1) It will take three to four years, with the possibility of defeat; and (2) It will cost tens if not hundreds of thousands of dollars.

By the time the developer approaches his attorney, he has invested a large sum of front-end money and has a great deal of interest in obtaining a permit. Moreover, he wants the permit immediately. He takes out his pencil, does some calculating, and decides to pay up.287

Certainly, the municipalities who impose various kinds of possessory and regulatory exactions on developers are not oblivious to the financial situation just described. This is what makes their position as permit giver so powerful.288

While certain land use regulations are beneficial to the devel-

284. Id.
285. See supra text accompanying notes 263-65.
286. See discussion infra part IV.E.4.
288. As one commentator noted, "[t]he fact that developers are willing to pay suggests the power of the local government's position, not the reasonableness of the exaction. Though inequitable, it is much cheaper and easier for developers to accept exactions than to challenge the regulations in court." Theodore C. Taub, Exactions, Linkages, and Regulatory Takings: The Developer's Perspective, 20 URB. LAW. 515, 518 (1988).
opment and community alike, increasingly the trend is to extract from private developments funds that primarily benefit the public at large.289 This turn of events runs completely counter to the U.S. Supreme Court's clear command that individuals not bear public burdens on their own.290

V. PROPOSAL

To ensure that land use regulations are applied in a fair and equitable manner, the takings analysis supplied by Nollan and Dolan291 should be applied by California courts and the Ninth Circuit to all takings claims, not just challenges to possessory exactions.

First, in evaluating every kind of takings claim, the essential nexus test should be applied.292 For a land use regulation to be constitutionally valid, an essential nexus between the regulation and the reasons advanced in support of the regulation must be demonstrated.293 Further, the reasons must be so compelling as to justify an outright permit denial.294 Application of the essential nexus test to nonpossessory land use regulations is necessary to keep governmental entities from arbitrarily requiring various dedications and fees which have little or no relation at all to the stated reasons for the regulations. At a minimum, the essential nexus test forces municipalities to substantially relate the proffered regulation to some legitimate state interest. For example, both the floodplain easement and bicycle pathway in Dolan were sufficiently related to legitimate governmental interests, the prevention of flooding and mitigation of traffic, respectively.295

Second, once a solid connection has been established between a land use regulation and its purposes, Dolan's rough proportionality standard should be applied to see if the regulation, be it possessory or regulatory, goes too far.296 Essentially, this test determines whether the land use regulation is

289. See supra text accompanying notes 263-65.
290. See supra text accompanying notes 236-38.
291. See discussion supra parts II.C, II.F.
292. See discussion supra part II.C.2.
293. See discussion supra part II.C.2.
294. See discussion supra part II.C.2.
295. See supra text accompanying notes 162-65.
296. See discussion supra part II.F.2.
proportional, in a rough sense, to the impact that the development project will have on the community.\textsuperscript{297}

The rough proportionality standard will operate to ferret out land use regulations that are disproportionate to the burdens created by the project. This will have the effect of overturning the present California rule that only an indirect relationship need exist between exaction and burden to sustain a land use regulation.\textsuperscript{298} If the burdens created by a specific development are not the main reasons for the exaction, as in the \textit{Grupe} case,\textsuperscript{299} presumably there are other, silent reasons for the exaction. In such a case, no rough proportionality would exist between the condition and the development's impact on the community, because the exaction and the reasons advanced therefor would have little to do with the burden created by the project. In other words, when only an indirect relation between exaction and burden is proffered in an attempt to sustain a land use regulation, the rough proportionality test should operate to invalidate the regulation.

Third, when a governmental entity conditions an individual permit application, the burden should be on the entity to make an individualized determination that the land use regulation is in fact roughly proportional to the impact which the development will have on the community.\textsuperscript{300} This will have the effect of eliminating those regulations that are justified on the basis of generalized findings not particular to the development in question.\textsuperscript{301}

\textsuperscript{297} See discussion supra part II.F.2.
\textsuperscript{298} See discussion supra part II.E.1.
\textsuperscript{299} See supra text accompanying notes 134-37.
\textsuperscript{300} See discussion supra part II.F.3.
\textsuperscript{301} For example, the low-income housing fee in \textit{Commercial Builders} would fail the individualized, rough proportionality determination mandated by \textit{Dolan}. \textit{Compare} \textit{Commercial Builders} v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), cert. denied, 504 U.S. 931 (1992) \textit{with} \textit{Dolan} v. City of Tigard, 114 S. Ct. 2309 (1994). The City of Sacramento made no attempt to show how the particular development in question would aggravate the low-income housing shortage, relying instead on a city-wide consulting firm study that dealt with the low-income housing problem generally. See supra text accompanying notes 104-16, 241-43. For the low-income housing fee to be constitutional, the City of Sacramento would have to demonstrate, quantitatively, that the particular development would actually lead to some measurably increased need for low-income housing. See supra text accompanying note 112. The in-lieu art fee in \textit{Ehrlich} would also be found unconstitutional under \textit{Dolan}'s individualized determination, because Culver City put forth no findings as to how the project in question would impact the arts. See supra text accompanying notes 244-45; see also \textit{Ehrlich} v. City of Culver City, 19 Cal. Rptr. 2d 468 (Ct. App. 1993), cert.
VI. Conclusion

California courts and the Ninth Circuit have interpreted prior U.S. Supreme Court takings cases as applying only to possessory interests in land. The Court's most recent takings case, Dolan v. City of Tigard, raises the question whether California courts and the Ninth Circuit should continue this restrictive approach, or evaluate all takings claims using the Nollan-Dolan tests.

This comment has argued that both possessory and nonpossessory land use regulations should be examined, when challenged, by the essential nexus and rough proportionality tests. Such a rule is necessary to alleviate the extreme deference that California courts and the Ninth Circuit give to governmental entities in imposing nonpossessory land use regulations. The language of Nollan and Dolan, coupled with the Court's command that takings claims require heightened scrutiny, in addition to avoiding the singular funding of public benefits, all dictate that California and the Ninth Circuit abandon the reasonable relationship standard for evaluating regulatory takings.

Adherents to the possessory-regulatory distinction for evaluating takings claims will certainly assault the proposal advanced by this comment as a windfall to developers. While proper application of the essential nexus and rough proportionality tests will certainly operate to screen out exactions of the Ehrlich type, governmental bodies will still be able to condition development permits on the provision of needed infrastructure. However, the more tenuous the connection becomes between the regulation, its stated purpose, and the impact of the development, the greater the chances that the land use regulation will be held unconstitutional.

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granted and vacated, 114 S. Ct. 2731 (1994); Dolan, 114 S. Ct. at 2309. Again, to be constitutional, the city would have to individually determine how the arts would be impacted by approval of a particular project. Sweeping declarations about how urbanization leads to decreased artistic opportunities are hardly enough to constitutionally mandate the payment of tens of thousands of dollars by developers. See supra note 245.

302. See supra text accompanying notes 103-23.
304. See discussion supra parts III, IV.
305. See discussion supra part V.
306. See discussion supra part II.D-E.
307. See discussion supra part IV.
308. See supra text accompanying notes 244-47, 268-86.
Application of the *Nollan-Dolan* analysis\(^{309}\) to all takings claims will return to the development process, and California takings jurisprudence generally, notions of fundamental fairness and reason. The *Nollan-Dolan* analysis proposed by this comment is congruent with the U.S. Constitution and U.S. Supreme Court jurisprudence, and recognizes that private property rights are just as important, in the constitutional sense, as every other civil right that Americans enjoy.

*Jason R. Biggs*

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309. *See discussion supra* parts II.C, II.F.