1-1-1992

Property Rights - The Effect of Nollan v. California Coastal Commission on Land Use Permits: A Proposed Constitutional Analysis

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COMMENTS

PROPERTY RIGHTS—THE EFFECT OF NOLLAN V. CALIFORNIA COASTAL COMMISSION ON LAND USE PERMITS: A PROPOSED CONSTITUTIONAL ANALYSIS

I. INTRODUCTION

The Hilton Hotel chain won permission last night to build a 26-story slab-shaped addition to its Tenderloin operation on the condition that it pay more than $1 million to subsidize low-income housing in the area.¹

There is a fine line between what is considered a taking without just compensation² and what is considered an exercise of valid police power by the government in granting permits for development of real property. No comprehensive analysis exists for determining the constitutionality of government action involving the use of permit conditions that mandate performance of a certain activity as a condition to issuance of a development permit. One frequently imposed condition is the requirement that a developer either build or provide funds for low and moderate-income housing.³ Thus, when property owners wish to develop their property in some specific way, a city may deny a permit to use the property in the desired manner unless the property owner agrees to either build or supply housing. Nollan


³. This comment addresses the very narrow topic of housing as a condition imposed on the issuance of a development permit. There are many other areas of public need that are targeted by the permit process which are not addressed in this comment: providing garages or parking facilities, parks, day care centers, transit facilities, etc. Although not addressed here, the proposed analysis set forth in this comment would be substantially the same when applied to these other areas, with some minor modifications to account for the specific needs of each condition.
v. California Coastal Commission may have changed the analysis to be applied in addressing the constitutionality of this practice.

While the community may clearly compel land owners to bear costs they impose on the community, there is a temptation to use permit conditions to impose burdens on property owners that should be borne by the public. This is objectionable if the result of such a practice requires that property owners wishing to obtain permit approval are required to pay more for public services than those similarly situated (i.e., pay a higher tax). However, because the profitability of any particular project is so closely linked to immediate construction (and because of the high costs of litigation), there have been few challenges to these conditions, even those that were apparently unconstitutional. Furthermore, because courts have traditionally given great deference to government action by applying the rational basis analysis in this area, there is little guarantee of success even if the condition is challenged. To ensure property owners due

4. 483 U.S. 825 (1987); see infra notes 70-87 and accompanying text for discussion of Nollan.

5. The issue of whether linkage ordinances, see discussion infra part II.B.3, are constitutional recently worked its way through the federal courts. Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), cert. denied, 112 S. Ct. 1997 (1992). In August 1991, the Ninth Circuit Court of Appeals, in a split decision, upheld the constitutionality of Sacramento’s linkage fees on commercial development to pay for affordable housing. Id. This case was considered the first important test of developer fees and exactions since Nollan. The United States Supreme Court recently denied certiorari. However, the issue continues to be hotly debated and further challenges to the constitutionality of this practice are expected.

6. The regressive nature of this unequal burden does not stop with the owner of the land. A developer of property will surely pass on the cost of the condition to future buyers and tenants of the property. Although this spreads the cost to a larger section of the population, it still places an unequal burden on some that should be borne by all. “The government may not seek to impose fees and conditions on the development process merely because the developer needs a permit and the public sector needs an unrelated public project.” John L. Jacobus, Constitutional Law: Eminent Domain and Conditional Grants of Building Permits—Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987), 11 HARV. J.L. & PUB. POL’Y 265, 271 (1988).


8. It has been argued that so-called “Development Agreements” are voluntary in nature and, therefore, do not warrant a cause of action. However, because of the unequal bargaining power between the government (which has complete control over zoning and permit issuance) and the developer (who must either accept the condition or be denied the permit), others believe that those who submit to such an agreement may also be unprotected. See Crew, supra note 7, at 53; Jerold S. Kayden & Robert Pollard, Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing, 50 LAW & CONTEMP. PROBS. 127 (1987). But see Board of County Supervisors v. Sie-Gray Developers,
process of law when permit issuance is conditioned on performance of a certain activity, a specific and defined analysis is needed.9

In 1987, the United States Supreme Court opened the door to a reevaluation of land use regulations when it decided Nollan v. California Coastal Commission.10 The main impact of Nollan is in the area of eminent domain, which occurs when the government takes or uses private property for public purposes.11 The Nollan Court, which invalidated a permit condition that was not related to the purpose for the condition, slightly raised the level of scrutiny to be applied in cases of eminent domain.12

A broader reading of Nollan, however, may reveal indications by the Court that due process and equal protection18 analysis should also be heightened (or at least specifically defined) when a permit condition mandates that a certain activity take place off the property. This would occur when a developer is required to build housing at another location or pay in-lieu fees for housing built at another location.14 The Nollan decision may be a message to the lower courts to begin a reevaluation of land use regulation standards.16

The purpose of this comment is to: (1) discuss reasons why the existing level of low and moderate-income housing has decreased in recent years; (2) discuss how municipalities have attempted to allevi-
ate this problem through the use of conditional permits;\(^{16}\) (3) outline a proposed basic analysis for determining the constitutionality of permit conditions; and (4) apply the analysis to hypothetical situations.

The basis for the proposed analysis is that *Nollan* reveals the Supreme Court's dissatisfaction with current judicial analysis as applied to conditional permits. The *Nollan* Court specifically defined what the analysis should be when the condition requires physical occupation of the land.\(^{17}\) This comment describes what constitutional review would look like if the Supreme Court decided to apply the same analysis to situations where the conditions imposed on permit issuance did not require physical invasion, but mandated some activity off the property.

It is not the purpose of this comment to completely re-define due process analysis. Due process analysis has remained unchanged since the 1930's, when a series of cases ended the *Lochner* era of judicial lawmaking.\(^{18}\) The Court has since been reluctant to impose its views on state regulating bodies. From a political and historical perspective, any change in due process analysis would have far-reaching ramifications. The proposed analysis merely tries to bring order and cohesion to an area of law that, prior to *Nollan*, had no ordered analysis.

II. Background

A. Cuts in Federal Housing and California's Proposition 13

Historically, housing projects were financed through a combination of long-term debt financing, federal grants, and property taxes. One reason that cities have recently increased the use of conditional permits for funding public housing is that there have been drastic changes in housing finance programs and in the state's tax structure. Historical sources of money for public projects are no longer

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16. For purposes of this comment, “conditional permit” refers to a development permit, the issuance of which is conditioned on a mandate that the developer either perform or pay in-lieu fees toward some public activity.

17. See infra notes 90-95 and accompanying text.

18. In *Lochner v. New York*, the Court held that there had to be a real and substantial relationship between a statute and the goals that it wished to serve. 198 U.S. 45 (1905). The case was criticized over the next thirty years as impermissible judicial lawmaking. See *Rotunda et al., 2 Treatise on Constitutional Law Substance and Procedure* § 15.3 (1986). In the 1930's, a series of cases cut back this high level of analysis to one of rational basis, which required only that "the law shall not be unreasonable, arbitrary or capricious." *Nebbia v. New York*, 291 U.S. 502 (1934); *see also* United States v. Carolene Prods. Co., 304 U.S. 144 (1938); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
available.

During the Reagan Administration (1981-88), federal housing programs were cut by over 70%. This has affected city planning in two direct ways. First, there has been a drastic cut in the amount of federal money available to cities for their housing programs. Second, as the existing stock of public housing is taken off the market (and no new units are put back on the market), affordable housing moves outside the reach of the poor. Cities are faced with a decreasing number of housing units, a decreasing amount of money, and an increasing need for funds to accommodate an increasing demand for public services.

On top of this, California has been faced with other internal problems that have made it extremely difficult for cities to collect the funds needed to address housing problems. On June 6, 1978, California voters passed through the initiative process Proposition 13, known as the Jarvis-Gann Initiative. The law imposed new tax and expenditure limitations that have resulted in less funds for housing projects. The initiative had the effect of "severely restricting the ability of local government to finance additional activities and in some cases [has] made it necessary to significantly reduce local public spending and services."

The effect of reduced federal funds and state tax limitations is that municipalities must look to alternative means of finance to continue many city programs. Increasingly through the 1980's, cities, especially in California, have begun to use conditional permits as a way to fund these projects.

B. Types of Housing Conditions Placed on Developers

There are basically three ways that cities have placed conditions on the issuance of a development permit: exactions, impact fees and linkage.
1. Exactions

Exactions have been the most common type of condition placed on developments. The term refers to techniques "employed by local authorities to compel a developer, either by regulation, negotiation, or simple leverage, to exchange land, money, materials, or services for permission to develop." Exactions can be either on-site or off-site. On-site exactions include improvements on the land such as sewers, water mains, sidewalks, gas and electrical systems, and parks. These exactions are generally not controversial because they usually are closely tied to a need that directly arises from the impact of the project.

Off-site exactions are more controversial because they require improvements located off the property. These may include upgrading or supplying public facilities such as roads, schools and sewage treatment plants, which have received additional pressures as a result of the project.

2. Impact Fees

The second type of condition is impact fees. Instead of actually providing a particular service, developers pay fees determined by formula that apply to all new developments. Cities justify these fees because, theoretically, they are used to cover costs directly resulting from the project.

Shortly after the passage of Proposition 13, cities started using impact and special assessment fees as a way of funding projects historically paid for by general revenues. The problem with impact fees is that because they are determined by formula, it is very difficult to know if the fees are being used to finance something created by the project's impact or used to fund standard public projects not necessitated by the project's impact. Such fees are often based not on

Subdivision Exactions, User Impact Fees and Linkage, 50 LAW & CONTEMP. PROBS. 139, 139-45 (1987).
25. See Crew, supra note 7, at 24-25.
26. Siemon, supra note 7, at 115 n.2.
28. Delaney et al., supra note 24, at 139.
30. Crew, supra note 7, at 24; Smith, supra note 27, at 7.
31. Crew, supra note 7, at 25.
32. Crew, supra note 7, at 25.
33. Fulton, supra note 22, at 38.
any impact on the community, but rather on the direct "benefit" conferred on the property from the fee expenditures. However, courts have approved of these impact and assessment fees in California and have held that they do not constitute an invalid tax. In fact, a San Diego fee ordinance was found to be valid even though it "did not take into account the location of an assessed parcel with respect to any particular improvement."  

3. Linkage

The most recent form of exaction developed by cities is linkage, an extension of the impact fee concept. It is often used to promote social programs and policies. Linkage ties the right to a permit to a certain activity. For example, a city might link the right of a permit for commercial or residential development to the construction or financing of new housing. Large cities, including San Francisco and Boston, were the first to develop these ordinances, but smaller cities were quick to follow.

The problem with linkage ordinances, similar to the problem with impact fees, is that the requirements are "imposed to offset the increased housing demand that . . . developments presumably would generate." Because certain assumptions are made in calculating this hypothetical need (and not calculated on a case-by-case basis), there is a question as to whether these fees are being constitutionally

34. Smith, supra note 27, at 20-22.
35. E.g., Solvang Mun. Improvement Dist. v. Board of Supervisors, 169 Cal. Rptr. 391 (Ct. App. 1980). The court specifically found that such fees are not a tax and therefore do not come within the tax limitations (mandated by Proposition 13) on ad valorem real property taxes imposed under Article XIII A of the California Constitution. Id. at 394-98.
37. Smith, supra note 27, at 25.
38. Delaney et al., supra note 24, at 140; Kayden & Pollard, supra note 8, at 128-29.
40. Smith, supra note 27, at 25.
43. Palo Alto, California has a typical linkage ordinance. PALO ALTO, CAL., CHARTER AND MUNICIPAL CODE ch. 16.47 (1984); CITY OF PALO ALTO, HOUSING ELEMENT OF THE COMPREHENSIVE PLAN 1985-2000, PROGRAM 12 (1984). For industrial and commercial developments, Palo Alto has developed a formula that is based on the "approximation of the amount of housing necessary" to satisfy the demand created by the average commercial or industrial development. Ch. 16.47. For residential developments, the builder is given an option to: (1) make ten percent of the units available at below market rate; (2) provide one off-site below market rate unit for each nine units developed; or (3) pay an in-lieu fee calculated at three percent of the market value of the completed project. CITY OF PALO ALTO, supra.
44. Smith, supra note 27, at 25 (emphasis added).
imposed.

To justify the permit condition, these three restrictions require different levels of impact on the community. Exactions by their very nature require a close connection between the impact of the project and the imposed condition. However, because of the hypothetical nature of impact fees and linkage, the imposed condition *may or may not* be connected to the project's impact on the community. Because of this, some impact fee and linkage ordinances may be constitutionally invalid after *Nollan*. 46

C. Eminent Domain, Zoning and the Imposition of Conditions—Analysis and Limitations

1. Eminent Domain

States have the constitutional power to take and use private land for public purposes, provided they pay just compensation. 46 Eminent domain cases fall into two broad categories: (1) trespassory cases and (2) regulatory cases. First, when a state physically trespasses on land to administer its public purpose, as is the case when there is actual condemnation (taking of title) or physical occupation, there is a “takings per se.” 47 There is no balancing of the public interest against the severity of the loss to determine if compensation should be paid. 48 Due to the actual physical entry onto the land, compensation must be made.

Second, when the state regulates land use, but does not physically occupy or condemn the property, it may still be required to pay compensation if a regulatory taking is found. The United States Supreme Court has given the states great deference in regulating activity on property. 49 The Court generally uses a balancing test (balancing the value to the public against the private harm occasioned by the regulation) when determining whether a taking has occurred. When the public value is greater than the private harm, regulations on land are generally valid notwithstanding a lack of payment of compensation. 50 For example, any regulatory nuisance control mea-

45. *See infra* notes 139-46 and accompanying text.
46. *See supra* note 2.
47. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (running of a cable along the roofs of neighborhood buildings is a takings per se).
48. *Id.* at 434-35.
49. *See infra* notes 57-62 and accompanying text.
sure is seen to be within a state's police power and not a taking, because the value to the public strongly outweighs the private harm.\textsuperscript{51} Although a taking is found when regulations have gone too far,\textsuperscript{52} courts have been reluctant to invalidate state action. Regulations have been validated as constitutional police power so long as they do not destroy an owner’s “reasonable investment-backed expectations” or deny an “economically viable use” of the land.\textsuperscript{53} Courts have read this broadly to mean that where there is any economic use left (no matter how diminished), a taking will not be found.\textsuperscript{54}

States are limited in their ability to assert the power of eminent domain to actions that substantially advance a legitimate state interest.\textsuperscript{55} The level of scrutiny applied is one of intermediate scrutiny requiring that the state has a legitimate state interest and that the means (taking of property) are substantially related to the end. As will be discussed below, courts, while stating that they are applying intermediate scrutiny, traditionally have given states much more de-

\begin{itemize}
\item[51.] See, e.g., Hadacheck v. Sebastian, 239 U.S. 394 (1915) (holding that the public interest in a healthy environment outweighs the private interest of plaintiff to operate a brick kiln, notwithstanding the fact that he was in the neighborhood first); Miller v. Schoene, 276 U.S. 272 (1928) (holding that the destruction of cedar trees was not a taking because the survival of apple trees, vital to the local economy, was more important than a private interest in infested cedar trees.
\item[52.] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). An issue that was recently resolved was the question of whether a government must pay just compensation for a temporary taking when an ordinance has gone too far and is invalidated. The idea was proposed in dictum in Goldblatt v. Hempstead, 369 U.S. 590 (1962). The Goldblatt Court stated: “That is not to say . . . that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation.” \textit{Id.} at 594. The modern Court again discussed the idea in San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981). Justice Brennan’s dissent proposed that “once a court finds that a police power regulation has effected a ‘taking,’ the government entity must pay just compensation for the period commencing on the date the regulation first effected the ‘taking,’ and ending on the date the government entity chooses to rescind or otherwise amend the regulation.” \textit{Id.} at 658. The Court finally resolved the issue in 1987 and held that a government that enacts a regulation which constitutes a taking must pay just compensation notwithstanding its temporary nature.
\item[54.] \textit{See id.} at 124-27; \textit{see also} Keystone Bituminous Coal Ass’n. v. DeBenedictis, 480 U.S. 470 (1987). The Keystone Court stated: “[W]here an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking because the aggregate must be viewed in its entirety.” \textit{Id.} at 497 (quoting Andrus v. Allard, 444 U.S. 51, 65-66 (1979)).
\item[55.] Nollan v. California Coastal Comm’n, 483 U.S. 825, 841 (1987).
\end{itemize}
ference than intermediate scrutiny analysis warrants.56

2. Zoning

Zoning is a justified police power of the state.57 States may grant to cities and counties the right to zone through enabling statutes.58 The ability to zone allows a city to designate certain parts of the city for certain uses (e.g., industrial, commercial, and residential). It is a powerful tool for a city because it allows for the control of development in light of present needs and future desires.

Because zoning imposes controls on a broad portion of the city, and usually not on individual land owners, courts review zoning plans with less scrutiny than plans to take land through eminent domain. However, due process places some minimal limits on a state’s police power. It requires that the zoning power of the government be exercised in a fundamentally fair fashion.59 Cities are given great deference and are allowed broad power to zone.60 So long as the ordinance reasonably relates to a legitimate state interest, it will be presumed valid.61 This low level of scrutiny is known as rational basis analysis.

Zoning issues are important in examining conditional permits because it is through this power to zone that a city gains its leverage to place a condition on a particular permit. The city, in granting a permit, often waives a certain zoning requirement in exchange for the performance of the condition. If there were no zoning problem, then the developer would not need a waiver; he would only need to comply with safety and construction codes. Because of this broad

56. See infra notes 88-89 and accompanying text.
57. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The Court discussed that zoning ordinances “find their justification in some aspect of the police power, asserted for the public welfare.” Id. at 387.
58. E.g., CAL. GOV’T CODE §§ 65800-65912 (West 1983 & Supp. 1992). A typical enabling statute might state: “Any municipality is hereby authorized and empowered to make, adopt, amend, extend, add to, or carry out a municipal plan as provided in this act and create by ordinance a planning commission with the powers and duties herein set forth.” DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 26 (3d ed. 1990).
60. Cities rarely give reasons for particular zoning decisions. When challenged, the city must then, in post hoc fashion, articulate sufficient reasons for the ordinance. The problem with this system is that with the ability of hindsight the city may rationalize the ordinance to fit the reason for the condition, even though it may not have been the real reason for the ordinance. See infra notes 88-89, 149 and accompanying text.
61. Crew, supra note 7, at 41.
power, localities may have an incentive to over-zone as a way of extorting conditions from developers.\textsuperscript{62}

3. \textit{Conditions on Development Permits}

State powers of eminent domain are limited to acts that substantially advance legitimate state interests, and zoning ordinances are limited to acts that reasonably relate to the public welfare. However, courts have been inconsistent in what limits should be placed on municipalities when they place conditions on a land owner seeking a development permit.\textsuperscript{63}

A minority of states have used the "specifically and uniquely attributable test," which requires a cause and effect analysis.\textsuperscript{64} This test requires that there be a "spatial proximity between the improvement and the property, a correlation between the cost and the provable benefit, and an improvement capable of being exactly financed or proportioned."\textsuperscript{65} This test is similar to the intermediate level of scrutiny applied in eminent domain cases. However, this high level of scrutiny is atypical for conditional permit cases.

Most states employ the "reasonable relationship test."\textsuperscript{66} California state courts, especially, have been deferential to state interests. This test requires only that the condition imposed be "reasonably related" to the proposed development.\textsuperscript{67} There is a presumption that the state has valid reasons to impose conditions and it will only be found invalid if completely arbitrary to the proposed project.\textsuperscript{68} Furthermore, California courts have upheld state development conditions that are reasonably based not only on present needs, but also on presumed future needs.\textsuperscript{69} This test is closer to the rational basis analysis applied in zoning cases.

Although different tests have been applied by lower federal and

\begin{itemize}
  \item \textsuperscript{62} The \textit{Nollan} Court stated, in view of the actual conveyance of property as a condition for the lifting of a restriction, that there is a "heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." \textit{Nollan v. California Coastal Comm'n}, 483 U.S 825, 841 (1987); \textit{see also infra} note 128.
  \item \textsuperscript{63} \textit{Delaney} et al., \textit{supra} note 24, at 148-56.
  \item \textsuperscript{64} \textit{Delaney} et al., \textit{supra} note 24, at 149-50.
  \item \textsuperscript{65} \textit{Holmes v. Planning Bd.}, 433 N.Y.S.2d 587, 598 (App. Div. 1980) ("Thus, the need alleviated must be created solely by the application and the benefit derived must accrue solely to the assessed property.").
  \item \textsuperscript{66} \textit{Delaney} et al., \textit{supra} note 24, at 148; \textit{see also} Kayden & Pollard, \textit{supra} note 8, at 127.
  \item \textsuperscript{67} \textit{Ayres v. City Council}, 207 P.2d 1, 8 (Cal. 1949).
  \item \textsuperscript{68} \textit{Id.}
  \item \textsuperscript{69} \textit{Associated Home Builders v. City of Walnut Creek}, 484 P.2d 606, 614 (Cal. 1971), \textit{appeal dismissed}, 404 U.S. 878 (1971).
\end{itemize}
state courts when conditions are applied to land use permits, the United States Supreme Court had not indicated what test was appropriate until Nollan.

D. Nollan v. California Coastal Commission

At a time when the number of conditional permits was increasing drastically and the courts were giving decision-makers extreme deference, the United States Supreme Court granted review and issued an opinion in Nollan v. California Coastal Commission. The Nollans owned a parcel of beach front property in Ventura County, California. They wished to replace a small bungalow on the property with a house, which required that they obtain a permit from the California Coastal Commission. The Nollans' property was bordered on each side by public beaches. The Commission was concerned that the private Nollan land prohibited access to the two public beaches. Therefore, the Commission granted the building permit on the condition that the Nollans grant an easement across their property to allow the public "to pass across a portion of the property bounded by the mean high tide line on one side, and their seawall on the other side."

The Nollans challenged the condition arguing that the "condition could not be imposed absent evidence that their proposed development would have a direct adverse impact on public access to the beach." The Commission argued that the easement was needed to assist the public in overcoming a "psychological barrier" created by the shorefront property inhibiting the public view and access to the beach. The Court agreed with the Nollans that the permit condition constituted an impermissible taking. In the opinion, the Justices appear to lower the level of deference given to the state and raise the level of scrutiny used in takings analysis.

The Scalia majority first reasoned that if the Commission had required the Nollans to grant an easement, rather than condition the permit on their agreeing to do so, "we have no doubt there would

71. Id. at 827.
72. Id. at 828. Under the permit system, the Nollans were required to obtain a permit from the Coastal Commission before they could legally build on the property. Id.
73. Id. at 827.
74. Nollan, 483 U.S. at 828.
75. Id.
76. Id. at 835.
77. Id. at 831.
78. See infra notes 90-95 and accompanying text.
land use permits

have been a taking.” Even though no particular person or object would be stationed permanently on the Nollans’ property, the Court found that a public easement was a “permanent physical occupation” based on the public’s right to continuously occupy. This constituted a “takings per se.”

The Court stated that although certain conditions can validly be placed on the issuance of a permit, that ability disappears if the condition “utterly fails to further the end advanced as the justification for the prohibition.” The Court discussed this through development of a substantial nexus requirement: a nexus must exist between the condition imposed (means) and the purpose for the imposition (ends). It found the required nexus lacking in this case. Accordingly, an unrelated condition is invalid even if a legitimate state interest is found.

The Court concluded that a condition would be valid only when the party imposing the condition could have denied the permit based on the same objective that the regulation was imposed. The Court stated that “unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but ‘an out and out plan of extortion.’” The Court reasoned that because the granting of an ease-

79. Nollan, 483 U.S at 831. The Court came to this determination based on the rule in Loretto that a permanent physical invasion is a takings per se. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S 419, 432-33 (1982).
80. The Nollan Court stated:
We think a “permanent physical occupation” has occurred, for the purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.
83. The Court stated that “the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was.”
84. Id.
85. Id. The Justices split 5-4 in Nollan. The dissent argued that the Coastal Commission could have denied permission to build due to lack of public access between the two beaches and that regulating agencies will have little difficulty overcoming the new standard in the future. Justice Brennan stated: “With respect to the permit condition program in general, the Commission should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access produced by new development.” Id. at 862 (Brennan, J., dissenting). Two of the dissenters in Nollan, Justices William Brennan and Thurgood Marshall, have since retired.
86. Nollan, 483 U.S at 837 (emphasis added) (citations omitted).
ment was not even rationally related to the government interest in restricting development (which was to increase the ability of people to see the public beach and to reduce "psychological barriers" in using the beach) it was not in the government's land use power to condition the Nollans' permit for any of these purposes. In other words, a permit condition that does not secure purposes related to the permit requirement is invalid.

III. Issues

In examining the constitutionality of conditional permits, two key issues must be resolved. First, what is the standard to be applied in takings claims? And second, what is the relationship between takings and due process claims?

One problem with the conditional permit system is that mandating a property owner to do some task as a condition to a certain use may have a greater impact on the value and use of the property than an actual physical taking. Yet when challenged, a claim that the condition imposed is unconstitutional traditionally warrants a lower level of scrutiny. For example, it has been held that the running of a cable along a property owner's roof is a trespassory taking. Surely, there is no great private harm or loss of use in this situation. On the other hand, a linkage ordinance that requires a land owner to pay money to use his property in a certain way (regardless of impact) creates an inhibition on use of the property and may significantly decrease the value of the land (due to the restriction on use). However, while the former requires intermediate takings scrutiny and just compensation, the latter only receives rational basis due process scrutiny and does not warrant compensation. The two outcomes are inconsistent in light of the inter-relationship of the issues. Nollan provides important guidance on both issues.

IV. Analysis of Nollan

A. The Supreme Court Is Serious About the Application of Intermediate Scrutiny in Takings Cases

With respect to the standard to be applied in takings cases, Nollan...
mandates the use of intermediate scrutiny, rejecting use of a rational basis due process test favored by the dissent. In reaffirming an intermediate scrutiny standard with some genuine rigor in its analysis, the Court attempts to clarify the confusion in the lower courts, unequivocally rejecting the lesser standard favored in some earlier cases.

The Supreme Court could have reversed the California Court of Appeal's decision validating the condition summarily by stating that the proposed condition does not even pass the lowest level of scrutiny. In fact, the majority stated in reference to the fit between the condition and the burden: "[W]e find that this case does not meet even the most untailored standards." That alone is basis for reversal, yet the Supreme Court did not stop there. It continued and explained in detail the proper analysis for takings cases. Furthermore, the Court seemed more concerned about conditional permit abuse than it did with traditional questions of takings analysis. These are indications that the Supreme Court is unhappy with what lower courts are doing. The Court is using Nollan as a tool to convey its message that the proper test in takings cases is true intermediate scrutiny and that conditions which lack a sufficient nexus to the purpose of the ordinance should be declared unconstitutional.

B. Indications in Nollan that the Supreme Court May Be Moving Toward a Higher Level of Scrutiny in Due Process Cases Concerning Property Rights and Conditional Use

The Nollan opinion suggests that a higher level of scrutiny may also be appropriate in at least some due process cases. Takings analysis and due process analysis are closely tied together. Many believe that they are so intertwined that before one even gets to the takings analysis, the state must first pass due process analysis. Nollan may be the first step by the Court in carving out stronger

90. Justice Brennan stated in dissent: "It is also by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State could rationally have decided that the measure adopted might achieve the State's objective." Nollan, 483 U.S. at 843 (Brennan, J., dissenting) (citations omitted).
91. Id. at 838.
92. See infra notes 101-09 and accompanying text.
94. Application of true intermediate scrutiny means that the Court will no longer allow lower courts to state that they are applying intermediate scrutiny while at the same time allowing the analysis to slip closer and closer to that of rational basis.
95. See infra notes 96-120 and accompanying text.
96. Wiseman, supra note 50, at 440-41.
rights for property owners. If the Court intends to provide greater protection to property owners in the future, it can only do so by addressing both takings and due process. A close look at the opinion in *Nollan* shows that the Court may be headed in this direction.

1. *Importance of Property Rights*

In *Nollan*, the majority stated:

We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our 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.97

The Fifth Amendment has two property clauses. One guarantees that an individual will not be deprived of property without due process of law; the other guarantees that property shall not be taken for public use without just compensation.98 Both guarantees apply to state action through the Fourteenth Amendment. The former clause is specifically found in the Fourteenth Amendment; the latter clause is applied to the states through the Fourteenth Amendment Due Process Clause.99

While the third sentence of the *Nollan* passage above is surely directed at the latter guarantee, the first two sentences could be applied to either one. The qualification in the third sentence ("[we] are inclined to be particularly careful . . . where the actual conveyance of property is made a condition to the lifting of a land-use restriction")100 suggests that the first two sentences apply to more than just eminent domain cases. This shows the concern of the Court that when a state exercises its police power over use of land, and thus abridges individual property rights, it must be to substantially advance a legitimate state interest; mere rational basis is not enough.

If the Court is concerned with the state abusing its police power

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97. *Nollan*, 483 U.S. at 841.
98. U.S. CONST. amend. V.
99. U.S. CONST. amend. XIV, § 1; *see supra* note 2.
100. *Nollan*, 483 U.S. at 841.
to avoid the compensation requirement of the takings clause, it must be concerned about abridgment of property rights when the police power is abused in a way that affects the value and use of land (i.e., in cases where no conveyance occurs). The potential for abuse in the conditional permit system is much greater in the latter case because such claims traditionally have received a lower level of judicial scrutiny. Furthermore, because the police power regulation does not physically invade the property, the injury is less tangible and property owners have a more difficult time challenging the state action.

2. Nexus Requirement

The Scalia opinion stated that in order to pass the true intermediate level of judicial scrutiny, there had to be a "nexus" between the condition imposed and the legitimate state interest. By way of demonstration, the Court gave a hypothetical situation where the Coastal Commission could have legitimately conditioned the Nollans' building permit. The Court stated that if the concern was the ability of the public to see the beach, then the Commission could have mandated that the Nollans provide a viewing platform, because that condition would serve the same government purpose as the development ban. The Court stated:

Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end.

The Court stated that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation." Any unrelated condition, even where there is a legitimate state interest, is inadequate to support the constitutionality of the condition.

What the nexus requirement really means is subject to interpre-

101. Id. at 837.
102. Id. at 836 (emphasis added). The Court went on to state: "If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not." Id. at 836-37.
103. Id. at 837 (emphasis added).
104. Nollan, 483 U.S. at 837.
tion. The Court does not give a concise definition or rule for applying this new standard. At the very least it seems to "require some relationship between the effects of the land use proposed by the owner and the exaction imposed by the state." 108

The message that emerges from Nollan is that even where the state has a legitimate interest, conditions cannot be placed on the issuance of a permit if the permit could not be denied for the same reason. In other words, a condition can only be placed on a permit when the governing body would have a right to deny the permit outright for the same reason it is requiring the condition. 108 For example, if a property owner was asked to provide public housing because of a demonstrated impact his development will have on housing, the condition to supply housing would be constitutional under Nollan because the governing body could have denied the permit outright. However, if there was a pre-existing need for public housing in the community (thus establishing a legitimate state interest), a permit condition should not be imposed on a property owner to supply that housing unless the development specifically contributed to the need. If the development did not contribute to the need, a condition to supply housing should be held unconstitutional under Nollan because the permit could not have been legitimately denied for that reason. 107

This analysis requires a tighter fit between the permit condition and the government interests because the condition must further the same "end advanced as justification for the prohibition." 108 It also means that because of the risk of abuse, less deference will be given to government decisions and there will be more of a search for the real government objective. 108 If the Court is serious about raising the level of scrutiny in property rights cases, this same analysis should be applied in cases that do not involve physical invasion.

3. The Meaning of Footnote Four

Footnote four of the Nollan opinion states:

If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had

106. Crew, supra note 7, at 32.
107. See infra part V.
108. Nollan, 483 U.S. at 837.
109. Id. at 840-42.
not contributed to it more than other coastal landowners, the State’s action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause.\footnote{Id. at 835 n.4.}

Since the Nollans did not make an equal protection claim, the Court did not address the issue.\footnote{Id.} But the note is important in that it shows that the Court is willing to hear other arguments in determining the outcome of cases that have been traditionally decided solely on a takings ground.

Equal protection and due process guarantees are closely related. Equal protection guarantees that laws will not impermissibly classify so that people who should be treated the same are treated differently. Due process guarantees against the arbitrary exercise of government power. The analysis for these two constitutional guarantees is basically the same. Both warrant deferential rational relationship scrutiny when dealing with social and economic issues\footnote{For an Equal Protection case see Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450 (1988). For a Due Process case see Nebbia v. New York, 291 U.S. 502 (1934). The Nebbia Court stated: “[D]ue process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained.” Id. at 525.} and strict scrutiny when a fundamental right is involved.\footnote{For an Equal Protection case see Shapiro v. Thompson, 394 U.S. 618 (1969) (constitutional fundamental right to interstate migration). For Due Process cases see Griswold v. Connecticut, 381 U.S. 479 (1965) and Roe v. Wade, 410 U.S. 113 (1973).} Property rights have never been held to be a fundamental right.

The fourth footnote, read in light of the rest of the opinion, suggests that the Court may be less deferential to government decisions when property rights are at issue. If the Court is willing to look at property rights differently in equal protection cases, it should apply a similar standard in due process cases. Since that was not an issue in the case, the Court went no further than to identify it as another possible constitutional challenge. This suggests that the Court is willing to see some changes in property rights cases.

4. Response to Brennan Dissent

Justice Brennan stated that because this case involves a “mere restriction on its use,”\footnote{Nollan, 483 U.S. at 848 n.3 (Brennan, J., dissenting) (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981)).} the “State’s exercise of its police power demands only that the State ‘could rationally have decided’ that the
measure adopted might achieve the State’s objective.” He applied the traditional due process analysis requiring rational basis review.

The majority responded: “To say that the appropriation of a public easement across a landowner’s premises does not constitute the taking of a property interest but rather... ‘a mere restriction on its use,’ is to use words in a manner that deprives them of all their ordinary meaning.” This shows that the majority was not willing to allow deviation from true intermediate scrutiny just by claiming analysis under another constitutional guarantee. Although the majority did state that the opinion does not establish that the standard for takings cases is the same as for due process or equal protection claims, the response to Justice Brennan suggests that at least it will apply the highest level of scrutiny available.

Justice Brennan also argued that the decision does not change the level of scrutiny at all. He argued that the Commission “should have little difficulty in the future... demonstrate[ing] a specific connection between provisions for access and burdens on access.” However, the Scalia majority disagreed with Justice Brennan. Justice Scalia reemphasized the level of review “for abridgment of property rights through the police power as a ‘substantial advanc[ing]’ of a legitimate state interest.” When the rights being allegedly infringed upon are property rights, Justice Scalia stated that courts should look particularly closely to make sure that the condition imposed really does substantially advance a legitimate state interest.

115. Id. at 843 (Brennan, J., dissenting) (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981)).
116. Id. at 831 (citation omitted).
117. Id. at 834 n.3. The Court stated: “[O]ur opinions do not establish that these standards are the same as those applied to due process and equal protection claims.” Id. The Court did not address whether a higher level of scrutiny may be available when the issue is not whether there is a taking, but whether a condition placed on a development permit violates due process (in which case the intermediate level of scrutiny applied in takings cases may not be available). It is the purpose of this comment to suggest that the two situations warrant application of similar scrutiny.
118. Nollan, 483 U.S. at 862 (Brennan, J., dissenting). Justice Brennan also argued that the traditional level of review in police power cases was rational relation. He believed that the Commission had satisfied this level, since the condition was rationally related to the Commission’s objective. Id. at 843 (Brennan, J., dissenting).
119. Id. at 841.
120. The Court stated:
We are inclined to be particularly careful about the adjective [substantial] where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement, rather than the state police power objective.
These concerns stated by the Nollan Court indicate sympathy for a strengthened due process standard in conditional permit cases.

V. PROPOSED ANALYSIS

Because of the lack of consensus and differing views among the courts as to what analysis should be applied for challenges to permit conditions, there is a need for an ordered, structured analysis. I propose that when a condition is placed on a development permit, it must pass the following six-part analysis to be valid. The proposed analysis is designed to be applied only when there is a condition placed on a development permit. Subpart 1 comes from traditional due process analysis. Subparts 2, 3 and 4 are designed in light of indications in Nollan that the current Supreme Court may be moving toward greater protection of property rights in cases of conditional permits. Subparts 5 and 6 are from traditional takings analysis.

As stated above, the proposed analysis is intended to show what constitutional review would look like if the Nollan principles were applied. It does not take into account the many philosophical and political questions that such a change would raise.

A. Proposed Basic Analysis For Permit Conditions

Part I—Due Process Analysis for Conditions Placed on Development Permits

Subpart 1—Legitimate State Interest: Does the government have a legitimate state interest?
—If no, the condition is invalid.
—If yes, go on to Subpart 2.

Subpart 2—Substantial Relationship/Nexus: Could the government sustain an outright denial of the permit based on the "same" reason the condition was imposed?

121. One reason that warrants this higher level of scrutiny is the threat of government abuse if the lower level of scrutiny was applied. See supra note 120; infra note 128 and part VI.B. The proposed analysis is not designed to be applied in other due process claims concerning land use. The approach used here (separating due process and takings issues) is similar to that taken by Professor Wiseman. Wiseman, supra note 50, at 440-41. However, Professor Wiseman's analysis applies only to traditional takings claims and does not address the issue of permit conditions. The six-part proposed analysis in the text is designed to do so.

122. See supra part IV.B.

123. See supra part I. Note that the Nollan majority does not specifically state that this stricter analysis is warranted in due process cases. The proposed analysis is the author's advocacy of a possible next step given the Court's increased concern for property rights.

124. This Subpart is designed with reference to the "nexus" requirement outlined by
If no, the condition is invalid.

If yes, go on to Subpart 3.

Subpart 3—Reasonable Ordinance: If the reason for justified permit denial in Subpart 2 is a zoning ordinance, is such ordinance reasonable in its inception and does the condition imposed on the land owner serve the same governmental purpose as the ordinance or development ban?

If no, go on to Subpart 4.

If yes, the condition is VALID, STOP.126

Subpart 4—Impact: Is the reason for justified permit denial in Subpart 2 based on the specific impact the proposed development will have on the community?

If no, the condition is invalid.

If yes, go on to Subpart 5.

Part 2—Takings Analysis for Conditions Placed on Development Permits

Subpart 5—Trespassory Taking: Does the condition imposed permanently destroy an essential property right?126

If yes, there is a taking and the condition is invalid absent compensation.

If no, go on to Subpart 6.

Subpart 6—Regulatory Taking: Does the value to the public of the end outweigh the private harm which results from the means?

If no, there is a taking and the condition is invalid absent compensation.

If yes, there is no taking and the government condition is VALID.

The analysis is divided into two parts. Part 1 focuses on due process issues and will be particularly important when analyzing the constitutionality of conditions that affect the ability to develop on the land, but neither require actual trespass onto the land nor perma-

125. This Subpart is designed to allow for the imposition of a permit condition based on reasonable ordinances. As the Court in Nollan stated: "If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not." 483 U.S. at 836-37. The requirement of a reasonable ordinance is designed to prevent municipal governments from over-zoning as a means of mandating conditions on permits to land owners. See infra note 128.

126. Professor Wiseman defines these rights as the right to exclude, the right to use, and the right to dispose. Wiseman, supra note 50, at 454-57.
nently destroy use of the land. Unlike traditional deferential analysis, where courts do not look into the reasons the government acted, the proposed analysis requires courts (under Subparts 2, 3, and 4) to look at the specific reasons the government placed the condition on the property owner. Part 1 warrants against the arbitrary application of government power in such a way as to force some individuals alone to bear public burdens that should be borne by the public as a whole. Subpart 3, in particular, warrants against the government over-zoning as a means of extorting money or action from land owners through the permit process.

Part 2 focuses on the application of traditional takings analysis (solidified by the Nollan decision) when the government has passed Part 1 of the analysis. It warrants against the government taking private property for public use without just compensation.

B. Application of Proposed Analysis

Because there are so few actual claims challenging permit conditions, the basic analysis proposed above will be applied to hypothetical situations designed to take into account all the possible challenges that a property owner might have against a government that places a condition on a land use permit.

1. Hypothetical Situation 1: Permit imposes a condition that housing be built on the property; condition based on direct impact the development will have on the housing market.

This situation would occur when a property owner wishes to develop land in a way that would affect the surrounding housing market. For example, if a developer wanted to build a commercial complex (bringing more workers to the area) and there were not enough housing units for the influx of people, the government may grant the permit on the condition that the developer provide ample

127. See infra parts V.B.3-5.
128. Over-zoning would occur when a city adopts overly restrictive zoning ordinances solely as a means to be able to place conditions on development permits. Because a valid reason for permit denial under Subpart 2 is violation of a zoning ordinance, the Subpart 3 requirement of reasonableness warrants against use of these over-zoning schemes.
129. See infra part V.B.1-2.
130. Since a condition can only be based on a finding that a sufficient nexus exists (reasonable ordinance or impact on the community), it will be extremely rare that a condition which passes Part 1 of the proposed analysis will fail Part 2. Only extreme government misconduct would warrant finding a condition invalid after it passed Part 1.
131. See supra notes 6-8 and accompanying text.
housing to accommodate the increased need. This is the case even if the condition mandates that the housing be placed on the land owner’s property.

Traditionally, this would be seen as a valid condition on a permit because there is a demonstrated impact on the community resulting directly from the development. There would be no taking because the permit condition is substantially related to the government interest in preserving the existing housing market.

Under the proposed analysis, the condition would also be valid. There is a legitimate state interest in keeping housing available and affordable (Subpart 1), and because of the impact on the community the permit could have been denied for the same reason the condition was imposed (Subpart 2). If there were a zoning ordinance limiting commercial development because of its adverse impact on the housing market, this surely would be seen as reasonable in its inception (Subpart 3). If there were no such ordinance, denial would be permissible because it would be specifically tied to the impact of the development (Subpart 4).

This would also not be considered a taking. Allowing the permit to be issued would not be considered a deprivation of an essential property right if the reason for the condition could have been a valid reason for denial. In fact, the issuance of the permit expands the property owner’s rights, since he did not have a right to build the proposed project prior to issuance. Thus, Subpart 5 is fulfilled. Subpart 6 is fulfilled because the value to the public (amelioration of the housing pressures caused by the development) outweighs the private harm of requiring that a part of the property be used for housing.

2. Hypothetical Situation 2: Permit imposes a condition that housing be built on the property; no demonstrated impact shown.

This situation would occur when a property owner wants to develop his land in a certain way, but a condition is imposed mandating that he provide housing units on the property to help ameliorate pre-existing housing pressures. However, the situation differs from Hypothetical Situation 1 in that there is no demonstration that the proposed development would have any impact on the housing market.

Under the traditional analysis, it is unclear whether this condition would be valid. However, because of the developer’s interest in quick resolution, he usually will submit to the condition just to avoid
the even higher costs of challenging it.\textsuperscript{132}

Under the proposed analysis, the condition would be invalid. Subpart 1 creates no problem for the government because it has a legitimate interest based on a pre-existing housing problem. However, Subparts 2, 3, and 4 create the same problems the Coastal Commission faced in the condition it imposed in Nollan. Because the government could not sustain an outright denial of the permit based on the development's impact on the housing market, it could not impose a condition for that reason.\textsuperscript{133} As the Nollan Court stated: "[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out and out plan of extortion.'"\textsuperscript{134}

Even if there were a reasonable ordinance banning certain types of development for purposes of city zoning,\textsuperscript{135} the government cannot impose a condition that does not serve the same purpose as the ordinance or the developmental ban. For example, the government could deny a permit for a high-rise building in the path of an airport based on a height restriction ordinance. However, this does not mean that the government may impose any condition for permit issuance. Such a system would lead to over-zoning for purposes of extortion.\textsuperscript{136} Any condition placed on a project must serve the same governmental purpose as the development ban (Subpart 3). If requiring housing on the property does not serve that same purpose (and in the example above it cannot), then it is an invalid condition. As the Nollan Court stated: "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."\textsuperscript{137}

Surely, the government could validly deny the permit for other reasons, but it may not impose conditions that are unrelated to the reason for denial. Subpart 3 acts as a check on the government to prevent extortion. Furthermore, the condition cannot pass Subpart 4 because the project does not impact the housing market.

\begin{itemize}
\item \textsuperscript{132} See \textit{supra} notes 6-8 and accompanying text.
\item \textsuperscript{133} It should be noted that the permit could be denied for other valid reasons. However, no condition can be placed on the permit for a reason that would not warrant outright denial. Because a permit could not be denied based on the project's adverse impact on the housing market, a condition mandating that a land owner supply additional housing is not valid.
\item \textsuperscript{135} See Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
\item \textsuperscript{136} See \textit{supra} notes 120 and 128.
\item \textsuperscript{137} Nollan, 483 U.S. at 837.
\end{itemize}
To be sure, if there is a substantial enough interest in providing housing in the area, the government may mandate that it be built on someone's property. But to do so, the government must pay just compensation under the takings analysis. As in Nollan, the government may not avoid the compensation requirement simply by making the desired activity a part of a permit condition. Either way it is a taking, which requires just compensation.

3. Hypothetical Situation 3: Permit imposes a condition that the developer either build housing "off" the property or provide in-lieu fees for such housing to be built; condition based on direct impact the development will have on the housing market.

This situation is very similar to Hypothetical Situation 1. However, where Hypothetical Situation 1 imposes a condition on the property, this hypothetical situation imposes a condition off the property. The situation would occur if a property owner wished to use his land in a certain way and the government imposed a condition on the permit because of some specific impact the development would have on the community. For example, if a developer were to build a commercial building that would have an impact on the surrounding housing market, the government may condition issuance of the permit on providing ample housing off the property or in-lieu fees to ameliorate the impact of the project.

Under the proposed analysis, such a condition would be valid. The government has a legitimate state interest (Subpart 1); the government would be able to sustain outright denial of the permit based on the adverse impact on the community, which is the same reason the condition was imposed (Subpart 2); if there were an ordinance designed specifically to address the need for affordable housing, it would certainly be reasonable and the condition imposed would serve the same purpose as the ordinance—to protect affordable housing (Subpart 3); and even if there were no ordinance, denial of the permit could be justifiably based on the specific impact the proposed development would have on the community (Subpart 4).

A condition may be placed on a permit as long as it substantially relates to the government interest. Since the interest is affordable housing, it is reasonable for the government to impose a condition that the property owner supply housing proportionate to the impact the development has on the housing market. Any condition

138. Id. at 831, 837.
that would mandate that the property owner supply more housing or in-lieu fees than could be shown to result from the impact of the development would be unconstitutional under the proposed analysis.

4. Hypothetical Situation 4: Permit imposes a condition that the developer either build housing "off" the property or provide in-lieu fees for such housing to be built; no demonstrated impact shown.

This hypothetical situation is very similar to Hypothetical Situation 2. It requires that the property owner perform some service (in this case providing housing off the property or in-lieu fees) even though the proposed use of land has no impact on the housing market. The result should also be the same as Hypothetical Situation 2—the condition would be invalid.

For almost the identical reasons stated in Hypothetical Situation 2, the government cannot get past Subpart 1. Although the government may have a legitimate interest in the housing market, making some property owners pay when they have no more contributed to the problem than any other taxpayer puts an undue burden on some to ameliorate problems that should be paid for through general revenues. To impose such a burden would be unconstitutional under the proposed analysis.

For the same reasons stated in Hypothetical Situation 2, the government would not be able to pass Subparts 2, 3, and 4 of the proposed analysis. Because the government would not be able to sustain outright denial of the permit because of an adverse impact on the housing market (even though it may sustain a denial for other reasons), there is not a substantial relationship between the government interest and the condition imposed on this particular land owner. Therefore, it cannot impose a condition for that reason. Any unrelated condition imposed is unconstitutional under the proposed analysis.

5. Hypothetical Situation 5: Linkage ordinances: developer must either build or provide in-lieu fees regardless of demonstrated impact; fee based on a formula.

As stated above, cities have recently enacted linkage ordinances as a way of addressing the problem of housing. However, because

139. See supra notes 37-45 and accompanying text. A recent study named the California cities with the highest office linkage fees (from the highest to the lowest): Berkeley, San Francisco, Santa Monica, Palo Alto, West Hollywood, San Diego, Menlo Park, Sacramento
they are relatively new in land use regulations, linkage ordinances have not been challenged extensively. For the same reasons as stated above, developers would rather accept the condition than spend the time and money to challenge it. Many believe that such ordinances are constitutional because they pass traditional scrutiny. However, although municipal governments may have good intentions in wanting to address housing problems, the linkage approach is flawed under the proposed analysis.

First, this is a per se requirement that all developers must comply with. Because such ordinances mandate that all developers supply housing even if their development in no way contributes adversely to the housing market, the only way for a government to pass Subpart 2 is to argue that it could sustain an outright denial of the permit if the developer does not agree to comply. Even assuming that it could pass Subpart 2, Subpart 3 requires that the ordinance be reasonable and that the condition imposed serve the same governmental purpose as the ordinance or development ban. Any ordinance that requires one person to pay disproportionately for a public need is not reasonable, and a condition that a specific developer supply housing when he has created no adverse impact on housing does not advance any reasonable justification for the ordinance.

Second, because linkage ordinances are not based on the specific impact a development will have on the community, conditions imposed based on linkage cannot pass Subpart 4.

Third, linkage ordinances completely eliminate any type of case-by-case analysis. Developers must supply housing, period. Although it is an easy system to administer, it shifts the burden of funding public housing not only among developers and non-developers, but among developers themselves. For example, if a specific development does not have an impact on the housing market, the developer is being asked to pay for something historically paid for by developers and non-developers alike. Furthermore, as among developers, different projects have different impacts depending on where they are located and what they will be used for. By use of the

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140. See supra notes 6-8 and accompanying text.
141. One study of linkage ordinances stated: “Linkage ordinances that attempt to match observable housing need and corresponding price impacts fairly with obligations imposed on office development should be able to pass muster under the traditional reasonable relationship test used by courts to analyze development exactions.” Kayden & Pollard, supra note 8, at 137.
142. This assumes that it is possible to know the extent of the impact a development will have on the housing market with some certainty. In many situations the extent of the
formula, some developers are required to pay for an impact they did not create, while others pay less than the impact they create. Although it may all even out in the end, it is not a fair system as applied individually.\textsuperscript{143}

Fourth, there is no option for a formal, statutory appeal.\textsuperscript{144} This further moves away from a case-by-case analysis. Under the current system, a developer pays or forfeits the opportunity to obtain a permit. This is just the type of extortion that Justice Scalia warned against in \textit{Nollan}.\textsuperscript{145} Having an opportunity to appeal and be exempted from the ordinance (if it can be in fact proved that the proposed development will not effect the housing market) may bring a linkage ordinance within the realm of reasonableness required to pass Subpart 3.\textsuperscript{146}

The argument against linkage ordinances is strongest in the residential development arena where housing developments actually \textit{increase} housing stock and may \textit{decrease} housing costs, possibly resulting in a positive effect on the housing market. The argument is not as strong in the industrial-commercial arena. It is easier for a municipality to show that commercial development will lead to increased need for housing. However, linkage ordinances imposed on commercial developers still do not take into account where the development is located, who will be using it, how many people will be using it, or what it will be used for, among other concerns. Answers to these questions are needed to determine the impact on the surrounding housing market. A formal appeal process would accomplish this.

Fifth, certain types of developments will not adversely effect housing markets. In fact, some may help it. For example, ordinances linking residential development to a condition that the land owner supply \textit{additional} housing may have more of an adverse effect on the housing market than would no ordinance at all. Simple supply and demand economics suggest that the more "goods" available, the lower the price. Thus, when a property owner decides to build housing units, he is not only adding to the existing stock, but may also be

\footnotesize
impact will not be known. However, at least where no impact can be shown with relative certainty, linkage ordinances should not be applied to such developments.

\textsuperscript{143.} See \textit{supra} note 6 and accompanying text.

\textsuperscript{144.} Usually, the only way for a land owner to challenge the imposition of a linkage fee is to petition the city council directly. Linkage statutes typically do not include a statutory appeal process by which the land owner can prove that the proposed development would not impact the housing market and therefore should be exempted from the mandatory condition requirement.

\textsuperscript{145.} \textit{Nollan} v. California Coastal Comm'n, 483 U.S. 825, 837 (1987).

\textsuperscript{146.} See \textit{infra} part V.I.C.
decreasing housing costs on the market. To punish such activity by mandating that the developer also supply additional housing for public use actually works against the purpose of the ordinance. In those situations where financing a project is very tight, linkage ordinances may actually deter the building of additional housing units.

VI. PROPOSALS

A. A Higher Level of Scrutiny Is Required When a Condition Is Imposed on a Development Permit

The above proposed analysis should be adopted when a condition is imposed on a development permit. An ordered and structured analysis is needed to protect property rights in this narrow area that is so ripe for abuse. When the government has the power to impose conditions on individual land owners and burden individual parcels of land, a higher level of scrutiny than mere rational basis is warranted. The proposed analysis reaches the needed balance between the government’s interest in being able to regulate land (and ensure that developments do not create costly community needs) and the developer’s right not to be held disproportionately responsible for public projects that were not a result of his development. Governments will still be able to impose conditions so long as there is a sufficient demonstration that the government could have otherwise validly denied the permit (i.e., where such denial is based on either a reasonable ordinance or the specific impact the proposed development has on the community).

The proposed analysis is designed solely to be used when a condition is imposed; no change in the traditional analysis has been suggested for other land use issues.

B. Cities Must Be Very Specific in Their Legislative Findings and in Stating Their Purposes for Ordinances

It should not be a sufficient reason for a governing body to put a permit requirement on a property owner merely because the proposed development does not comply with an ordinance. In order for

147. It is not inconsistent to suggest that traditional zoning analysis would warrant a lesser level of scrutiny than the level warranted when a condition is imposed on a development permit. When conditions are imposed, the government is exerting pressure on an individual parcel of property. The situation which results is much closer to the traditional takings situation than a traditional zoning situation, where all parcels within a zone are affected equally. When an individual parcel is burdened, there is a greater need for protection.

148. See supra notes 121 and 147.
an ordinance to be the basis for justified permit denial under the proposed analysis (and thus the basis for imposing a condition), it must be reasonable (Subpart 3). This analysis is hardest to apply when the city has strict zoning laws and little or no legislative purpose as to why the zoning ordinances were implemented. For example, a downtown area may be zoned with certain height restrictions for many reasons: it may be to relieve traffic congestion, it may be to accommodate a near-by airport's flight path, or it may be to keep the commercial space/residential space ratio sufficient to house the population. However, if there is no specific purpose stated for the ordinance, the city is allowed to pick and choose whenever it is faced with giving a developer a permit. It may condition one permit on supplying mass transit because traffic management is the reason for the ordinance, then it may condition another permit on supplying housing because housing management is the reason for the ordinance.

If there is no reasonableness requirement, then the city may over-zone with strict ordinances as a means of extorting money through the permit process. Such abuse of power should not be allowed. Unless the purpose for an ordinance is sufficiently specific, it is difficult to know if the condition imposed on a development permit is really the same as the reason for the ordinance. Specifically stated purposes and legislative findings are needed so that these determinations can be made.

Because of the potential for abuse, ordinances should no longer be presumed to be reasonable unless the city states a sufficiently specific reason and backs it up with factual findings. This will help courts, in their review of Subpart 3, determine whether the condition serves the same purpose as the ordinance.

C. Linkage Ordinances Must Allow for Some Case-By-Case Analysis

Some linkage ordinances do not take into account the specific impact that the project has on the community. For reasons stated above, such ordinances unduly burden some more than others. To make linkage ordinances reasonable under the proposed analysis, there should be at least some room for inquiry into the specific im-

149. A zoning ordinance may lead to a taking if it does not substantially advance legitimate state interests. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928)).
150. See supra part II.B.3.
These linkage ordinances do not pass the proposed analysis in all situations because they lack case-by-case analysis. However, a few changes would make these ordinances constitutional under the proposed analysis.

First, it must have a strong legislative finding that a certain type of development does in fact have an adverse impact on the housing market. As stated above, this will be easier to show in industrial and commercial developments than in residential developments. The findings should show that in most instances a certain type of development affects housing in some specific way. For example, that “x” square feet of commercial development brings in “y” number of people to the community, requiring “z” number of housing units to accommodate the impact. To avoid abuse this should be based on specific findings in the community and not just an estimate.

Second, some stage of the process requires case-by-case analysis. At the very least, there should be a formal appeal process whereby a developer could show that his particular development does not have the impact on the community that the linkage ordinance approximates it will. Putting the burden of proof on the developer still allows the government the advantage of not having to prove the impact of each development project while insuring that a developer will not be responsible for providing housing in situations where he did not create the need; if the developer does not challenge the condition, the formula sets the number of units or amount of in-lieu fees to be paid.

VII. Conclusion

There definitely is a need for affordable housing in many parts of the country. Few would deny that this is true. Most land owners who wish to develop their land are not unsympathetic to this problem and are willing to pay their fair share in addressing the need for public programs. However, land owners should not be asked to pay for more than their fair share.

151. Municipalities are concerned that these ordinances may be held unconstitutional. Palo Alto has a severability clause in their linkage ordinance to ensure that if one section is found unconstitutional the whole ordinance will not be invalidated: “If any provision of this chapter or the application thereof to any person or circumstance is held to be unconstitutional or to be otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other chapter provisions, and clauses of this chapter are declared to be severable.” PALO ALTO, CAL., MUNICIPAL CODE § 16.47.050.

152. See supra part V.B.5.
Cities around the nation are faced with a Catch-22 situation. They are faced with decreasing funds and increasing public needs. An easy way to make up for the lost funds is to ask those who seek government approval to contribute for these public programs. When one seeks a development permit that will put a strain on the housing market, cities have every right to ask the developer to pay for housing to ameliorate the adverse effects he has created. However, a land owner who is asked to pay for housing, when his proposed use has no impact on the housing market, is being asked to bear a public burden which should be borne by the public as a whole.

Property rights are important and deserve protection. This is not to say that governments should not have the police power to regulate land use; they should have that power. Putting conditions on development projects is an important way to ensure that the development will not have an adverse impact on the community that will later require public funds to ameliorate. Permit conditions are an important tool for separating general public needs from needs that are created specifically by developers. Governments need these tools and should continue to have them available in the future.

Still, governments should not be able to use permit conditions in a way that unjustly imposes a burden on a few people to pay for public projects that should be borne by the public. Because of shrinking public funds in the last decade, the use of permit conditions has continued to spread into areas that have historically been funded by the public purse. To ensure that some members of society are not asked to pay a disproportionate amount, the proposal outlined above should be adopted.

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