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Dolan v. City of Tigard: Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner

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Dolan v. City of Tigard: Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner*

RICHARD A. EPSTEIN** AND WILLIAM H. MELLOR III***

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* This Amicus Curiae Brief was filed on January 13, 1994 in support of Petitioner in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

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The Institute for Justice submitted this Brief as part of its mission to promote through litigation and training the rights of individuals to control and transfer property and to advance the belief that private property rights are intricately connected with other civil rights.

1. Please note that the Table of Authorities has been omitted from this brief and that the Table of Contents has been renumbered to correspond with the Review's pagination.

INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest legal center committed to defending and strengthening essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. The instant case involves the limits of government power when conditioning the right to use and develop one's property on the surrender of other property to the government without compensation.

Although the question in the case before this Court specifically concerns development "exactions," the issues presented go to fundamental questions about the nature and exercise of government power in a highly regulated, modern state and the rights of individuals faced with such enormous power. The Institute's brief, co-authored with a nationally recognized expert on takings law, addresses the specifics of the instant case while also analyzing the larger issues raised by this particular instance of government power.

The Institute for Justice has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk.

STATEMENT OF THE CASE

The facts of the case have been well stated in the petitioner's principal brief and are summarized here only insofar as is necessary to illuminate the critical legal issues. The petitioner presently owns a 1.67 acre plot in the City of Tigard, on which she operates a 9,700 square foot retail electric and plumbing supply store. Her land borders Fanno Creek. The petitioner's proposed expansion of the store to 17,600 square feet meets all applicable zoning restrictions. The City of Tigard, however, refuses to issue a permit for the expansion unless she yields to two additional conditions, specifically:

- (1) That she dedicate to the City that portion of her land that lies within the 100-year flood plain of Fanno Creek as a greenway, and
- (2) That she dedicate a 15 foot strip of land adjacent to the floodplain for the construction of a pedestrian and bicycle pathway, to be paid for by petitioner. The City also wants to hold the land in reserve for a future storm drainage system.

These dedications were demanded pursuant to a 1983 local plan adopted to meet the requirements of Oregon's land use planning statutes, which require dedication of land for open space in order, among other goals to "(a) Conserve and enhance natural or scenic resources; . . . (e) Enhance the value to the public of abutting or neighboring parks, forests, wildlife

preserves, nature reservations or sanctuaries or other open space; (f) Enhance recreation opportunities; . . . and (h) Promote orderly urban development." OAR § 660-15-000(5).

The case wound its way through the Oregon legal system. In the Oregon Supreme Court, the petitioner claimed that the City had failed to demonstrate an "essential nexus" between the exactions and some legitimate state objective, as is required under *Nollan v. California Coastal Commission*, 483 U.S. 825, 836 (1987). But that court held that Oregon was only required to establish some "reasonable relationship" between the exactions and some legitimate public purpose. *Dolan v. City of Tigard*, 317 Or. 110, 854 P.2d 437 (1993). The Oregon Supreme Court then held that both of the City's exactions met the relevant test for two reasons. First, the expanded size of the petitioner's store created a larger surface of impervious material that could increase the runoff into Fanno Creek, which justified the dedication of the land contained within the flood plain. Second, the increased commercial use of the site promised an increased use of the bicycle and pedestrian paths within the City, which justified the dedication of land for a foot and bike path. This Court granted certiorari to determine whether these purported justifications for the exactions are permissible under the takings and due process clauses of the Constitution.

SUMMARY OF ARGUMENT

In principle this case is about a single issue: who bears the cost of public improvements? The position urged in this brief is the ancient rule that requires the government to use public funds for public improvements. If Oregon's decision is allowed to stand, then this principle will be honored in the breach and not in the observance. The petitioner in this case is asked to fund a greenway and a bicycle path that provide benefits to the community at large. Her building permit is held hostage to the demands of the City. Yet she cannot choose the party with whom she bargains, for the City has sole authority to block any change in land use that she might make.

A power so vast cannot be exercised with impunity, but must be subject to constraints of fair dealing which allow the petitioner to be taxed only if one of two conditions is satisfied. Either her activities cause harm to the public at large, or she receives some benefit from the exaction in question. In the first case she should be charged only to the extent of the harm caused, and in the second case her compensation should be reduced by at most the extent of the benefit she received. Yet the City made no determination of harms inflicted by petitioner or benefits conferred on her. Its exactions here represent a raw use of state power.

Nor is the exaction permissible because the petitioner could avoid its sting by foregoing the expansion of her business. That hollow choice is akin in all relevant respect to the choice in the gunman's demand — "Your money or your life." Here Oregon says, "If you want to develop your property in useful and productive ways, then you must surrender part of it to the state for a floodplain and bike path." If this exaction is allowed, then why not one for a post office or an army garrison? No citizen should be forced to knuckle under such a choice. Simple fairness dictates that petitioner should not be subject to burdens and exactions that are wholly unrelated to the burdens and inconveniences that her conduct imposes on others. No one doubts that the public could take land for any public purpose by paying just compensation. Yet conversely, Oregon should not be allowed to use the existence of an admitted public purpose to defeat its obligation to pay just compensation whenever it takes land.

The City will doubtless reply that petitioner has waived her right to compensation under the takings clause by consenting to the exactions in order to obtain the permit, which the state has a right to withhold. The City will say that its greater power to withhold the permit embraces the lesser power to grant the permit subject to conditions and exactions, however onerous. To this argument several responses are appropriate. First, the permit power and the zoning power are not unlimited as to ends, but like all powers in a constitutional democracy, their use must be justified by showing the essential nexus to legitimate social ends. The building permit and police powers allow the state to regulate land to protect others from harm, but not to become by mere assertion and insinuation an owner of some part of the land.

Second, aggressive use of the state's monopoly power allows the state to undermine the critical compromise implicit in the state's eminent domain power. Under our constitutional regime, the state is allowed to force a taking so as to prevent private parties from holding out in ways that frustrate the assembly of land for useful public projects. But by the same token, the state must pay compensation to demonstrate that the public really believes that the project it undertakes is worth the private sacrifice it imposes. The discipline that the just compensation requirement imposes on public authorities will be lost if the state is allowed to bundle the taking of land with its exercise of the permit power. If this occurs, the individual citizen will be forced to compare the cost of the exaction with its potential gain from getting the permit. That citizen will yield to state power if exactions are allowed whenever that potential gain exceeds the private loss. Lost in the shuffle, however, is the relevant social comparison: will the property be worth more in the hands of the state than in the hands of a private party. The state will not make that comparison because it does not have to pay for

what it gets. The citizen will not make that comparison but instead will compare the cost of the exaction with the gains obtainable from getting the permit. A transparent subterfuge will erode the discipline on government action that the constitutional requirement of just compensation imposes.

In *Nollan*, 483 U.S. 825 (1987), this Court condemned as "an out and out plan of extortion," the crude attempt of the California Coastal Commission to force the Nollans to dedicate to the public a lateral beachfront easement across their property as the price for getting a building permit to replace a run-down cottage with a modern building. The principle of that case applies with equal force here, and should not be dissipated by some facile finding of a "reasonable relationship" between the legitimate ends of government and its use of the permit power. To be sure, this case may differ from *Nollan* in that the exaction may generate some small return benefit to the petitioner. If so, then the proper procedure is to reduce the compensation owing by at most the sum of the benefit conferred on the petitioner. Likewise her proposed expansion of the property may inflict some small harm on the public at large. But if so the remedy is a tax equal to the harm, not an exaction unrelated to its size or severity. Nothing in *Nollan* or in the logic of the eminent domain power authorizes a land grab here or elsewhere under the cloak of the permit power.

ARGUMENT

I. THE TAKINGS CLAUSE ALLOWS THE STATE TO OVERCOME HOLDOUT PROBLEMS WITHOUT ENGAGING IN ACTS OF EXPROPRIATION AGAINST SOME OF ITS CITIZENS

The takings clause of the United States Constitution represents an elegant and enduring compromise between the twin demands of individual autonomy and public control. On the one hand, the autonomy principle says that no person should ever be required to part with his labor or property without his consent. See J. Locke, *Second Treatise of Government* § 137 (1690) ("The supreme power cannot take from any man any part of his property without his consent; for the preservation of property being the end of government; . . . [F]or I have truly no property in that, which another can by right take from me, when he pleases, against my consent. . . ."). Individual consent thus acts as a barrier to both private and government oppression for no one will surrender valuable property unless he receives a fair equivalent in exchange.

The absolute right of any owner to hold or surrender property at will, however, sometimes leads to undesirable social consequences. Thus suppose that the government needs to acquire land to build a highway or a bike path

that runs across the lands of many individuals; assume further that the value of the path far exceeds its private cost. In principle, a system of voluntary land acquisition that relied solely on consent should be able to assemble the needed land for the community project. But the strategic behavior of individuals — the bargaining, bluffing and blustering — can frustrate a goal that all desire separately, but are unable to achieve collectively by voluntary means alone. So long as the autonomy principle is given unlimited sway each person can ask for whatever price he or she pleases. The combined demands can be so exorbitant that the individual actions of each party will block the collective solution desired by all. The road which benefits all will just not get built. This holdout problem does not arise when each individual owner is a competitor with every other owner. See Cohen, *Holdouts and Free Riders*, 20 J. Legal Stud. 351 (1991). But the holdout power does arise when the cooperation of all is necessary to achieve a common venture.

One way to escape this holdout problem is to run roughshod over the rights of individual property owners. The state, operating by majority vote, could just take the land outright for the highway without paying anyone any compensation. The holdout problem vanishes under the overwhelming weight of state power. Unfortunately, this seductive approach trades in one enormous social problem for another problem even more serious: the difficulties of coordination are overcome at the price of massive expropriation. One might be tempted to say that the ostensible injustice in the case is justified by the greater social good that is obtained, but that argument too depends on knowing that the proposed public improvement is not some mischievous boondoggle, but really is worth its total cost. Many projects should never be undertaken, yet no court is in a position to evaluate the gains from building a particular road. A regime that lets the state do what it will spends millions for projects worth thousands.

The need to make public improvements thus appears to place any well-constructed political regime in the midst of an insoluble dilemma. Follow the usual rules of autonomy and consent, and the project can be shipwrecked by the extortionate behavior of individuals seeking to divert the gain from the public project into their private hands. But to ignore consent invites the converse problem of confiscation, which in turn encourages the state to engage in public projects with negative social value. Yet there is a middle path between the horns of this dilemma, and its course is unerringly set by the takings clause of our Constitution. The Constitution consciously deviates from Locke on one critical point that transforms the entire analysis. No longer is the restraint against government power expressed in terms of individual consent: nor is it expressed in terms of majority will. It is now expressed in terms of just compensation: "nor shall private property be taken for public use, without just compensation." The

state is allowed to take the property for public use, but it must pay just compensation. The state may take land for the highway, but it must pay the owner its fair value. The power to compel takings for public use avoids the holdout problem, while the compensation requirement avoids the expropriation problem. Needed public improvements can be funded without placing disproportionate burdens on those individuals who just happen to own the needed land. In this context, it is important to repeat the oft-quoted statement of Justice Black in *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (quoted in *Nollan*, 483 U.S. at 835 n.4): "One of the principal purposes of the Takings Clause is 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."

Requiring just compensation for takings is not without its administrative costs, for someone must value the land prior to the government action. But valuation is a small price to pay to escape the enormous political risks of a policy that requires unanimous consent or one that dispenses with the need for any compensation altogether. Under our constitutional scheme, the price which the individual owner receives is equal to the pre-project market value, so the holdout problem is effectively checked. By the same token the state has no incentive to engage in projects with a negative expected value. The opportunity cost of the land, measured by its best use in private hands, must be paid in cash before the project can go forward; the costs of these items are put on-budget so that public officials must now ask taxpayers to pay the full cost of the venture. See *Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., dissenting). One single mechanism — paying just compensation — thus gives the state the power to initiate beneficial social changes that could not be obtained if unanimous consent were required, but it does not allow it to crush any single landowner or group of landowners in the process.

II. THE BUILDING PERMIT AND POLICE POWERS OF THE STATE SHOULD NOT BE ALLOWED TO NULLIFY THE BENEFICIAL COMPROMISE BETWEEN STATE POWER AND INDIVIDUAL RIGHTS CREATED BY THE TAKINGS CLAUSE

The above analysis of the scope and purposes of the takings clause presupposes that the government has imposed its will on the individual without his consent. At one level therefore the petitioner's case is quite different because these exactions are imposed only with her consent. The City's argument is that if the petitioner wishes to forgo the construction of her new and larger store, then she need not dedicate any portion of her land to open spaces, storm-drainage or bicycle and pedestrian paths. The City offers her the "bitter" of state exactions only with the "sweet" of land use

improvements. The just compensation clause says nothing about consent, but the City argues that it should be interpreted to mean that once the individual consents to an exaction, then no compensation should be required.

The City's argument is profoundly wrong. But it takes a good deal of analysis to see why the presence of consent does not establish the ultimate legitimacy of government action any more than its absence establishes the ultimate illegitimacy of government action. Before developing the general theory, it is useful to articulate the reasons why the question is so difficult. At one level the question of consent is surely relevant. If the City were to offer to purchase petitioner's entire plot of land, and she accepted the price tendered, then that contract is as good as any other. She could not at some later time insist that the amount that she had agreed to accept was not just compensation for the land taken pursuant to contract. Consent therefore is as important for relationships between the individual and the state as it is for relationships between private individuals.

In many cases, however, the state does not act as an ordinary market participant, but rather as a regulator vested with powers to allow or prohibit all sorts of legitimate private activities. When it operates in this position, its power is not curbed by competition from other potential market participants. Instead, it has a monopoly power that can be abused as well as used.

In this case, for example, the City of Tigard demanded 10 percent of the petitioner's land for storm drainage and bicycle and pedestrian paths. What then is to prevent it from seeking 20 percent or more of the land for the same permits? Or asking a million dollars? Or asking for political contributions or from forbidding religious activities on the remaining land? Nothing in the pure logic of consent makes one bargain any better than the other; and yet one senses that there must be some limits somewhere. The enormous state power should not be used for ends wholly alien to the reasons for having local governments issue permits in the first place: to prevent activities that are harmful to neighbors or (much more debatably) not in keeping with the overall character and sensibility of the neighborhood.

For these purposes, moreover, it does not matter whether the burden is imposed on a constitutional right to free speech or freedom of religion or to the undisputed exclusive possession of land. All are equally protected under the Constitution.²

2. As recently as this term, this Court stressed that "[i]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 114 S.Ct. 492, 505 (1993). And the threats to property are the same as those to religion, speech and political association: the abuse of state monopoly power. Note that this case does

The entire question of monopoly power, and the risks attendant with its use, has long been a major subject of concern in contexts outside of public law. To take perhaps the most familiar example, the — ordinary law of real property says that an owner has the absolute right to exclude any person from his premises. Entrance is normally on permission, and there is no requirement that this consent not be unreasonably withheld. In ordinary situations, this set of rules is perfectly adequate because the presence of rival landowners constrain the price that can be charged for entry onto land: raise it too high and potential customers will migrate elsewhere unless forbidden from doing so by force.

Yet sometimes situations of necessity arise — situations in which individuals are at immediate peril of life and limb — and here the law has long recognized a privilege to enter land against the will of the owner, so that it is clearly a wrong for the owner to stand his ground and exclude others from the premises. See *Ploof v. Putnam*, 81 Vt. 471, 71 A. 188 (1908). Yet by the same token it is equally clear that the entrant onto the property of another is required to make just compensation. See *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 124 N.W. 221 (1910). Again the principle of necessity has broad and old philosophical foundations. Thus Hugo Grotius wrote, "Now among Theologians also it is a received opinion, that if in urgent distress, anyone shall take from another what is absolutely necessary for the preservation of his own life, it shall not be deemed a theft." H. Grotius, *The Rights of War and Peace*, ch. 2, § VI (1625). However, that right to so take was sharply limited, for this "indulgence must be granted with precautions and restrictions, to prevent it from generating into licentiousness." *Id.* Chief among the restrictions imposed was the payment of just compensation: "the party thus supplying his wants from the property of another, is bound to make restitution, or give an equivalent to the owner, whenever this is possible." *Id.*

Just as the conditions of necessity suspend the ordinary rights of exclusion, so too they suspend the rules of consent. To give only the most famous example, suppose that a well-equipped ship comes on another in distress and offers its assistance only in exchange for an exorbitant sum of money. It is well established as a matter of maritime law that the owner of the ship in distress can accept the offer, and then repudiate the promise after

not raise the question of whether various forms of land use regulations are compensable under the takings clause. Rather it assumes that the state would have to pay compensation if it occupied the flood-plain and built the pedestrian and bike paths, see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984), and then asks whether the state could avoid its obligation to pay by resort to the permit power.

the rescue has been successfully completed. But again the owner of the rescued ship is not allowed to escape all obligations but must pay just compensation for services rendered:

Courts of admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain; but they will not tolerate the doctrine that a salvor can take advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit performance of a public duty to be turned into a traffic for profit. The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by the courts for such services.

Post v. Jones, 60 U.S. 150, 160 (1856).

The bottom line is that the consent is again disregarded under conditions of necessity, and just compensation is provided for the services taken, taking into account the magnitude of the risk. See Landes & Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. Legal Stud. 83 (1978).

These cases raise the identical intellectual puzzle that is presented in the cases of permits with exactions. Viewed in a narrow sense it seems clear that the bargain made between a party in distress and the rescuer works to their mutual benefit in the sense that all things considered, the party in distress would rather pay handsomely in order to survive. Yet from a social point of view something is clearly amiss, given the risks of extortion and bargaining breakdown that can result from the effort to "take advantage of a situation." Rather than take these risks the law seeks to eliminate the coordination problem what arises in the absence of an orderly competitive market. Yet by the same token it does not simply allow some in need to take what is needed, for fear that an indulgence will "degenerate" into "licentiousness," or the abuse of power will degenerate into out and out extortion. The state monopoly powers are far greater for they arise systematically from the power to exclude all rivals. The petitioner must do business with the City of Tigard whose legal power does not depend on happenstance and does not erode with time. The limits of consent applicable to private disputes carry over to matters of public law where there is again an imperative need to constrain the potential abuses of monopoly power, abuses so great that they cannot be brushed aside even in the presence of explicit consent. Ironically, the claim of an unfair exaction may also be raised by the government when it finds itself in a situation of

necessity. In *United States v. Bethlehem Steel*, 315 U.S. 289 (1942), the government sought to set aside shipbuilding contracts which it entered into just after the United States entered World War I. The Court refused to allow the claim of economic duress, but Justice Frankfurter's dissent in the case nonetheless accurately sets out the common law response to the issue.

It always is for the interest of the party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called. Holmes, J. in *Union Pacific R. Co. v. Public Service Comm'n*, 248 U.S. 67, 70. In that case a state unconstitutionally exacted a fee for a certificate of authority to issue railroad bonds. A railroad which had paid the fee and obtained a certificate, rather than run the risk of subsequent invalidation of its bonds and imposition of serious penalties, was held to have been coerced into making the payments. In *Swift Company v. U.S.*, 111 U.S. 22, 29, the taxpayer's only alternatives were "to submit to an illegal exaction or discontinue its business." The payment of the tax in these circumstances was held to be duress. The courts generally regard the dilemma of the taxpayer who must either pay the taxes or incur serious business losses as a species of duress.

Id. 315 U.S. at 326-27 (1942) (some citations omitted).

It matters little whether we speak of certificates for railroad operation or permits for new real estate construction. The same peril arises in both settings and both settings call for a determined constitutional response under the Takings Clause.

III. THE UNTRAMMELED EXERCISE OF THE PERMIT POWER BY GOVERNMENT OFFICIALS LEADS TO EXCESSIVE AND ABUSIVE FORMS OF REGULATION, EVEN WHEN THE CONSENT OF PRIVATE LANDOWNERS IS OBTAINED

The dilemmas identified by Justice Frankfurter in *Bethlehem Steel* are applicable in this very case where petitioner can expand her business only if she first obtains the necessary permits from the City. In this case too, the role of individual consent is circumscribed by the exercise of monopoly power. And government entities possess a monopoly power that is never eroded by the passage of necessity or the arrival of some other person willing to provide assistance in time of peril. The government which has the permit power over real estate knows full well that the owner of this

property cannot exit the jurisdiction by picking up her land and moving it somewhere else. Nor can the petitioner shop around for another planning board to do business with if she is unhappy with the service that she receives from the City. There is nothing that says that the size of an exaction is written in stone, and the state may well increase the level of exactions on successful private projects, even if these projects pose no threat to the public at large. Only by tying the level of the exaction to the harm caused by the private project, or the benefit conferred on that project by government action, can these public abuses be curbed. The persistence and the power of government monopoly thus demand great scrutiny over the exercise of government powers, even when consent is obtained. See R. Epstein, *Bargaining With the State* (1993).

In order to see how the monopoly power allows government to "take advantage of its situation" it is sufficient to consider two simple numerical examples of how the process works from its onset to its conclusion. Thus suppose that the landowner wishes to expand a current store into a larger and more profitable one. Let us assume that the cost of the expansion is \$1,000, and that the anticipated benefits that it will yield to the owner are \$3,000. Let us assume further that the improvement is, as was the case here, in full conformity with all general applicable zoning ordinances so that approval would generate to the owner the full \$2,000 in gain from the new project. (We assume for the sake of argument that the improvement causes no public harm, and note that if it did, the level of compensation payable should not be reduced to zero, but only to the extent of the harm caused.) What happens to this situation when exactions are imposed? It is instructive to consider two distinct scenarios.

First, assume that the exaction in question will cost something under \$2,000, say \$500, and that it will generate a public gain in excess of its cost to the landowner, say \$900. Under these circumstances it is clear that if left to a yes-or-no choice, the individual landowner will yield to the demands of the state (which is why exactions hold such terror for property owners). The private gain subject to the exaction is \$2,000 minus \$500 or \$1,500, which is far greater than the zero gain that flows from accepting the status quo. The state exaction thus expropriates one-fourth of the project gain. From a social point of view should the state be allowed to respond with a blunt, so what? After all, the public gain from the exaction is stipulated to be at \$900, so that there is a net social gain if both the project goes forward and the exaction is allowed. But any supposed aggregate social gain is illusory, for nothing prevents the state from reaching the same desirable outcome by allowing the development to go forward while spending \$500 in public funds to purchase the land and any additional public improvements on it. The system of exactions thus creates a very skewed distributional outcome,

for the total cost of the public improvement is borne by a private party who is no longer able to keep the gain from her plan to herself. The fairness concerns of *Armstrong v. United States* are squarely raised.

Worse still, the system of exactions will create nonstop political intrigue and high transaction costs in the absence of any limits in setting the terms and conditions of the exactions. In real world settings, the size of the exactions could well be doubled, for example, to \$1,000 or even \$1,999, but where that happens the property owner is left with the same vice-like choice: either capitulate and obtain a permit or have no profit at all.

A second scenario is even more troublesome. Assume that the exaction will still cost less than \$2,000, say, \$900, but now will generate a social benefit of less than the last figure, say \$500. At this point the true social evil of the exaction technique becomes apparent. So long as the exaction is allowed without compensation, the state has every incentive to ignore the private losses. It is still \$500 better off, but the social situation is now far worse, as the exaction is for a government project with a negative expected value of \$400 (\$900 is spent on a \$500 improvement). Yet by the same token the landowner remains powerless to resist the exaction, for from her point of view going forward subject to the exaction generates a gain of \$1,100, while standing pat generates no gain at all. The vice here is that the exaction extracts more from the anticipated gain of the property owner than it provides in social benefits. A legal rule of no compensation gives the state no incentive to halt this imprudent project, and provides no opportunity for the landowner to resist it. Allow the linkage of exactions and permits as part of a single package and the incentives to create an inferior social outcome are inexorable on the public side and inescapable on the private one.

The outcome in this setting, moreover, is wholly different if the state is required to pay compensation for the exactions taken; now the state is forced to compare the public benefits of its project with the private costs that it imposes on others. It will not spend \$900 in public funds to undertake a project that is worth only \$500. Unbundling the exaction from the approval process thus generates unambiguous social benefits in this second case by generating, as in the basic takings scenario, the right incentives for the state in the evaluation of its social projects. It is possible to imagine other situations, including those in which the size of the exaction is greater than the anticipated private gains that the owner has from a particular project, so that the project would be abandoned altogether given the stiff price that the government charges.

But these variations do nothing to alter the basic analysis. In each case the relevant social comparison is between the gains to the state from imposing the exaction and the losses to the private party from that same

exaction. And that comparison will only be made if the state is required to pay for each exaction it demands, and not conceal valuation behind the veil thrown up by the permit process. Yet the decision to allow uncompensated exactions means that this comparison is never made, so that sound social planning is frustrated in most cases and achieved by dumb luck in all others. When permits can be conditioned on the acceptance of exactions, the sole choice that anyone has to face is whether the social benefits of the improvement are greater than the anticipated private benefits (as opposed to costs) obtained from getting the permit, a choice which bears no relationship to overall social improvements. The social evil in *Nollan* itself was that the California Coastal Commission never made the proper comparison between the benefit it derived from the lateral easement and its cost to the owners.

It therefore follows that bundling permits and exactions together create dangerous incentives for public officials to disregard the private costs of public projects. Since the private gain from improvement is hard to determine, there are all sorts of incentives on the state to set the exactions very high, and then to back off slowly thereafter. By the same token there are far too many incentives for private landowners to bluff and to bluster in order to persuade government officials that they will not go forward unless the size of the exaction is reduced. The entire process generates wrangling and deception, and it doubtless throws a pall over many sensible projects which could and would be undertaken if the exaction threat did not lurk so prominently in the background. A sound system of government regulation of property should not allow the state to initiate these destructive strategic games with its citizens

IV. BECAUSE THE CITY OF TIGARD AND MANY OTHER LOCAL GOVERNMENTS HAVE STRAYED FROM THE IMPORT OF THIS COURT'S *NOLLAN* DECISION, IT IS IMPERATIVE TO REQUIRE THAT ALL GOVERNMENT EXACTIONS BE GIVEN CAREFUL SCRUTINY

The concerns with the use of government monopoly power are decisive in shaping the law of exactions in the permit process. Where the state is allowed to do more or less as it pleases, it will doubtless make all sorts of grandiose claims as to the worth of its projects. Its activities will chill the process of development as private individuals do not wish to enter a legal environment that is fraught with such uncertainty. In order to cope with this problem it is not necessary to insist that the entire permit process be scrapped (which could lay the public open to the creation of dangerous or obnoxious development processes). State officials can act in a legitimate fashion, for example, when they condition a permit on the ability of the landowner to curb the discharge of dangerous pollutants into public waters or to make provision for solid waste disposal from the site. Nonetheless it

is important that the conditions imposed always be tied to some recognizable evil of the sort that the state is entitled to prevent.

The instant case illustrates the dangers of the unconstrained permit process. Thus if one considers first the question of whether some greenway should be provided, the right question to ask is whether the diminution in private value is greater than the public gain. No court should try to evaluate this directly. But by the same token no court should accept the naked assertions of the City of Tigard that the project is worth doing, so long as the City has the power to make someone else bear the price. The City has every incentive to overstate the public benefits and understate the private costs. In this case the City wanted to take some portion of the land for a bike and pedestrian path near Fanno Creek. Even the City does not have the temerity to argue that leaving that portion of the land in its original undeveloped state constitutes a public nuisance. Nor is her proposed expansion of a country store a nuisance, lest every building in America be deemed wrongful by legislative fiat. And if petitioner's new building were a nuisance, (which it is not), then it would be wholly improper for the City to allow its operation just because it wanted to obtain a floodplain or bike path free of charge. The right response would be to enjoin the expansion of the store as a nuisance, separately condemn outright the land for the bicycle and pedestrian path with public moneys, and then use public money to construct the path.

The City has tried to sidestep these arguments by claiming that the larger store will increase traffic within the overall system. But its claim is patently manufactured for the occasion. The original master plan of Tigard contemplated the development of these bike paths long before petitioner gave any thought to the expansion of her business. It is a moral certainty that most users of the path will be going by the store and not to it. Nothing in the record even hints that 100 percent of the traffic increase, real or imagined, is traceable to that expansion. Petitioner's larger store is subject to increased real estate taxes, and thus bears in responsible fashion its pro rata share of any increased traffic densities, here and elsewhere in the City. Why should she be required to bear the costs of projects that work for the benefit of the public generally?

The planning board tried to deflect these concerns by also noting that it was "reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian and bicycle pathway adjacent to this development for their transportation and recreational needs." App. G-24. Yet this whole argument is quite beside the point because everyone in town has equal access to the public improvement along with the customers and employees. And if anything, it is highly unlikely that anyone could bike away with a large kitchen sink in tow. Why then should the public at large

gain dominant access for free while the petitioner pays for an improvement of little or no value to her? Only if the City is required to condemn the land and pay for the improvement itself will the City, or indeed any government, be forced to decide responsibly whether the proposed path, or any other project, is a good or a bad idea.

The second condition - the preservation of the greenway within the 100-year floodplain - raises a variation on the original question: does any additional stormwater runoff justify requiring petitioner's dedication of the floodplain? Once again, one fatal concession undermines the City's entire argument: the City's findings that the increase in runoff is anticipated not only from the petitioner's development but also from "elsewhere in the Fanno Creek drainage basin. . . ." App. G-40 (emphasis added). If so, then the City must disaggregate the increased flow by source. If all the water came from sources other than the petitioner, then why make her bear the costs of its containment? Surely if the City needed pipe, asphalt or sealant to secure drainage, it could not force her to pay these costs alone. It would have to purchase these needed supplies with public money. Why then should the City be able to hold up the petitioner's development permit in order to make her neutralize a peril created by others? If others have created the greater flow, then charges could be levied against them given the losses that their private conduct imposes on others. If natural runoff is in issue, then general taxes must fund public responses against the natural hazards to the community.

Perhaps, however, some fraction of the extra flow is attributable to the expansion of the petitioner's store. Increased ground coverage with impervious materials might increase the level of saturation in the uncovered land, which in turn might increase the runoff into the creek, which might require some costly public response. There is in principle no a priori way to deal with this aspect of the case, for so much depends on the ratio of runoff that is created by petitioner's expansion relative to the total increase in runoff from all sources. However, general declarations of harm should not be allowed to replace specific forms of proof. At the very least the City should be required to estimate the fraction of the anticipated overflow that is attributable to the on-site changes, and limit its charges accordingly, after giving petitioner the opportunity to redesign her premises to reduce that risk. The guiding principle is that any exaction must be "cost-justified," that is, it must be tied to the harm caused, and not to the petitioner's anticipated profit from an expanded business. The possibility of some additional public harm cannot be used as a pretext for massive confiscation.

The approach that is advocated in this case is perfectly consistent with the approach that this Court took in *Nollan*. There the suspicion of state abused to the requirement that some "essential nexus" be established

between the exaction and some legitimate state end. The requirement was no mere "pleading" technique, but depended on a real and substantial showing of potential harm closely related to the exaction that was imposed. If this case turns solely on the close reading of *Nollan*, then it should be apparent that the Oregon Supreme Court has strayed from a sound understanding of the case. As these interpretative matters have been well canvassed in petitioner's brief, it is best here to show why the rule in *Nollan* helps prevent widespread and pervasive forms of local government abuse that were identified above.

In *Nollan* itself, this Court refused to allow the California Coastal Commission to link a permit for building a new beach house to a demand for the dedication of a lateral easement running along the beach. The clear justification for this result is that the easement itself can normally be taken in payment of full value. If the Coastal Commission could hold the landowner hostage under the permit power, then the proper social comparisons would never be made. The landowner would ask whether the easement is worth more to him than his right to develop and given an affirmative answer to that question, he would submit, no matter how unfair. But the correct social question is whether the easement is worth more to the state than it costs to the owner, and the state will make that comparison only if forced to condemn the easement for cash.

Nollan's commands are not always obeyed by government. In *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App. 3d 1260, 277 Cal. Rptr. 371 (1991), the California Coastal Commission was again slapped down when it sought to condition Surfside's right to build a revetment needed to prevent erosion damage on its willingness to dedicate a lateral beachfront easement on its property. The Court of Appeals properly interpreted *Nollan* to preclude any linkage between the sea wall and the lateral easement in the absence of a showing how the building of a wall could cause erosion or other forms of harm to the beach. *Id.* at 1260. Even if the revetment did pose an erosion peril, the proper response is a special assessment sufficient to cover the costs of rectification or damages. The response should not be a forced dedication of a lateral easement whose cost to the owner could far exceed the harm inflicted on the public beaches.

Similarly, the Ninth Circuit reached the right result in its pre-*Nollan* decision in *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), cited with approval in *Nollan*. In *Parks*, the Ninth Circuit rebuffed efforts by the City of Klamath Falls, Oregon to condition a building permit for a condominium project on the surrender of title to lands which contained valuable geothermal wells. The value of the wells to the owner, while substantial, was probably far below the anticipated profit from undertaking this extensive project, so that the consent could have been extracted had the court not

intervened to protect the property owner. That judicial intervention was clearly correct because the surrender of ownership of the wells was not related to any conceivable external harm that the development might impose.

Unfortunately, other cases have not been consistent with the general teaching of *Nollan*. In *Pengilly v. Multnomah County*, 810 F. Supp. 1111 (D. Or. 1992), the question before the Court was whether the County could condition its building permit on the dedication of frontage necessary to widen an existing public street fronting the new development. Prior to 1951, Oregon law allowed public streets narrower than 50 feet wide. After that date new streets had to be laid out with a minimum width of 50 feet. The ordinance did not, however, bring established streets up to the new standard, a result that could have been achieved by condemning the necessary frontage. The purpose of the linkage, however, was to get the property owner to contribute the needed land to the City free of charge. The practice was upheld in *Pengilly* chiefly on the ground that the wider road worked some benefit to the property owner in question. While the outcome of dedication without compensation might (although it seems unlikely) be justified on this ground, the court's decision clearly elided over the critical issue because nowhere did it determine whether the benefit, if any, to the property owner from the required expansion of the road was equal to the value of the land lost.

A far more egregious practice is illustrated by *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 19 Cal. Rptr. 468 (1993). Here a \$280,000 exaction was imposed to fund a public park and another \$33,000 exaction to fund an "art in the parks program," without any showing of external harm to the City or return benefit to the land owner. Here the exaction represents the "out and out form of extortion" unequivocally condemned in *Nollan* and shows as well how the use of the exaction power can pose genuine threats to freedom of speech by forcing property owners to support projects that may well be antithetical to their own political beliefs or artistic tastes.

Finally, special mention must be made of *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), which sustained a large financial exaction imposed on all new commercial construction within the City on the ground that these fees were needed to offset the increased demand for housing by the poor who were said to be brought within the City limits by these new projects. The Ninth Circuit prefaced its analysis with the observation that *Nollan* worked no change in the applicable constitutional standards, and then continued with the remark that it was a mistake in exaction cases to require "too close a nexus between the regulation and the interest at stake." *Id.* at 874. With that said, it concocted a causal chain composed of missing links. Initially, it is quite impossible to posit a uniform connection between any particular commercial

development and any increase in housing needs of the poor. Commercial developments come in all sizes and shapes, and there is no reason for a fancy boutique to function identically with a Walmart, or to have the same effects on residential or business patterns within Sacramento.

Worse still, any commercial development will necessarily have multiple effects, and not just the single one identified in the ostensibly independent planning survey commissioned by the City to buttress its special exactions. Large developments are prized in many towns because they increase the value of nearby properties, create jobs for a flourishing middle class and offer opportunities for poor people to leave the welfare rolls. They also contribute substantially to the tax rolls through the ordinary real estate taxes for which they have no claim for exemption. Development is linked to prosperity as well as poverty, and should not be charged with some hypothetical cost when it receives no credit for the external benefits it creates. The general assessment, moreover, is not simply a way to finance housing for the poor; it also acts as a barrier to entry against new competition for established buildings. One can easily see this scheme as a transparent ruse whereby established real estate developers place roadblocks in the path of new arrivals. The use of general exactions in *Commercial Builders* falls far short of the close connection needed to insure that the exaction is imposed to compensate for some discrete benefit that it caused.

V. CONCLUSION

The legal issues raised in *Dolan* go far beyond the question of a single bicycle path or floodplain. They relate to the powers that governments can exert over their citizens. If the state can force individual citizens to surrender their land in order to gain permission to develop their land, then a wide train of abuses will surely follow in its wake as governments in their quest to satisfy the demands of the political majority will run roughshod over the rights of any isolated and discrete minority. Certain individuals will be forced to bear the costs of improvements that work to the benefit of the public at large, and unwise projects will be undertaken by governments that are insulated by law from the costs of the decisions they impose on private owners of property within their borders. And it is all so unnecessary. So long as the takings are for a valid public purpose, the state can obtain the land by paying for it. Where a proposed private improvement threatens external harms, the party that seeks to make that improvement can be required to pay for the losses that it imposes on others. Where a proposed public exaction provides some benefit to the private party, then the compensation paid can be reduced by the benefit conferred. These rules are not mysterious nor difficult to interpret or enforce. They follow inexorably from the logic of *Nollan* itself. The simple rule for exactions must be this:

the state should never be allowed to condition its approval of a private development on the uncompensated surrender of a separate and distinct interest in property which it would have to purchase for cash if the state sought to obtain it in a separate transaction. A system of unsupervised exactions is a mischievous form of extortion that has no place in our constitutional order. The judgment for the City of Tigard should be reversed as the exaction imposed is an out and out form of extortion condemned by this Court's *Nollan* decision.