

DOLAN AND WASHINGTON REGULATORY TAKING DOCTRINE

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I. INTRODUCTION

Some time ago, I concluded that the United States Supreme Court's regulatory taking decisions were comprehensible only on the basis of two distinct bodies of doctrine. See Settle, Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't, 12 U. of Puget Sound L. Rev. 339,356, 380 N.243 (1989). These two different bodies of regulatory taking doctrine were largely implicit for the last fifteen years, or so, but finally have been explicitly acknowledged during the last several years. See Dolan v. City of Tigard, ___ U.S. ___, 114 S.Ct. 2309 (1994). Most government regulation of real property imposes restrictions on how land is used. Zoning, shoreline, and wetland regulation are common examples. Less frequently, public regulation requires landowners to surrender a property right by dedicating an interest in land or suffering a permanent invasion. Subdivision and other regulatory exactions, by which approval to develop land is contingent on dedicating an interest in land to the public, are common examples. These two categories of regulation are governed by strikingly different branches of regulatory taking doctrine.

Regulations which merely limit how an owner uses and develops land generally have been upheld against taking challenges even when land use is narrowly limited and property value is greatly depreciated. See, e.g. Keystone Bituminous Coal Assn. v. De Benedictis, 480 U.S. 470 (1987), Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). Only where such restrictions preclude economically viable use of land, is there likely to be a taking. Lucas v. South Carolina Coastal Council, 120 L.Ed 2d 798 (1992). In theory, use restrictions, which greatly reduce value but still allow economically viable use, may conceivably be takings, but the Court has not yet articulated meaningful standards governing so-called "partial takings." Id.

On the other hand, regulation that requires a landowner to surrender a property right may be a taking even if property value is not depreciated at all. A regulatory requirement that permanently denies an owner of the right to possess or exclude others from land ("fundamental attributes of ownership," in the words of the Washington Supreme Court) is a taking requiring compensation unless

it is imposed to avoid or mitigate the projected adverse effects of proposed land development. Reduction of property value is irrelevant to the taking issue. (It would be relevant to the amount of compensation owed.) This branch of regulatory taking doctrine is quite clear and has become a bit clearer as a result of Dolan.

Prior to Dolan, the Court had held that a regulation requiring the owners of existing apartment buildings to allow the installation of Cable TV facilities on their buildings was a taking regardless of property value reduction because it permanently denied the owners' right to exclude strangers. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 102 S.Ct. 3164, 73 L.Ed2d 868 (1982). Then, in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), the Court recognized a qualification to the general rule of Loretto. If a property right is exacted in the regulation of land development, there is no taking if the exaction merely mitigates an impact that would have justified disapproval of the development. In Nollan, the property right exacted did not mitigate adverse consequences of the proposed development, failing the Court's "essential nexus" test and amounting to "extortion."

II. THE DOLAN CASE

The factual background of Dolan, is familiar. The Dolans applied for regulatory permission to expand their plumbing supply store and pave their gravel parking lot. The City of Tigard granted regulatory approval subject to conditions that the Dolans dedicate land to the City for (1) a public greenway along Fanno Creek to reduce or contain flooding that would be exacerbated by the proposed increased areas of impervious surfaces on the site and (2) a pedestrian and bicycle pathway to reduce vehicular traffic on streets in the area. The City's exactions were upheld by the Oregon Land Use Board of Appeals, Court of Appeals, and Supreme Court.

The U.S. Supreme Court granted certiorari and held that the dedication requirements were takings of property without compensation in violation of the Fifth Amendment as applied to state and local government through the Fourteenth Amendment.

In Dolan, the majority's main point, as it elaborated upon Nollan, was hardly surprising. Since, in Nollan, there was no qualitative connection between the exaction and the public interests threatened by the regulated development, the Court had no occasion to discuss quantitative proportionality. In Dolan, having found the qualitative "essential nexus" satisfied, the Court addressed the required quantitative relationship. Anyone who thought hard about the Nollan doctrine could not help but conclude that it must have a quantitative dimension or it would be open to subversion. The underlying principle of Nollan is that requiring a landowner to surrender a property right is "extortion" if it does not essentially neutralize adverse effects of the landowner's activity on the public interest. The Nollan principle would be violated qualitatively if a building permit to remodel a homeowner's kitchen was conditioned on dedication of a strip of land to widen an abutting road since a home with an upgraded kitchen would generate no more traffic than it did before. Certainly, the Nollan principle would be quantitatively violated if a proposed development that would generate a trivial amount of traffic was conditioned on construction and dedication of a freeway. Dolan's recognition of the quantitative dimension of the Nollan principle is not an extension, but an explanation and application, of Nollan. Indeed, the line between the qualitative and quantitative dimensions of a regulatory exaction is not always easy to draw. Did the requirement of public access to the flood plain area of Dolan's land violate Nollan's qualitative dimension, as Justice Souter hypothetically opined, or Nollan's quantitative dimension, as the majority reasoned?

As significant as the Court's refinement of the Nollan test, was the Court's assignment of burden of proof on whether the two prongs of the Nollan-Dolan test are satisfied. The Court stressed that such regulatory exactions of property dedication must be justified through individualized determinations that the tests are met and that government must bear the burden of justification.

III. THE IMPACT OF DOLAN ON WASHINGTON REGULATORY TAKING DOCTRINE

The holding of Dolan should have no significant affect on Washington regulatory taking doctrine. While the "use regulation" branch of Washington doctrine arguably is inconsistent with federal court decisions, the "denial of fundamental attribute of ownership" branch of Washington

doctrine is faithful to Nollan and even has anticipated Dolan. Since road-widening dedication exactions were held violative of Nollan in two Washington cases decided prior to Dolan, where the conditioned development did generate some new traffic, Dolan's quantitative "rough proportionality" test would support the decisions more precisely than Nollan's narrow holding. See Unlimited v. Kitsap County, 50 Wash. App. 723, 750 P.2d 651, review denied, 111 Wash.2d 1008 (1988); Sparks v. Douglas County, 863 P.2d 142 (Wash. App. Div. 3, 1993). In Sparks, the Court held that the exaction of land to widen abutting roads as a condition to short plat approval was a taking. The Court did not explicitly address burden of proof, but effectively imposed the burden on the county to justify the exaction. The constitutional doctrine articulated by the Court was consistent with Dolan:

Permanent physical invasions of property, such as the proposed dedications here, are usually considered takings. . . . However, permission to develop land may be conditioned on the owner's agreement to dedicate a portion of his property to public use if the regulatory exaction reasonably prevents or compensates, in a specific and proportional fashion, for adverse public impacts of the proposed development (citations omitted).

It may be arguable that Sparks went beyond Dolan's "rough proportionality" test which requires "some sort of individualized determination" but "no precise mathematical calculation," Dolan, 1994 WL 276693, 9, in finding insufficient justification by the county in the record:

The record here does not show an adverse impact, i.e., that the Sparkses' developments necessitate widening the roads in question. Douglas County has no immediate plans for improvements to the roads, with the exception of Empire Avenue N.W. which is included in the County Six Year Transportation Improvement Program. And even with respect to Empire Avenue N.W. and the other roads, the evidence establishes that the homes in the plats will, at the most, add only 25 vehicles per hour to existing traffic. There is no direct evidence these already deficient roads will be less safe after the addition of 25 cars per hour. And 25 is not a number of sufficient magnitude to support, by itself, a reasonable inference that the developments will decrease the roads' safety. (Footnotes omitted.)

The Washington Supreme Court, which has not had occasion to apply Nollan, has granted a petition for review and heard arguments in Sparks. Since Dolan, the Court of Appeals reaffirmed its anticipated Dolan doctrine in Luxembourg v. Snohomish County, 76 Wash.App. 502 ___P.2d ___, (1995).

IV. UNRESOLVED ISSUES

An important issue closely related to Dolan is whether the constitutional standards of Nollan and Dolan apply to regulatory exactions that do not directly deny a fundamental attribute of land ownership, such as development fees or the cost of new traffic signals? Such exactions do not involve denial of the right to possess, or exclude strangers, from land, and yet they often are functionally equivalent to land dedication. Indeed, in Dolan, the ordinance requiring the exaction of bike paths called for the exaction of fees in lieu of dedication where the site of development would not be an appropriate location for a bike path. See Dolan at 1994 WL 276693, 11, FN 1.

If regulatory exactions that do not deny a fundamental attribute of ownership are not subject to the rigorous Dolan standard, functionally equivalent exactions might be subject to quite different constitutional limitations. The Washington Supreme Court has so-held in Sintra, Inc. v. Seattle, 119 Wash.2d 1, 16 n. 7, 829 P.2d 765 (1992) and reaffirmed in Guimont v. Clarke, 121 Wn.2d 586, 608 n. 9, ___ P.2d __ (1993). In doing so, the Court relied on two decisions of the U.S. Supreme Court, Yee v. Escondido, 118 L.Ed.2d 153, 166 (1992) and U.S. v. Sperry Corp., 493 U.S. 521, 62 n. 9 (1989). However, in Ehrlich v. Culver City, 62 U.S.L.W. 3860 (June 27, 1994), decision below Ehrlich v. Culver City, 15 Cal. App. 4th 1737, 190 Cal. Rptr. 468 (1993), the U.S. Supreme Court indicated that the heightened scrutiny of Nollan and Dolan does apply to regulatory exactions that do not deny a landowner's fundamental right to exclusively possess land. In Ehrlich, a developer proposed to construct townhomes on the site of a failed private tennis club. Even though the tennis courts, which would be displaced by the development, were private, the city conditioned regulatory permission on payment of \$280,000 to be used for new public tennis courts. The city also exacted \$33,220 to be used for public art. An appellate court upheld the exactions and the California

Supreme Court denied discretionary review. Shortly after deciding Dolan, the U.S. Supreme Court granted certiorari in Ehrlich, immediately vacated the California decision, and directed the state court to reconsider its decision in light of Dolan. On remand, the California Court of Appeals reaffirmed the validity of the challenged exactions. The California Supreme Court recently granted discretionary review in the Ehrlich case. This is a momentous event since California's highest court has largely abstained from taking cases.

If Nollan and Dolan ultimately are limited to exactions that involve permanent physical invasions of land, which now seems unlikely, there will be strong incentives in other states to employ development fees instead of land dedication and easement exactions. However, in Washington, the narrow interpretation of Nollan did not save the challenged exactions. In both Sintra and Guimont, they were held violative of Washington's uniquely rigorous "unduly oppressive" prong of substantive due process. Moreover, in Washington, development fees and exaction of SEPA mitigating conditions are subject to stringent statutory limitations that would seem to satisfy Dolan. See RCW 82.02.050, .060, .070., .080; RCW 43.21C.060; WAC 197-11-660.

If the Strict Standards of Nollan-Dolan Apply to Development Impact Fees, How Will the Court Distinguish Such Regulatory Fees From Taxation Which Is Most Differentially Reviewed? To the citizen paying them, regulatory fees and taxes feel about the same. It now appears that regulatory fees are subject to the Nollan-Dolan requirements that such fees be designed to proportionally compensate for the adverse impacts on the public interest of the regulated activity. Taxes, in sharp contrasts, are not subject to any such constitutional limitations. See, e.g., Nordlinger v. Hahn, 505 U.S. _____, 120 L.Ed.2d 1 (1992) (the California Proposition 13 case).

How will the Court explain the sharply differential standards applicable to development fees and taxes? Will the court rely on the distinction that Taxes apply broadly and regulatory fees narrowly so that constitutional protection of minority property owners from exploitation by the majority is appropriate for fees but not taxes? Will the Court rely on the adjudicative-legislative distinction emphasized in Dolan?

Will all adjudicative land use regulatory actions be subject to the rigorous Nollan-Dolan tests while legislative actions will be subject to more differential review? In Dolan, the Court explained that rigorous constitutional scrutiny with the burden of justification on the City is appropriate because the exactions were characterized as adjudicative rather than legislative. Since Dolan's "individualized determination" requirement presumably would make all regulatory exactions adjudicative rather than legislative, the intensified scrutiny and burden of justification apparently cannot be escaped by the expedient of broadly legislated exactions. Perhaps the Court employed the adjudicative - legislative distinction as ground work for distinguishing deferential review of taxation and close scrutiny of development fees in the future. Or perhaps the Court is setting the scene for extension of Dolan scrutiny beyond exaction of property rights and development fees to adjudicative use restrictions.

Stay tuned.