

CONSTITUTIONAL GREENWAY DEDICATION REQUIRES "ROUGH
PROPORTIONALITY" TO DEVELOPMENT'S IMPACT

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On Friday, June 24, 1994, the United States Supreme Court issued its decision in the case of *Dolan v. City of Tigard*. In this case, the Supreme Court reversed a decision by the Oregon state supreme court which had upheld the dedication of land for a public greenway and bikepath as a precondition to a building permit. In this particular instance, the city had rejected Dolan's request for a variance from the pathway dedication condition on the basis that "omitting the planned section of the pathway across Dolan's property would conflict with its adopted policy of providing a continuous pathway system."

In a 5 to 4 vote, the United States Supreme Court held that "the city's dedication requirements constitute an uncompensated taking of property." In effect, the Court found that the city had exercised leverage over an application for a building permit to expand its urban greenway system over private property without any expenditure of public funds. Specifically, the Court found that the "Takings Clause" of the Constitution "requires the city to implement its policy by condemnation unless the required relationship between the Dolan's development and added traffic is shown."

As indicated in the majority opinion described below, the Supreme Court found that the city's environmental data failed to demonstrate the required reasonable relationship between the required dedications and the impact of Dolan's proposed development. Accordingly, to survive a constitutional challenge, *Dolan* would require public entities to demonstrate a "roughly proportional" quantitative relationship between dedication requirements imposed on the individual property owner and the increased demands of the proposed development on the existing infrastructure (e.g., traffic control, flood control, open space requirements.)

AM I ROUGH ENOUGH?

In the case of *Dolan v. City of Tigard*, No. 93-518, --- U.S. ---, --- S.Ct. --- (1994), Florence Dolan petitioned the United States Supreme Court to review a decision by the Oregon state supreme court which had held that "the city of Tigard could condition the approval of her building permit on the dedication of a portion of her property for flood control and traffic improvements." The U.S. Supreme Court granted Dolan's petition for the purpose of determining "the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development." The facts of the case were as follows:

Florence Dolan owns a plumbing and electric supply store located on Main Street in the

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Central Business District of the city. The store covers approximately 9,700 square feet on the eastern side of a 1.67-acre parcel, which includes a gravel parking lot. Fanno Creek flows through the southwestern corner of the lot and along its western boundary. The year-round flow of the creek renders the area within the creek's 100-year floodplain virtually unusable for commercial development. The city's comprehensive plan includes the Fanno Creek floodplain as part of the city's greenway system.

Dolan applied to the city for a permit to redevelop the site. Her proposed plans called for nearly doubling the size of the store to 17,600 square feet, and paving a 39-space parking lot. The existing store, located on the opposite side of the parcel, would be razed in sections as construction progressed on the new building... The City Planning Commission [CDC] granted Dolan's permit application subject to conditions imposed by the city's CDC.

Thus, the Commission required that Dolan dedicate the portion of her property lying within the 100-year floodplain for improvement of a storm drainage system along Fanno Creek and that she dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway. The dedication required by that condition encompasses approximately 7,000 square feet, or roughly 10% of the property...

Dolan requested variances from the CDC standards. Variances are granted only where it can be shown that, owing to special circumstances related to a specific piece of the land, the literal interpretation of the applicable zoning provisions would cause "an undue or unnecessary hardship" unless the variance is granted. Rather than posing alternative mitigating measures to offset the expected impacts of her proposed development, as allowed under the CDC, Dolan simply argued that her proposed development would not conflict with the policies of the comprehensive plan.. The Commission denied the request.

The Commission made a series of findings concerning the relationship between the dedicated conditions and the projected impacts of Dolan's project. First, the Commission noted that "[i]t is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs." The Commission noted that the site plan has provided for bicycle parking in a rack in front of the proposed building and "[i]t is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed."

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In addition, the Commission found that creation of a convenient, safe pedestrian/ bicycle pathway system as an alternative means of transportation "could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion." The Commission went on to note that the required floodplain dedication would be reasonably related to Dolan's request to intensify the use of the site given the increase in the impervious surface. The Commission stated that the "anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes."

Dolan appealed to the Land Use Board of Appeals (LUBA) on the ground that the city's dedication requirements were not related to the proposed development, and, therefore, those requirements constituted an uncompensated taking of their property under the Fifth Amendment.

In evaluating the federal taking claim, LUBA assumed that the city's findings about the impacts of the proposed development were supported by substantial evidence. Given the undisputed fact that the proposed larger building and paved parking area would increase the amount of impervious surfaces and the runoff into Fanno Creek, LUBA concluded that "there is a 'reasonable relationship' between the proposed development and the requirement to dedicate land along Fanno Creek for a greenway." With respect to the pedestrian/bicycle pathway, LUBA noted the Commission's finding that a significantly larger retail sales building and parking lot would attract larger numbers of customers and employees and their vehicles. It again found a "reasonable relationship" between alleviating the impacts of increased traffic from the development and facilitating the provision of a pedestrian/bicycle pathway as an alternative means of transportation....

The Oregon appeals court and the state supreme court affirmed. According to the state supreme court, "an exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve." In this particular instance, the state supreme court found that "both the pedestrian/bicycle pathway condition and the storm drainage dedication had an essential nexus to the development of the proposed site." The state supreme court, therefore, concluded that "the conditions to be reasonably related to the impact of the expansion of Dolan's business." Dolan petitioned the United States Supreme Court to review this determination.

As described by the Supreme Court, the Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides: "Nor shall

private property be taken for public use, without just compensation."

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." Without question, had the city simply required Dolan to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. Such public access would deprive Dolan of the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property."

On the other hand, the Court acknowledged that "the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in *Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926)."

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. A land use regulation does not effect a taking if it "substantially advances legitimate state interests" and does not "deny an owner economically viable use of his land."

Rather than a legitimate exercise of land use planning and regulation, the Court characterized the city's action in this particular instance as "an adjudicative decision to condition Dolan's application for a building permit on an individual parcel." Further, the Court found that "the conditions imposed were not simply a limitation on the use Dolan might make of her own parcel, but a requirement that she deed portions of the property to the city."

Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.

As noted by the Court, Dolan maintained that the city had "forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements."

Dolan does not quarrel with the city's authority to exact some forms of dedication as a condition for the grant of a building permit, but challenges the showing made by the city to justify these exactions. She argues that the city has identified "no special benefits"

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conferred on her, and has not identified any "special quantifiable burdens" created by her new store that would justify the particular dedications required from her which are not required from the public at large.

In evaluating Dolan's claim, the Court indicated it would first consider "whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city." In this particular instance, the Court found that such a "nexus" existed.

Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld. It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100-year floodplain. Dolan proposes to double the size of her retail store and to pave her now-gravel parking lot, thereby expanding the impervious surface on the property and increasing the amount of stormwater run-off into Fanno Creek.

The same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation. In theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers. Pedestrians and bicyclists occupying dedicated spaces for walking and/or bicycling remove potential vehicles from streets, resulting in an overall improvement in total transportation system flow.

Having found the necessary "nexus," the Court then considered "the required degree of connection between the exactions and the projected impact of the proposed development." Specifically, this second part of the analysis would require the Court to "determine whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of Dolan's proposed development."

A use restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial government purpose. Here the Oregon Supreme Court deferred to what it termed the "city's unchallenged factual findings" supporting the dedication conditions and found them to be reasonably related to the impact of the expansion of Dolan's business.

In pertinent part, the city made the following specific findings relevant to the pedestrian/bicycle pathway:

In addition, the proposed expanded use of this site is anticipated to generate additional

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vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

The specific issue for the Supreme Court was, therefore, "whether these findings are constitutionally sufficient to justify the conditions imposed by the city on Dolan's building permit." According to the Supreme Court, "a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment."

No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development... The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.

[A] city may not require a property owner to dedicate private property for some future public use as a condition of obtaining a building permit when such future use is not occasioned by the construction sought to be permitted... Some form of the reasonable relationship test has been adopted in many other jurisdictions...requiring a showing of a reasonable relationship between the planned subdivision and the municipality's need for land... Despite any semantical differences, general agreement exists among the courts that the dedication should have some reasonable relationship to the needs created by the development.

We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

Applying these principles to the facts of the case, the Supreme Court found it "difficult to see why recreational visitors trampling along Dolan's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek." Further, the Court found that "the city has not attempted to make any individualized determination to support this part of its request."

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[The city] not only wanted Dolan not to build in the floodplain, but it also wanted Dolan's property along Fanno Creek for its Greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control. The difference to Dolan, of course, is the loss of her ability to exclude others. As we have noted, this right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property...

[T]he city wants to impose a permanent recreational easement upon Dolan's property that borders Fanno Creek. Dolan would lose all rights to regulate the time in which the public entered onto the Greenway, regardless of any interference it might pose with her retail store. Her right to exclude would not be regulated, it would be eviscerated.

If Dolan's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require Dolan to provide some alternative greenway space for the public either on her property or elsewhere.

Accordingly, the Supreme Court concluded that "the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the Dolan's proposed new building."

With respect to the pedestrian/bicycle pathway, we have no doubt that the city was correct in finding that the larger retail sales facility proposed by Dolan will increase traffic on the streets of the Central Business District. The city estimates that the proposed development would generate roughly 435 additional trips per day. Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use. But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the Dolan's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "could offset some of the traffic demand ... and lessen the increase in traffic congestion."

The findings of fact that the bicycle pathway system "could offset some of the traffic demand" is a far cry from a finding that the bicycle pathway system will, or is likely to, offset some of the traffic demand. No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of

the traffic demand generated.

Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization particularly in metropolitan areas such as Portland. The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done. A strong public desire to improve the public condition will not warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

The Supreme Court, therefore, reversed the judgment of the Oregon state supreme court in favor of the city and remanded (i.e. sent back) the case "for further proceedings consistent with this opinion." On remand, the constitutionality of the city's actions would have to be based upon "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."