

CASENOTES

A Constitutional Standard of Review for Permit Conditions, Exactions, and Linkage Programs: *Nollan v. California Coastal Commission*¹ — In an effort to alleviate urban housing shortages, several cities in the United States have imposed an obligation on office building developers to construct or pay for the construction of low and moderate income housing as a condition for granting a building permit.² This type of permit condition, known as a linkage program, raises the possibility that a "taking" has occurred. The "takings clause" of the fifth amendment of the United States Constitution states that private property shall not be taken for public use without just compensation.³ Where government exercises its power of eminent domain and actually takes possession of private property, clearly a "taking" has occurred, requiring just compensation. Furthermore, the United States Supreme Court has recognized that where a government regulation goes "too far" in restricting a private property owner's use of his land, a taking has also occurred.⁴ The Court has held that the application of a zoning regulation to private property goes "too far" and constitutes a "taking" if it does not "substantially advance" legitimate state interests.⁵ Thus, the question of whether or not a linkage program constitutes a taking depends on whether such a program "substantially advances" legitimate state interests.

The United States Supreme Court, in *Nollan v. California Coastal Commission*, considered this issue of when permit conditions "sub-

¹ 107 S. Ct. 3141 (1987).

² Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 6-7 (1987). Boston and San Francisco are presently the only two cities that have adopted linkage programs. Several other U.S. cities, such as Chicago, Denver and Seattle, have or are exploring the possibilities of adopting linkage programs. *Id.* at 6-7; Connors & High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 78 (1987).

³ The fifth amendment of the United States Constitution states: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The fifth amendment itself applies only to the federal government. The Supreme Court, however, has incorporated the fifth amendment into the fourteenth amendment, and thus its provisions have been held to apply to the states through the fourteenth amendment. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1240 n.10 (1987); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978); *Chicago, B & Q R.R. Co. v. Chicago*, 166 U.S. 226, 238-39 (1897).

⁴ *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).

⁵ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central*, 438 U.S. at 127 ("a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . .").

stantially advance" a legitimate state interest.⁶ In *Nollan*, in return for granting permission to the Nollans to replace a small bungalow on their shorefront property with a larger, three bedroom home, the California Coastal Commission (Commission) required the Nollans to grant an easement allowing the public to pass over their property between their seawall and the ocean.⁷ The Nollans argued that the imposition of the easement condition constituted a taking without just compensation.⁸ In response, the Commission contended that the easement was necessary to alleviate the adverse impact of the Nollans' development on public access to the shorefront and private access to the beach.⁹ In ruling for the Nollans, the Court held that in order for a permit condition to "substantially advance" a legitimate state purpose, there must be a sufficient nexus between the permit condition and the public need created by the development that the condition seeks to alleviate.¹⁰

This casenote examines what local governments must do to establish this "sufficient nexus" after *Nollan* and this requirement's likely effect on linkage programs. Section I discusses the standard of review applied by the United States Supreme Court to land use regulations imposed by governmental bodies.¹¹ Section II examines the various standards utilized by state courts in reviewing permit conditions.¹² Section III presents the *Nollan* decision, detailing the majority's holding and reasoning and the dissenting opinions filed in the case.¹³ Section IV analyzes the Court's holding in *Nollan* in light of its prior decisions and what the *Nollan* decision means for permit conditions in the future.¹⁴ Section V examines the impact the *Nollan* decision will have on linkage programs, a particular form of permit condition.¹⁵ This casenote concludes that in order for permit conditions to avoid constituting a taking after *Nollan*, governmental bodies must clearly establish that the imposed condition does in fact address the adverse impact of the development on the community.

⁶ 107 S. Ct. 3141, 3146 (1987).

⁷ *Id.* at 3143. See *infra* notes 102-08 and accompanying text.

⁸ *Id.* at 3145.

⁹ *Nollan*, 107 S. Ct. at 3143. See *infra* notes 106-08 and accompanying text.

¹⁰ *Nollan*, 107 S. Ct. at 3147-48.

¹¹ See *infra* notes 16-43 and accompanying text.

¹² See *infra* notes 44-98 and accompanying text.

¹³ See *infra* notes 99-163 and accompanying text.

¹⁴ See *infra* notes 164-86 and accompanying text.

¹⁵ See *infra* notes 187-90 and accompanying text.

I. THE UNITED STATES SUPREME COURT'S STANDARD OF REVIEW FOR LAND USE REGULATIONS

In a series of cases beginning early in the 1900s, the United States Supreme Court has developed a standard of review for determining when land use regulations imposed by government constitute a taking of property requiring compensation under the fifth amendment. Under this standard, a land use regulation constitutes a taking where it fails to "substantially advance" a legitimate state interest or denies a landowner economically viable use of his or her land.¹⁶ In the landmark case of *Pennsylvania Coal v. Mahon*, decided in 1922, the Supreme Court held that government could effectuate a taking requiring just compensation not only by exercising its power of eminent domain, but also by *regulating* private property.¹⁷ In *Pennsylvania Coal*, a coal company sold the surface rights to a parcel of property, but retained the right to mine the coal beneath the surface of the property. Following the transaction, Pennsylvania enacted legislation barring the mining of coal in such a way as would cause the subsidence of any house, unless the house was owned by the owner of the underlying coal and was more than one hundred fifty feet from another person's improved property.¹⁸ Although private property may be regulated to a certain extent, Justice Holmes ruled, when the government applies to a property owner a land use regulation that goes "too far," such an application constitutes a taking of property. Because the Pennsylvania law rendered the coal commercially impractical to mine, the Court held that the regulation went "too far" and therefore constituted a taking.¹⁹

In subsequent decisions, the Supreme Court further articulated when a government land use regulation goes "too far" and constitutes a taking of property. In *Nectow v. City of Cambridge*, decided by the Court in 1928, Cambridge had adopted a zoning ordinance dividing the city into three types of use districts: "residential," "business," and "unrestricted."²⁰ The plaintiff owned a parcel of land, a one hundred foot wide strip of which marked the eastern boundary of the "residential" district in the area. The remainder of the plaintiff's tract was included in an "unrestricted" zone.²¹ The plaintiff

¹⁶ *Agins*, 447 U.S. at 260; *Penn Central*, 438 U.S. at 127, 138 n.6.

¹⁷ *Pennsylvania Coal*, 260 U.S. at 415.

¹⁸ *Id.* at 412-13.

¹⁹ *Id.* at 414-16.

²⁰ 277 U.S. 183, 185 (1928).

²¹ *Id.* at 186-87.

argued that as applied to him, the city ordinance constituted a deprivation of property in violation of the fourteenth amendment.²²

Finding for the plaintiff, the Court held that where a land use regulation does not bear a "substantial relation" to a police power objective such as public health, safety, morals, or general welfare, that regulation effectuates a taking. Applying this standard, the Court held that the health, safety, convenience, and general welfare of the community were not promoted by zoning the one hundred foot strip of plaintiff's property "residential," as the boundary of the "residential" district could have been drawn in such a way as to exclude the one hundred foot strip with little if any impact on the community.²³ Accordingly, the Court found that the zoning ordinance as applied to the plaintiff did not meet the "substantially related" standard.²⁴

In 1978, fifty years following its decision in *Nectow*, the Court refined its standard of review for land use regulations in *Penn Central Transportation Co. v. City of New York*.²⁵ In *Penn Central*, the City of New York had adopted a Landmarks Preservation Law intended to preserve historic sites within the city.²⁶ The Penn Central Transportation Company (Penn Central) owned Grand Central Terminal, which was designated a "landmark" by the city in 1967 under the Landmarks Preservation Law. In 1968, Penn Central applied to the Landmarks Preservation Commission (Landmarks Commission) for permission to construct an office building atop the terminal.²⁷ The Landmarks Commission denied permission for the construction on the grounds that it would overwhelm the original design of the terminal and reduce it from a historic landmark to a mere curiosity. Penn Central then filed suit, claiming that the application of the Landmarks Preservation Law to its property constituted a taking without compensation in violation of the fifth and fourteenth amendments.²⁸

Finding in favor of the Landmarks Commission, the Supreme Court held that a land use regulation effectuates a taking if it either is "not reasonably related to the effectuation of a substantial public

²² *Id.* at 185.

²³ *Id.* at 188.

²⁴ *Id.* at 188-89.

²⁵ 438 U.S. 122, 127-38 (1978).

²⁶ *Id.* at 108-09.

²⁷ *Id.* at 115-16.

²⁸ *Id.* at 117-19.

purpose,"²⁹ or does not permit an economically viable use of the property to which it is applied.³⁰ The Court noted that it agreed with the judgment of the New York Court of Appeals that the preservation of landmarks under the city ordinance benefited all New York residents and structures, both economically and in terms of improving the quality of life in the city. The Court concluded that the restrictions imposed on Penn Central were "substantially" related to the promotion of the general welfare.³¹ The Court further concluded that the imposition of the restrictions on Penn Central did not deny the company all viable economic use of their property. The imposed restrictions did not constitute a taking, concluded the Court, because the property's use as a terminal guaranteed Penn Central a "reasonable return"³² and because the city had made the rights to build above the property transferable to at least eight other parcels in the vicinity of the terminal.³³

The Supreme Court further refined this standard of review in the 1980 case of *Agins v. City of Tiburon*.³⁴ In *Agins*, the plaintiff landowner purchased five acres of unimproved land, intending to develop the property as a residential area.³⁵ Following the purchase, the state of California required Tiburon to draft a general plan governing land use and the development of open-space land. Accordingly, the city adopted two ordinances modifying existing zoning regulations. Under the new zoning provisions, use of the plaintiff's five acre tract was restricted by density limitations to the construction of between one and five single family residences.³⁶ Following the adoption of the ordinances, the plaintiffs brought suit on the grounds that the city had taken their property without just compensation in violation of the fifth and fourteenth amendments.³⁷

The Supreme Court affirmed the California Supreme Court's holding each the zoning ordinances on its face did not effectuate a taking.³⁸ Citing *Nectow* and *Penn Central*, the Court held that a

²⁹ *Id.* at 127.

³⁰ *Id.* at 138 n.36.

³¹ *Id.* at 134-35, 138.

³² *Id.* at 136.

³³ *Id.* at 137-38.

³⁴ 447 U.S. 255, 260 (1980).

³⁵ *Id.* at 257.

³⁶ *Id.*

³⁷ *Id.* at 258.

³⁸ *Id.* at 259. The Court did not consider the issue of whether the ordinance as applied constituted a taking of property. *Id.* at 260. The Court noted that, because the plaintiffs had

zoning restriction constituted a taking where it "does not substantially advance legitimate state interests or denies an owner economically viable use of his land."³⁹ Applying this standard, the Court held that the interests of preserving open space advanced by the ordinances had long been recognized by the Court as "legitimate state interests."⁴⁰ Furthermore, the Court noted, the ordinances by their terms served the city's interest in assuring careful and orderly development of residential property and the provision of adequate open space areas.⁴¹ Accordingly, the Court concluded, the ordinance "substantially advanced" these legitimate state interests. The Court also held that the city ordinances did not constitute a taking by denying the landowner economically viable use of his property.⁴² Although the ordinances limited development, the Court noted, the plaintiffs could potentially build as many as five residences on their prime residential property, thus guaranteeing a reasonable return on the property. Accordingly, the Court found that the ordinances adopted by the city of Tiburon did not constitute a taking.⁴³

Thus, under the takings clause of the fifth amendment, a land use regulation imposed by the government may constitute a taking in two ways. First, a land use regulation constitutes a taking if it fails to "substantially advance" a legitimate state interest. Second, the application of a land use regulation to a property owner is a taking when it denies the property owner economically viable use of his or her land.

II. STANDARDS UTILIZED BY STATE COURTS TO REVIEW PERMIT CONDITIONS

Faced with dwindling contributions from the federal government and severe housing shortages, some cities in the United States have adopted a form of permit condition called linkage to deal with these difficulties.⁴⁴ Although linkage programs differ in some re-

not submitted a plan for development under the new ordinances, there existed no controversy as to whether the ordinances as applied to the plaintiffs constituted a taking. *Id.* Thus, the Court concluded, the only issue was whether the enactment of the ordinances themselves constituted a taking, i.e., whether the ordinances were invalid on their face. *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 261-62, (citing *Penn Central*, 438 U.S. at 129; *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *Euclid v. Ambler Co.*, 272 U.S. 365, 394-95 (1926)).

⁴¹ *Id.* at 262.

⁴² *Id.* at 261-63.

⁴³ *Id.* at 262-63.

⁴⁴ *Connors & High, supra* note 2, at 78; *Delaney, Gordon & Hess, The Needs-Nexus Analysis:*

spects depending on the particular city, all such programs are based on the principle that because office developments attract additional people to the city, they necessarily exacerbate the city's housing shortage.⁴⁵ Accordingly, the argument goes, office developers may be required to alleviate this burden by paying for the construction of low and middle-income housing as a condition precedent to their obtaining a building permit.⁴⁶ Developers have never directly challenged the constitutionality of these linkage programs.⁴⁷

Developers have, however, challenged a closely related form of permit condition, the subdivision exaction, on the grounds that it constitutes a taking of property without just compensation.⁴⁸ The subdivision exaction is conceptually identical to linkage; it is a requirement that a subdivider dedicate a portion of the proposed development or donate a fee in lieu thereof for public purposes prior to obtaining subdivision approval.⁴⁹ To avoid a declaration that subdivision exactions constitute an unconstitutional taking without just compensation, courts have required that such conditions be reasonable.⁵⁰ Various state courts have applied one of three tests in determining whether a subdivision exaction meets this requirement of reasonableness: the "rational relationship" test, the "uniquely and specifically attributable" test and the "rational nexus" test.⁵¹

The "rational relationship" test is the easiest of these three standards for a government to satisfy. Under the rational relation-

A *Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 LAW & CONTEMP. PROBS. 139, 145 (1987); Diamond, *The San Francisco Office Housing Program: Social Policy Underwritten by Private Enterprise*, 7 HARV. ENVTL. L. REV. 449, 449-50 (1983).

⁴⁵ Smith, *supra* note 2, at 25; Porter, *The Office/Housing Linkage Issue*, 44 URBAN LAND 16, 20 (Sept. 1985); Delaney, Gordon & Hess, *supra* note 44, at 128; Diamond, *supra* note 44, at 449.

⁴⁶ Smith, *supra* note 2, at 25-27; Delaney, Gordon & Hess, *supra* note 44, at 128-29.

⁴⁷ Delaney, Gordon & Hess, *supra* note 44, at 143; Porter, *supra* note 45, at 21.

⁴⁸ See, e.g., *Associated Home Builders, Inc. v. Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971); *Grupe v. California Coastal Comm'n*, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985); *Wald Corp. v. Metropolitan Dade County*, 338 So. 2d 863 (Fla. 1976); *Krughoff v. Naperville*, 68 Ill. 2d 352, 369 N.E.2d 892 (1977); *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961); *Collis v. City of Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976); *Home Builder's Ass'n v. Kansas City*, 555 S.W.2d 832 (Mo. 1977); *Jenad, Inc. v. City of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); *Frank Ansuini, Inc. v. City of Cranston*, 107 R.I. 63, 264 A.2d 910 (1970); *Call v. West Jordan*, 606 P.2d 217 (Utah 1979); *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

⁴⁹ E. McQUILLAN, *THE LAW OF MUNICIPAL CORPORATIONS* § 25.118d, at 349 (3d ed. 1983).

⁵⁰ *Id.*

⁵¹ Delaney, Gordon & Hess, *supra* note 44, at 147-56.

ship test, applied by the courts of California, a municipality must establish that the subdivision exaction bears a rational or reasonable relationship to the needs arising from the development of the subdivision.⁵² The California courts have generally deferred to the judgment of state and local governments in evaluating whether this requirement has been satisfied, requiring only a showing that the subdivision have a general impact on the public need that the condition seeks to alleviate.⁵³ A municipality need not show that the particular subdivision subjected to the condition is the sole creator of the need addressed by the condition.⁵⁴

The Supreme Court of California applied the "rational relationship" test in upholding a subdivision exaction ordinance in *Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek*.⁵⁵ Walnut Creek, pursuant to state enabling legislation, had adopted an ordinance requiring that a subdivision developer dedicate a portion of his or her land or donate a fee in lieu thereof for park or recreational facilities as a condition precedent to subdivision approval.⁵⁶ The court rejected the developer's contention that the imposed condition could be justified only by showing that the subdivision was the sole cause of the deficiency of parks and recreational facilities the condition was designed to remedy. Instead, the court held that as long as a municipality could show a general need for parks and recreational facilities created by present and future subdivisions, a subdivision exaction designed to meet these overall needs of the community was constitutional.⁵⁷

In finding this standard satisfied, the court displayed great deference to the state's judgment in passing the enabling legislation and to the city's judgment in adopting the dedication ordinance. The court did not determine whether the condition imposed on the particular subdivision at issue actually addressed the impact of the subdivision on the community. Instead, the court simply noted that Walnut Creek had experienced an enormous population growth over the past decade.⁵⁸ Rapid population growth and a correspond-

⁵² See *id.* at 148.

⁵³ *Associated Home Builders*, 4 Cal. 3d at 637-40, 484 P.2d at 610-11, 94 Cal. Rptr. at 634-36; *Grupe*, 166 Cal. App. 3d at 164-66, 212 Cal. Rptr. at 587-89.

⁵⁴ *Associated Home Builders*, 4 Cal. 3d at 637-40, 484 P.2d at 610-11, 94 Cal. Rptr. at 634-36; *Grupe*, 166 Cal. App. 3d at 164-66, 212 Cal. Rptr. 587-89.

⁵⁵ 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971).

⁵⁶ *Id.* at 636, 484 P.2d at 609, 94 Cal. Rptr. at 633.

⁵⁷ *Id.* at 639-40, 484 P.2d at 611, 94 Cal. Rptr. at 635.

⁵⁸ *Id.* at 639, 484 P.2d at 611, 94 Cal. Rptr. at 635.

ing disappearance of open land, the court noted, were urgent problems faced by communities throughout California.⁵⁹ Given the severity of these problems, the court maintained that Walnut Creek need not show that the particular developer subject to the permit condition would, solely by the development of his subdivision, increase the need for parks and open space to the extent that additional land was required. The existence of these urgent needs and their necessary exacerbation by the addition of new subdivisions to the community, the court held, were sufficient to justify requiring a developer to dedicate a portion of the proposed subdivision or pay a fee in lieu thereof for parks and recreational facilities as a condition precedent to subdivision approval.⁶⁰

In *Grupe v. California Coastal Commission*, the California Court of Appeal also applied the "rational relationship" standard in upholding a permit condition imposed on a property owner.⁶¹ As a condition to receiving approval to build a home on his shorefront property, Mr. Grupe was required to grant an easement allowing the public to pass to and fro along the shorefront between his seawall and the ocean.⁶² Citing *Associated Home Builders*, the California Court of Appeal held that a particular development need not create the need for a particular exaction.⁶³ Instead, the court ruled that there need only be an indirect relationship between a proposed exaction and the public need to which the development contributes. Thus, the court continued, the exaction need only be designed to meet the public need to which the project contributes in an incidental way.⁶⁴

In applying this standard, the court did not examine the factual record to establish whether the condition imposed on Mr. Grupe actually addressed the impact of his development on public access to the shorefront.⁶⁵ Instead, the court noted that Mr. Grupe's development was part of an overall process of development occurring in California reducing public access. Exhibiting great deference to the Commission's judgment, the court did not inquire into the factual record beyond this observation, accepting the Commission's

⁵⁹ *Id.* at 638-39, 648, 484 P.2d at 610-11, 618, 94 Cal. Rptr. at 634-35, 642.

⁶⁰ *Id.* at 639-40, 484 P.2d at 611, 94 Cal. Rptr. at 635.

⁶¹ 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985).

⁶² *Id.* at 156, 212 Cal. Rptr. at 581.

⁶³ *Id.* at 166 & n.11, 212 Cal. Rptr. at 589 & n.11.

⁶⁴ *Id.* at 166, 212 Cal. Rptr. at 589.

⁶⁵ *Id.* at 166 & n.11, 212 Cal. Rptr. at 589 & n.11.

division at hand.⁷⁹ The imposition of an across-the-board 7% requirement was therefore necessarily invalid, the court stated, as it failed to take into account to what extent a particular subdivision itself created the need the condition sought to alleviate.⁸⁰

In sum, in contrast to the "rational relationship" test, the "uniquely and specifically attributable" test imposes a substantial burden on a municipality in establishing the constitutionally required nexus between a permit condition and the public need that the imposed condition seeks to address. Unlike the "rational relationship" standard, the "uniquely and specifically attributable" test requires more than a showing that a general community need exists and that the condition imposed on the subdivision addresses that need. In short, courts applying this test require that the condition be shown to remedy a need created solely by the particular subdivision at hand.

As an alternative to the "rational relationship" and "uniquely and specifically attributable" tests, some courts apply a third standard in reviewing the constitutionality of subdivision exactions: the "rational nexus" standard.⁸¹ In contrast to the "uniquely and specifically attributable" test, courts applying the "rational nexus" standard do not require local governments to establish that the proposed subdivision is solely responsible for the public need the imposed condition is intended to address.⁸² A community may impose a permit condition without effectuating a taking where a subdivision does not solely create but merely exacerbates a public need created by a community's overall development.⁸³

On the other hand, courts applying the "rational nexus" standard do not afford local governments the great deference typical of courts applying the rational relationship standard. Unwilling to rely without further inquiry on the judgment of local governmental bodies, courts applying this standard examine the factual record to determine whether an actual, concrete connection exists between

⁷⁹ *Id.* at 68-69, 264 A.2d at 913.

⁸⁰ *Id.* at 71, 264 A.2d at 914.

⁸¹ See, e.g., *Wald Corp. v. Metropolitan Dade County*, 338 So. 2d 863, 868 (Fla. 1976); *Collis v. City of Bloomington*, 310 Minn. 5, 18, 246 N.W.2d 19, 26 (1976); *Home Builders Ass'n v. City of Kansas City*, 555 S.W.2d 832, 835 (Mo. 1977); *Land/Vest Prop., Inc. v. Town of Plainfield*, 117 N.H. 817, 823, 379 A.2d 200, 204 (1977); *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 617-18, 137 N.W.2d 442, 447 (1965), *appeal dismissed*, 385 U.S. 4 (1966); see also *Delaney, Gordon & Hess*, *supra* note 44, at 152-54.

⁸² *Wald*, 338 So. 2d at 868; *Jordan*, 28 Wis. 2d at 617-20, 137 N.W.2d at 445-47.

⁸³ *Wald*, 338 So. 2d at 868; *Jordan*, 28 Wis. 2d at 617-18, 137 N.W.2d at 447.

the exaction and the needs created by the proposed subdivision.⁸⁴ In *Wald Corp. v. Metropolitan Dade County*, the Florida Court of Appeal applied the "rational nexus" test in upholding a subdivision exaction ordinance.⁸⁵ Metropolitan Dade County had adopted an ordinance requiring that a subdivider dedicate land to the county for canal purposes as a condition to obtaining subdivision plat approval.⁸⁶ In determining the standard of review to apply to permit conditions, the court rejected both the "rational relationship" and the "uniquely and specifically attributable" tests.⁸⁷ The court held that, although the "rational relationship" test allowed municipalities substantial flexibility in formulating comprehensive plans for future growth and development, it afforded too much deference to local governments in determining whether the imposition of a permit condition was valid. Because the imposition of a permit condition affected constitutionally protected property rights, the court held that a more stringent standard granting less deference to local government judgment was required to ensure that local governments did not abuse the police power in imposing exactions.⁸⁸

The court also rejected the "uniquely and specifically attributable" test, on the grounds that it placed too great a restriction on the ability of local governments to impose exactions on subdividers. In most instances, stated the court, a municipality would be able to show only that a subdivision *contributed* to a community wide problem rather than *created* the public burden.⁸⁹ Adopting the "uniquely and specifically attributable" test, concluded the court, would essentially remove the subdivision exaction from local governments as a tool for planning for growth and development in the community.⁹⁰

As an alternative, the court adopted the "rational nexus" approach for reviewing the constitutionality of subdivision exactions.⁹¹ The court held that government need not show that the imposed exaction would be necessary to meet a need solely attributable to one particular subdivision. Yet, unlimited deference would not be afforded to legislative judgment; local governments would be required to prove to the court that continued approval of subdivisions

⁸⁴ See *infra* notes 92-94, 97-98 and accompanying text.

⁸⁵ *Wald*, 338 So. 2d at 868.

⁸⁶ *Id.* at 864.

⁸⁷ *Id.* at 866-67.

⁸⁸ *Id.* at 866.

⁸⁹ *Id.* at 867 (emphasis added).

⁹⁰ *Id.*

⁹¹ *Id.*

could increase the amount of services the community would have to provide. Applying this standard, the court examined the record to determine whether the evidence submitted established that the imposition of the exaction did indeed alleviate the adverse impact of the proposed subdivision on the public.⁹² The court noted that the proposed subdivision was in an area prone to periodic flooding, and that runoff from the proposed subdivision would adversely affect property both upstream and downstream if the canal exaction were not imposed. Furthermore, property within the subdivision would be damaged in the event of flooding if the condition was not imposed. Given these facts, the court held that the imposition of the exaction on the proposed subdivision would alleviate an adverse effect of the subdivision on the public.⁹³ Accordingly, the court upheld the imposition of the exaction condition on the development.⁹⁴

In *Jordan v. Village of Menomonee Falls*, the Supreme Court of Wisconsin applied a similar standard upholding an ordinance adopted by the village. The ordinance required that a developer dedicate a portion of the proposed subdivision or donate a fee in lieu thereof to provide for schools, parks, and playgrounds as a condition for subdivision approval.⁹⁵ In upholding the ordinance as a valid exercise of the police power, the court rejected the argument that a municipality must show that the dedication condition was required to meet a need created solely by the subdivision at hand. The court, however, refused to defer to the judgment of local governments that a sufficient basis for imposing an exaction existed. Instead, the court required that the evidence establish a reasonable connection between the exaction and the needs created by the subdivision.⁹⁶

To this end, the court held that a city or town must submit evidence to the court establishing that the general construction of subdivisions over several years was responsible for increasing the population in the community.⁹⁷ Where the factual record did not reveal contravening evidence, such as an indication that the city had an existing, adequate supply of land for recreational and school purposes, or that the acquisition of additional land would be re-

⁹² *Id.* at 868.

⁹³ *Id.*

⁹⁴ *Id.* at 868-69.

⁹⁵ *Jordan*, 28 Wis. 2d 608, 137 N.W.2d 442.

⁹⁶ *Id.* at 617-18, 137 N.W.2d at 447.

⁹⁷ *Id.* at 617-18, 137 N.W.2d at 448.

quired regardless of whether the proposed subdivision was constructed, a reasonable basis existed for requiring that a subdivider dedicate land for school, park, and recreational purposes.⁹⁸

Thus, prior to *Nollan*, state courts subjected subdivision exactions to the "rational relation" test, the "uniquely and specifically attributable" test, or the "rational nexus" standard to determine their constitutionality, depending on the jurisdiction involved. In *Nollan*, the United States Supreme Court for the first time adopted a standard for review of conditions placed upon development.

III. *NOLLAN V. CALIFORNIA COASTAL COMMISSION*

The case of *Nollan v. California Coastal Commission* began when James and Marilyn Nollan decided to demolish a small bungalow and replace it with a three bedroom house with an ocean view.⁹⁹ The Nollans own a lot fronting on the Pacific Ocean in Ventura County, California. A public beach, Faria County Park, lies a quarter mile north of the Nollans' property, and another public beach, "the Cove," lies 1800 feet south of their property. An eight foot high seawall divides that part of the Nollans' property that is beach from the rest of the lot.¹⁰⁰ The mean high water line delineates the property's oceanside boundary.¹⁰¹

The Nollans initially leased the lot with an option to purchase the property from the lessor. The option to purchase required the Nollans to demolish and replace the small bungalow on the property, which had fallen into disrepair. Deciding to replace the bungalow and purchase the property, the Nollans applied for a coastal development permit from the California Coastal Commission,¹⁰² seeking permission to demolish the bungalow and replace it with a three bedroom house consistent with the size and style of other homes in the neighborhood. Over the Nollans' objections, the Commission granted the permit subject to the Nollans' recording of a deed restriction on the property granting the public an easement of lateral access across that portion of their lot between the ocean

⁹⁸ *Id.* For other cases applying a "rational nexus" analysis, see, e.g., *Collis*, 310 Minn. at 18, 246 N.W.2d at 26; *Home Builders Association*, 555 S.W.2d at 835; *Land/Vest*, 117 N.H. at 823, 379 A.2d at 204.

⁹⁹ 107 S. Ct. 3141, 3143 (1987).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

and the seawall, facilitating public access to Faria County Park and "the Cove."¹⁰³

On June 3, 1982, the Nollans filed a petition in the Ventura County Superior Court, requesting that the condition imposed by the Commission be declared invalid because the Commission had failed to submit evidence that the Nollans' proposed construction would directly affect public access to the beach.¹⁰⁴ The superior court ruled in favor of the Nollans, remanding the case to the Coastal Commission for rehearing on this issue.¹⁰⁵

At the subsequent hearing, the Commission made several findings of fact and again imposed the condition.¹⁰⁶ The Commission found that the Nollans' proposed home would reduce the public's view of the ocean, contributing to the development of a wall of residences. This wall, the Commission concluded, would prevent the public from seeing that there was a stretch of accessible coastline in the area.¹⁰⁷ In addition, the Commission found that the Nollans' development would increase private use of the waterfront to the detriment of the population generally. Because the new house would burden the public's access to the shore, the Commission held that the Nollans were required to alleviate that burden by granting a public easement across their property, thus providing additional lateral access to the public beaches in the area.¹⁰⁸

The Nollans subsequently filed a petition with the Ventura County Superior Court, arguing that the imposition of the permit condition violated the takings clause of the fifth amendment, as applied to the states through the fourteenth amendment.¹⁰⁹ The superior court, avoiding the constitutional issue, held that the Coastal Commission had not sufficiently established that the proposed development by the Nollans would have an adverse impact on public access to the water. The Commission was required to establish such a result under the California Coastal Act of 1976. Accordingly, the superior court held that the imposition of the access condition was invalid.¹¹⁰

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 3143-44.

¹⁰⁸ *Id.* at 3144.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

The California Coastal Commission appealed the superior court's decision to the California Court of Appeal.¹¹¹ During the course of that appeal, the Nollans replaced the bungalow without notifying the Commission. The court of appeal reversed the holding of the superior court. The court found that the California Coastal Act of 1976 allowed the imposition of the easement condition.¹¹² The court also held that the condition was constitutional, basing its holding on one of its earlier decisions, *Grupe v. California Coastal Commission*.¹¹³

The court held that the facts of *Grupe* were identical to those presented by the Nollan development. Accordingly, the court ruled that the condition imposed by the Coastal Commission was not unconstitutional.¹¹⁴ The court also held that the Nollans' claim that the imposition of the access condition constituted a taking was without merit, because although the condition reduced the value of the Nollans' property, it did not deprive them of all reasonable use of their property.¹¹⁵

The Nollans filed a petition for a writ of certiorari to the United States Supreme Court, arguing that the imposition of the access condition constituted a taking without just compensation in violation of the fifth amendment, as applied to the states through the fourteenth amendment.¹¹⁶ The Supreme Court reversed the California court, holding that the imposition of the easement condition on the Nollans constituted a taking without just compensation.¹¹⁷ Justice Scalia, writing for the majority, held that a permit condition must "substantially advance" a legitimate state interest to avoid an unconstitutional taking of property.¹¹⁸ The Court further held that, since the imposition of the easement condition did not even meet the rational relation standard proposed by the Commission as the proper test for reviewing permit conditions, the imposition of that condition on the Nollans constituted an unlawful taking of property.¹¹⁹

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* (citing *Grupe*, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985)). See *supra* notes 61-67 and accompanying text for a discussion of *Grupe*.

¹¹⁴ *Nollan*, 107 S. Ct. at 3144.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 3145.

¹¹⁷ *Id.* at 3150.

¹¹⁸ *Id.* at 3146, 3150.

¹¹⁹ *Id.* at 3148.

Justice Brennan, joined by Justice Marshall, filed a lengthy and vigorous dissent, arguing that the majority was applying a more rigid standard in reviewing the constitutionality of permit conditions than had previously been used by the Court.¹²⁰ Furthermore, Justice Brennan argued, even under this new, more demanding standard, the Commission's imposition of the easement condition on the Nollans was not an unconstitutional taking of property.¹²¹

In *Nollan*, the Supreme Court held that an unconstitutional taking of property occurs where a permit condition does not "substantially advance" a legitimate state interest.¹²² The Court found that the imposition of a permit condition on the Nollans requiring them to grant an easement providing lateral access between the two beaches adjoining their property did not substantially advance a legitimate state interest. Thus, the Court ruled that the permit condition constituted a taking of property without just compensation in violation of the fifth and fourteenth amendments.¹²³

In reaching its decision, the Court noted that had the Commission simply required the Nollans to grant to the public an easement across their beachfront outright, a taking would have occurred, requiring just compensation to the Nollans.¹²⁴ Under previous Supreme Court rulings, the Court noted, where governmental action results in a permanent physical occupation by the government or others, that governmental action constitutes a taking. The majority noted that a permanent physical occupation would exist where the public was given the permanent right to pass along the Nollans' beachfront. The case before the Court, however, involved the imposition of such an easement as a condition to development, rather than an outright requirement that the easement be granted.¹²⁵ The issue therefore, the majority stated, was whether requiring a lateral access easement as a condition for a building permit also constituted a taking.¹²⁶

The Court rejected the contention of Justice Brennan that the proper standard to be applied in reviewing land use regulations was the "rational relationship" standard, traditionally applied in equal

¹²⁰ *Id.* at 3151 (Brennan, J., dissenting).

¹²¹ *Id.* (Brennan, J., dissenting). Justice Blackmun filed a short dissent. *See infra* note 163. Justice Stevens, joined by Justice Blackmun, also filed a short dissent. *See infra* note 163.

¹²² *Id.* at 3146, 3150.

¹²³ *Id.* at 3148-50.

¹²⁴ *Id.* at 3145.

¹²⁵ *Id.*

¹²⁶ *Id.* at 3146.

protection and due process cases.¹²⁷ The Court stated that it had long recognized that a land use regulation did not constitute a taking as long as "it 'substantially advance[s] legitimate state interests' and [does] not 'den[y] an owner economically viable use of his land.'"¹²⁸ The Court admitted that its prior cases did not elaborate the standards for evaluating what constitutes a "legitimate state interest" or what type of connection between land use regulation and state interest satisfied the requirement that the former "substantially advance" the latter.¹²⁹

Assuming without deciding that the state interests claimed by the Commission — protecting the public's ability to see the beach, assisting the public in overcoming a "psychological barrier" to shore-front access, and preventing private congestion of public beaches — were legitimate state interests, the Court then turned to the issue of whether the second part of the takings test had been satisfied: whether the permit condition imposed on the Nollans "substantially advanced" those legitimate state interests.¹³⁰ The Court agreed with the Commission that a permit condition that advances the same legitimate state interest as a refusal to issue the permit does not constitute a taking if the refusal to issue the permit altogether would not constitute a taking.¹³¹ The Court explained that if the state as a legitimate exercise of the police power could refuse to allow the construction of the Nollans' house for the purpose of protecting the public's ability to see the beach, the state could impose a condition, such as limiting height or width of the home or even providing a viewing spot on the property, that served that same purpose.¹³² The Court noted that it would be "strange" if the state could prohibit altogether the development to serve this purpose, but could not provide the landowner an alternative to prohibition in the form of a condition serving the same purpose without effectuating a taking.¹³³

The constitutional difficulty arises, the majority continued, when the condition imposed "utterly fails" to further the state interest advanced as a justification for the prohibition. Without a nexus between the condition and the original purpose of the pro-

¹²⁷ *Id.* at 3147 n.3.

¹²⁸ *Id.* at 3146 (quoting *Agins*, 447 U.S. at 260).

¹²⁹ *Id.* at 3146-47.

¹³⁰ *Id.* at 3147-48.

¹³¹ *Id.* at 3147.

¹³² *Id.* at 3147-48.

¹³³ *Id.* at 3148.

hibition or restriction, the Court maintained, the condition allows the government to acquire an easement to serve a valid governmental objective, but permits the government to avoid paying compensation.¹³⁴ This, the Court ruled, constituted a taking of property without just compensation.¹³⁵ The Court concluded that unless the permit condition serves the same governmental purpose as barring development altogether, thus establishing a nexus between condition and legitimate state interest, the imposition of the condition constitutes an invalid land use regulation.¹³⁶

Having established that a nexus between condition and legitimate state interest must be shown to avoid an unconstitutional taking of property, the Court then turned to the issue of how close a nexus between permit condition and state interest was required.¹³⁷ The Coastal Commission contended that a sufficient nexus could be established by a showing that the condition imposed on the landowner was reasonably related to the public need or burden that the development would affect. The Court refused to adopt this "reasonable relation" standard for determining how close a fit between permit condition and public need was required, but did accept this standard "for the purposes of discussion" because, according to the Court, the nexus between condition and public need did not even satisfy this standard.¹³⁸

In support of its position that the condition failed even the "rational relation" test, the Court maintained that the condition imposed failed to advance the state interests alleged by the California Coastal Commission.¹³⁹ According to the Court, the requirement that people on the beach be allowed to pass along the shorefront at the foot of the Nollans' property failed to reduce any barriers to viewing the beach, failed to reduce any "psychological barrier" to the public's access to the ocean, and failed to remedy any additional congestion on the beach caused by the Nollans' construction of a new home. On this ground, the Court held that a sufficient nexus between condition and public need sought to be alleviated by that condition (the legitimate state interest) had not been established, and thus the imposition of the permit condition was an unconstitutional taking of property. The Court noted that its approach had

¹³⁴ *Id.*

¹³⁵ *See id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 3149.

been followed by every court dealing with the constitutionality of permit conditions with the exception of the courts of California.¹⁴⁰

The Court next responded to Justice Brennan's dissenting argument that the condition was rational in that it would allow persons looking from the road toward the beach to see people passing along the front of the Nollans' property, allowing them to overcome the psychological barrier burdening their access to the shorefront.¹⁴¹ The Court noted that the wall of houses completely blocked the view of the beach and thus a person on the road behind the Nollans' house would not be able to see the beach or anyone on it. The Court further noted that, even if Justice Brennan's contention were supported by the facts, it was not certain that there would be a sufficient nexus between the condition and public need to render the imposition of the condition valid. The majority stated that it did not share Justice Brennan's opinion that the Commission, because of its expertise in the land use area, would have little difficulty in the future in establishing a specific connection between condition and public need that would avoid the majority's holding in *Nollan*.¹⁴²

The takings clause is not an empty requirement, the majority maintained, easily satisfied by a minimally rational justification.¹⁴³ To the contrary, the majority maintained that a showing of a minimally rational relationship between permit condition and public need sought to be alleviated would not be sufficient to avoid an unconstitutional taking of property. Instead, stated the majority, the government must show that the imposition of a permit condition "substantially advances" a legitimate state interest. The Court noted that it was inclined to be particularly careful in examining whether this standard had been met in permit condition cases, as in that context there existed a greater possibility that the government had imposed the condition to avoid the compensation requirement rather than to fulfill a stated police power objective.¹⁴⁴

Writing in dissent, Justice Brennan argued that the permit condition was not unreasonable.¹⁴⁵ Justice Brennan maintained that the majority's standard of review for the sufficiency of the nexus between condition and public need was too demanding.¹⁴⁶ By re-

¹⁴⁰ *Id.* at 3149-50.

¹⁴¹ *Id.* at 3150.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 3151 (Brennan, J., dissenting).

¹⁴⁶ *Id.* at 3151-54 (Brennan, J., dissenting).

quiring what Justice Brennan termed a "precise fit" between forms of burden and condition on each individual parcel, the majority was imposing a standard "discredited for the better part of this century."¹⁴⁷ Based on the Court's prior decisions in the police power area,¹⁴⁸ Justice Brennan maintained that a review of the state's exercise of the police power demanded only that the state "could rationally have decided" that the regulation adopted might achieve the state's objective.¹⁴⁹

Justice Brennan maintained that the imposition of the easement condition on the Nollans was rationally related to the state's objective and thus within the state's police power. In support of this position, Justice Brennan deferred to the judgment of the California Coastal Commission. In its "informed judgment," Justice Brennan argued, the Commission had decided that the grant of a public easement would preserve the net amount of public access to the shoreline.¹⁵⁰ Justice Brennan maintained that this was enough to establish a rational relation between condition and public need, and thus the imposition of the condition was a valid exercise of the police power.¹⁵¹

Not only did the condition meet the "rational relation" test, asserted Justice Brennan, but it met a more rigorous test, what he termed the majority's "demand for a precise match between the condition imposed and the specific type of burden on access created by the applicants." Disagreeing with the majority, Justice Brennan contended that the lateral access condition would reduce the psychological barrier to public recognition of accessible shorefront by allowing persons on the road behind the Nollan home to see people walking along the waterfront.¹⁵² The majority, Justice Brennan argued, had assumed incorrectly that the Commission was concerned only with blockage of visual access to the beach. Justice Brennan noted that the Commission also was concerned that the public, seeing an increase in private use of the shorefront, would believe that the shorefront was no longer publicly accessible.¹⁵³ The im-

¹⁴⁷ *Id.* at 3151 (Brennan, J., dissenting).

¹⁴⁸ *Id.* at 3151 n.1 (Brennan, J., dissenting) (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952)).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 3153 (Brennan, J., dissenting).

¹⁵¹ *Id.* at 3153-54 (Brennan, J., dissenting).

¹⁵² *Id.* at 3154 (Brennan, J., dissenting).

¹⁵³ *Id.* at 3155 (Brennan, J., dissenting).

sition of the easement condition on the Nollans, Justice Brennan argued, would address this threat directly by affirming the public's right of access to the shorefront.¹⁵⁴ Such a direct relationship between need and condition, Justice Brennan contended, satisfied the majority's strict standard of review.¹⁵⁵

Justice Brennan acknowledged that, although the imposition of the access condition on the Nollans constituted a valid exercise of the police power, the condition might nonetheless constitute an unlawful taking of property if it went "too far" in restricting the landowner's use of his property. Justice Brennan observed that in measuring whether a land use regulation goes "too far," the Court had traditionally evaluated the nature of the government's action and the economic impact of the regulation.¹⁵⁶ Here, argued Justice Brennan, the physical and economic impact of the condition did not go too far.¹⁵⁷ The extent of physical intrusion on the Nollans' property was minimal, involving only a ten foot wide strip of land.¹⁵⁸ Justice Brennan also argued that the economic impact of the condition on the value of the Nollans' property was *de minimis*; indeed, the Nollans' property had enjoyed an *increase* in value even with the condition due to their replacement of a run-down bungalow with a new three bedroom house.¹⁵⁹ The permit condition did not disrupt the Nollans' investment-backed expectations, as they had no right under California law to exclude the public from the shorefront; even if they had such a right, they had advance notice that new development along the coast was conditioned on provisions maintaining public access to the ocean. Accordingly, Justice Brennan argued, the imposition of the condition did not have such an economic or physical impact on the Nollans' property that it rose to the level of an unconstitutional taking of property without just compensation.¹⁶⁰

Although Justice Brennan believed that the majority's holding was incorrect, he also believed that the holding in *Nollan* would have minimal impact.¹⁶¹ According to Justice Brennan, the Commission in the future would have little trouble establishing a specific con-

¹⁵⁴ *Id.* at 3155-56 (Brennan, J., dissenting).

¹⁵⁵ *Id.* at 3156 (Brennan, J., dissenting).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 3156-60 (Brennan, J., dissenting).

¹⁵⁸ *Id.* at 3156 (Brennan, J., dissenting).

¹⁵⁹ *Id.* at 3158 (Brennan, J., dissenting).

¹⁶⁰ *Id.* at 3158-60 (Brennan, J., dissenting).

¹⁶¹ *Id.* at 3161 (Brennan, J., dissenting).

nection between condition and public burden demanded by the majority. The reason the Commission did not do so in the present case, Justice Brennan contended, was because it had reasonably believed that its justification for the condition would satisfy the "reasonable relation" standard of review for evaluating whether an exercise of the police power was constitutional.¹⁶² Now aware of the majority's more demanding requirement, the Coastal Commission could readily tailor its justifications for imposing permit conditions to meet this test in the future.¹⁶³

IV. *NOLLAN*: ANALYSIS AND EFFECT

In *Nollan v. California Coastal Commission*, the Supreme Court held that in order to be upheld as constitutional, a permit condition

¹⁶² *Id.*

¹⁶³ *Id.* Justice Blackmun also filed a dissenting opinion in *Nollan*, objecting to the majority's holding on essentially the same grounds as Justice Brennan. Justice Blackmun argued that the majority had utilized an overly-demanding standard in requiring that the permit condition "substantially advance" a legitimate state interest. *Id.* at 3162-63 (Blackmun, J., dissenting). Justice Blackmun objected to the majority's requirement of a close nexus between condition and public burden in order to uphold the imposition of a permit condition as a valid exercise of the police power. *Id.* (Blackmun, J., dissenting). In Justice Blackmun's view, the condition in *Nollan* satisfied the ordinary requirement that a state's exercise of its police power need be no more than rationally based. *Id.* Coastal development, he argued, "by its very nature makes public access to the shore generally more difficult." *Id.* at 3163 (Blackmun, J., dissenting). The Nollans' development, therefore, could be legitimately subjected to a condition that a lateral access easement across their property be granted to the public, as such an easement would at least in part counteract the burden imposed by the development on public access. *Id.* Justice Blackmun also agreed with Justice Brennan that no taking had occurred, as there was no evidence of a major economic impact on the Nollans' property or interference with their investment-backed expectations as a result of the imposition of the permit condition. *Id.* Justice Stevens, joined by Justice Blackmun, dissented as well, arguing that the Court's recent decision in *First English Evangelical Church of Glendale v. County of Los Angeles*, California, 107 S. Ct. 2378 (1987), had serious implications in *Nollan* given the majority's disposition of the case. *Id.* at 3163-64 (Stevens, J., dissenting). In *First English*, the County of Los Angeles adopted an interim ordinance barring development on the First English Evangelical Church of Glendale's property after a flood had destroyed the Church's camp located on the property. 107 S. Ct. at 2381-82. In dismissing the Church's suit for damages, the California Court of Appeals held that the Church could seek only declaratory relief or mandamus barring enforcement of the ordinance against its property, not damages for the period during which the regulation was applied prior to being declared invalid. *Id.* at 2382-83. The California Supreme Court denied review. *Id.* at 2383. The United States Supreme Court, assuming for the purposes of argument that the ordinance did constitute a taking, held that damages could be recovered by a property owner for the period during which a land use regulation was imposed prior to being declared a taking. *Id.* at 2384-85, 2389. Justice Blackmun argued that the strict standard of review for land use regulations adopted in *Nollan* combined with the Court's holding in *First English* would have a chilling effect on governments' efforts to regulate development. *Nollan*, 107 S. Ct. at 3163-64 (Blackmun, J., dissenting). Accordingly, Justice Blackmun again voiced his objection to the standard of review adopted by the majority in *Nollan* as well as the rule adopted by the Court in *First English*. *Id.* (Blackmun, J., dissenting).

must "substantially advance" a legitimate state interest.¹⁶⁴ In order for a permit condition to "substantially advance" a legitimate state interest, the Court ruled that a sufficient nexus must be established between the permit condition and the public need it seeks to address.¹⁶⁵ Where a sufficient nexus does not exist, the Court held, the imposition of the permit condition constitutes a taking of property without just compensation.¹⁶⁶

The Court in *Nollan* acted consistently with its prior decisions in subjecting permit conditions to the "substantially advance" test in reviewing their constitutionality. Justice Brennan was correct in his assertion that in reviewing the constitutionality of government's exercise of the police power, the Court's prior decisions have generally applied a minimum rationality standard.¹⁶⁷ The Court's decisions in *Penn Central* and *Agins v. Tiburon*, however, clearly indicate that land use regulations do not fall within the scope of this general rule.¹⁶⁸ The Court's position in those cases is explicit. In justifying land use regulations, a showing that those regulations are minimally rational is insufficient.¹⁶⁹ To avoid a taking, a land use regulation must "substantially advance" a legitimate state interest.¹⁷⁰ A condition imposed on a landowner, which he or she must meet to obtain a building permit, is clearly a land use regulation; thus, it follows that the "substantially advance" test should be used to determine the constitutionality of such permit conditions.

The Court in *Nollan* held that this "substantially advance" test is satisfied when a sufficient nexus exists between the imposed condition and the public need it seeks to address.¹⁷¹ This nexus requirement makes sense in light of the underlying basis for imposing a permit condition on a property owner. As *Pennsylvania Coal* and the Court's subsequent decisions indicate, as long as their regulations do not go "too far," governmental bodies may bar development for public purposes without violating the takings clause.¹⁷² As the Court held in *Nollan*, it is self-evident that if government may bar development completely without committing a taking, it may make the lesser intrusion of allowing development subject to a property

¹⁶⁴ *Nollan*, 107 S. Ct. at 3146, 3150.

¹⁶⁵ *Id.* at 3148.

¹⁶⁶ *Id.*

¹⁶⁷ See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955).

¹⁶⁸ See *supra* notes 25-43 and accompanying text.

¹⁶⁹ See *supra* notes 25-43 and accompanying text.

¹⁷⁰ See *supra* notes 25-43 and accompanying text.

¹⁷¹ *Nollan*, 107 S. Ct. at 3148.

¹⁷² *Pennsylvania Coal*, 260 U.S. at 415.

owner's agreement to satisfy an imposed condition without committing a taking. As the majority correctly reasoned, however, the imposed condition must further the same purpose as barring development altogether. If the condition does not further this purpose, it can no longer be justified under the same reasoning justifying the complete bar of development. The condition in this instance no longer represents a lesser intrusion for the same purpose as the development ban, but rather constitutes a distinct intrusion on the property owner's rights for a different purpose. The Court thus correctly reasoned that a nexus must exist between the lesser imposed condition and the purpose of a complete ban on development.

Although the Court persuasively supported its contention that a nexus must exist between the imposed permit condition and the public burden or need created by the development, it did not establish a clear standard for determining when a sufficient nexus exists so that the condition "substantially advances" a legitimate state interest. Rather than establishing such a standard, the Court in *Nollan* utilized the standard proposed by the California Coastal Commission to dispose of the case.¹⁷³ Adopting the Commission's "rational relationship" standard "for purposes of discussion," the Court found that the nexus between the permit condition imposed on the Nollans and the public need created by their development was insufficiently close to meet this minimal standard.¹⁷⁴

This conclusion of the majority was correct. As the majority pointed out, assuming that the Nollans' development would create a psychological barrier to the shorefront and increase private congestion on the beach, it is difficult to see how an easement allowing the public to pass to and fro in front of the Nollans' seawall would alleviate the impact of the Nollans' development on the public. The Commission's argument that the view from the road of people on the beach reduces the psychological barrier created by the home is specious at best, because the wall of houses completely blocks the view of people on the beach.¹⁷⁵ It is also difficult to understand how allowing the *public* to pass along the shore in front of the Nollans' home would alleviate *private* congestion on the beach created by the development. Thus, because little if any nexus existed between the permit condition and the public need created by the

¹⁷³ *Nollan*, 107 S. Ct. at 3148.

¹⁷⁴ *Id.* at 3148-50.

¹⁷⁵ *Id.* at 3150.

Nollans' development, the majority was correct in holding that the imposition of the permit condition on the Nollans constituted an unconstitutional taking of property.

The Court thus properly disposed of the case before it, yet it failed to clearly set forth a standard for determining when the nexus between permit condition and public need is sufficiently close to satisfy the "substantially advance" test. The Court, in the interest of future cases, should not have simply adopted the "rational relationship standard" for "purposes of discussion" because that standard was sufficient to dispose of the case. Instead, the Court should have explicitly adopted a standard for such review and applied that standard in the *Nollan* case. The Court would thus have established a clear reference for governmental bodies to decide under what circumstances permit conditions may constitutionally be imposed. By not adopting a standard, the *Nollan* decision is likely to confuse governmental bodies as to when permit conditions may be imposed without constituting a taking, and will create unnecessary litigation.

Governmental bodies are not, however, totally without guidance. Despite the Court's failure to explicitly adopt a standard for determining when the nexus between permit condition and public need is sufficiently close to satisfy the "substantially advance" test, it is possible to extract from the decision an indication of what governmental bodies must demonstrate to impose permit conditions on property owners.

A showing that a "rational relationship" exists between permit condition and public need created by the proposed development, such as that required by the courts of California in *Walnut Creek*¹⁷⁶ and *Grupe*,¹⁷⁷ will be insufficient to pass constitutional scrutiny following *Nollan*. First, the Court in *Nollan*, although it utilized the "rational relationship" standard "for purposes of discussion," qualified its use of this standard and refused to adopt it outright. Second, in finding an insufficient nexus between permit condition and public need in *Nollan*, the Court, citing a number of state court cases, noted that its approach was consistent with the approach utilized by every other court dealing with the constitutionality of permit conditions, with the exception of the courts of California.¹⁷⁸ In every case cited by the Supreme Court, the respective state court applied either the more stringent "rational nexus" or "uniquely and

¹⁷⁶ See *supra* note 55 and accompanying text.

¹⁷⁷ See *supra* note 61 and accompanying text.

¹⁷⁸ *Nollan*, 107 S. Ct. at 3149.

specifically attributable" tests. Third, the Court refused to display the considerable deference to legislative judgment inherent in the "rational relationship" standard. As Justice Brennan correctly noted in his dissent, the Court was unwilling to rely solely on the expertise of the California Coastal Commission in determining that the condition imposed on the Nollans was necessary to preserve public access to the shorefront.¹⁷⁹ Instead, the Court closely examined the factual record before it, carefully weighing the merits of each of the Commission's arguments based on the facts of the case. The Court was unwilling to accept the general argument that any building along the shorefront necessarily has an adverse impact on the public's access to the shore, precisely the kind of argument readily accepted by courts applying the "rational relationship" test.¹⁸⁰

Finally, the majority's response to Justice Brennan's contention that the California Coastal Commission would have little difficulty in the future in utilizing its expertise to establish a sufficient connection between permit condition and public need reveals its rejection of the "rational relationship" test. In disagreeing with Justice Brennan's opinion, the majority indicated that it viewed its standard as requiring more than cleverness and imagination in pleading.¹⁸¹ The majority's response to Justice Brennan reflects an intention that the nexus between permit condition and public need be subjected to a more rigorous review than the minimal scrutiny inherent to the "rational relationship" test. Accordingly, following *Nollan*, governmental bodies must do more than merely establish the "rational relationship" accepted as sufficient by the California courts in *Walnut Creek* and *Grupe* to avoid a finding that the imposition of a permit condition on a property owner represents an unconstitutional taking of property.

Although the majority did not adopt the least strict "rational relation" standard, the *Nollan* Court also failed to adopt the stricter model for review of permit conditions proposed by the Supreme Courts of Illinois¹⁸² and Rhode Island,¹⁸³ requiring governmental bodies to establish that a development subject to a permit condition has *created* rather than merely contributed to the public burden the condition purports to alleviate. First, the Court did not require that

¹⁷⁹ *Id.* at 3162 (Brennan, J., dissenting).

¹⁸⁰ See *supra* note 55, 61 and accompanying text.

¹⁸¹ *Nollan*, 107 S. Ct. at 3150.

¹⁸² See *supra* note 71 and accompanying text.

¹⁸³ See *supra* note 77 and accompanying text.

the Commission establish that the Nollans' development *created* the burden on public access to the shorefront and private congestion on the beach. Second, it did not reject the notion that a landowner may be constitutionally subjected to a permit condition imposed to address a public need to which he or she merely contributes. The Court instead noted that, had the Commission imposed as a permit condition a requirement which clearly would have alleviated the contribution of the Nollans' development on the public's ability to see the beach — such as a height or width limitation or the provision of a public viewing spot on the property — a sufficient nexus would be established and no unconstitutional taking would have occurred. In light of the majority's acceptance of the Commission's argument that the Nollan development did not in and of itself create this burden on public access, but merely *contributed* to its creation as part of the overall pattern of development along the shorefront, the imposition of some types of permit conditions on the Nollans may not have constituted a taking, despite the fact that their development merely contributed to rather than created the relevant public need. This position clearly is inconsistent with the "uniquely and specifically attributable" standard.

Furthermore, the fact that the Court held that its approach in reviewing the constitutionality of permit conditions was consistent with courts utilizing the "rational nexus" as well as the more stringent "uniquely and specifically attributable" test indicates that the standard of review adopted by the Court in *Nollan* is not as rigorous as the "uniquely and specifically attributable" standard. Had the Court adopted this more stringent approach, it would not have also cited cases applying a less taxing standard as consistent with the majority's approach. Thus, the Court in *Nollan* did not adopt "uniquely and specifically attributable" as the standard for reviewing the constitutionality of permit conditions.

The Court in *Nollan*, it appears, has instead adopted a standard of review of permit conditions akin to the "rational nexus" standard adopted by the Florida court in *Wald Corp. v. Metropolitan Dade County*¹⁸⁴ and the Supreme Court of Wisconsin in *Jordan v. Village of Menomonee Falls*.¹⁸⁵ Like courts utilizing the "rational nexus" standard, the majority in *Nollan* was unwilling to show great deference to local governmental bodies and accept a broad, general argument justifying the imposition of a permit condition on a property owner.

¹⁸⁴ See *supra* note 85 and accompanying text.

¹⁸⁵ See *supra* note 95 and accompanying text.

Also consistent with the courts applying the "rational nexus" test, the majority in *Nollan*, as noted, did not require that the Nollans' proposed development *create* the public need the imposed condition sought to alleviate. Instead, as do courts applying the "rational nexus" test, the Court in *Nollan* undertook a close inquiry into the facts of the case to determine whether the permit condition would actually address the public burden created by the Nollans' development.

The Court also stated that it was inclined to be "more careful" in reviewing whether permit conditions satisfy the "substantially advance" standard, as in that context there exists a greater possibility that the purpose of the condition was to avoid the compensation requirement, rather than the stated police power objective. Implicit in this statement is the Court's concern that the impact of a development on the community could be used as a pretext for imposing a condition on a development which does not address the development's impact on the public. The "more careful" review proposed by the Court, consistent with the approach of courts applying the "rational nexus" test, requires a close examination of the facts of the case to ensure that the condition imposed addresses the development's effect on the public, and is not merely a method of unjustifiably acquiring property rights without compensation.

Thus, having implicitly adopted in *Nollan* the "rational nexus" standard, the Supreme Court has indicated to governmental bodies what they must establish in order to impose permit conditions on property owners without committing a taking. On the one hand, broad arguments made in general terms purporting to establish a nexus between permit condition and public need will not be enough, because under this standard courts are unwilling to grant unlimited deference to the judgments of local governmental bodies. On the other hand, local governments will not be required to establish that the development upon which the permit condition is imposed itself *created* the particular public burden; they must be prepared, however, to submit evidence establishing in concrete and clear terms that the imposed condition addresses the adverse impact on the public resulting from the development. The outcome of these cases will necessarily depend on the facts and circumstances of each case.¹⁸⁶

¹⁸⁶ An excellent example of such a case-by-case analysis is the Supreme Court's basic test for determining whether a land-use regulation so restricts a landowner's use of his or her property that it constitutes an unconstitutional taking without just compensation. As Justice

V. *NOLLAN'S* IMPACT ON LINKAGE PROGRAMS

The Supreme Court's holding in *Nollan v. California Coastal Commission* is likely to pose the same kinds of challenges to local governments adopting linkage programs as those faced by local governments in imposing permit conditions. Local governments cannot simply rely on the broad, general argument that because office developments add jobs and people to the city, thus exacerbating the city's housing shortage, developers should be required to construct low and moderate income housing as a condition precedent to development approval. After *Nollan*, courts will be unwilling, or in any case unable, to afford city authorities this kind of substantial deference. Neither, however, will city authorities be required to establish that the particular development at issue itself solely created the housing shortage sought to be alleviated by the imposition of the linkage condition.

What will be required of cities pursuing linkage programs is an in-depth, empirical analysis demonstrating that the theoretical argument advanced as a justification for linkage has a concrete basis in fact. Such an analysis, revealing in statistical terms a direct relationship between the construction of office developments and an exacerbation of the city's housing shortage, would establish clearly that linkage programs serve to alleviate the housing shortage created by the developments and are not merely a pretext for imposing an obligation on a developer to remedy a public need wholly unrelated to his or her activity.

An example of such an empirical analysis likely to establish a sufficient nexus under *Nollan* between permit condition and public

Holmes stated in *Pennsylvania Coal*, "[t]he general rule at least is that while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." 260 U.S. 393, 415 (1922). The difficult follow-up question, of course, is at what point does a regulation go "too far"? The Court has responded to the inherent vagueness of this takings standard with an essentially ad-hoc, case-by-case analysis based on the particular facts of each case. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 122, 124 (1978). Writing for the majority in *Penn Central*, Justice Brennan wrote:

The question of what constitutes a "taking" for purposes of the 4th Amendment has proved to be a problem of considerable difficulty. . . . [T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government. . . . Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances of that case."

Id. at 123-24 (emphasis added) (citing *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958)).

need involved in linkage programs is the study undertaken by the city of Boston. In 1986, the Boston Redevelopment Authority authorized an extensive study of its linkage program, taking into account such factors as the growth of office development employment in Boston, the extent to which such employees actually lived within the city of Boston, the extent the addition of office developments contributed to the city's housing shortage, and the effect of that exacerbation of the housing shortage on the cost of housing in the city.¹⁸⁷ In justifying its linkage program,¹⁸⁸ Boston has not merely relied on a theoretical argument that office developments add jobs to the city and increase the population, exacerbating the city's housing shortage. Instead, Boston has undertaken an in-depth study establishing in concrete, statistical terms a direct relationship between office development in Boston and an exacerbation of the city's housing shortage.¹⁸⁹ Based on this wealth of empirical data, the study concluded that office development in Boston directly contributed to the increased need for housing in the city.¹⁹⁰

This kind of detailed, empirical analysis supporting the theoretical argument that office development exacerbates urban housing needs is likely to satisfy the *Nollan* requirement that there be a sufficient nexus between the permit condition imposed on a property owner and the public burden that condition seeks to address. Such a study would establish a direct, concrete link between condition and public burden, removing the need for courts to show great deference to the judgment of municipal authorities and allaying fears that the linkage condition imposes a requirement on a developer to alleviate a burden he or she played no part in creating.

¹⁸⁷ Kayden, Case & Pollard, *The Linkage Between Office Development and Housing Costs in the City of Boston*, in LINKAGE, CONTRACT AND INCLUSIONARY ZONING: USE OF ZONING FOR OTHER THAN LAND USE PURPOSES 219-25 (MCLE, Inc. 1986) [hereinafter Kayden, Case & Pollard].

¹⁸⁸ The City of Boston's linkage program was adopted in 1983 as Article 26 of the City Zoning Code. Kayden & Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing*, 50 LAW & CONTEMP. PROBS. 130-31 (1987). As amended by Article 26A, adopted in 1986, the Code requires that the developer of any building having a gross floor area of more than 100,000 square feet or that is enlarged so that its gross floor area exceeds 100,000 square feet must agree to pay a fee of five dollars per square foot of floor area in excess of 100,000 square feet as a condition precedent to the issuance of a building permit. *Id.* These payments are in turn used for the construction of low and moderate income housing. The developer may, as an alternative to contributing to the fund, actually construct low and moderate income housing in an amount equal to that which would have been able to have been built with the exaction fee. *Id.*

¹⁸⁹ Kayden, Case & Pollard, *supra* note 187, at 218; see Kayden & Pollard, *supra* note 188, at 132-36.

¹⁹⁰ Kayden, Case & Pollard, *supra* note 187, at 218.

CONCLUSION

Nollan v. California Coastal Commission is significant in that the United States Supreme Court for the first time applied its general standard of review for land use regulations, the "substantially advance" test, to permit conditions. In order to meet this standard, the Court held that a sufficient nexus must exist between the permit condition imposed and the public need the condition seeks to address. Although the Court did not explicitly state the standard for determining whether this nexus is "sufficient," the context of the decision as a whole indicates that in future permit condition cases, the Court will apply the "rational nexus" standard used by several state courts.

In adopting this standard, the Court has struck the proper balance between the need to allow governmental bodies sufficient authority to regulate development and mitigate its adverse impact on the community, and the rights of property owners protected by the fifth amendment. By requiring governmental bodies to submit evidence establishing that the condition imposed actually addresses the impact of the development on the community, a landowner is unlikely to be subjected unfairly to a permit condition that bears no relation to the public burden to which his development contributes. Certainly, it is not unfair to compel a property owner to submit to a permit condition that legitimately addresses a burden he or she placed on the public. At the same time, requiring local government to meet this standard does not impede its ability to mitigate the adverse impact of growth and development on the community. Instead, it merely ensures that state and local governments will not impose permit conditions on property owners without first inquiring as to whether such conditions actually address the public need to which the developments contribute. As a result of the *Nollan* decision, governmental bodies will be required to think through their imposition of permit conditions on property owners and ensure that the imposition of such conditions is justified. Whenever government gives careful consideration to the basis for their actions prior to taking action, all of society benefits.

PETER F. NERONHA