

## ***Dolan v. City of Tigard (1994)***

512 U.S. 374

*Florence Dolan sought a city permit to expand her plumbing and electric supply store from 9,700 square feet to 17,600 square feet and to pave her thirty-nine-space parking lot. The City Planning Commission of Tigard, Oregon, approved her permit application on the condition that she dedicate approximately 10 percent of her 1.67-acre parcel of land to the city for a public greenway along an adjacent creek (to minimize flooding that would be exacerbated by the increases in impervious surfaces associated with her development) and for a pedestrian and bicycle pathway (intended to relieve traffic congestion in the central business district caused by the additional customers visiting her enlarged store). Dolan appealed the commission's denial of her request for a waiver of this condition to the Land Use Board of Appeals, alleging that the land-dedication requirements were unrelated to the proposed development and thus constituted an uncompensated taking of her property in violation of the Fifth Amendment. The Land Use Board of Appeals rejected her appeal, and the State Court of Appeals and the Oregon State Supreme Court both affirmed its decision. The United States Supreme Court granted certiorari.*

Opinion of the Court: Rehnquist, O'Connor, Scalia, Kennedy, Thomas.

Dissenting opinions: Stevens, Blackmun, Ginsburg; Souter.

### **THE CHIEF JUSTICE delivered the opinion of the Court.**

Petitioner challenges the decision of the Oregon Supreme Court which 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. We granted certiorari to resolve a question left open by our decision in *Nollan v. California Coastal Commission* (1987), of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development. . . .

The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, *Chicago B. & Q. R. Co. v. Chicago* (1897), provides: “[N]or 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.” *Armstrong v. United States* (1960). Without question, had the city simply required petitioner 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 petitioner 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 side of the ledger, 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.* (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.” *Pennsylvania Coal Co. v. Mahon* (1922). A land use regulation does not effect a taking if it “substantially advance[s] legitimate state interests” and does not “den[y] an owner economically viable use of his land.” *Agins v. Tiburon* (1980).

The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In *Nollan*, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. 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.

Petitioner contends that the city has forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements. Petitioner does not quarrel with the city’s authority to exact some forms of dedication as a condition for the granting 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” 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 petitioner’s claim, we must first determine whether the “essential nexus” exists between the “legitimate state interest” and the permit condition exacted by the city. If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development. We were not required to reach this question in *Nollan*, because we concluded that the connection did not meet even the loosest standard. Here, however, we must decide this question. . . .

It seems obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek’s 100-year floodplain. Petitioner 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 runoff into Fanno Creek.

The same may be said for the city’s attempt to reduce traffic congestion by providing for alternative means of transportation. . . .

The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city’s permit conditions bear the required relationship to the projected impact of petitioner’s proposed -development. . . .

We think 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.

JUSTICE STEVENS' dissent relies upon the proposition that the city's conditional demands for part of petitioner's property are "a species of business regulation that heretofore warranted a strong presumption of constitutional validity." But simply denominating a governmental measure as a "business regulation" does not immunize it from constitutional challenge on the grounds that it violates a provision of the Bill of Rights. In *Marshall v. Barlow's, Inc.* (1978), we held that a statute authorizing a warrantless search of business premises in order to detect OSHA [Occupational Safety and Health Administration] violations violated the Fourth Amendment. And in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n. of N.Y.* (1980), we held that an order of the New York Public Service Commission, designed to cut down the use of electricity because of a fuel shortage, violated the First Amendment insofar as it prohibited advertising by a utility company to promote the use of electricity. We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances. We turn now to analysis of whether the findings relied upon by the city here, first with respect to the floodplain easement, and second with respect to the pedestrian/bicycle path, satisfied these requirements.

It is axiomatic that increasing the amount of impervious surface will increase the quantity and rate of stormwater flow from petitioner's property. Therefore, keeping the floodplain open and free from development would likely confine the pressures on Fanno Creek created by petitioner's development. In fact, because petitioner's property lies within the Central Business District, the Community Development Code already required that petitioner leave 15% of it as open space and the undeveloped floodplain would have nearly satisfied that requirement. But the city demanded more—it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner'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 petitioner, 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." It is difficult to see why recreational visitors tramping along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek, and the city has not attempted to make any individualized determination to support this part of its request. . . .

We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building.

With respect to the pedestrian/bicycle pathway, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably relate to the city's requirement 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." . . .

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. . . .

The judgment of the Supreme Court of Oregon is reversed, and the case is remanded for further proceedings consistent with this opinion.

**JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE GINSBURG join, dissenting.**

. . . The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan. Even more consequential than its incorrect disposition of this case, however, is the Court's resurrection of a species of substantive due process analysis that it firmly rejected decades ago. . . .

Dolan has no right to be compensated for a taking unless the city acquires the property interests that she has refused to surrender. Since no taking has yet occurred, there has not been any infringement of her constitutional right to compensation.

Even if Dolan should accept the city's conditions in exchange for the benefit that she seeks, it would not necessarily follow that she had been denied "just compensation" since it would be appropriate to consider the receipt of that benefit in any calculation of "just compensation." . . . The city's conditions are by no means immune from constitutional scrutiny. The level of scrutiny, however, does not approximate the kind of review that would apply if the city had insisted on a surrender of Dolan's First Amendment rights in exchange for a building permit. One can only hope that the Court's reliance today on First Amendment cases, and its candid disavowal of the term "rational basis" to describe its new standard of review, do not signify a reassertion of the kind of superlegislative power the Court exercised during the *Lochner* era.