EXACTIONS: EXPLORING EXACTLY WHEN *NOLLAN* AND *DOLAN* SHOULD BE TRIGGERED

*Jane C. Needleman**

INTRODUCTION

Through *Nollan v. California Coastal Commission*[1] and *Dolan v. City of Tigard*,[2] the United States Supreme Court established a two-part test determining the constitutionality of an exaction[3] demanded by a

* Articles Editor, Cardozo Law Review. J.D. Candidate (June 2007), Benjamin N. Cardozo School of Law; M.A. New York University (2002); B.F.A. New York University (2000). I would like to thank Professor Stewart Sterk for his insight and guidance; Marissa Cohen and Jordana Shreiber for their editing and suggestions; my family—particularly my parents Martha and Jack Needleman, and my wonderful fiancé Ken Schuster, for loving me unconditionally and supporting me in this endeavor.

[1] *See generally* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (establishing that there must be an "essential nexus" between a permit condition and its requirement for an exaction to pass constitutional muster).

[2] *See generally* Dolan v. City of Tigard, 512 U.S. 374 (1994) (establishing that not only must the *Nollan* essential nexus test be fulfilled when analyzing an exaction, but also that the requirement demanded by the municipality also be roughly proportional to the impact of the development).

[3] Much rests on how one defines an exaction—particularly a large part of the answer to the question addressed in this Note of when to apply exaction analysis in the first place. Neither courts nor academics subscribe to a single definition. Professor Sterk defines an exaction as a requirement that a person give up a constitutionally protected right. Stewart E. Sterk, *What Counts as an Exaction?*, N.Y. REAL EST. L. REP., Feb. 2005, at 3 [hereinafter Sterk, *What Counts*]. Professor Fenster defines an exaction as "the concessions local governments require of property owners as conditions for the issuance of the entitlements that enable the intensified use of real property." Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 611 (2004). The *Town of Flower Mound* court embraces the definition that "'any requirement that a developer provide or do something as a condition to receiving municipal approval is an exaction.'" Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 625 (Tex. 2004). Exactions are employed by municipalities for many reasons, often because a municipality is looking for a way to fund an important community program. *See* Stewart E. Sterk, *Nollan, Henry George, and Exactions*, 88 COLUM. L. REV. 1731 (1988). In *B.A.M. Development L.L.C. v. Salt Lake County*, the court explained:

> Development exactions may be defined as contributions to a governmental entity imposed as a condition precedent to approving the developer's project. Usually, exactions are imposed prior to the issuance of a building permit or zoning/subdivision approval . . . [and] may take the form of: (1) mandatory dedications of land for roads, schools or parks, as a condition to plat approval, . . . (3) water or sewage connection fees, and (4) impact fees.

municipality as a condition upon development approval.[4] After *Nollan* and *Dolan*, when a municipality requires an exaction as a condition for a development permit, the condition must bear an "essential nexus" to the reason for requiring the permit, and the condition must also be "roughly proportional" to the impact of the development project.[5] An exaction that does not meet this two-prong requirement will be deemed a "taking" in violation of the Fifth Amendment.[6] The potential for government leveraging and abuse is great in the development permit context,[7] rendering the heightened scrutiny demanded by *Nollan* and *Dolan* necessary.

Nollan and *Dolan* have left open a threshold question of what constitutes an exaction, thereby triggering the two-part *Nollan/Dolan* analysis. Courts have taken various approaches. *Nollan* and *Dolan* are both exaction cases that deal with a municipality conditioning a permit upon a landowner's grant of an easement.[8] Although many courts agree

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87 P.3d 710, 715 (Utah Ct. App. 2004). Exactions are a peculiar breed of "takings" analysis. In trying to determine the circumstances that trigger exaction analysis, it is helpful to acknowledge what does not. Justice Kennedy points out that the Court has not "extended the rough-proportionality test of *Dolan* beyond the special context of exactions[.]" City of Monterey v. Del Monte Dunes, 526 U.S. 687, 702 (1999). Therefore, it would be inappropriate to subject a zoning scheme to the *Nollan/Dolan* analysis.

[4] Although whatever a developer builds might benefit the community, it has the potential to place increased demands on the community as well. "Development [often] adds children to the schools, traffic to the streets, increased use of parks, burdens on [the] sewers, and assorted other costs to a community." Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. ILL. U. L. REV. 513, 516 (1995). Professor Cordes further explains the practical dichotomy of imposed permit conditions on developers:

> At their best exactions reflect a sincere government effort to require developers to pay for the costs development places on the surrounding community. At its worst the system has been a means by which governments can use their monopoly power to extort from developers property interests often unrelated to the proposed development.

Id. at 513-14.

[5] *See Dolan*, 512 U.S. at 386.

[6] The Fifth Amendment prohibits the government from taking private property for public use without justly compensating the party to whom the property belongs. The Takings Clause, the last clause of the Fifth Amendment, designed to prevent government over-reaching and abuse provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Over time, the United States Supreme Court has developed various categorical rules that help courts and legislatures determine how to act in specific circumstances, but have left open many unanswered questions regarding how to deal with others.

[7] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987). Justice Scalia explains that within the land use permit context, there is a very real concern that some regulations lack a legitimate purpose and function as "'an out-and-out plan of extortion.'" *Id*; see *infra* Part I.C for further discussion.

Notably, the development permit context is not the only context that the United States Supreme Court has rejected balancing to provide landowners greater protection against government discretion. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) (establishing a per se rule that a taking has occurred when a "regulation . . . deprives [a property] of all economically beneficial use"); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (employing a per se rule that any permanent physical occupation authorized by the government, no matter how minor, is a taking that requires compensation).

[8] *See Nollan*, 483 U.S. at 827; *Dolan*, 512 U.S. at 377.

that the *Nollan/Dolan* analysis is not restricted solely to easement grants, language in the *Nollan* and *Dolan* opinions has sent courts down diverse paths regarding the appropriateness of applying this analysis to other contexts.[9]

This Note argues that the *Nollan/Dolan* analysis should be triggered by judicial challenges to conditions that local municipalities place on development permits when the actual exaction imposed could not otherwise be acquired by the municipality outside the development permit context.[10] This Note concludes that many courts mistakenly focus on artificial bright-line categories to dictate when to apply *Nollan* and *Dolan*, effectively denying developers an opportunity for the close judicial review necessary in order to combat the very real danger of local government extortion, thus championing judicial economy over fairness and encouraging the proliferation of unconstitutional conditions.

Part I presents the backdrop for exaction analysis as carved out by the United States Supreme Court in *Nollan* and *Dolan*. Part II outlines the various bright-line categorical approaches courts have employed to avoid applying *Nollan* and *Dolan*, focusing on (a) whether the required dedication is a conservation easement or open-space provision, (b) whether it is monetary rather than a dedication of real property, or (c) whether it was enacted by a "legislative" entity. Part III proposes that the *Nollan/Dolan* analysis should be triggered when a municipality places a condition on granting a development permit, where the condition in question could otherwise not be acquired though another land use regulation without compensating the landowner. Against this backdrop, Part IV discusses the difficulties that are prevalent when courts adhere to the various categorical approaches rather than focusing on an approach that directly addresses the concerns highlighted by Justice Scalia in *Nollan*.[11]

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[9] It is important to try to discern the scope of what the Supreme Court meant when it laid out these guidelines to examine exactions, as it is unlikely they will revisit the issue anytime soon, and it is a matter of great importance. *See* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 247 (2004):

> Having announced a rough-proportionality standard in *Dolan*, the Court appears unlikely to refine it further . . . . Rather than monitoring compliance with the standard, the Court appears content to leave implementation to the state courts—many of which had already embraced the Court's position and others which had exceeded the Court's mandate.

Id. Also, Justice Scalia, in a denial of certiorari dissent for *Lambert v. City & County of San Francisco*, 529 U.S. 1045 (2000), voiced his concerns that courts are not applying the *Nollan/Dolan* analysis appropriately and ignoring the need for the stricter scrutiny analysis. *See* Fenster, *supra* note 3, at 613.

[10] For the purposes of this analysis, this Note stresses that money should be treated as property because the dangers of government abuse are just as present with money as with land. See *infra* Part IV.B for further discussion of why money should be treated as property for the purposes of exaction analysis.

[11] *See infra* Part I.A (discussing Justice Scalia's concerns and reasoning that the permit

I. *NOLLAN* AND *DOLAN*: THE CREATION OF THE TWO-PART TEST

A. Nollan*: Establishing an "Essential Nexus" Requirement*

The *Nollan* Court established that when a municipality conditions a development permit on a landowner's grant of an easement to the public, the municipality's exaction of the easement constitutes an unconstitutional taking unless there is an essential nexus between the easement and the reason for requiring a permit. In *Nollan*, the Court held that the condition imposed—dedication of an easement to the public—constituted a taking in violation of the Fifth Amendment because the condition lacked a relationship to the impact the Nollans' building plans would have on the surrounding community. The Court left open what other permit conditions would trigger this heightened scrutiny.

The Nollans had an option to buy a piece of beachfront property, but the option was conditioned upon their promise to tear down and replace the ramshackle bungalow that stood on the parcel.[12] Rather than build another small bungalow, they decided to replace it with a larger three-bedroom house, much like the other homes in the neighborhood.[13] After the Nollans applied for the permit to move forward with their plans, the Coastal Commission staff informed them it had recommended that their permit be conditioned upon the granting of a lateral easement to permit the public to cross their beachfront land.[14] The Nollans protested the condition.[15] They contended that there was insufficient evidence to show that the proposed house significantly burdened public access to the beach enough to justify the municipality's condition.[16] The easement would decrease the value of the property and create a significant inconvenience.[17] The California Superior Court agreed with them, but the California Court of Appeal reversed and ruled that no taking had occurred.[18] The Nollans appealed to the United States

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context is an ideal setting for government abuse that necessitates heightened scrutiny to analyze municipal exactions).

12 *Nollan*, 483 U.S. at 828.

13 *Id.*

14 *Id.* Interestingly, similar easements had been granted to the city by forty-three other similarly situated property owners. *Id.* at 829.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* at 828-31. After the California Superior Court ruled in favor of the Nollans, but before the California Appellate Court reversed that ruling, the Nollans went ahead and satisfied their option to purchase; they tore down the bungalow, built a new house, and bought the property. *Id.* at 829-830. Interestingly, the Nollans chose not to inform the Commission of their actions. *Id.* at 830.

Supreme Court for a ruling on the constitutional takings issue.[19]

The Coastal Commission argued that the permit it required from the Nollans served a legitimate police-power purpose and therefore should not constitute a taking.[20] The Nollans' new house would be bigger than their old house, and therefore would block the view of the beach from the road.[21] The Coastal Commission argued that members of the public who drove by a bigger house would be psychologically blocked from experiencing the coastline, and therefore an easement for those people to enter the beach would be necessary to maintain visual access.[22]

As a threshold matter, Justice Scalia pointed out:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so . . . no doubt there would have been a taking.[23]

While Justice Scalia acknowledged that the Coastal Commission likely had a legitimate concern in protecting visual access to the coastline, he concluded that the easement it required was an unconstitutional method to remedy the particular problem the Nollans' new house created. Allowing the public already present on the beach to walk across the Nollans' private property would not reduce any viewing obstacles from the street that would be created by the new house.[24] The absence of a nexus between the condition imposed by the Costal Commission and its stated purpose made it likely that the municipality's purpose was to obtain an easement without having to pay for it.[25]

The Coastal Commission could have furthered its legitimate police power purpose of protecting the view through a regulation that *would* have directly addressed the problem of visual access, perhaps by imposing height or width requirements on the new construction.[26] It likely could have gone so far as to require that the Nollans create a special viewing spot in case anyone passing by wanted to stop and enjoy the ocean view.[27] But what the Coastal Commission could not do

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19 *Id.* at 831.
20 *Id.* at 836.
21 *Id.* at 838.
22 *Id.*
23 *Id.* at 831.
24 *Id.* at 836-37.
25 *Id.* at 837.
26 *Id.* at 836.
27 *Id.* Justice Scalia explained:

> Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power

was use the permit approval process to acquire a right indirectly, where the Coastal Commission would otherwise have had to pay for the right.

Justice Scalia further illustrated the constitutional impropriety through analogy, explaining that when the essential nexus between the prohibition and the police power purpose is eliminated, it is as if the government forbade shouting fire in a crowded theater, but allowed individuals to avoid the regulation by paying $100 to the state.[28] He pointed out that while the government may implement such a ban on speech in order to protect public safety, once the government adds the unrelated condition that allows an individual to avoid the regulation, the regulation is undermined and is no longer valid.[29] He concluded his analogy, "even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster."[30]

B. Dolan*: Establishing a "Rough Proportionality" Requirement*

A few years later, the *Dolan* Court addressed one of the questions left open by the *Nollan* Court: How much of a connection is necessary between the exaction by the city and the likely impact of the proposed development?[31] The *Dolan* Court determined that a permit condition on development must meet two requirements: (1) the "essential nexus" requirement established in *Nollan*, and a finding that the exaction (2) be "roughly proportional" to the impact of the proposed development in nature and extent.[32] If these requirements are not satisfied, the municipality's action constitutes a taking.

Florence Dolan owned a parcel of land in the City of Tigard, on the southwest edge of Portland, Oregon, where she ran a plumbing and electrical supply store.[33] She applied to the City Planning Commission (Commission) for a permit to redevelop her site with a bigger store and

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> to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. . . . The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition.

Id. at 836-37.

28 *Id.* at 836.

29 *Id.*

30 *Id.*

31 Dolan v. City of Tigard, 512 U.S. 374, 377 (1994).

32 *Id.* at 386, 391. Professor Cordes asserts: "the central message of Dolan is quite simple: government may seek exactions to offset the impact from development, but the exactions must relate to and flow from the development. Government cannot use a land approval process as an excuse to capture an interest unrelated to the impact of development." Cordes, *supra* note 4, at 535.

33 *Dolan*, 512 U.S. at 379.

additional parking.[34] The Commission, in order to comply with its Community Development Code, conditioned the permit on the dedication of two portions of her land to the city—one portion that fell within a floodplain and another fifteen-foot strip adjacent to the floodplain as a public access pedestrian/bicycle pathway.[35] Florence Dolan, feeling unduly burdened, requested variances from the Commission, but her request was denied.[36] Dolan appealed to the Land Use Board of Appeals and then the Oregon Court of Appeals, but was denied relief.[37] The Oregon Supreme Court affirmed the lower court decisions and the United States Supreme Court granted certiorari.[38]

Chief Justice Rehnquist explained that it was necessary to go beyond the *Nollan* essential nexus analysis in order to ensure that the exaction imposed did not create an "unconstitutional condition."[39] Unconstitutional conditions are evaluated by first examining the condition under the *Nollan* test.[40] Then, the sufficiency of connection between the state interest and the condition must be determined by analyzing whether it is "roughly proportional" to what is being required of the individual to give in return.[41] The Court made the point that there is no mathematical formula that will provide a simple answer.[42] Rather, the municipality is required to examine both the nature and extent of the proposed development to ensure that it reasonably matches up with the required condition of the dedication.[43] Here, the Commission failed to

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[34] *Id.* Florence Dolan was not asking the municipality to allow her to do something she otherwise was barred from doing, nor was her request unreasonable. The Court explained:

> Her proposed plans called for nearly doubling the size of the store to 17,600 square feet and paving a 39-space parking lot. . . . In the second phase of the project, petitioner proposed to build an additional structure on the northeast side of the site . . . . The proposed expansion and intensified use [were] consistent with the city's zoning scheme.

Id.

[35] *Id.* at 380.

[36] *Id.* at 380-81.

[37] *Id.* at 382-83.

[38] *Id.* at 383.

[39] *Id.* at 386.

[40] *Id.*

[41] *Id.* at 391.

[42] *Id.* Professor Cordes suggests that although mathematical precision is not required by the Court, "it was equally clear that the state cannot merely assume a relationship exists." Cordes, *supra* note 4, at 537. He explains:

> What is perhaps most significant about Dolan is not so much the required degree of connection, but rather the process of establishing that . . . connection . . . . In this respect, *Dolan* appears to impose three important requirements for establishing "rough proportionality": (1) the burden of proof is on the state; (2) there must be an individual determination of the relationship; and (3) in most cases there must be an effort to quantify the relationship.

Id.

[43] *Dolan*, 512 U.S. at 391.

meet this two-prong burden.[44]

The city was able to satisfy the first prong of the analysis and successfully show that the burdens it was placing on Dolan met the "essential nexus" requirement laid out in *Nollan*.[45] The city presented a strong argument that it fulfilled this requirement—under the circumstances there was an apparent, logical connection between requiring a greenway dedication to help with flood control, as well as requiring a bicycle path to help with traffic control.[46] However, the City of Tigard failed to establish the second prong, that the burden it was imposing on Dolan was "roughly proportional" to the impact that Dolan would create through her building proposal.[47] In particular, the greenway the city required was public rather than private, the need for which was not supported by any facts provided by the city.[48] Because of its failure to meet both prongs of the required analysis, the city effected a taking.[49]

C. Nollan *and* Dolan *Demand a Heightened Standard*

Nollan and *Dolan* stand for the proposition that heightened scrutiny[50] should be applied when examining takings challenges in the development permit context.[51] A heightened level of scrutiny is

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[44] *Id.* at 393. "The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control." *Id.* In reference to the bicycle/pedestrian walkway, the Court found that the Nolan "essential nexus" prong was met, but the city failed to "make some effort to quantify its findings in support of the dedication . . . beyond the conclusory statement that it could offset some of the traffic demand generated." *Id.* at 395-96.

[45] *Id.* at 386-87.

[46] *Id.* at 387; *see also* Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620 (Tex. 2004).

[47] *Dolan*, 512 U.S. at 393.

[48] *Id.* Chief Justice Rehnquist explained that: "It is difficult to see why recreational visitors trampling 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." *Id.*

[49] *Dolan*, 512 U.S. at 394, 395. The city mistakenly relied on findings that failed to show the "required reasonable relationship between the floodplain easement and the petitioner's proposed new building." *Id.*

[50] It is important to note that although a heightened scrutiny is necessary, the Court does not demand (in either *Nollan* or *Dolan*) the strictest scrutiny usually applied in situations like discrimination cases. See *Dolan*, 512 U.S. at 389-92, for a thorough discussion of how the Court settled on the level of scrutiny demanded by *Nollan* and *Dolan*.

[51] *See* Sterk, *What Counts*, *supra* note 3, at 1. "Constitutional scrutiny of government exactions is more stringent than constitutional scrutiny of other land use controls." *Id.* One approach to exactions is to first determine whether the dedication would be considered a taking if analyzed outside of the development prohibition. *Id.* at 3. If it is, then certainly we must apply the *Nollan/Dolan* analysis. *Id.* But the analysis should not end there. The fact that something would not be evaluated as a taking outside of the permit requirement does not mean that it would not constitute a taking under an exaction analysis. See *infra* Part III for an expansion on this

necessary because, when a municipality requires an exaction as a condition to grant of a permit, the risk increases that the municipality is simply trying to deprive the landowner of a property right for which it would otherwise have to provide compensation.[52]

This was Justice Scalia's concern in *Nollan*; he warned that when "the actual conveyance of property is made a condition to the lifting of a land-use restriction . . . there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."[53] If a municipality engaging in exactions knows its methods will not be closely examined, the municipality has an incentive to manufacture regulations only to increase the number of situations where a developer will be forced to petition for an exception.[54] This is a greater concern in the context of exactions than with other regulations, such as zoning, because exactions present a municipality with an opportunity to acquire rights it would never be able to acquire through zoning; the most striking example is money.[55]

But the essential nexus test in *Nollan* functions as an insurance policy, ensuring that the municipality actually wants what it has asked for. It protects the developer from being cornered into paying whatever "price" the municipality sets in order to have the regulation lifted. *Dolan* then demands that even if the municipality meets its burden in showing that it is in fact directly interested in the impact of the particular development, the municipality may not overburden the

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theory.

[52] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841 (1987). Lee Anne Fennell, in her article *Hard Bargains and Real Steals: Land Use Exactions Revisited*, points out that the protections laid out in *Nollan* and *Dolan* have "opened the door" to third party lawsuits. 86 IOWA L. REV. 1, 40 (2000). She explains: "Third parties harmed by development might be able [to] attack 'sweetheart deals' between developments and local governmental bodies on the grounds that the concession lacks an essential nexus to the harm caused by the development." *Id.* at 41.

[53] *Nollan*, 483 U.S. at 841.

[54] Professor Cordes explains the financial problems many municipalities face and their approach to dealing with it:

> Over the last thirty years local governments have increasingly relied on development exactions as a funding source for land use development. Faced with shrinking budgets and the need to provide services attendant to growth, cities and counties have used the development approval process to require developers to provide land and money to offset the perceived costs that development places on a community.

Cordes, *supra* note 4, at 513.

[55] With zoning, municipalities can set up a system by which neighbors know how to deal with one another. For example, municipalities use zoning:

> to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of a lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence, or other purposes.

DANIEL R. MENDELKER, LAND USE LAW § 4.16 (5th ed. 2003) (quoting Bittinger v. Corp. of Bolivar, 395 S.E.2d 554 (W. Va. 1990)). Exactions can be used to accomplish similar results, but exactions also offer more flexibility in the scope of what municipalities can ask for.

individual beyond the proportional impact of that development.[56]

D. *Unanswered Questions*

Nollan and *Dolan* have left many questions unresolved, including the standards used to determine whether an exaction meets the *Nollan* "essential nexus" and *Dolan* "rough proportionality" tests.[57] However, this Note addresses only the first stumbling block of determining *when* the two-part heightened scrutiny analysis required by *Nollan* and *Dolan* should be triggered. The section that follows will focus on the circumstances under which courts have held that an exaction falls outside the *Nollan/Dolan* analysis. This Note then proposes a different approach to determining when the *Nollan/Dolan* analysis should be triggered, and against this background demonstrates why these various categorical approaches are problematic.

II. FAULT LINES: WHERE COURTS FALL INTO THE CRACKS

Perhaps in recognition that municipalities are faced with increasingly dwindling funds,[58] a number of courts have created bright-line distinctions in order to shelter various municipal decisions from a heightened scrutiny analysis. However, by establishing the artificial distinctions outlined below, those courts have increased the opportunities for municipalities to engage in questionable behavior that will remain unchecked by the judicial process.

A. *Conservation Easements and Open Space Provisions*

The New York Court of Appeals refused to apply the *Nollan/Dolan* analysis to a conservation easement imposed by the municipality as a condition on development approval in *Smith v. Town of Mendon*.[59] The court denied that an exaction had occurred when the

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[56] Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

[57] The two-part *Nollan* and *Dolan* test has proven complicated and problematic for many courts to apply, and many resist doing so under certain circumstances. *See* Fenster, *supra* note 3, at 629. Justice Schuman, in *Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park &Recreation District*, complains that the *Nollan/Dolan* analysis uses vague and confusing language that is difficult to apply. 62 P.3d 404, 408 (Or. Ct. App. 2003). He insists that "'rough proportionality'" is an abstract, elastic phrase and suggests that it lacks any substantial meaning. *Id.*

[58] *See supra* note 54.

[59] *See generally In re* Smith v. Town of Mendon, 822 N.E.2d 1214 (N.Y. 2004).

municipality conditioned site approval for the Smith's single family home on the Smith's grant of a conservation restriction on other areas of their property.[60] The court concluded that the restriction could not amount to an exaction because title to the property did not officially change hands.[61]

In support of the decision not to apply *Nollan* and *Dolan* to this breed of open-space regulations, the court focused on the language in the *Nollan* opinion that reminds us "as to property reserved by its owner for private use, 'the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[62] Additionally, in *Dolan*, the Court made a point of highlighting the fact that the city's requirement that the greenway be public rather than private weighed into its analysis.[63] In *Smith*, by contrast, the open space ordinance did not deprive the landowner of the right to exclude.

B. *Money*

Some courts refuse to apply the *Nollan/Dolan* analysis to monetary exactions.[64] In *Krupp v. Breckenridge Sanitation District*,[65] the Colorado Supreme Court refused to apply the *Nollan/Dolan* analysis to a one-time impact fee assessment because it believed that *Nollan* and *Dolan* are limited to land exactions.[66] The court stipulated that because the government did not specifically demand "real property," the *Nollan/Dolan* analysis was inapplicable.[67] This approach is grounded in the idea that a government's physical invasion of an individual's land is somehow more malignant than the government's invasion of that same individual's purse.[68]

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60 *Id.* at 1218-19.

61 *Id.* at 1215-16.

62 Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987) (quoting Loretto v. Teleprompter Manhattan CATV Corp., 485 U.S. 419, 433 (1982) (internal quotation omitted)).

63 Dolan v. City of Tigard, 512 U.S. 374, 393 (1994).

64 Some courts focus on the fact that both *Nollan* and *Dolan* dealt with real property and take the very narrow stance that unless the exaction is a forced land dedication, the heightened scrutiny does not apply. *See, e.g.*, Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 697 (Colo. 2001); Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park & Recreation Dist., 62 P.3d 404, 411 (Or. Ct. App. 2003).

65 *Krupp*, 19 P.3d at 697.

66 The *Krupp* court also held *Nollan/Dolan* inapplicable because the exaction was imposed by the legislature rather than through an ad hoc adjudication. *Id.* at 695-96.

67 *Id.* at 697.

68 *Id.* Although the *Krupp* court acknowledged that some other courts have begun to recognize that monetary exactions may sometimes be subject to a heightened scrutiny, it refused to acknowledge that the situation before it fell under that umbrella. *Id.* at 698. There is no doubt that the United States Supreme Court feels very strongly about physical invasion onto someone's

Similarly, the Oregon Court of Appeals noted that *Nollan/Dolan* was inapplicable in *Homebuilders Ass'n of Metropolitan Portland v. Tualatin Hills Park & Recreation*[69] when the exaction at issue was also in the form of money. The Oregon court argued application of the analysis to monetary exactions leads to an "incoherent result."[70] The court reasoned that application of the *Nollan/Dolan* analysis to monetary exactions was absurd and illustrated its point through an illogical, paradoxical phrase: "Government can take money, but only if it pays for it—that is, only if it gives the money back."[71]

C. *Legislation*

Some courts refuse to hold the *Nollan/Dolan* analysis applicable to exactions promulgated through legislation.[72] In a footnote in *Dolan*, Chief Justice Rehnquist distinguished *Village of Euclid*,[73] a case about generally applicable zoning regulations. He pointed out that in *Dolan*, but not in *Village of Euclid*, "the city made an adjudicative decision to condition petitioner's application[.]"[74] Similarly, there is language in *Dolan* recognizing that the exaction in that case was based on an adjudicative decision.[75] Some courts use this language as an indication that the *Nollan/Dolan* analysis is applicable only to exactions arrived at through ad hoc adjudicative decisions[76] and never to exactions promulgated through legislation.

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private property, evidenced by the decision that even a small cable box placed on someone's building constituted a taking. *See generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). However, most people will tell you they feel more subjected to a "taking" by the government when they receive a pay check and a large sum of that money is "taken" by the government through taxes.

69 Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park & Recreation Dist., 62 P.3d 404, 411 (Or. Ct. App. 2003).

70 *Id.*

71 *Id.*

72 *See, e.g.*, Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997).

73 *See* Vill. of Euclid v. Amber Realty Co., 272 U.S. 365 (1926).

74 Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994). Additionally, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005), the Court described *Nollan* and *Dolan* as "challenges to adjudicative land-use exactions." However, the Court has never said that *Nollan* and *Dolan* are limited only to adjudicative exactions.

75 *Dolan*, 512 U.S. at 385.

76 "Ad hoc adjudicatory" proceedings, sometimes called "quasi-judicial" proceedings, are a hybrid between a purely legislative enactment and a full judicial proceeding. In this breed of proceedings, some amount of procedural due process is afforded to the players due to the individualized review of case specific issues and judicial discretion involved. *See* Kenneth G. Silliman, *Risk Management for Land Use Regulations: A Proposed Model*, 49 CLEV. ST. L. REV. 591, 635 n.204 (2001).

In *Home Builders Ass'n of Central Arizona v. City of Scottsdale*,[77] the Arizona Supreme Court concluded that the *Nollan/Dolan* analysis was inapplicable to a water resources development fee imposed upon new realty developments, even though the fee was exacted as a condition on development approval.[78] The court based its decision not to apply the heightened scrutiny analysis on the distinction that *Dolan* involved an adjudicative decision.[79] It reasoned that when faced with a municipality exercising adjudicative discretion over conditioning permits on exactions, there is greater concern that an individual will be unfairly burdened.[80] Here, the decision to exact the fee was a legislative decision, and the court found that to be dispositive; *Nollan* and *Dolan* should not apply.[81] The court reasoned that when a city makes a legislative decision, the same risk of leveraging does not exist as would occur if a landowner is forced to engage in bargaining in order to obtain approval for building plans.[82]

In *Krupp*, the Colorado Supreme Court also held that the *Nollan/Dolan* analysis did not apply since the fee the municipality exacted was based on legislation.[83] It stressed that the risk of leveraging and extortion was simply not a concern when dealing with legislative exactions, even though the piece of legislation, on its face, allowed for individual discretion by the district manager in assessing the amount of the fee in question.[84] The court reasoned that because there was no indication the district manager was arbitrary in his determinations, the fee he assigned to the construction of a triplex, (a structure not accounted for by the legislation), presumptively comported with the

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77 930 P.2d 993 (Ariz. 1997). After engaging in a study, the City of Scottsdale determined that it lacked enough water resources for the future as well as the necessary financial resources to remedy the problem. *Id.* at 994. In order to create this capital, the city decided to adopt a development fee that would place the burden on new residential developments. *Id.* at 995. New plans for development were made conditional upon paying this new fee. *Id.* Because the ordinance was adopted by the legislature, the court stressed that it was "cloaked with a presumption of validity." *Id.* at 996. It explained that the most important thing to consider was that the city needed water, and the method by which the legislature decided to get it was presumptively fine. *Id.*

78 *Id.* at 993-94, 999. The court's decision did not actually hinge on whether or not it found *Dolan* applicable because the issue was never raised at trial and therefore could not officially be raised on appeal. However, the court examined the reasoning by which it would have ruled if the issue had been preserved for appeal. Although only dictum, the opinion gives insight and guidance to lower courts on how lower courts should approach similar cases.

79 *Id.* at 1000.

80 *Id.*

81 *Id.*

82 *Id.*

83 Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687 (Colo. 2001).

84 *Id.* at 696. However, the court acknowledged that in this case there was a significant amount of discretion given to the district manager whose job it was to use the guidelines laid out by the legislation and fee conversion schedule to determine how much money a developer should pay the city for a plant investment fee for each structure. *Id.* at 687.

Constitution.[85] Despite the fact that the district manager had used his discretion in determining the fee, the court was not concerned about leveraging on the part of the municipality.[86]

III. WHEN *NOLLAN* AND *DOLAN* SHOULD BE TRIGGERED

Each of these bright-line categorical approaches fails to address head-on the concern laid out by Justice Scalia in *Nollan*; some municipalities are using the development permit context as an opportunity to acquire property rights indirectly that otherwise would require payment of compensation. If a municipality cannot acquire a property right directly, it seems unreasonable to allow a municipality to acquire the same property right indirectly without pausing to scrutinize the acquisition process. Heightened scrutiny in this context will ensure that individual rights are protected and not hijacked under the shadows of the permit approval process. For this reason, the trigger for whether or not to apply the *Nollan/Dolan* analysis should be based on whether the actual "exaction" in question would constitute a taking outside the development context.[87]

Since the United States Supreme Court decided *Nollan* and *Dolan*, it has been virtually undisputed that courts should apply a heightened scrutiny when a municipality conditions development approval upon the developer granting a land easement to the municipality.[88] This reality comports with the proposal offered by this Note; because a municipality could only obtain an easement outside the development permit context if it compensated the landowner, it follows that when a municipality uses the permit context to acquire the same easement *without* having to pay compensation for it, the court should engage in a higher level of scrutiny to ensure that the landowner is not being unfairly deprived of a

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[85] *Id.*

[86] *Id.* at 691. The court made the assumption that the district manager was taking into account the legislative intent of the ordinance. *Id.* Essentially, the court insisted that by labeling the fee as part of a legislative measure rather than an adjudicative one, the fee may only be examined under the guise of whether it is an arbitrary or illegal administrative action. *Id.* at 696.

[87] *See* Sterk, *What Counts*, *supra* note 3, at 3.

[88] Courts generally have no trouble applying *Nollan* and *Dolan* to the obvious cases that essentially parallel the facts in those cases, scenarios where a municipality conditions a land dedication on development approval. For example, recently in *B.A.M. Development, L.L.C. v. Salt Lake County*, the county conditioned a land dedication on a subdivision approval. 87 P.3d 710, 716 (Utah Ct. App. 2004). The Utah Court of Appeals compared the facts in front of it to *Nollan* and *Dolan*, recognized that an exaction had occurred, and directed the trial court on remand to apply the two-prong heightened scrutiny analysis. *Id.* Similarly, in *Luxembourg Group, Inc. v. Snohomish County*, the Washington Court of Appeals ascertained that the county had exacted a property interest when it made a rezoning and subdivision application contingent upon a sixty-foot right-of-way easement—it also applied *Nollan* and *Dolan*. 887 P.2d 446, 447 (Wash. Ct. App. 1995).

property right.[89]

The related decision of whether to apply *Nollan* and *Dolan* to conservation and open-space ordinances is more difficult (and somewhat controversial)[90] because open-space can be acquired using other land use regulations.[91] Although a municipality may have good intentions to protect nature and open space, those intentions do not justify forcing a developer to suffer an unconstitutional taking. However, because development inherently compromises the natural habitat it impedes on, the *Nollan* "essential nexus" prong will most likely be fulfilled in every case. Therefore, in this context, the *Nollan* "essential nexus" will be quickly satisfied. But, the *Dolan* "rough proportionality" prong is still essential in evaluating takings claims in this context because the concern remains that a municipality is being excessive in its demands, taking away more property rights than it has the right to take.

In contrast, forced monetary dedications, like forced land dedications, should trigger both the *Nollan* "essential nexus" and *Dolan* "rough proportionality" prongs. Because the municipality may not single out an individual to arbitrarily pay a sum of money under any situation when it would not be considered a taking, any exaction in the form of money is likewise suspect and needs to be closely examined. This will ensure the municipality is only using the exacted money for the purpose it claimed to need it for and that it is not demanding an unreasonable amount.

IV. REJECTING THE CATEGORICAL APPROACHES (AND EMBRACING THE COURTS THAT GOT IT RIGHT)

As the approach proposed above suggests, the categories courts have been using to avoid applying *Nollan* and *Dolan* seem arbitrary, the reasoning behind such approaches balanced precariously on bits of language extracted from the opinions of *Nollan* and *Dolan*, rather than directly addressing the dangers of government abuse that *Nollan* and

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89 This is the very analysis that Justice Rehnquist engages in at the beginning of the *Dolan* opinion: "[w]ithout 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." Dolan v. City of Tigard, 512 U.S. 374, 384 (1994).

90 See Professor Wright's article on how exaction jurisprudence is straining the ability for the creation of recreational trails that would benefit the public. Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Takings Jurisprudence?*, 26 COLUM. J. ENVTL. L. 399 (2001).

91 See *infra* further analysis in Part IV.A on why the exaction context is distinguishable from other types of regulations that also create open space such as large lot zoning and set-back ordinances.

Dolan seek to ameliorate.

If only forced land dedications in which actual property title changes hands and easements where the public may physically traverse the land are subject to the heightened scrutiny of *Nollan* and *Dolan* as some courts suggest,[92] there is no reason to suppose that government entities will not make an effort to translate the exaction into another form in order to avoid compensating the private land owner or developer. But in *Nollan*, Justice Scalia warned that "the Fifth Amendment's Property Clause [is] more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination."[93] For this reason, the sections that follow scrutinize the various categorical approaches courts are employing to circumvent the *Nollan/Dolan* analysis in order to address why they fail to sufficiently address the issue of government abuse.

A. *Conservation Easement and Open-Space Provisions: Context Matters*

A municipality may not arbitrarily target one landowner to dedicate a conservation easement in order to maintain open space in the community, even if the municipality can demonstrate a need for that open space. In *Lucas*, the United States Supreme Court determined that when a regulation goes so far as to deprive the landowner of all economic value on his land, it constitutes a "per se" taking.[94] After *Lucas*, if a municipality wants to maintain complete open space on property it does not own, it must compensate the landowner. However, when a municipality conditions development approval on the granting of a conservation easement, the municipality seeks to avoid compensating the individual landowner.

If not closely scrutinized, a municipality may use the pretext of protecting the environment to acquire land it otherwise has no right to take. The municipality may argue that heightened scrutiny should be rejected, because if it had used large lot zoning or a set-back ordinance to ensure open space, it would have only been subject to minimal

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92 The *Rogers Machinery* court explained that "[t]raditionally, takings jurisprudence has distinguished between two kinds of encroachments on property interests, with significantly different analyses applicable to each. The first is an actual physical invasion or occupation of property . . . . [The other is] regulatory restrictions on property uses (*e.g.*, zoning.)" and that exactions "do not fit neatly" within either of these categories, thus causing some confusion in applying the law. Rogers Mach., Inc., v. Wash. County, 45 P.3d 966, 973 (2002).

93 Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841 (1987).

94 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) (establishing a per se rule that a taking has occurred when a "regulation . . . deprives [a property] of all economically beneficial use"); *see also supra* note 7.

scrutiny by the courts.[95] However, exactions are distinguishable from these various forms of zoning because with exactions the municipality conditioning the dedication is often vested with a large amount of discretion and the opportunity to abuse that discretion.[96] Additionally, in the context of zoning, a landowner may always seek relief by showing that he is subject to a discriminatory zoning scheme; the municipality may have to provide reasons for requiring a landowner—but not his neighbors—to leave much of her land as open space. That same protection is not available to the landowner outside of a zoning scheme. Therefore, if a court does not apply *Nollan* and *Dolan*, a landowner subject to an exaction that amounts to an unconstitutional taking will have no redress.

By denying an exaction ever occurred in *Smith v. Town of Mendon*,[97] the court effectively sanctioned the municipality taking a property right away from the Smiths without any scrutiny of the newly imposed restriction. Although the title on the property did not officially change hands,[98] the municipality insisted the deed restriction be recorded so that it would have the authority to enforce the provisions on the current landowner as well as any future landowner. Although the Smiths had several environmentally sensitive parcels on their land, the area on which the Smiths wanted to build their single family home was not environmentally sensitive.[99] Thus, it is difficult to understand why the court refused to recognize that an exaction had occurred.

Further, the conservation easement demanded by the municipality in *Smith* was highly burdensome on the Smiths and any future purchasers. The Smiths would be required to grant permission for

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95 Zoning, usually the result of a legislative act, is generally thought to have the presumption of validity and courts will not closely scrutinize it. Shelby D. Green, *Development Agreements: Bargained-For Zoning that is Neither Illegal Contract Nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 384-85 (2004). Zoning legislation became very widespread after the United States Supreme Court decided *Village of Euclid* in 1926. *Id.* at 385. "'Standard zoning enabling acts require that zoning ordinances apply uniformly to all property within a district.'" *Id.* at 386. However, as time has passed, more flexible "zoning devices" have developed that are not as far-reaching and even-handed in application. *Id.* at 388. The increased amount of discretion now present in zoning and how that should potentially effect or change the level of scrutiny afforded to it by the courts is outside the scope of this Note.

96 Professor Cordes suggests that the reason for this is that an exaction conditioned upon a dedication of real property is inherently "adjudicative in the sense that they involve a condition imposed on a particular parcel of land as opposed to a more general classification, thus raising the Court's traditional concern for government decisions focusing on a few people." Cordes, *supra* note 4, at 539; *see also* Curtis v. Town of S. Thomaston, 708 A.2d 657 (Me. 1998) (applying the *Nollan/Dolan* analysis to a permit application that was conditioned on the developer granting an easement to the town for fire safety purposes); Goss v. City of Little Rock, 151 F.3d 861 (8th Cir. 1998) (applying the *Nollan/Dolan* analysis to a permit conditioned upon the developer dedicating twenty-two percent of his land to the city to be used for expanding an adjacent roadway).

97 *In re* Smith v. Town of Mendon, 822 N.E.2d 1214 (N.Y. 2004).

98 *Id.* at 1219.

99 *Id.* at 1215-16.

government officials to enter the land to test certain standards and would be deprived of the ability to build any structure on the designated plot of land.[100] Although various types of regulations may prevent a landowner from placing a house or permanent structure on a certain specified area of a parcel, compliance with a zoning scheme will likely still allow swing-sets, picnic tables, or other movable/non-permanent recreational structures to be placed on the "restricted area[,]" whereas compliance with a conservation easement, like the one presented in *Smith*, will not.

In contrast to the majority opinion in *Smith*, Judge Pleus, in the concurring opinion in *St. John River Water Management District v. Koontz*,[101] understood the potential for abuse when a municipality requires a conservation easement. In his concurring opinion (to a very cursory majority opinion that dismissed the case for lack of jurisdiction),[102] he addressed the dangers and acknowledged the huge burden that conservation easements placed on a landowner.[103] He commended the trial court for recognizing that the municipality was engaging in an exaction and correctly applying *Dolan*.[104] Koontz, a developer, was informed that in order to go forward with the plans he submitted for approval, he would have to either dedicate the remaining portion of his land into a conservation area and perform "off-site mitigation" or reduce the area his development would occupy to an acre and turn the remaining property into a deed-restricted conservation area.[105] In order to conform to the state statutes that regulate conservation easements, government agents would have a right to enter the property to ensure compliance.[106] Judge Pleus expressed his frustration with the municipality for its extortionate behavior.[107] It was apparent that Koontz was being unfairly and unconstitutionally targeted, used only as a pawn for the city to acquire more open space under the

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100 The Town of Mendon insisted that in those areas considered environmentally sensitive, the Smiths would be "prohibited . . . from '[c]onstruction, including, but not limited to structures, roads, bridges, drainage facilities, barns . . . fences,' . . . removal of vegetation . . . and using motorized vehicles," among other things. *Id.* at 1216. The Smiths were also required to "maintain the 'Restricted Area' in accordance with the terms of their grant" as well as periodically allow government officials to enter the property in order to ensure compliance with the restrictions. *Id.*

101 861 So. 2d 1267 (Fla. Dist. Ct. App. 2003). The court dismissed the appeal for lack of jurisdiction, but Judge Pleus was upset by the clear and recurring abuse of discretion by the municipality. *Id.* at 1268-69.

102 The case was dismissed for lack of jurisdiction because the District Court had not entered a final order. *Id.* at 1268.

103 *Id.*

104 *Id.* at 1271.

105 *Id.* at 1268-69. Interestingly, neither "option" is particularly different, effectively denying the landowner any choice whatsoever.

106 *Id.* at 1271.

107 *Id.*

guise of protecting the environment.[108]

In *Isla Verde International Holdings, Inc. v. City of Camas*,[109] the Washington Court of Appeals recognized the potential for the city to abuse its power in the permit context and addressed the problem head-on. It applied the *Nollan/Dolan* analysis and found the open-space, set-aside ordinance that conditioned development approval on the developers setting aside thirty percent of their land to be "constitutionally defective" because the land to be set aside exceeded the impact of the proposed development.[110] The court rejected the city's argument that there could be no taking because the title to the land to be set aside would not change hands.[111] Instead, the court stressed "the essence of the harm [was] the government's unconstitutional interference with one's right to use and enjoy property."[112] It was reasonable for the municipality to insist that if the development is going to have an impact on the reduction of open space, the developer should be responsible for replacing what is proportional to that impact.[113] However, anything beyond that turns the exaction into a taking.[114] For all of these reasons, conservation easements in the development permit context warrant the closer scrutiny of *Dolan* to ensure rough proportionality and thus constitutionality.

B. *Money: Why It Should Be Considered Property for the Purposes of Exaction Analysis*

Impact fees and other requirements that a landowner pay money as a condition for permit approval should be scrutinized under both prongs of *Nollan* and *Dolan*. Despite the argument in *Homebuilders Ass'n of Metropolitan Portland*,[115] applying the exaction analysis to a monetary

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108 *Id.* at 1272. Koontz hired an expert ecologist to show that his building plans would not have such an adverse effect on the surrounding wildlife that off-site mitigation was necessary to counteract the impact of the development. *Id.* at 1269-70.

109 Isla Verde Int'l Holdings, Inc. v. City of Camas, 990 P.2d 429 (Wash. Ct. App. 1999).

110 *Id.* at 431-36. The municipality's requirement that Isla Verde construct a second road and pay a park fee was also found to be constitutionally defective. *Id.* at 432-33.

111 *Id.* The city was well intentioned in its demands that Isla Verde dedicate a significant amount of land for wildlife preservation, something the public would benefit from substantially. *Id.* at 436. However, wildlife preservation is a community responsibility, not a cost that can be unfairly thrust into a single developer's lap.

112 *Id.* at 435.

113 *Id.* at 436.

114 *Id.* Although the city was able to show that some land fulfilled the *Nollan* essential nexus requirement, it was unable to prove that it fulfilled the *Dolan* prong. *Id.* at 436-37. Therefore, like in *Nollan*, if that city wants that land, it will have to pay for it. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 842 (1987).

115 Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park & Recreation Dist., 62 P.3d 404, 411 (Or. Ct. App. 2003) (illustrating that money should not be analyzed the same way as real

exaction is not as absurd as the court seemed to suggest.[116] Monetary exactions, as opposed to real property exactions, pose an even greater threat of government abuse. Whereas real property can only be used for limited purposes and has a more obvious connection to development impact, money is fungible and can potentially be used for anything.

If monetary exactions are not examined under a heightened scrutiny, there will be an increased incentive for government entities to complain that proposed developments will negatively impact the community in order to acquire much needed funds for other enterprises like schools, road work, firehouses, etc.[117] For this reason, even though some courts may be hesitant to apply the analysis to monetary exactions,[118] the heightened scrutiny analysis of *Nollan* and *Dolan* is just as necessary in the context of money as it is with real property to ensure that individual rights are protected.[119] By glibly asserting that applying *Nollan* and *Dolan* to a development fee leads to an "incoherent result," as in *Homebuilders Ass'n of Metropolitan Portland*,[120] the court denies landowners a significant protection.

Many courts that apply the *Nollan/Dolan* analysis to monetary exactions anchor their reasoning in *Ehrlich v. City of Culver City*,[121]

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property through the paradoxical phrase: "Government can take money, but only if it pays for it—that is, only if it gives the money back.").

116 Even in *Homebuilders Ass'n of Metropolitan Portland*, the court acknowledged that "the United States Supreme Court has applied the Takings Clause to exactions of money[.]" *Id.* However, the Oregon court made the point that when the Supreme Court exacted money in those cases, it was "where the money was in an identifiable fund rather than charged as a fee for service or a tax." *Id.* Whether a municipality exacts money and then uses its eminent domain power to buy that developers land, or simply forces the dedication initially, the result is the same—the developer has been forced to give up his or her property without compensation. *See* Cordes, *supra* note 4, at 542. Recently, the City of Boise unsuccessfully argued before the Supreme Court of Idaho that the money it required on the transfer of liquor licenses did not constitute property in *BHA Investments, Inc. v. City of Boise*, 108 P.3d 315, 319 (Idaho 2005). In response, the court poked fun at the city's reasoning by pointing out "if that argument were valid then the City should have no problem returning the money it unlawfully exacted, since it would not be returning property." *Id.* The court then went on to explain, "[m]oney is clearly property that may not be taken for public use without the payment of just compensation" and denied that the taking of money necessarily mandates judicial deference in its review of the regulation that exacted it. *Id.*

117 See Cordes, *supra* note 54, at 513.

118 *See Nollan*, 483 U.S. at 827; Dolan v. City of Tigard, 512 U.S. 374, 377 (1994).

119 *See* Cordes, *supra* note 4, at 542. It is hard to see a good reason why a land/money distinction should matter when analyzing its constitutionality in the context of exactions. After all, money simply allows "cities to indirectly acquire title to property" rather than just taking the property initially. *Id.*

120 *Homebuilders Ass'n of Metro. Portland*, 62 P.3d at 411 ("Government can take money, but only if it pays for it—that is, only if it gives the money back.").

121 Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996). This case is particularly persuasive because of its procedural history. Justice Arabian's opinion begins:

> This case comes to us . . . having been remanded after the United States Supreme Court issued a writ of certiorari to the Court of Appeal and vacated that court's judgment in favor of defendant City of Culver City. The high court's order of remand directed the

which involved an "[i]n lieu of" fee.[122] In *Ehrlich*, the California Supreme Court determined that the *Nollan/Dolan* analysis was applicable to a permit that was conditioned upon a monetary exaction despite the city's argument that heightened scrutiny is not warranted unless actual real property is exacted.[123] The situation in *Ehrlich* was very similar to other land dedication exaction cases—a city council voted to approve a permit application on the condition that the landowner agreed to give something in return—in this case it happened to be money.[124]

Rather than approaching *Nollan* and *Dolan* as part of a limited framework that only concerns real property dedications, the *Ehrlich* court wisely heeded Justice Scalia's warnings from the *Nollan* opinion and scrutinized the exaction before it in order to ensure that the city was not engaging in regulatory leveraging against the developer.[125] The court acknowledged that "[i]t is in this paradigmatic permit context—where the individual property owner-developer seeks to negotiate approval of planned development—that the combined *Nollan* and *Dolan* test quintessentially applies."[126] The court reasoned that the test should be applied where circumstances dictate that there is an increased risk that the city making land use decisions is simply trying to avoid paying just compensation for the exaction.[127] It explained that it could see little difference in a land use permit authority demanding a payment of

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Court of Appeal to reexamine its prior judgment 'in light of *Dolan v. City of Tigard*[.]' *Id.* at 432-33.

122 *Id.* at 434. The condition on the development permit was initially a requirement to build four tennis courts in order to replace the lost recreation space the city would be losing from the proposed development. *Id.* at 434-35. The developer negotiated with the city and was able to have the requirement converted to an "in lieu of" fee which he paid under protest. *Id.* at 435.

123 *Id.* Although the *Ehrlich* court applied the *Nollan/Dolan* analysis to the monetary exaction in front of it, it stressed that the analysis applies "*under the circumstances of this case*," leaving the implication that the holding is very narrow. *Id.* at 433. In the end, the court applied the analysis and found that the city satisfied the "essential nexus" prong of the test, but found insufficient evidence to warrant a determination of whether the amount of the fee exacted was "roughly proportional" to the impact of the proposed development, and remanded the case once again. *Id.* at 449.

124 *Id.* at 434-35.

125 *Id.* at 438-39. The *Ehrlich* court "view[ed] this case as one presenting the earmarks of what has come to be characterized in . . . takings jurisprudence as a form of regulatory 'leveraging.'" *Id.* at 438.

126 *Id.* In situations where the landowner and the city enter into a bargaining context, as in *Ehrlich*, the risk of leveraging on the part of the city is extremely high.

127 *Id.* The *Ehrlich* court stressed that even though many courts insist that the *Nollan/Dolan* analysis is inapplicable to any exactions other than a *Loretto*-like "physical occupation" of property, it does not adopt that position. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The *Ehrlich* court further explained:

> [W]e reject the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions. When such exactions are imposed—as in this case—neither generally or ministerially, but on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered.

Ehrlich, 911 P.2d at 444.

money or a conveyance of property.[128]

Similarly, in *Benchmark Land Co. v. City of Battleground*,[129] the Washington Court of Appeals also rejected the more deferential balancing test and applied the *Nollan/Dolan* analysis to a monetary exaction.[130] The amount of the exaction was based on the cost of making improvements on half of a road that adjoined the development; after close analysis the court held the municipality violated the *Dolan* rough proportionality requirement.[131] The court acknowledged that *Nollan* and *Dolan* were unique in that they required dedications of property.[132] But, the court also pointed out that these cases were unique in another way—"in each, the conditions required the developer to make an affirmative contribution to solve a public problem that existed, at least in part, outside the developed property."[133] Rather than proceeding with a narrow view of property, the court concluded that the *Nollan/Dolan* analysis is just as applicable as if the city was requiring a land dedication.[134]

In *Home Builders Ass'n of Dayton v. City of Beavercreek*,[135] the Ohio Supreme Court also understood the essence of the problem inherent in excluding money from the exaction analysis and suggested that the name a municipality places on a burden is not determinative of the type of constitutional analysis it must undergo; therefore it applied

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128 *Id.* The *Ehrlich* court points out that cases where the exaction in question is designed by the legislative process may not require heightened scrutiny analysis. *Id.* at 447. However, this approach fails to acknowledge that legislation might still potentially leave the possibility for a significant amount of discretion on the part of the city and carry the same risks of leveraging.

129 Benchmark Land Co. v. City of Battleground, 14 P.3d 172 (Wash. Ct. App. 2000).

130 Outside of a few narrow exceptions outlined by the United States Supreme Court, Fifth Amendment "takings" jurisprudence is largely governed by a balancing approach. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (regulations should be examined through a balancing test in order to ensure a landowner is not deprived of economically viable use of his or her land). The *Penn Central* standard is very deferential and makes the government's position difficult to overcome. The *Penn Central* Court outlined the three factors to be taken into consideration: (1) the economic impact on the individual; (2) the extent of the regulations interference with the individual's economic expectations; and (3) the character of the government regulation. *Id.* at 124. This balancing test is the default approach courts take when analyzing a land use regulation that does not fit into one of the other "per se" categories. *See supra* note 7; *see also* MENDELKER, *supra* note 55, at § 2.07.

131 *Benchmark*, 14 P.3d at 173.

132 *Id.* at 174.

133 *Id.*

134 *Id.* at 174-75.

135 Home Builders Ass'n of Dayton v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000). The City of Beavercreek enacted an ordinance that imposed an impact fee on real estate developers to help pay for the cost of new roadway projects. *Id.* at 350-51. The court explained that one of the issues they were asked to rule on was whether the fact the city does not have a matching funds provision makes the ordinance unconstitutional. *Id.* at 353-54. "A matching funds provision would require a city to contribute public funds to roadway projects in an amount that bears some proportion to the fees collected from developers." *Id.* The court averred that this provision was not a determining component in deciding an ordinance's constitutionality, although it was a factor that may weigh into the balance. *Id.* at 354.

the *Nollan/Dolan* analysis to an "impact fee."[136] The court reasoned that in determining whether an ordinance is improperly burdensome upon application, the fact the municipality labeled it a tax or an impact fee is irrelevant to the inquiry of its ramifications.[137] Rather, the court explained that the primary concern was not the form that the exaction came in, or what name it was placed under, but the fact that the government would be permitted to act with "unfettered discretion."[138] *Nollan* and *Dolan* provide a necessary check to ensure that a municipality is not overstepping its constitutional authority or hiding behind the form or the name of the exaction.

C. *Legislation: Denying Local Governments Judicial Deference*

The label "legislative" should not always have a protective presumption of validity in the context of exactions. The deference usually afforded to legislation is inadequate "to treat seriously the

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136 *Id.* at 356. The court explained that by applying the *Nollan/Dolan* analysis, they could most fairly balance the interests of the developers and the interests of the local governments. *Id.*

137 *Id.* The idea that placing a different name on something doesn't change its essence is not a new concept. William Shakespeare, in his well loved work *Romeo and Juliet*, begs us to consider, "What's in a name? [T]hat which we call a rose [b]y any other name would smell as sweet[.]" WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2.

138 *See Home Builders Ass'n*, 729 N.E.2d at 355. For further analysis on discretion playing a major factor in a court's decision, see the recent Texas Supreme Court decision *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 622 (Tex. 2004). In *Town of Flower Mound*, the city had conditioned a development plan on a requirement that Stafford Estates rebuild a nearby road. *Id.* at 622. "The Town of Flower Mound's Land Development Code requires that a subdivision developer improve abutting streets that do not meet specified standards, *even if the improvements are not necessary to accommodate the impact of the subdivision*." *Id.* (emphasis added). Although the city did not directly insist upon a fee, the road improvements that Stafford Estates were required to perform forced them to expend a significant amount of money beyond the level of impact of the proposed development, though they were not required to dedicate any of their own land to the town. *Id.* at 624.

> Stafford argued that it should not be required to pay more than half the cost of rebuilding [the road]. The asphalt surface was not in disrepair, and the Town had made no attempt to determine whether the required improvements were roughly proportional to [that road] in particular or on the Town's roadway system as a whole.

Id. at 624.

The court held that the *Nollan/Dolan* analysis was applicable to this situation because the dangers of government abuse remained regardless of the form the exaction comes in.

> The [trial] court determined that the Supreme Court had not so limited the test [to dedication of an interest in real property] and reasoned that non-dedicatory exactions pose no less danger that the government may threaten withholding of approval in order to extract from an applicant some benefit or concession it could not otherwise require.

Id. at 625. The town had made exceptions to other developers, and the fact that they would not make one for Stafford Estates "showed that its decision was a discretionary one based on individual circumstances rather than a ministerial enforcement of its code based on general policy considerations." *Id.* The issue was not the substance of the exaction—whether it was land or money or a required a service. Rather, because the town could use its discretion in imposing the exaction, there remained the potential that the government could abuse its discretion. *Id.* at 624.

fairness claims of the individual property owners with interests at stake in piecemeal changes" at the heart of every exaction case.[139] More general and universally applicable land use regulations do not raise the same concerns as exactions (and other small-scale zoning)[140] in a general land use scheme. This is because, in the context of exactions, as opposed to other land use regulations, the scope of property rights that the municipality can acquire is far greater. A municipality cannot acquire money through zoning, but it can within the development permit context.[141] A municipality cannot use zoning to have roads repaired, traffic lights installed, or acquire a public easement, but it can within the development permit context.[142]

In addition, because these exactions target individuals, it is unlikely that any unfairness or discretion that is present in the legislation itself will be worked out by the political process (in electing new legislators). Although it is true that in narrow circumstances developers may have some political muscle through campaign contributions, in small rural and suburban communities, such contributions will often be of little use in effecting local policy and politicians.[143] Thus, the courts are the only place that developers can turn to ensure their rights are protected.

Nevertheless, the court in *Home Builders Ass'n of Central Arizona*[144] and *Krupp*[145] failed to see itself as a place a landowner could turn to for protection from a legislative action. The Arizona court asserted that legislative acts come to the court "cloaked with a presumption of validity" and are only invalidated when it appears that the regulation is arbitrary.[146] Similarly, in *Krupp*, the Colorado court refused to accept the proposition that government leveraging could result from legislation that was "generally applicable . . . on all new development."[147] However, neither court examined how many people would actually be affected by the legislation at issue. If the legislation

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139 Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 842 (1983).

140 Spot zoning, a form of small scale zoning, presents the reverse issue of exactions, but the same need for stricter review. Spot zoning tends to give developers sweetheart deals at the expense of the surrounding community. *See* MENDELKER, *supra* note 55, at § 6.28.

141 For examples of money being acquired through exactions, see *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687 (Colo. 2001); *Home Builder's Ass'n of Dayton v. City of Beavercreek*, 729 N.E.2d 349, 355 (Ohio 2000); *Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park and Recreation Dist.*, 62 P.3d 404, 411 (Or. Ct. App. 2003).

142 See *supra* note 55 for further discussion of benefits that can be acquired through zoning.

143 *See* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 404-08 (1977).

144 930 P.2d 993 (Ariz. 1997).

145 19 P.3d 687 (Colo. 2001).

146 930 P.2d at 996-97. This is a very deferential standard of review.

147 19 P.3d at 696.

was targeted at a single developer, and the legislation did not affect anyone else, it seems that this would simply be "government leveraging" by a different government body.[148]

It is possible to separate legislation into two categories: (1) legislation that gives a municipality discretion in applying it built into the very language of the ordinance;[149] and (2) legislation that allows for no discretion and is, by default, more even handed in nature.[150] Two cases in the same Oregon Court of Appeals, *Rogers Machinery, Inc. v. Washington County*[151] and *Dudek v. Umatilla County*[152] illustrate the dichotomy between the different types of legislation.

In *Rogers Machinery*, the court refused to apply the *Nollan/Dolan* analysis to a traffic impact fee assessed against developments.[153] Although the court asserted that the general distinction of whether something is legislative or adjudicative was the sole factor determining if a heightened scrutiny should be applied, it also made a point to consider the components of the legislation and ensure it was not discretionary.[154] The court examined the scope of the ordinance in question, and found that it was fairly exhaustive, encompassing a majority of different types of possible land uses in the county.[155] It noted that for each type of use, the ordinance specified the related basis for the fee that applies to each development.[156] Based on its examination, the court determined that calculating the fee is "nondiscretionary."[157] The *Rogers Machinery* court's decision not to apply heightened scrutiny fell into the first legislation category, which it asserted created less risk of government leveraging.[158]

A few months later, the same court was presented with a similar challenge in *Dudek*, but this time chose to apply the *Nollan/Dolan* analysis.[159] Here, the legislation the court faced fell into the second

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148 *Id.* Additionally, both courts seem to presuppose (without explicitly saying) that the local legislative bodies that promulgated the laws at issue had the experience and knowledge to make well-reasoned, impartial decisions.

149 See *infra* note 159 and accompanying text for an analysis of *Dudek*; see also *supra* Part II.B for a discussion of *Krupp*.

150 General zoning schemes are an example of legislation that poses little risk of government leveraging. See discussion of *Village of Euclid*, *supra* at Part II.C.

151 45 P.3d 966 (Or. Ct. App. 2002).

152 69 P.3d 751 (Or. Ct. App. 2003).

153 Rogers Mach., Inc., v. Wash. County, 45 P.3d 966, 982 (2002).

154 *Id.* at 981-82.

155 *Id.* at 981.

156 *Id.*

157 *Id.*

158 *Id.* at 982.

159 Dudek v. Umatilla County, 69 P.3d 751, 756 (Or. Ct. App. 2003). The petitioner in this case was a third party who was indirectly affected by the city's decision not to apply a road expansion condition to a permit for Smith's development partition. *Id.* at 752 n.1; *see also* Fennell, *supra* note 52, on third party standing. The petitioner argued that the excessive burden on the developer should not matter because, as it was mandated by a legislative ordinance, the

category where there was an increased risk the municipality would abuse its discretion in applying the legislation. In *Dudek*, the court focused on the fact that, although the ordinance was seemingly legislative, in order to apply it, a significant amount of discretion needed to be employed, and therefore the same concerns were present as if the permit condition was based upon an ad hoc adjudication.[160] In each case, the municipality had to assess "whether the land division 'will serve four or more lots *and* will *likely* serve additional parcels due to development pressures in the area, or *likely* be an extension of a future road as specified in a future road plan[.]'"[161] Thus each determination was case-by-case, investing the decision-makers with extensive discretion. Although the language of the legislatively adopted ordinance in *Dudek* applied to "a broad class of property," each time the ordinance was to be imposed, a separate adjudicative determination was necessary because every parcel is unique and different developments have different needs.[162]

The Oregon court's approach addresses the concern that the courts lack the capacity to see through discretionary and therefore potentially dangerous legislation. However, it fails to address the concern that any land use regulation employed by a local government may in many ways be inherently discretionary in deciding to enact it in the first place.[163] The very nature and make-up of many local legislatures raises concerns; they are not fully legislative in the way that we think of the larger state or federal legislature because "local governments are not structured under strict separation of powers principles."[164]

A small group of prominent local citizens may be single-handedly

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burden did not have to be roughly proportional to the impact, as required by the court in *Dudek*. 69 P.3d at 755. However, the county's Land Use Board of Appeals found that even though an ordinance would usually require that a road be widened to compensate for an increase in traffic created by the partition, in this case widening the road would be a substantial burden. *Id.* at 756.

160 *Id.* The court explained that here "there appears to be a risk of leveraging or singling out of the applicant for concessions as a condition for development approval—a risk not present in widely applicable legislative enactments that do not require the exercise of meaningful discretion in applying the ordinance." *Id.*

161 *Id.*

162 *Id.* The court distinguished this approach from the *Rogers Machinery* decision by reiterating that there, the process was "mechanical and nondiscretionary" in application. *Id.*

163 The Supreme Court of Oregon, rejecting that zoning was legislative, reasoned that local legislatures are not institutionally competent to make various types of land use decisions regarding "'permits . . . special exceptions, or . . . particular cases.'" Fasano v. Bd. of County Comm'rs, 507 P.2d 23, 26 (Or. 1973) (quoting Ward v. Vill. of Skokie, 186 N.E.2d 529, 533 (Ill. 1962)). The court further asserted that "'[s]uch activities are not legislative but administrative, quasi-judicial . . . in character. To place them in the hands of legislative bodies, whose acts as such are not judicially reviewable, is to open the door completely to arbitrary government.'" *Id.* This same argument is perhaps even more applicable to exaction cases than zoning cases, for which it is no longer considered good law.

164 Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. REV. 242, 257 (2000).

running the legislature, perhaps with little to no expertise in the area of land use planning, and yet could decide to enact a piece of legislation that could injure a single developer that they simply do not like.[165] Although the legislation might sweep broadly on its face, if it is targeted at the one developer in the small local area, it becomes increasingly likely that the municipality has abused its legislative discretion from the outset, and all of the *Nollan* concerns come to a head.[166] With the deferential standard usually applied to legislation, the municipality would effectively have free rein to make unreasonable demands on individual developers in order to force them to the bargaining table and acquire a pay-off.[167] These individual developers, who would otherwise have no alternate method of political recourse, would likely be forced into an unfair situation with unequal bargaining power.

It was for this very reason that Judge Orm, in a recent dissent in *B.A.M Development, L.L.C. v. Salt Lake County*, made the well-reasoned argument that the determining factor of whether a land dedication should be analyzed with the *Nollan/Dolan* heightened scrutiny should not be based on which governmental body implemented the exaction.[168] He explained that it is illogical that the entity responsible for the exaction is the determining factor of whether or not the court decides if a taking has occurred.[169] After all, "'[a] municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating a citizen's property.'"[170] He also stressed that it is not

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165 Rose, *supra* note 139, at 855-56. Professor Rose explains the concerns raised by local legislatures making land use decisions:

> In a small scale government . . . there may be no clash of multiple interests leading to at least temporary stasis and ultimately to an adequate and careful consideration of the public well-being. . . . [T]here may not be enough items of political interest to permit the development of coalitions and the benefit-trading and mutual forbearance they entail. Thus, a local representative council cannot (or cannot always) be trusted to act with the 'legislative due process' envisioned by *The Federalist* No. 10 in a larger legislature.

Id. at 855-56.

166 *See* Reznik, *supra* note 164, at 257 (asserting that "the nature of the land use decisionmaking process relies on flexibility and discretion").

167 Charles L. Siemon and Julie P. Kendig argue in their article *Judicial Review of Local Government Decisions: "Midnight in the Garden of Good and Evil"* that local legislatures are not incentivized to do a good job of planning and making fair land use decisions because they know they will not be scrutinized by the courts. Charles L. Siemon & Julie P. Kendig, 20 NOVA L. REV. 707, 710-11 (1996).

168 B.A.M Dev., L.L.C., v. Salt Lake County, 87 P.3d 710, 727 (Utah Ct. App. 2004) (Orm, J., dissenting).

169 *Id.* In support of this argument, Judge Orm quoted Justice Thomas, joined by Justice O'Connor in a dissent from a denial of certiorari: "'A city council can take property just as well as a planning commission can.'" *Id.* (quoting Parking Ass'n of Georgia, Inc. v. City of Atlanta, 515 U.S. 1116, 1118 (1995)).

170 *B.A.M. Dev., L.L.C.*, 87 P.3d at 728 (quoting Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380 (Ill. App. Ct. 1995)).

always easy to determine the category, legislative or adjudicative, into which an exaction will fall.[171]

For these reasons, courts should not presuppose that the process by which a particular piece of legislation was enacted is any sort of insurance policy that corruption was absent when a municipality effectively targets only an individual or small group. Rather, courts should approach these individual and small scale land use regulations enacted by a local government with the same skepticism as any ad hoc determinations, disregarding the label "legislative" in reference to local land use decisions, in order to ensure fairness and legality.

Focusing on the subject of the exaction and whether it would be deemed a taking outside the permit context assures that courts analyze cases in light of the evil *Nollan* and *Dolan* were designed to address. Under this proposed approach, the focus shifts away from artificial distinctions and to the core of the issue—protecting individual property rights from unwarranted and unconstitutional municipal takings.

CONCLUSION

For the foregoing reasons, courts can ensure greater compliance with constitutional values by triggering the *Nollan/Dolan* analysis whenever a municipality places a condition on granting development approval that it could not otherwise acquire. The development approval process should not create a window whereby municipalities may acquire property rights indirectly they would not be able to acquire directly without providing compensation. Unlike the categorical approach employed by many courts, the framework proposed by this Note protects developers against government extortion in the development approval process.

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171 *Id.* at 728; *see also* Reznik, *supra* note 164 (explaining how the distinction between whether something is legislative or adjudicative is not always clear, and there are many factors involved in creating this problem).