

FLORENCE DOLAN

v.

CITY OF TIGARD

SUPREME COURT OF THE UNITED STATES

Argued March 23, 1994.

Decided June 24, 1994.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN and GINSBURG, JJ., joined. SOUTER, J., filed a dissenting opinion.

CHIEF JUSTICE REHNQUIST 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. 317 Ore. 110, 854 P. 2d 437 (1993). We granted certiorari to resolve a question left open by our decision in *Nollan v. California Coastal Comm'n*, 483 U. S. 825 (1987), of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.

I

The State of Oregon enacted a comprehensive land use management program in 1973. The program required all Oregon cities and counties to adopt new comprehensive land use plans that were consistent with the statewide planning goals. The plans are implemented by land use regulations which are part of an integrated hierarchy of legally binding goals, plans, and regulations. Pursuant to the State's requirements, the city of Tigard, a community of some 30,000 residents on the southwest edge of Portland, developed a comprehensive plan and codified it in its Community Development Code (CDC). The CDC requires property owners in the area zoned Central Business District to comply with a 15% open space and landscaping requirement, which limits total site coverage, including all structures and paved parking, to 85% of the parcel. After the completion of a transportation study that identified congestion in the Central Business District as a particular problem, the city adopted a plan for a pedestrian/bicycle pathway intended to encourage alternatives to automobile transportation for short trips. The CDC requires that new development facilitate this plan by dedicating land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan.

The city also adopted a Master Drainage Plan (Drainage Plan). The Drainage Plan noted that flooding occurred in several areas along Fanno Creek, including areas near petitioner's property. The Drainage Plan also established that the increase in impervious surfaces associated with continued urbanization would exacerbate these flooding problems. To combat these risks, the Drainage Plan suggested a series of improvements to the Fanno Creek Basin, including channel excavation in the area next to petitioner's property. Other recommendations included

ensuring that the floodplain remains free of structures and that it be preserved as greenways to minimize flood damage to structures. The Drainage Plan concluded that the cost of these improvements should be shared based on both direct and indirect benefits, with property owners along the waterways paying more due to the direct benefit that they would receive.

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

Petitioner applied to the city for a permit to redevelop the site. Her proposed plans called for nearly doubling the size of the store to 17,600 square feet, and paving a 39-space parking lot. The existing store, located on the opposite side of the parcel, would be razed in sections as construction progressed on the new building. In the second phase of the project, petitioner proposed to build an additional structure on the northeast side of the site for complementary businesses, and to provide more parking. The proposed expansion and intensified use are consistent with the city's zoning scheme in the Central Business District.

The City Planning Commission granted petitioner's permit application subject to conditions imposed by the city's CDC. The CDC establishes the following standard for site development review approval: "Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the city shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan." Thus, the Commission required that petitioner dedicate the portion of her property lying within the 100-year floodplain for improvement of a storm drainage system along Fanno Creek and that she dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway. The dedication required by that condition encompasses approximately 7,000 square feet, or roughly 10% of the property. In accordance with city practice, petitioner could rely on the dedicated property to meet the 15% open space and landscaping requirement mandated by the city's zoning scheme. The city would bear the cost of maintaining a landscaped buffer between the dedicated area and the new store.

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

The Commission made a series of findings concerning the relationship between the

dedicated conditions and the projected impacts of petitioner's project. First, the Commission noted that "[i]t is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs." The Commission noted that the site plan has provided for bicycle parking in a rack in front of the proposed building and "[i]t is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed." In addition, the Commission found that creation of a convenient, safe pedestrian/ bicycle pathway system as an alternative means of transportation "could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion."

The Commission went on to note that the required floodplain dedication would be reasonably related to petitioner's request to intensify the use of the site given the increase in the impervious surface. The Commission stated that the "anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes." Based on this anticipated increased storm water flow, the Commission concluded that "the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." The Tigard City Council approved the Commission's final order, subject to one minor modification; the City Council reassigned the responsibility for surveying and marking the floodplain area from petitioner to the city's engineering department.

Petitioner appealed to the Land Use Board of Appeals (LUBA) on the ground that the city's dedication requirements were not related to the proposed development, and, therefore, those requirements constituted an uncompensated taking of their property under the Fifth Amendment. In evaluating the federal taking claim, LUBA assumed that the city's findings about the impacts of the proposed development were supported by substantial evidence. Given the undisputed fact that the proposed larger building and paved parking area would increase the amount of impervious surfaces and the runoff into Fanno Creek, LUBA concluded that "there is a *reasonable relationship* between the proposed development and the requirement to dedicate land along Fanno Creek for a greenway." With respect to the pedestrian/bicycle pathway, LUBA noted the Commission's finding that a significantly larger retail sales building and parking lot would attract larger numbers of customers and employees and their vehicles. It again found a "reasonable relationship" between alleviating the impacts of increased traffic from the development and facilitating the provision of a pedestrian/bicycle pathway as an alternative means of transportation.

The Oregon Court of Appeals affirmed, rejecting petitioner's contention that in *Nollan v. California Coastal Comm'n.*, 483 U. S. 825 (1987), we had abandoned the "reasonable relationship" test in favor of a stricter "essential nexus" test. The Oregon Supreme Court affirmed. ... The court decided that both the pedestrian/bicycle pathway condition and the storm drainage dedication had an essential nexus to the development of the proposed site. Therefore, the court found the conditions to be reasonably related to the impact of the expansion of petitioner's business. We granted certiorari, 510 U. S. (1993), because of an alleged conflict

between the Oregon Supreme Court's decision and our decision in *Nollan*.

II

The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment 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." 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.*, 272 U. S. 365 (1926). "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 413 (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*, 447 U. S. 255, 260 (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 grant of a building permit, but challenges the showing made by the city to justify these exactions. She argues that the city has identified "no special benefits" 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.

III

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.

A

We addressed the essential nexus question in *Nollan*. The California Coastal Commission demanded a lateral public easement across the Nollan's beachfront lot in exchange for a permit to demolish an existing bungalow and replace it with a three-bedroom house. The public easement was designed to connect two public beaches that were separated by the Nollan's property. The Coastal Commission had asserted that the public easement condition was imposed to promote the legitimate state interest of diminishing the "blockage of the view of the ocean" caused by construction of the larger house.

We agreed that the Coastal Commission's concern with protecting visual access to the ocean constituted a legitimate public interest. We also agreed that the permit condition would have been constitutional "even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." We resolved, however, that the Coastal Commission's regulatory authority was set completely adrift from its constitutional moorings when it claimed that a nexus existed between visual access to the ocean and a permit condition requiring lateral public access along the Nollan's beachfront lot. How enhancing the public's ability to "traverse to and along the shorefront" served the same governmental purpose of "visual access to the ocean" from the roadway was beyond our ability to countenance. The absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into "an out-and-out plan of extortion."

No such gimmicks are associated with the permit conditions imposed by the city in this case. Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld. It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100-year floodplain. 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 run-off into Fanno Creek.

The same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation. In theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers

B

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. ...

The city required that petitioner dedicate "to the city as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] ... and all property 15 feet above [the floodplain] boundary." In addition, the city demanded that the retail store be designed so as not to intrude into the greenway area. The city relies on the Commission's rather tentative findings that increased stormwater flow from petitioner's property "can only add to the public need to manage the [floodplain] for drainage purposes" to support its conclusion that the "requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site."

The city made the following specific findings relevant to the pedestrian/bicycle pathway: "In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion."

The question for us is whether these findings are constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit. Since state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them.

In some States, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice. We think this standard is too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose.

Other state courts require a very exacting correspondence, described as the "specifi[c] and uniquely attributable" test. The Supreme Court of Illinois first developed this test in *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 Ill. 2d 375, 380, 176 N. E. 2d 799, 802 (1961). Under this standard, if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes "a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations." We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved.

A number of state courts have taken an intermediate position, requiring the municipality to show a "reasonable relationship" between the required dedication and the impact of the proposed development. Typical is the Supreme Court of Nebraska's opinion in *Simpson v. North Platte*, 206 Neb. 240, 245, 292 N. W. 2d 297, 301 (1980), where that court stated: "The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the

city for some license or permit." Thus, the court held that a city may not require a property owner to dedicate private property for some future public use as a condition of obtaining a building permit when such future use is not "occasioned by the construction sought to be permitted." ...

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

The city contends that recreational easement along the Greenway is only ancillary to the city's chief purpose in controlling flood hazards. It further asserts that unlike the residential property at issue in *Nollan*, petitioner's property is commercial in character and therefore, her

right to exclude others is compromised. The city maintains that "[t]here is nothing to suggest that preventing [petitioner] from prohibiting [the easements] will unreasonably impair the value of [her] property as a [retail store]." *PruneYard Shopping Center v. Robins*, 447 U. S. 74, 83 (1980). ...

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

... 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.

IV

Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization particularly in metropolitan areas such as Portland. The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done. ...

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

It is so ordered.

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

I

Candidly acknowledging the lack of federal precedent for its exercise in rulemaking, the Court purports to find guidance in 12 "representative" state court decisions. To do so is certainly appropriate. The state cases the Court consults, however, either fail to support or decidedly undermine the Court's conclusions in key respects.

First, although discussion of the state cases permeates the Court's analysis of the appropriate test to apply in this case, the test on which the Court settles is not naturally derived from those courts' decisions. The Court recognizes as an initial matter that the city's conditions satisfy the "essential nexus" requirement announced in *Nollan v. California Coastal Comm'n*, 483 U. S. 825 (1987), because they serve the legitimate interests in minimizing floods and traffic congestions. The Court goes on, however, to erect a new constitutional hurdle in the path of these conditions. In addition to showing a rational nexus to a public purpose that would justify an outright denial of the permit, the city must also demonstrate "rough proportionality" between the harm caused by the new land use and the benefit obtained by the condition. The Court also decides for the first time that the city has the burden of establishing the constitutionality of its conditions by making an "individualized determination" that the condition in question satisfies the proportionality requirement.

Not one of the state cases cited by the Court announces anything akin to a "rough proportionality" requirement. For the most part, moreover, those cases that invalidated municipal ordinances did so on state law or unspecified grounds roughly equivalent to *Nollan's* "essential nexus" requirement. ... Although 4 of the 12 opinions mention the Federal Constitution—two of those only in passing—it is quite obvious that neither the courts nor the litigants imagined they might be participating in the development of a new rule of federal law. Thus, although these state cases do lend support to the Court's reaffirmance of *Nollan's* reasonable nexus requirement, the role the Court accords them in the announcement of its newly minted second phase of the constitutional inquiry is remarkably inventive.

In addition, the Court ignores the state courts' willingness to consider what the property owner gains from the exchange in question. ... In this case, Dolan's acceptance of the permit, with its attached conditions, would provide her with benefits that may well go beyond any advantage she gets from expanding her business. As the United States pointed out at oral argument, the improvement that the city's drainage plan contemplates would widen the channel and reinforce the slopes to increase the carrying capacity during serious floods, "confer[ring] considerable benefits on the property owners immediately adjacent to the creek." ...

II

...

The Court's narrow focus on one strand in the property owner's bundle of rights is particularly misguided in a case involving the development of commercial property. ... The exactions associated with the development of a retail business are likewise a species of business regulation that heretofore warranted a strong presumption of constitutional validity.

... The city of Tigard has demonstrated that its plan is rational and impartial and that the conditions at issue are "conducive to fulfillment of authorized planning objectives." Dolan, on the other hand, has offered no evidence that her burden of compliance has any impact at all on the value or profitability of her planned development. Following the teaching of the cases on which it purports to rely, the Court should not isolate the burden associated with the loss of the power to exclude from an evaluation of the benefit to be derived from the permit to enlarge the store and

the parking lot.

The Court's assurances that its "rough proportionality" test leaves ample room for cities to pursue the "commendable task of land use planning even twice avowing that "[n]o precise mathematical calculation is required" are wanting given the result that test compels here. Under the Court's approach, a city must not only "quantify its findings" and make "individualized determination[s]" with respect to the nature and the extent of the relationship between the conditions and the impact but also demonstrate "proportionality." The correct inquiry should instead concentrate on whether the required nexus is present and venture beyond considerations of a condition's nature or germaneness only if the developer establishes that a concededly germane condition is so grossly disproportionate to the proposed development's adverse effects that it manifests motives other than land use regulation on the part of the city. The heightened requirement the Court imposes on cities is even more unjustified when all the tools needed to resolve the questions presented by this case can be garnered from our existing case law.

III

Applying its new standard, the Court finds two defects in the city's case. First, while the record would adequately support a requirement that Dolan maintain the portion of the floodplain on her property as undeveloped open space, it does not support the additional requirement that the floodplain be dedicated to the city. Second, while the city adequately established the traffic increase that the proposed development would generate, it failed to quantify the offsetting decrease in automobile traffic that the bike path will produce. Even under the Court's new rule, both defects are, at most, nothing more than harmless error.

In her objections to the floodplain condition, Dolan made no effort to demonstrate that the dedication of that portion of her property would be any more onerous than a simple prohibition against any development on that portion of her property. Given the commercial character of both the existing and the proposed use of the property as a retail store, it seems likely that potential customers "trampling along petitioner's floodplain" are more valuable than a useless parcel of vacant land. Moreover, the duty to pay taxes and the responsibility for potential tort liability may well make ownership of the fee interest in useless land a liability rather than an asset. That may explain why Dolan never conceded that she could be prevented from building on the floodplain. ...

The Court's rejection of the bike path condition amounts to nothing more than a play on words. Everyone agrees that the bike path "could" offset some of the increased traffic flow that the larger store will generate, but the findings do not unequivocally state that it will do so, or tell us just how many cyclists will replace motorists. Predictions on such matters are inherently nothing more than estimates. Certainly the assumption that there will be an offsetting benefit here is entirely reasonable and should suffice whether it amounts to 100 percent, 35 percent, or only 5 percent of the increase in automobile traffic that would otherwise occur. If the Court proposes to have the federal judiciary micromanage state decisions of this kind, it is indeed extending its welcome mat to a significant new class of litigants. Although there is no reason to believe that state courts have failed to rise to the task, property owners have surely found a new

friend today.

IV

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. ...

This case inaugurates an even more recent judicial innovation than the regulatory takings doctrine: the application of the "unconstitutional conditions" label to a mutually beneficial transaction between a property owner and a city. The Court tells us that the city's refusal to grant Dolan a discretionary benefit infringes her right to receive just compensation for the property interests that she has refused to dedicate to the city "where the property sought has little or no relationship to the benefit." Although it is well settled that a government cannot deny a benefit on a basis that infringes constitutionally protected interests "especially [one's] interest in freedom of speech," *Perry v. Sindermann*, 408 U. S. 593, 597 (1972) the "unconstitutional conditions" doctrine provides an inadequate framework in which to analyze this case. 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." Particularly in the absence of any evidence on the point, we should not presume that the discretionary benefit the city has offered is less valuable than the property interests that Dolan can retain or surrender at her option. But even if that discretionary benefit were so trifling that it could not be considered just compensation when it has "little or no relationship" to the property, the Court fails to explain why the same value would suffice when the required nexus is present. In this respect, the Court's reliance on the "unconstitutional conditions" doctrine is assuredly novel, and arguably incoherent. 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. ...

In our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms. When there is doubt concerning the magnitude of those impacts, the public interest in averting them must outweigh the private interest of the commercial entrepreneur. If the government can demonstrate that the conditions it has imposed in a land-use permit are

rational, impartial and conducive to fulfilling the aims of a valid land-use plan, a strong presumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action's constitutionality. That allocation of burdens has served us well in the past. The Court has stumbled badly today by reversing it.

I respectfully dissent.

JUSTICE SOUTER, dissenting.

This case, like *Nollan v. California Coastal Comm'n*, 483 U. S. 825 (1987), invites the Court to examine the relationship between conditions imposed by development permits, requiring landowners to dedicate portions of their land for use by the public, and governmental interests in mitigating the adverse effects of such development. *Nollan* declared the need for a nexus between the nature of an exaction of an interest in land (a beach easement) and the nature of governmental interests. The Court treats this case as raising a further question, not about the nature, but about the degree, of connection required between such an exaction and the adverse effects of development. The Court's opinion announces a test to address this question, but as I read the opinion, the Court does not apply that test to these facts, which do not raise the question the Court addresses.

First, as to the floodplain and Greenway, the Court acknowledges that an easement of this land for open space (and presumably including the five feet required for needed creek channel improvements) is reasonably related to flood control but argues that the "permanent recreational easement" for the public on the Greenway is not so related. If that is so, it is not because of any lack of proportionality between permit condition and adverse effect, but because of a lack of any rational connection at all between exaction of a public recreational area and the governmental interest in providing for the effect of increased water runoff. That is merely an application of *Nollan's* nexus analysis. ...

Second, as to the bicycle path, the Court again acknowledges the "theor[etically]" reasonable relationship between "the city's attempt to reduce traffic congestion by providing [a bicycle path] for alternative means of transportation," and the "correct" finding of the city that "the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District." The Court only faults the city for saying that the bicycle path "could" rather than "would" offset the increased traffic from the store. That again, as far as I can tell, is an application of *Nollan*, for the Court holds that the stated connection ("could offset") between traffic congestion and bicycle paths is too tenuous; only if the bicycle path "would" offset the increased traffic by some amount, could the bicycle path be said to be related to the city's legitimate interest in reducing traffic congestion.

I cannot agree that the application of *Nollan* is a sound one here, since it appears that the Court has placed the burden of producing evidence of relationship on the city, despite the usual rule in cases involving the police power that the government is presumed to have acted

constitutionally. Having thus assigned the burden, the Court concludes that the City loses based on one word ("could" instead of "would"), and despite the fact that this record shows the connection the Court looks for. Dolan has put forward no evidence that the burden of granting a dedication for the bicycle path is unrelated in kind to the anticipated increase in traffic congestion, nor, if there exists a requirement that the relationship be related in degree, has Dolan shown that the exaction fails any such test. The city, by contrast, calculated the increased traffic flow that would result from Dolan's proposed development to be 435 trips per day, and its Comprehensive Plan, applied here, relied on studies showing the link between alternative modes of transportation, including bicycle paths, and reduced street traffic congestion. *Nollan*, therefore, is satisfied, and on that assumption the city's conditions should not be held to fail a further rough proportionality test or any other that might be devised to give meaning to the constitutional limits. ...

In any event, on my reading, the Court's conclusions about the city's vulnerability carry the Court no further than *Nollan* has gone already, and I do not view this case as a suitable vehicle for taking the law beyond that point. ...