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I. Introduction

In *Nollan v. California Coastal Commission*[1] and *Dolan v. City of Tigard*,[2] the Supreme Court imposed federal constitutional limits on governments that attempt to exact property from landowners in return for development approval.[3] In *Nollan*, the Court ruled that these exactions violate the Takings Clause of the Fifth Amendment unless there is an "essential nexus" between the required concessions and the public impact of the proposed development.[4] The Court held that the California Coastal Commission violated the new nexus standard when it demanded that the Nollans give up a lateral beachfront easement in exchange for a building permit.[5] In *Dolan*, the Court added to the nexus test, declaring that an exaction of property must be "roughly proportional" in nature and extent to the impact of the proposed land development.[6] The Court again found a taking when a landowner was required to give up an easement in land in exchange for a development permit.[7]

Although there always has been some disagreement about the crux of these decisions – whether it was the fact that government engaged in a physical invasion of land,[8] the potential abuse of government permitting power,[9] or

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1. 483 U.S. 825 (1987).

2. 512 U.S. 374 (1994).

3. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841-42 (1987) (finding government's ability to extract concessions from landowners limited by Fifth Amendment Takings Clause); *see also* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (stating that Fifth Amendment requires "rough proportionality" between property exaction and developmental impact).

4. *Nollan*, 483 U.S. at 837.

5. *Id.* at 841-42.

6. *Dolan*, 512 U.S. at 391.

7. *See id.* at 394-95 ("We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and [Dolan's] proposed new building.").

8. *See* Frank I. Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1608 (1988) (suggesting that "talismanic force of 'permanent physical occupation' is the cornerstone of *Nollan*"). Interestingly, Michelman later characterizes *Nollan* as a case involving a "regulatory restriction on use." *See* Frank I. Michelman, *Tutelary Jurisprudence and Constitutional Property*, *in* LIBERTY, PROPERTY & THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 127, 140 (Jennifer Nedelsky ed., 1990).

9. *See* Lambert v. City & County of San Francisco, 529 U.S. 1045, 1048 (2000) (Scalia, J., dissenting from denial of certiorari) (noting that "the object of the Court's holding in *Nollan*

a simple desire on the part of the Court to elevate property rights in the constitutional hierarchy[10] – the cases at least seemed to call for increased judicial scrutiny of land use conditions.[11] Yet, while some post-*Dolan* federal and state cases indeed reflect a more skeptical stance toward the permitting process,[12] many others have discovered exceptions to the essential nexus rule[13] that preclude its application to many, if not most, of the exactions commonly imposed by government. In particular, there is great confusion over the applicability of the essential nexus to exactions that amount to a demand for money[14] and to exactions that originate from a legislative act.[15] Many courts have concluded that both types of land use conditions fall outside the scope of *Nollan* and *Dolan*.

This Article contends that courts misread *Nollan* and *Dolan* and undermine the purposes of the Takings Clause when they hold that the essential nexus does not apply to monetary or legislative exactions. Part II briefly reviews *Nollan* and *Dolan* and summarizes the rules that flow from each of those decisions. Part III surveys post-*Dolan* lower court decisions dealing with monetary exactions and explores the judicial debate over relevance of the

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and *Dolan* was to protect against the State's cloaking within the permit process 'an out-and-out plan of extortion'").

10. *See* Otto J. Hetzel & Kimberly A. Gough, *Assessing the Impact of* Dolan v. City of Tigard *on Local Governments' Land-Use Powers*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS 219, 219 (David L. Callies ed., 1996) (stating that Court's takings cases, including *Nollan* and *Dolan*, "clearly signaled the Court's determination to provide greater protection for private property rights").

11. *See* Mark W. Cordes, *Legal Limits on Development Exactions: Responding to* Nollan *and* Dolan, 15 N. ILL. L. REV. 513, 534 (1995) (noting that *Dolan* "Court's analysis demonstrated a seriousness of review to protect unjustified intrusions on property interests"); Hetzel & Gough, *supra* note 9, at 232 (commenting that *Nollan* applied "intermediated level of scrutiny"); Douglas W. Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1649 (1988) (noting that parts of *Nollan* call for "heightened intermediate scrutiny of [government's] means").

12. *See* David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan *and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523, 568-71 (1999) (reviewing post-*Dolan* cases that find taking due to impermissible exaction).

13. The term "essential nexus" is used throughout this Article to refer to both the *Nollan* nexus test and the *Dolan* rough proportionality standard, unless clearly noted. The conjunction is appropriate here because both prongs are applied in the context of impact fees and legislative exactions. It is important to keep in mind, however, that it is misleading to address the rough proportionality and nexus tests in the same breath in the permit denial context because only *Nollan* applies there. *See* City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 703, 721 (1999) (holding "rough proportionality" test inapplicable to permit denial, but affirming jury's right to consider whether denial substantially advanced legitimate state interests).

14. *See infra* notes 86-89 and accompanying text.

15. *See infra* note 114-48 and accompanying text.

source of the exaction. Part IV argues that the purposes underlying *Nollan* and *Dolan* and the Takings Clause compel application of the essential nexus to both monetary and legislative exactions. Finally, Part V concludes that courts should apply the essential nexus test equally to all land use conditions, not only because the thrust of the cases requires this application, but also because the most narrow holdings of *Nollan* and *Dolan* are rendered meaningless without an integrated and consistent takings doctrine in the exaction context.

II. A Brief Review of Nollan *and* Dolan

Nollan burst onto the scene in 1987 as part of a "trilogy" of regulatory takings cases decided that year.[16] The case had its genesis, however, in a land use process that dated to the 1970s.[17] Since that time, the California Coastal Commission required coastal landowners to dedicate easements across their property when seeking permission to improve their land.[18] In the early 1980s, the Commission set its sights on James and Marilyn Nollan after they applied to replace a dilapidated 504 square-foot beach "bungalow" that had fallen into such disrepair that it could no longer be rented out[19] with a new "three-bedroom house in keeping with the rest of the neighborhood."[20]

The Commission informed the Nollans that they could have the necessary permits as long as they agreed to dedicate a public access easement across the dry sand area of their lot.[21] In the Commission's view, the easement was proper because the Nollan's house "would increase blockage of the view of the ocean, thus contributing to the development of 'a "wall" of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to

16. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318-19 (1987) (holding that compensation is always remedy for regulatory taking regardless of whether government removes offending regulation and thus makes taking "temporary"); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 501-02 (1987) (finding no taking when state of Pennsylvania denied coal company right to extract its coal from beneath occupied land); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (finding that attempt to extort easement for building permit violates Takings Clause unless compensation is paid). For a general discussion of all three cases, see Kmiec, *supra* note 11.

17. *Nollan*, 483 U.S. at 859 (Brennan, J., dissenting) (noting that "regulation to ensure public access to the ocean had been directly authorized by California citizens in 1972").

18. *Id.* (Brennan, J., dissenting) (observing that "[t]he specific deed restriction to which the Commission sought to subject them had been imposed since 1979 on all 43 shoreline new development projects" in Nollan's vicinity).

19. *Id.* at 827.

20. *Id.* at 828.

21. *Id.* at 828-29.

visit.'"[22] It also found that the house was likely to jeopardize public access by increasing "private use of the shorefront."[23] Disagreeing with the Commission's conclusions, the Nollans turned to the courts in an effort to bar the Commission from imposing the dedication condition and to have the condition declared a taking without just compensation in violation of the Takings Clause of the Fifth Amendment. After an extended foray through the California courts,[24] the Nollans appealed to the United States Supreme Court.[25]

The issue before the High Court in *Nollan* was whether the Takings Clause allowed the Commission to require an "uncompensated conveyance" as a condition for issuing a land-use permit when it could not do so outright.[26] In the Court's view, this question depended on whether the condition "substantially advances legitimate state interests."[27] Disposing of the "legitimate state interest" prong by assuming that the provision of public beach access was a proper purpose,[28] the Court focused on the lack of congruence between the easement demanded of the Nollans and the purposes articulated by the Commission.[29] A "lack of nexus between the condition and the original purpose of the building restriction,"[30] was critical because: "[U]nless the permit condition serves the same governmental purpose as [a] development

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22. *Id.*

23. *Id.* at 829.

24. "On June 3, 1982, the Nollans filed a petition for a writ of administrative mandamus asking the Ventura County Superior Court to invalidate the access condition." *Id.* at 828. The superior court subsequently issued an order requiring the Commission to hold an evidentiary hearing to determine if the proposed house "would have a direct adverse impact on public access to the beach." *Id.* After this hearing resulted in findings adverse to the Nollans, they returned to superior court to attack the merits of the Commission's findings and to assert the constitutional challenge. *See id.* at 829 (arguing that condition violated Takings Clause of Fifth Amendment). The superior court agreed with the Nollans that the condition was unwarranted because the evidence failed to show that the house would actually have a "direct or cumulative burden" on beach access. *Id.* The victory was short-lived, however, because the California Court of Appeals reversed and additionally held that the dedication requirement did not amount to a taking. *Id.* at 830-31.

25. *Id.* at 831.

26. *Id* at 834. The Court explained:

> 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, we have no doubt there would have been a taking.

Id.

27. *Id.*

28. *Id* at 834-36.

29. *See id.* at 837 (stating that "constitutional propriety disappears, however, if the condition fails to further the end advanced as the justification").

30. *Id.*

ban, the building restriction is not a valid regulation of land use but an 'out-and-out plan of extortion.'"[31]

Having laid the legal framework, the Court quickly determined that the lateral beach access exaction imposed on the Nollans did not advance the Commission's stated purposes:

> It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house.[32]

As a result, the Commission's exaction could not be treated as a proper exercise of the police power.[33] In the end, California "was free to advance" public access along the coast, but if it wanted "an easement across the Nollans' property, it must pay for it."[34]

Nollan thus established that an "essential nexus" must exist between a development condition and the amelioration of a legitimate public problem arising from the development.[35] Although the Court does a poor job of defining the parameters of the test, suggesting that it simply requires a correspondence between the government's purposes and its means,[36] its reasoning and holding clearly show that the raw nexus test requires (1) a legitimate state interest or purpose; (2) a connection between that interest and the land use exaction chosen to address it; and (3) a minimal connection between the impacts of the proposed development and the land use exaction.[37] The Court

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31. *Id.*

32. *Id.* at 838-39.

33. *Id.* at 839.

34. *Id.* at 841-42.

35. *Id.* at 837-39. For an exceptional discussion of the bifurcated nature of the nexus test, see Burton v. Clark County, 958 P.2d 343, 356-57 (Wash. Ct. App. 1998). *See also* Jan G. Laitos, *Causation and the Unconstitutional Conditions Doctrine: Why the City of Tigard's Exaction Was a Taking*, 72 DENV. U. L. REV. 893, 904-08 (1995) (explaining bifurcated analysis of *Dolan*).

36. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987). The Court observed that, without a nexus, a "condition . . . utterly fails to further the end advanced as the justification for the prohibition."

37. *Id.* at 838-39. In this regard, it is important to remember that the Court struck the easement condition imposed on the Nollans in part because it did not reduce "any obstacles to viewing the beach *created by the new house*." *Id.* at 838. The centrality of the requirement that a land use condition address a problem traceable to the proposed development is seen by considering several hypothetical situations. As the Court noted, the Commission permissibly could have required the Nollans to supply a viewing area on their property in return for a building permit. *Id.* at 836. This condition would pass constitutional muster because it would

left unanswered the question of just how close a connection there must be between development exaction and development impact, as the beachfront easement demanded of the Nollans failed to meet even the loosest standard.[38]

In *Dolan*, the Court set out to finish what it started in *Nollan*. In *Dolan*, the City of Tigard required Florence Dolan to submit to several exactions in return for permission to expand a plumbing and electrical supply store and to pave an enlarged parking area.[39] Citing concerns that Dolan's development would lead to more storm water runoff and flood potential,[40] the local Planning Commission demanded that Ms. Dolan "dedicate the portion of her property lying within the 100-year floodplain for improvement of a storm drainage system."[41] In addition, the Commission required Ms. Dolan to dedicate a fifteen-foot strip of land along the floodplain as a pedestrian/bicycle pathway, over and above that which was needed for the storm water system.[42] The Commission justified its decision on the ground that it "could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion."[43]

In considering whether the dedication conditions were consistent with *Nollan*,[44] the Court explained that it was necessary first to determine "the

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advance the state's interest in protecting views of the ocean by addressing a problem (loss of view) directly caused by construction of the Nollans' house. *Id.* But a different outcome would result if the Commission were to require the Nollans to give up a vertical access easement across their lot so that the public could get from a road fronting the house to the public beach beyond. Although this condition undoubtedly would promote beach access and, therefore, "further the [public access] end advanced," it still would fail the nexus test because construction of the house could not cause the public access problem. Regardless of whether the lot was improved by just a "bungalow," or nothing at all, it would remain private property and, therefore, off-limits to the general public at pain of criminal trespass. Thus, it would be difficult to see how the requirement of a vertical access easement "reduces any obstacles" to beach access "created by the house."

38. *Id.* at 838. The Court stated, "[W]e find that this case does not meet even the most untailored standards." *Id.*

39. Dolan v. City of Tigard, 512 U.S. 374, 379 (1994).

40. *Id.* at 382. The western and southwestern portions of the lot in which the expansion was to take place bordered a creek, the year round low of which rendered "the area within the creek's 100-year floodplain virtually unusable for commercial development." *Id.* at 379.

41. *Id.* at 380.

42. *Id.*

43. *Id.* at 381-82 (quoting Commission findings).

44. *Id.* at 383. The U.S. Supreme Court granted certiorari after both the Oregon Court of Appeals and the Oregon Supreme Court held that the bikeway and floodplain dedications demanded of Ms. Dolan were "reasonably related to the impact of the expansion of [her] business," and, therefore, permissible under *Nollan*. Thus, in granting certiorari, the Court intended to resolve "an alleged conflict between the Oregon Supreme Court's decision and our decision in *Nollan*." *Id.*

required degree of connection between the exactions and the projected impact of the proposed development."[45] After concluding that a minimal nexus existed between the city's interest in flood prevention and reduced traffic congestion and the land dedications it sought from Ms. Dolan,[46] the Court turned to state courts for guidance on the question of the "required degree of connection."[47] Noting that a "reasonable relationship" test was "closer to the federal constitutional norm,"[48] the court adopted this intermediate standard.[49] However, to avoid confusion with the "rational basis" test central to Equal Protection analysis, the Court held that "'*rough proportionality*' best encapsulates what we hold to be the requirement of the Fifth Amendment."[50] The Court summarized the new standard as follows: "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*."[51]

When it applied the "rough proportionality" test to the facts at hand, the Court concluded that the City of Tigard failed to meet its requirements when it "demanded more" from Ms. Dolan than an open space reservation: "[The City] 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."[52] The Court continued: "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

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45. *Id.* at 386. The Court stated: "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." *Id.*

46. *Id.* at 387-88.

47. *Id.* at 386. According to the Court, states accepted "very generalized statements as to the necessary connection" between an exaction and a development; a "very exacting correspondence," under which the exaction fails if it is not "directly proportional to the specifically created need"; or a "reasonable relationship" test, described as an "intermediate" standard. *Id.* at 389-90.

48. *Id.* at 391.

49. *Id.*

50. *Id.* (emphasis added).

51. *Id.* (emphasis added). An open space reservation condition would comport with the essential nexus test because it would "likely confine the pressures on Fanno Creek created by petitioner's development." *Id.* at 393.

52. *Id.*

request."[53] On the other hand, while the city's demand for a pedestrian/bicycle pathway was sufficiently related, in theory, to an increase in traffic that might arise from the new store,[54] the Court refused to uphold that exaction because there was no clear showing that it was indeed roughly proportional to the impacts of Ms. Dolan's development.[55]

Dolan thus refined the *Nollan* nexus test in two important ways. First, it held that exactions must be roughly proportional in nature and extent, not merely related, to the impacts of a proposed development.[56] Second, it shifted the burden of showing the required degree of connection to the government.[57]

III. The Search for the Limits of the Essential Nexus Requirement

In the years since *Dolan*, lower courts consistently have applied the essential nexus test to land use exactions similar to those challenged in *Nollan* and *Dolan*.[58] Indeed, they have had surprising little difficulty applying the dual aspects of the test to strike down exactions when presented with facts similar to those in *Nollan* and *Dolan*.[59] Thus, unlike the Court's other regula-

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53. *Id.*

54. *Id.* at 395. The Court stated:

> [W]e 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 . . . Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use.

Id.

55. *Id.* at 395-96. The city's conclusion "that the creation of the pathway 'could offset some of the traffic demand . . . and lessen the increase in traffic congestion,'" was not specific enough to pass the rough proportionality test: "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." *Id.*

56. For an excellent summary of the requirements of the *Dolan* test, see Callies, *supra* note 12, at 549-50.

57. Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994).

58. *See* Culbro Corp. v. Town of Simsbury, CV 960559508, 1999 Conn. Super LEXIS 551 at *9 (Conn. Super. Ct. Mar. 1 1999) (reviewing twenty percent open-space dedication requirement under *Dolan*); River Birch Ass'n v. City of Raleigh, 388 S.E.2d 538, 550 (N.C. 1990) (applying *Nollan* to forced conveyance of recreational area to home owner's association); Trimen Dev. Co. v. King County, 877 P.2d 187, 194 (Wash. 1994) (applying *Dolan* to open-space dedication requirement).

59. *See generally* Goss v. City of Little Rock, 151 F.3d 861 (8th Cir. 1998) (holding highway dedication condition unconstitutional); Walz v. Town of Smithtown, 46 F.3d 162 (2d Cir. 1995) (applying essential nexus test to strike down requirement that landowners deed portions of their property in return for water service); Christopher Lake Dev. Co. v. St. Louis County, 35 F.3d 1269 (8th Cir. 1994) (applying *Nollan* and *Dolan* to strike down requirement that land developer build drainage system for county); Isla Verde Int'l Holdings, Inc. v. City of

tory takings tests, particularly the economically viable use standard articulated in *Lucas v. South Carolina Coastal Council*,[60] the essential nexus standard is routinely enforced beyond the halls of the High Court, at least with respect to dedications of real property.[61]

The test is hardly as healthy, however, when challenged land use regulations arise from a factual context distinct from that in *Nollan* and *Dolan*. In these situations, there is only agreement that the "rough proportionality" prong of the essential nexus test does not apply when there is no conditioned permit at issue.[62] When a permit condition is implicated, courts have split along two key issues, namely whether *Nollan* and *Dolan* apply to monetary exactions, and whether they are relevant to land use conditions imposed by general legislation.

A. The Tenuous Application to Monetary Exactions

The most contentious and most litigated issue to arise from *Nollan* and *Dolan* is whether the essential nexus requirement applies to monetary exac-

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Camas, 990 P.2d 429 (Wash. Ct. App. 1999) (holding exaction of open space reservation unconstitutional under *Nollan* and *Dolan*); Burton v. Clark County, 958 P.2d 343, 354 (Wash. Ct. App. 1998) (holding exaction of "right-of-way" unconstitutional under *Nollan* and *Dolan* because "exacted road lacks any tendency to solve or even alleviate the public problems that the county identifies"); Luxembourg Group, Inc. v. Snohomish County, 887 P.2d 446, 448 (Wash. Ct. App. 1995) (noting that dedication requirement is unconstitutional if unrelated to development problem).

60. 505 U.S. 1003 (1992). In *Lucas*, the Court held that a per se regulatory taking occurs when the government denies all "economically viable use." Unfortunately, some lower courts have burdened this rule with expansive and controversial exceptions. *See* R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law*?, 9 N.Y.U. ENVTL. L.J. 449, 472-531 (2001) (discussing *Lucas* decision and post-*Lucas* doctrine).

61. *See* Callies, *supra* note 12, at 567 ("Courts since *Dolan*, both state and federal, appear to have adopted completely both the nexus and proportionality tests . . . .").

62. *See* City of Monterey v. Del Monte Dunes, 526 U.S. 687, 703 (1999) (declaring that *Dolan* was "inapposite" to Del Monte Dunes' challenge of denial of development application); Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578-79 (10th Cir. 1995) (refusing to apply *Nollan* and *Dolan* to statute limiting hunting on private land); Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993, 1002 (Cal. 1999) (holding *Nollan* and *Dolan* inapplicable to rent control challenge); Breneric Ass'n v. City of Del Mar, 69 Cal. App. 4th 166, 175-76 (1998) (holding *Nollan* and *Dolan* inapplicable to denial of building permit); Largent v. Klickitat County, No. 18231-2-III, 2000 Wash. App. LEXIS 1166, at *15 (Wash. Ct. App. July 6, 2000) (refusing to apply *Dolan* to denial of road construction variance). *But see* Steel v. Cape Corp., 677 A.2d 634, 641, 651 (Md. Ct. Spec. App. 1996) (applying *Dolan* to open space zoning). For a more extensive summary of cases refusing to apply *Dolan* to a permit denial, see Richard J. Ansson, Jr., Dolan v. Tigard*'s Rough Proportionality Standard: Why This Standard Should Not Be Applied to an Inverse Condemnation Claim Based upon Regulatory Denial*, 10 SETON HALL CONST. L.J. 417 (2000).

tions. Monetary exactions are often characterized as either "impact fees" or "in lieu" fees, depending upon whether government initially demands money or actual capital facilities,[63] but the effect is the same: a prospective developer must hand over cash in exchange for government approval and permits.[64] In the period between *Nollan* and *Dolan*, federal and state courts consistently refused to extend *Nollan* to monetary exactions[65] most often by simply pointing to the fact that *Nollan* involved an exaction of real property.[66] All this changed, however, with the Court's decision in *Dolan*[67]

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63. *See* Bd. of County Comm'rs v. Bainbridge, Inc., 929 P.2d 691, 698-99 (Colo. 1996) (describing differences between impact fees and in lieu fees); *see also* Hetzel & Gough, *supra* note 10, at 237-39 (discussing various characterizations and uses of monetary exactions).

64. *Id.* The question of the applicability of *Nollan* and *Dolan* to these conditions is of great practical importance to landowners, for in recent years governments increasingly have turned to them as a way to raise capital for public improvements. *See generally* James Berger, Note, *Conscripting Private Resources to Meet Urban Needs: The Statutory and Constitutional Validity of Affordable Housing Impact Fees in New York*, 20 FORDHAM URB. L.J. 911 (1993).

65. *See* Commercial Builders of Northern Cal. v. City of Sacramento, 941 F.2d 872, 875 (9th Cir. 1991) (holding *Nollan* inapplicable to impact fee designed to provide low-income housing); Adolph v. Fed. Emergency Mgmt. Agency, 854 F.2d 732, 737 (5th Cir. 1988); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172, 178 (4th Cir. 1988); Blue Jeans Equities West v. City & County of San Francisco, 4 Cal. Rptr. 2d 114, 115 (Cal. Ct. App. 1992) (holding *Nollan* inapplicable to San Francisco's Transit Impact Development Fee); McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995) (refusing to apply *Dolan* to traffic impact fee).

66. *See, e.g.*, *Commercial Builders*, 941 F.2d at 874 (noting that no previous cases "have interpreted [*Nollan*] as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land"). *Commercial Builders* is a good example of early judicial attitudes toward monetary exactions. There, the City of Sacramento enacted an ordinance that required commercial developers to pay a fee "into a fund to assist in the financing of low-income housing," prior to receiving a building permit. *Id.* at 873. The ordinance was premised on a city-commissioned study that found that nonresidential development created "a need for additional housing in the city" because it tended to attract new employees to the area. *Id.* The court agreed "with the City that *Nollan* does not stand for the proposition that the exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question." *Id.* at 875. It subsequently upheld the fee ordinance despite the "indirectness of the connection between the creation of new jobs and the need for low-income housing," because "nothing in *Nollan* or any other authority . . . requires the nexus to be more direct than that achieved through the legislative process that the city here employed." *Id.* at 876.

67. After *Dolan* was decided, several courts concluded that the essential nexus requirement could not be limited to exactions of real property. *See* City of Portsmouth v. Schlesinger, 57 F.3d 12, 17-18 (1st Cir. 1995) (striking down $1,792,960 impact fee imposed on residential housing developer); Northern Illinois Home Builders Ass'n v. County of DuPage, 649 N.E.2d 384, 387-90 (Ill. 1995) (applying essential nexus test to traffic impact fee); Castle Homes Dev., Inc. v. City of Brier, 882 P.2d 1172, 1178 (Wash. Ct. App. 1994) (holding monetary exaction invalid because it was not linked to charged development).

and the California Supreme Court's decision in the 1996 case of *Ehrlich v. City of Culver City*.[68]

In *Ehrlich*, the California Supreme Court clearly endorsed the applicability of *Nollan* and *Dolan* to monetary exactions.[69] The case arose in 1988 when Richard Ehrlich, owner of a failing private tennis and recreational club in Culver City, California, attempted to amend the city's general plan and zoning scheme so that he could replace the club with a "30-unit condominium complex."[70] Concerned about the impact of the proposal on recreational space within its boundaries, the city assured Ehrlich that it would oppose his project "*unless* he agreed to build new recreational facilities for the city."[71]

Ehrlich subsequently indicated a willingness to build tennis courts for the city, which prompted the city council to approve his project conditioned on a payment of $280,000. This money was to be provided in-lieu of four new tennis courts, and was to be used "for additional [public] recreational facilities as directed by the City Council."[72] The council also required Ehrlich to provide "art work," valued at one percent of the project, on the project site, or a payment of an equivalent amount into a "city art fund."[73] Ehrlich protested, but when it became clear that the city would not budge, he "agreed to pay the $280,000 recreation fee under protest in exchange for the necessary building and grading permits for the project."[74] However, as soon as the property was securely developed, Ehrlich initiated suit to have the fees declared unconstitutional under the Fifth Amendment.[75] So began an extended journey up and down the judicial ladder, with the case ending up in the California Supreme Court only after a California Court of Appeal appeared to ignore the U.S. Supreme Court's command that it consider the constitutionality of the fees in light of *Dolan*.[76]

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68. 911 P.2d 429 (Cal. 1996).

69. *See* Ehrlich v. City of Culver City, 911 P.2d 429, 433 (Cal. 1996) (holding that *Nollan* and *Dolan* "apply *under the circumstances of this case*, to the *monetary* exaction imposed by Culver City").

70. *Id.* at 433-34.

71. *Id.* at 434. In the meantime, Ehrlich went ahead and demolished the recreational facility, donating the left-over recreational equipment to the city. *Id.*

72. *Id.* at 435 (quoting from minutes of city council meeting).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* The trial court upheld the $33,200 art fee, but agreed with Ehrlich that the larger recreational fee violated the Takings Clause because it was not reasonably related to the condominium project. This judgment was initially affirmed on appeal, but was later reversed on rehearing. In its second opinion, the California Court of Appeal held that both fees were sufficiently related to the project to satisfy the Constitution. The California Supreme Court

When the case finally came before it, the California Supreme Court conducted an extensive review of *Nollan* and *Dolan* and concluded that they were meant to apply anytime "the individual property owner seeks to negotiate approval of a planned development."[77] This type of bargaining process triggered the essential nexus because it put government in position to use its permitting power to appropriate property it would otherwise have to pay for.

> [S]uch a discretionary context presents an inherent and heightened risk that local government will manipulate the police power to impose conditions *unrelated* to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation. In such a context, the heightened *Nollan-Dolan* standard of scrutiny works to dispel such concerns by assuring a constitutionally sufficient link between ends and means. It is the imposition of land-use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sin qua non for application of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan*.[78]

The court subsequently concluded that the distinction between physical dedications and monetary exactions was inconsistent with the underlying rationale of *Nollan* and *Dolan*: "In a context in which the constraints imposed by legislative and political processes are absent or substantially reduced, the risk of too elastic or diluted takings standard – the vice of distributive justice in the allocation of civic costs – is heightened in either case."[79] Rejecting previous cases that limited the essential nexus to exactions of real property, the court explicitly held that monetary exactions are subject to essential nexus

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then denied Ehrlich's petition for review, prompting him to look for relief in the United States Supreme Court. That court granted Ehrlich's petition for a writ of certiorari and promptly returned the case to the California Court of Appeal for reconsideration "in light of *Dolan*." The appellate court was unmoved by the Court's remand, upholding the fees in a third opinion. Ehrlich petitioned the California Supreme Court once more, and this time the court granted Ehrlich's petition to consider the applicability of *Nollan* and *Dolan* to monetary exactions. *Id.* at 436.

77. *Id.* at 438.

78. *Id.* at 439. The court later summarized as follows:

> The essential nexus test is . . . intended to limit the government's bargaining mobility in imposing permit conditions on individual property owners – whether they consist of possessory dedications or the exaction of cash payments – that, because they appear to lack any evident connection to the public impact of the proposed land use, *may* conceal an illegitimate demand – may in other words, amount to "out-and-out . . . extortion."

Id. at 444 (emphasis in original).

79. *Id.*

review "when such exactions are imposed – as in this case – neither generally or ministerially, but on an individual basis . . . ."[80]

Applying these principles, the court determined that the city's justifications for the $280,000 recreation fee were insufficient to establish the constitutionally required "fit" between exaction and development impact.[81] The court was particularly distressed by the city's belief that it could base a fee intended to fund *public* tennis courts on the loss of the *private* courts that would have existed on Ehrlich's land.[82] In the court's view, this equation failed the proportionality standard because it required the landowner to supply free and open facilities to a public that had lost only the ability to access member financed facilities.[83] This did not mean, however, that the city could impose no fee, or even that it was barred from charging $280,000, only that the fee "must be tied more closely to the actual impact of the land-use change the city granted plaintiff."[84] After suggesting several alternatives, the court

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80. *Id.*

81. *Id.* at 447-50. The court determined that the art fee was not a development exaction at all, but "more akin to traditional land-use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions such as color schemes, building materials and architectural amenities." *Id.* at 450. *Nollan* and *Dolan* were, therefore, inapposite not because the art fee was a monetary exaction, but because such design controls traditionally have been upheld as "valid exercises of the city's traditional police power." *Id.* The court was of a different mind, however, when it considered the recreational fee. Because this monetary exaction was one of the "special, discretionary permit conditions on development by individual property owners," it triggered *Nollan* and *Dolan*. *Id.* at 447.

Applying the nexus test to the recreational fee, the court found that the basic nexus was "plain" because "the $280,000 fee, which the city has committed to the purchase of additional recreation facilities, will substantially advance its legitimate interest in correcting a demonstrated deficiency in municipal recreational resources." *Id.* at 448. It was troubled by the "rough proportionality" component of the test, though, because the record failed to show "individualized findings to support the required 'fit' between the monetary exaction and the loss of a parcel zoned for commercial recreational use." *Id.* The private nature of the tennis courts demolished by Ehrlich meant that the public always had less than full rights in them and, therefore, could not expect full reimbursement for their loss under the "rough proportionality" test:

> [U]nder the city's formula, the public would receive, ex gratia, $280,000 worth of recreational facilities the cost of which it would otherwise have to finance through membership fees. Plaintiff is being asked to pay for something that should be paid for either by the public as a whole, or by a private entrepreneur in business for a profit. The city may not constitutionally measure the magnitude of its loss, or of the recreational exaction, by the value of facilities it had no right to appropriate without payment.

Id. at 449.

82. *Id.* at 448-49.

83. *Id.* at 449.

84. *Id.*

remanded the case to the city to "reconsider its valuation of the [recreational] fee in light of the principles we have articulated."[85]

The decision in *Ehrlich* lent credence to the few courts that had anticipated a broader and logically consistent application of Nollan and Dolan,[86] and thus altered the constitutional terrain surrounding monetary exactions. Although a slight majority of post-*Ehrlich* courts continue to hold the essential nexus test inapplicable to monetary exactions,[87] recently several tribunals have come to the opposite conclusion.[88] The disagreement rests primarily on the importance the courts place on the facts in *Nollan* and *Dolan* and sometimes on language in the 1999 case of *City of Monterey v. Del Monte Dunes*.[89]

In *Krupp v. Breckenridge Sanitation District*,[90] the Colorado Supreme Court utilized both considerations in refusing to apply *Nollan* and *Dolan* to a District's imposition of a $4000 per unit "plant investment fee" (PIF) on a residential townhouse project.[91] The court, observing that *Nollan* and *Dolan* dealt with the physical dedication of property, initially relied on the traditional

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85. *Id.*

86. *See supra* note 67 (citing cases in which courts had concluded that *Dolan* had expanded essential nexus requirement).

87. *See* Henry v. Jefferson County Planning Comm'n, 148 F. Supp. 2d 698, 709 (N.D.W. Va. 2001); Home Builders Ass'n of Central Ariz. v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997) (refusing to apply essential nexus to water district impact fee in part because district "seeks to impose a fee, a considerably more benign form of regulation" than exaction of real property); Lambert v. City & County of San Francisco, 67 Cal. Rptr. 2d 562, 568-69 (Ct. App. 1997) (refusing to apply essential nexus to $600,000 hotel conversion fee), *cert. denied*, 529 U.S. 1045 (2000); Loyola Marymount Univ. v. Los Angeles Unified Sch. Dist., 53 Cal. Rptr. 2d 424, 435 (Ct. App. 1996) (holding Supreme Court cases inapplicable "in California cases involving development fees"); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 695 (Colo. 2001) (requiring "essential nexus" and "rough proportionality").

88. *See* Home Builders Ass'n of Dayton v. City of Beavercreek, 729 N.E.2d 349, 356 (Ohio 2000) (applying dual rational nexus test to monetary exaction); Clark v. City of Albany, 904 P.2d 185, 189-90 (Or. Ct. App. 1995) (applying *Dolan* to monetary exaction); Town of Flower Mound v. Stafford Estates Ltd., P'ship, 2002 Tex. App. LEXIS 1209, at **27-28 (Feb. 14, 2002) (applying essential nexus test to road improvement exaction); Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 979 P.2d 864, 871 (Wash. Ct. App. 1999) ("We decline to adopt the dicta that *Nollan* and *Dolan* may be applied only to dedications of land required to allow a development to proceed.").

89. *See Henry*, 148 F. Supp. 2d at 709 (noting Court's limit of *Dolan* test to exactions and refusal to extend to denials of development proposals); *Krupp*, 19 P.3d at 697. The relevant language from *Del Monte Dunes* is: "Although in a general sense concerns for proportionality animate the Takings Clause . . . we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use." *Del Monte Dunes*, 526 U.S. at 702 (citations omitted).

90. 19 P.3d 687 (Colo. 2001).

91. *Id.* at 691-92.

avenue for avoiding application of *Nollan* and *Dolan* [92] – that most courts have limited the essential nexus test to that context, and consequently, that the essential nexus did not in any way limit the PIF at issue.[93] The court explained:

> There was no physical taking here. The PIF is not an exaction of land; rather it is a generally applicable service fee designed to defray the costs of expanding the wastewater treatment system directly caused by the new development. Because *Nollan*, *Dolan*, and their progeny applied heightened scrutiny only where the government demanded real property as a condition of development, we find that they are not applicable to a general development fee.[94]

To buttress this conclusion, the court turned to the Supreme Court's statement in *Del Monte Dunes* that "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use."[95] The *Krupp* court declared that this language "made explicit the conclusion that other jurisdictions had been reaching for years," namely, that the essential nexus requirement is limited to real property exactions.[96] Although it later backtracked from this expansive reading of the *Del Monte Dunes* dicta,[97] the court ultimately concluded that, as a "generally applicable service fee" which was "neither a land use regulation nor an exaction of property as a condition of development," the PIF "does not fall into the relatively narrow category of development exactions addressed by *Nollan* and *Dolan*."[98]

In reaching its holding, the *Krupp* court minimized the importance of contemporaneous state court decisions, such as *Home Builders Ass'n of Dayton v. City of Beavercreek*,[99] that have applied *Nollan* and *Dolan* to monetary exactions. In *Beavercreek*, the Ohio Supreme Court faced a question almost identical to that considered in *Krupp* – whether the essential nexus test should be applied to an ordinance imposing impact fees on certain devel-

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92. *Id.* at 695-98.

93. *Id.* at 697-98.

94. *Id.* at 697.

95. *Id.*

96. *Id.* (stating that "[t]he plain language of *City of Monterey* suggests that a *Nollan/Dolan* analysis is appropriate in the narrow circumstance where the government conditions development on the forfeiture of private property for public use").

97. *Id.* at 698. The Court appeared to recognize that the context of the language in *Del Monte Dunes* and the holding in *Ehrlich* left room for application of the essential nexus standard to certain monetary exactions. *Id.*

98. *Id.*

99. 729 N.E.2d 349 (Ohio 2000).

opments for the purpose of funding new roads.[100] The court reviewed the standards of scrutiny applied by other courts and, like the *Dolan* court, opted for the intermediate reasonable relationship test ultimately incorporated into federal takings law by *Dolan*.[101] Although it recognized that the essential nexus, or as it termed it, the dual rational nexus test,[102] evolved from cases dealing with exactions of real property, the court gave little weight to this factual distinction:

> Although impact fees do not threaten property rights to the same degree as land use exactions or zoning laws, there are similarities. Just as forced easements or zoning reclassifications can inhibit the desired use of property, an unreasonable impact fee may affect the manner in which a parcel of land is developed. Further, impact fees are closer in form to land exactions than to zoning laws.[103]

Thus, in stark contrast to *Krupp*, the *Beavercreek* decision placed the imposition of excessive and arbitrary impact fees upon the same constitutional plane as demands for physical dedications.[104] To get around the implications of this holding, the *Krupp* court blithely dismissed *Beavercreek* as a case that "discussed *Nollan* and *Dolan* in the context of service fees but ultimately articulated a 'reasonable relationship'" test.[105] Apparently, the Colorado court

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100. Home Builders Ass'n of Dayton v. City of Beavercreek, 729 N.E.2d 349, 353 (Ohio 2000).

101. *See id.* at 355-56 ("This [dual rational nexus] test applies a middle level of scrutiny that balances the prospective needs of the community against the property rights of the developer.").

102. *Id.* at 356. Noting its origins in *Nollan* and *Dolan*, and a Florida case, *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. Ct. App. 1983), the court described the "dual rational nexus test" as follows:

> The dual rational nexus test requires a court to determine (1) whether there is a reasonable connection between the need for additional capital facilities and the growth in population generated by the subdivision; and (2) if a reasonable connection exists, whether there is a reasonable connection between the expenditure of the funds collected through the imposition of an impact fee, and the benefits accruing to the subdivision.

Id. at 354-55.

The first prong of the above test is a reasonable rendition of the *Nollan* nexus standard. However, it is notable that second prong differs from *Dolan*'s rough proportionality test by asking whether the fees benefit the development rather than whether they are proportional to the development's impact. This difference shows the influence of *Hollywood, Inc.*, in which the Florida Court of Appeals established that monetary exactions must be used so as to benefit the charged development in some way. *See Hollywood, Inc.*, 431 So. 2d at 612.

103. *Beavercreek*, 729 N.E.2d at 355.

104. *See* Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 698 (Colo. 2001).

105. *Id.*

did not realize that *Dolan* specifically adopted the exact same standard in the guise of "rough proportionality."[106]

In the 2002 case of *Town of Flower Mound v. Stafford Estates, Ltd.*,[107] the Texas Court of Appeals sided with the *Beavercreek* court, holding that there is no basis for applying the heightened scrutiny required by *Nollan* and *Dolan* to exactions of real property, but not to demands for money.[108] In *Town of Flower Mound*, the Town required a developer to demolish and replace an existing asphalt street with a concrete road and three-foot high concrete shoulders at the developer's expense in return for permission to build a 247-unit residential subdivision.[109] Treating the Town's demands as a monetary exaction, the court concluded that these exactions present the same dangers as demands for real property and thus that the essential nexus test logically applies to both situations.[110] In so doing, the court rejected the assertion, accepted by the *Krupp* court, that *Del Monte Dunes* limited *Nollan* and *Dolan* to dedications of real property.[111] It ultimately held that the Town failed to satisfy the "rough proportionality" test because it did not demonstrate that "the additional traffic generated by the Subdivision bears a sufficient relationship to the requirement that Stafford demolish a nearly new, two land asphalt road that was not in disrepair and replace it with a two-land concrete road."[112] Thus, while consensus on the applicability of the nexus test to monetary exactions continues to allude courts, there is growing recognition that the logic of *Nollan* and *Dolan* apply in such a context and that the Supreme Court has not otherwise precluded courts from moving in that direction.[113]

B. Legislative vs. Adjudicative Exactions

Evan as the split over monetary exactions begins to favor applying *Nollan* and *Dolan*, a controversy over the applicability of the nexus test to legislative acts continues to retard judicial consistency in application of that test. Indeed, when courts hold the essential nexus test inapplicable to monetary exactions, the result is occasionally justified not only by the nature of the exaction, but also by the fact it emanated from a legislative, rather than an

106. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

107. 2002 Tex. App. LEXIS 1209 (Feb. 14, 2002).

108. Town of Flower Mound v. Stafford Estates, Ltd., 2002 Tex. App. LEXIS 1209, at **31-32 (Feb. 14, 2002).

109. *Id.* at **4-6.

110. *Id.* at **30-31.

111. *Id.* at **26-27.

112. *Id.* at **59-61.

113. *See, e.g., id.* at **26-27; Benchmark Land Co. v. City of Battleground, 14 P.3d 172, 173 (Wash. Ct. App. 2000), *rev. granted*, 2001 Wash. LEXIS 352 (May 2, 2001).

administrative, body.[114] The source of an exaction is, in fact, an important factor in exactions cases in general, with courts as deeply divided over the issue as they are over the standard to be applied to monetary exactions.[115]

The disagreement over legislative exactions traces largely to comments made by the *Dolan* Court suggesting that the adjudicative nature of the exaction was a relevant factor in its decision.[116] *Dolan* twice drew attention to the adjudicative nature of the challenged exactions – once in rejecting a deferential standard normally reserved for "essentially legislative determinations classifying entire areas of the city"[117] and, later, in justifying the placement of the burden to show rough proportionality on the city.[118] While the Court left its implied deference to legislative exactions unexplained, lower

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114. *See Krupp*, 19 P.3d at 698 (concluding that "plant investment fee" was not subject to the essential nexus test in part because fee "is not imposed adjudicatively in the *Nollan/Dolan* sense"); Arcadia Dev. Corp. v. City of Bloomington, 552 N.W.2d 281, 286 (Mn. Ct. App. 1996) (holding *Dolan* inapplicable to requirement that mobile home park owners pay "relocation costs" to displaced tenants because fee flowed from city-wide ordinance).

115. *See* Callies, *supra* note 12, at 572 (noting that courts are unclear on "whether to apply the tests from [*Nollan* and *Dolan*] to 'legislative' determinations").

116. *See* Tex. Manufactured Housing Ass'n, Inc. v. Nederland, 101 F.3d 1095, 1105 (5th Cir. 1996) (citing distinction noted in *Dolan* about land use regulations that are legislative in character); Harris v. City of Witchita, 862 F. Supp. 287, 294 (D. Kan. 1994) (noting *Dolan* Court's comments on legislative nature of *Dolan* regulations and determining that *Dolan*'s rough proportionality test does not apply in instant case due to legislative nature of regulations at issue); Parking Ass'n of Ga., Inc. v. City of Atlanta, 450 S.E.2d 200, 203 n.3 (Ga. 1994) (distinguishing Atlanta ordinance from *Dolan* because Atlanta ordinance was "a legislative determination"); Curtis v. Town of S. Thomaston, 708 A.2d 657, 660 (Me. 1998) (relying on *Dolan* language about legislative nature of regulation to support conclusion that South Thomaston's regulation, as example of legislative rule, "more likely represents a carefully crafted determination of need tempered by the political and legislative process"); *see also* Garneau v. City of Seattle, 897 F. Supp. 1318, 1325 (W.D. Wash. 1995) (noting that *Dolan* emphasized adjudicative nature of exaction struck down in that case).

117. Dolan v. City of Tigard, 512 U.S. 374, 385 (1994). The court stated:

> 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.

Id.

118. *Id.* at 391 n.8. The court further noted:

> [Justice Stevens] is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests with the city.

Id. (citation omitted).

courts often cite the lower danger of extortion present in generally applicable lawmaking. *Ehrlich* is the leading example.[119]

In *Ehrlich*, the California Supreme Court held that *Nollan* and *Dolan* apply to monetary exactions imposed on a discretionary, individual basis because they present "a heightened risk that local government will manipulate the police power to impose conditions *unrelated* to legitimate land use regulatory ends."[120] The court subsequently suggested that exactions imposed "generally or ministerially" were likely to be free of such manipulation: "Fees of this nature may indeed be subject to a lesser standard of judicial scrutiny than that formulated by the court in *Nollan* and *Dolan* because the heightened risk of the 'extortionate use' of the police power to exact unconstitutional conditions is not present."[121]

The concurring opinion of Justice Stanley Mosk[122] forcefully elaborated on the same theme, as did the court's later opinion in the case of *Santa Monica Beach, Ltd. v. Superior Court*.[123] This trend was further solidified in the recent case of *San Remo Hotel v. San Francisco*,[124] in which the Supreme Court of California held that the City of San Francisco did not engage in a taking when requiring the owner of a residential hotel to pay $567,000 in return for permission to convert sixty-two residential units to tourist rooms.[125] In determining that the fee was subject to deferential review, rather than the essential nexus test, the court focused on the fact that the fee was imposed pursuant to a "generally applicable" city ordinance that required all residential

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119. *See supra* notes 69-85 and accompanying text (discussing *Ehrlich*).

120. Ehrlich v. City of Culver City, 991 P.2d 429, 439 (Cal. 1996).

121. *Id.* at 444. The court additionally noted that "it is not at all clear that the rationale (and the heightened standard of scrutiny) of *Nollan* and *Dolan* applies to cases in which the exactions takes the form of a generally applicable development fee or assessment." *Id.* at 447.

122. *See id.* at 459-61 (Mosk, J., concurring) (advocating heightened scrutiny for development fees imposed by land use regulations). In his concurring opinion, Justice Mosk explained:

> This risk [of extortion] diminishes when the fee is formulated according to preexisting statutes or ordinances which purport to rationally allocate the costs of development among a general class of developers or property owners . . . . But when the fee is ad hoc, enacted at the time the development application was approved, there is a greater likelihood that it is motivated by the desire to extract the maximum revenue from the property owner seeking the development permit, rather than on a legislative policy of mitigating the public impacts of development or of otherwise reasonably distributing the burdens of achieving legitimate government objectives.

Id. at 459-60.

123. *See* Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993, 1002 (Cal. 1999) (holding *Nollan* and *Dolan* inapplicable to rent control challenge).

124. 117 Cal. Rptr. 2d 269 (2002).

125. *See* San Remo Hotel v. San Francisco, 117 Cal. Rptr. 2d 269, 273-74 (2002) (holding that trial court "properly denied . . . the demurrer as to the [taking] action").

hotels wishing to convert to tourist uses to build replacement units or pay an in-lieu fee sufficient to cover the cost of such units.[126]

When state courts outside California reject exaction challenges, they also tend to point to the general applicability of the condition.[127] In *Parking Ass'n of Georgia, Inc. v. City of Atlanta*,[128] for instance, the Georgia Supreme Court relied on the general applicability of a zoning ordinance that required individuals who owned parking lots of thirty spaces or more to bear all the costs of providing "minimum barrier curbs and landscaping areas equal to at least ten percent of the paved area within a lot, ground cover (shrubs, ivy, pine bark or similar landscape materials) and at least one tree for every eight parking spaces," as a basis for its decision.[129] The court refused to apply *Dolan* because "[h]ere the city made a *legislative determination with regard to many landowners* and it simply limited the use the landowners might make of a small portion of their lands."[130]

Most courts go one step further and, following *Ehrlich*, cite the lower probability of extortion in general legislative acts. In *Home Builders Ass'n of Central Arizona v. City of Scottsdale*,[131] the Arizona Supreme Court turned back a takings challenge to a "water resources development fee" because the danger of improper "leveraging [of the police power] does not exist when the exaction is embodied in a generally applicable legislative decision."[132] Similarly, in *Curtis v. Town of South Thomaston*,[133] the Supreme Judicial Court of Maine dismissed a challenge under *Dolan* to an ordinance requiring subdivision developers to build "a 250,000 gallon fire pond" and then convey a "right of way or easement" to the town "[b]ecause the Town's dedication

126. *Id.* at 288-89.

127. *See, e.g.*, Home Builders Ass'n of Cent. Az. v. City of Scottsdale, 930 P.2d 993, 1000 (Az. 1997) (noting general applicability of Scottsdale's water fee as one reason supporting court's decision to uphold water fee); Parking Ass'n of Ga., Inc. v. City of Atlanta, 450 S.E.2d 200, 203 (Ga. 1994) (upholding parking lot regulations that apply to lots with thirty or more spaces); Curtis v. Town of S. Thomaston, 708 A.2d 657, 660 (Me. 1998) (supporting decision to uphold regulation with argument that conditions on land use were imposed by "a legislative rule of general applicability").

128. 450 S.E.2d 200 (Ga. 1994).

129. Parking Ass'n of Ga., Inc. v. City of Atlanta, 450 S.E.2d 200, 201-02 (Ga. 1994); *see id.* at 203 (refusing to apply *Dolan* because of general applicability of zoning ordinance).

130. *Id.* at 203 n.3 (emphasis added). It, therefore, applied a test that "weighs the benefit to the public against the detriment to the individual." *Id.* at 202. The court found that there was no significant detriment to the parking lot owners and, thus, no taking. *Id.* at 202-03 (quoting Gradous v. Bd. of Comm'rs, 349 S.E.2d 707, 709 (Ga. 1986)).

131. 930 P.2d 993 (Az. 1997).

132. Home Builders Ass'n of Cent. Az. v. City of Scottsdale, 930 P.2d 993, 994, 1000 (Az. 1997).

133. 708 A.2d 657 (Me. 1998).

requirement is a legislative rule, this requirement more likely represents a carefully crafted determination of need tempered by the political and legislative processes rather than a 'plan of extortion' directed at a particular land owner."[134] Not all courts find merit in the legislative distinction, however, or its purported theoretical basis.[135] Oregon courts are particularly skeptical. In *Shultz v. City of Grants Pass*,[136] the Oregon Court of Appeals rejected the city's argument that a land dedication condition imposed by ordinance was not subject to *Nollan* and *Dolan*, stating:

> The city insists that, because the relevant ordinances *require* the imposition of such conditions, the decision to do so is, in reality, a legislative one. The city misses the point. Even if that were so, the character of the restriction remains the type that is subject to the analysis in Dolan. In drawing its distinction between the legislative land use decisions that are entitled to a presumption of validity and the exactions that are not, the Supreme Court noted that what triggers the heightened scrutiny of exactions is the fact that they are "not simply a limitation of the use" to which an owner may put his or her property, but rather a requirement that the owner deed portions of the property to the local government.[137]

The court went one step further in *J.C. Reeves Corp. v. Clackamus County*,[138] concluding that the legislative/adjudicative distinction was irrelevant in the context of monetary as well as real property exactions.[139] There, the court considered whether a condition requiring a prospective developer to pay all of the costs of road improvements adjacent to his land violated the Takings Clause.[140] Quoting *Shultz*, the court stated, "'[T]he character of the [condition] remains the type that is subject to the analysis in *Dolan*,' whether it is legislatively required or a case-specific formulation. The nature, not the source, of the imposition is what matters."[141] To make sure it was being clear, the court emphasized that "[a] condition on the development of particular property is not converted into something other than that by reason of legisla-

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134. Curtis v. Town of S. Thomaston, 708 A.2d 657, 660 (Me. 1998).

135. *See* J.C. Reeves Corp. v. Clackamus County, 887 P.2d 360, 365 (Or. Ct. App. 1994) (noting that "the nature, not the source" of land use regulations is what matters in constitutional analysis irrespective of whether regulation emanated from legislative or case-specific formulations); Trimen Dev. Co. v. King County, 877 P.2d 187 (Wash. 1994).

136. 884 P.2d 569 (Or. Ct. App. 1994).

137. Shultz v. City of Grant Pass, 884 P.2d 569, 573 (Or. Ct. App. 1994) (citation omitted).

138. 887 P.2d 360 (Or. Ct. App. 1994).

139. *Id.* at 365.

140. *Id.* at 361-62.

141. *Id.* at 365 (citation omitted).

tion that requires it to be imposed."[142] The court subsequently concluded that the road improvement fees could not be reconciled with *Nollan* and *Dolan*.[143]

Several courts outside of Oregon also have refused to adopt the distinction between legislative and administrative exactions. In *Amoco Oil Co. v. Village of Schaumburg*,[144] an Illinois appellate court refused to give any credence to the city's argument that it could "skirt its obligation to pay compensation when taking private property for public use merely by having the Village Board of trustees pass an 'ordinance' rather than having a planning commission issue a permit."[145] Accordingly the court held that the city affected a taking when it conditioned a zoning change on the landowner's dedication of twenty percent of its property for use in the redesign of an intersection.[146] The Washington Supreme Court[147] and a Washington state appeals court also have applied the essential nexus requirement to a legislative exaction.[148]

IV. The Case for Jettisoning Judicial Exceptions to the Essential Nexus Requirement

When one looks beyond the bare facts of *Nollan* and *Dolan* and examines the purposes underlying the essential nexus standard, it becomes apparent that

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142. *Id.* at 365 n.1.

143. *See id.* at 365 (reversing and remanding on issue of road improvements).

144. 661 N.E.2d 380 (Ill. App. Ct. 1995). Illinois courts typically apply a higher standard of scrutiny to land use exactions than that adopted by the Supreme Court in *Nollan* and *Dolan*. *See* Dolan v. City of Tigard, 512 U.S. 374, 389-90 (1994). However, the court's rejection of the legislative/adjudicative distinction in *Amoco Oil* was premised largely on Justice Thomas's dissent to a denial of a petition for certiorari in *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., dissenting from denial of certiorari). *See* Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 390 (Ill. App. Ct. 1995) ("Although not binding as precedent, we find Justice Thomas's comments particularly persuasive and consonant with the rationale underlying *Dolan* and similar cases.").

145. *Amoco Oil*, 661 N.E.2d at 389.

146. *Id.* at 381, 391-92.

147. *See* Trimen Dev. Co. v. King County, 877 P.2d 187, 194 (Wash. 1994) (citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and applying "rough proportionality" test). In *Trimen*, the Washington Supreme Court ignored the legislative/adjudicative distinction in applying *Dolan* to an ordinance that made subdivision approvals "contingent upon reservation or dedication of land for the open space and recreational needs of its residents, but which ultimately required a developer to pay a fee of more than fifty thousand dollars "in lieu of providing open space." *Id.* at 189-90.

148. *See* Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 979 P.2d 864, 871 (Wash. Ct. App. 1999) (concluding that *Nollan* and *Dolan* apply to Seattle ordinance that clarified policies to be considered in designating critical environmental areas).

the test cannot easily be limited to exactions of real property and/or exactions imposed administratively. Indeed, those purposes logically call for an integrated doctrine that recognizes the constitutional equivalency of monetary exactions. Statements from the Supreme Court are consistent with and, in fact, support such a reading. Indeed, given the lack of a clear basis for distinguishing money from real property for takings purposes, a harmonized exaction doctrine is a rather unremarkable proposition.[149]

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149. The applicability of the Takings Clause to money is not fully settled. This is illustrated by the ongoing battle over the constitutionality of state interest on lawyer trust fund account (IOLTA) programs, which require lawyers to deposit some client funds into interest bearing bank accounts and then facilitate the transfer of the generated interest to certain groups providing legal services to the indigent. *See generally* J. David Breemer, Comment, *IOLTA in the New Millenium: Slowly Sinking Under the Weight of the Takings Clause*, 23 U. HAW. L. REV. 221 (2000) (arguing that IOLTA programs are unconstitutional takings of private property). In 1998, the Supreme Court rejected the time-worn, and often successful, argument that IOLTA interest was not subject to the Takings Clause because it was public rather than private property. *See* Phillips v. Wash. Legal Found., 524 U.S. 156, 165-72 (1998) (citing rule that interest follows principle in concluding that IOLTA interest income is private property). After remand, the Fifth Circuit held that the per se takings analysis that applies to physical invasions of real property applied to, and required the invalidation of, IOLTA's confiscation of private funds. Wash. Legal Found. v. Tex. Equal Access to Justice, 270 F.3d 180, 185-86 (5th Cir. 2001). The Ninth Circuit originally came to a similar conclusion in an IOLTA case arising out of Washington State, but then reversed itself upon rehearing the case en banc, thus setting up a conflict that may prompt resolution by the Supreme Court. *See* Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 841 (9th Cir. 2001) (en banc) (holding that there is "no taking of property without just compensation in violation of the Fifth Amendment" for funds that lawyers deposit in client trust accounts), *petition for cert. filed*, 70 U.S.L.W. 3580 (Mar. 7, 2002) (No. 01-1325).

The Supreme Court has sent mixed signals on the applicability of the Takings Clause to "a general [monetary] liability." *See* E. Enters. v. Apfel, 524 U.S. 498, 537 (1998) (plurality opinion) (holding for plaintiff that application of Coal Act to Eastern "effects an unconstitutional taking"). In *Eastern Enterprises*, a plurality found that a congressional act requiring a defunct coal company to contribute money to a private pension fund violated the Takings Clause, *id.* at 537, even as the remaining justices indicated that the monetary liability was more properly challenged under the Due Process Clause. *Id.* at 556 (Breyer, J., dissenting). However, in other contexts, a majority of the Court consistently has portrayed money as a form of property that is protected by the Fifth Amendment. *See* Phillips v. Wash. Legal Found. 524 U.S. 156, 172 (1998) (holding that interest generated by IOLTA accounts is private property for purposes of Takings Clause); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 164-65 (1980) (holding that government's attempt to confiscate interest accruing on interpleader fund amounted to taking). Lower federal courts also have reviewed appropriations of money under traditional takings standards. *See, e.g.*, Student Loan Mktg. Ass'n v. Riley, 104 F.3d 397, 402 (D.C. Cir. 1997) (applying ad-hoc takings inquiry to "straightforward mandate [ ] of cash payment to the government"), *cert. denied*, 522 U.S. 913 (1997); LTV Steel Co. v. Shalala (*In re* Chateaugay Corp.), 53 F.3d 478, 493 (2d Cir. 1995) (applying multi-factor takings inquiry to act "requiring direct transfer[s] of funds to the government"), *cert. denied*, 516 U.S. 913 (1995).

A. The Essential Nexus Test Should Apply to Monetary Exactions

1. The Purposes of the Essential Nexus Requirement Compel Its Application to Monetary Exactions

The essential nexus test is grounded primarily in a concern for protecting individuals from bearing public burdens that should be borne by the public as a whole.[150] The nexus test reflects that concern by requiring a strong causal link between development and exaction, thus ensuring that the landowner rectifies only those public problems that flow from the development. Once she is required to solve (pay for) problems or a portion of a problem not arising from her development, a nexus and "rough proportionality" are absent, and the government has overstepped its authority.[151] The causation requirement also weeds out exactions that are motivated by a "plan of out-and-out extortion" rather than by considerations of public health, welfare, and safety.[152] Those exactions that are not needed to offset the actual impact of development are presumed to flow from an improper desire to obtain property without paying for it and, thus, must be treated as an exercise of condemnation power.[153]

When courts reject the applicability of the essential nexus test to monetary exactions, they would have us believe that the concerns underlying *Nollan* and *Dolan* alter with the nature of property in danger of appropriation. But this is clearly not so. A monetary exaction can be used to force a landowner to shoulder a disproportionate share of a public burden just as easily as

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150. *See* Kmiec, *supra* note 11, at 1651-52 (stating that one key to understanding *Nollan* is its emphasis on preventing societal burdens from being borne by only one landowner); Laitos, *supra* note 35, at 905 (explaining one premise behind Takings Clause as being to prevent individuals from solely bearing societal burdens).

151. *See* Laitos, *supra* note 35, at 905-06 (citing *Dolan* as example of government overreaching that resulted in taking because government sought to single out Ms. Dolan to bear burden for greenway construction when government's only "legitimate interest" was in "reducing flooding").

152. *See* Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996) (noting that exactions require heightened scrutiny under *Nollan* and *Dolan*). The court explained:

> The essential nexus test is . . . intended to limit the government's bargaining mobility in imposing permit conditions on individual property owners – whether they consist of possessory dedications or the exaction of cash payments – that, because they appear to lack any evident connection to the public impact of the proposed land use, *may* conceal an illegitimate demand – may, in other words, amount to "out-and-out . . . extortion."

Id.

153. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (stating "the lack of nexus . . . converts that [police power] purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose.").

a demand for a dedication of real property; all that is required is that the appropriated money be designed to address a problem unrelated to the owner's use of property[154] or be in an amount that is excessive for addressing the problems that do arise from the property.[155] For instance, in *Ehrlich*, the city wanted Ehrlich to pay to solve a deficiency in public recreational facilities that existed before he ever sought a zoning reclassification.[156] Further, it is impossible to see how monetary exactions are immunized by their nature from acting as a vehicle of government extortion.[157] The law identifies extortion by looking at the characteristic pattern of behavior, not by examining the specific content of the extortionist's demands. In *Nollan*, the Court implicitly made this point when it observed that, as a measure of extortion, the essential nexus test would preclude government from conditioning the right to shout "fire" in a theater upon payment of a $100 tax.[158]

2. *The Supreme Court Has Not Limited the Essential Nexus' Requirement to Real Property Exactions*

As we have seen, some courts like to justify the preclusion of the essential nexus test from monetary exactions on the ground that this "extension" is disfavored by the High Court.[159] In reality, the Supreme Court has sent the opposite signals, even though it has not yet given definitive word on the subject. *Ehrlich* was, after all, remanded to the California court to be recon-

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154. *See* Laitos, *supra* note 35, at 905 (noting that when "condition or restriction is imposed on a property owner who has not caused the problem that the government action is designed to correct, then the owner is being singled out and the Takings Clause might be violated").

155. *See, e.g.*, *Dolan*, 512 U.S. at 393 (holding that public easement was excessive means to address flood problems that might arise from landowner's proposed development).

156. *Ehrlich*, 911 P.2d at 434. The city recognized it had a deficit of recreational facilities in 1974, a year before Ehrlich even opened the private club that he later hoped to replace with condominiums. *Id.*

157. *See* San Remo Hotel v. San Francisco, 2002 Cal. LEXIS 623 at *55 ("[L]egislatively mandated fees do present some danger of improper leveraging."); Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 979 P.2d 864, 871 (Wash. Ct. App. 1999) ("Other [nonreal property] conditions exacted to obtain development permits may differ in degree of burden short of a taking, but do not differ in kind."); *see also* Cordes, *supra* note 11, at 542 ("[T]he primary concern behind the *Dolan* test – that local governments will use their monopoly power to seek exactions unrelated to the impact of development – applies equally to impact fees as well as to physical exactions.").

158. *Nollan*, 483 U.S. at 837. The court stated: "[E]ven 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." *Id.*

159. *See, e.g.*, Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 697 (Colo. 2001) ("Recent pronouncements by the United States Supreme Court strongly indicate that the *Nollan/Dolan* test is limited to exactions involving the dedication of property.").

sidered in light of *Dolan*.[160] The only reasonable conclusion to be drawn from this event is that at least some members of the Court viewed the essential nexus test as being relevant to impact fees at that time. A recent dissent to a denial of certiorari in *Lambert v. City & County of San Francisco*[161] suggests that at least three justices still adhere to that view – even in the context of permit denials.[162]

In the *Lambert* dissent, Justices Scalia, Kennedy, and Thomas expressed regret that the Court chose not to review a case in which the City of San Francisco denied a hotel owner the right to convert some residential hotel rooms to commercial use after he refused to pay $600,000 to the city.[163] The critical issue was whether a California appellate court erred in refusing to apply *Nollan* and *Dolan* to the permit denial. While Justice Scalia saw the case as presenting an important unanswered question as to whether the essential nexus test indeed applies to a permit *denial* premised on an unpaid exaction,[164] there is no suggestion that the issue hinged on the nature of the exaction. On the contrary, the dissent clearly assumes that *Nollan* and *Dolan* are applicable to monetary exactions, if not permit denials:

> When there is uncontested evidence of *a demand for money* or other property – and still assuming that denial of a permit because of failure to meet such a demand constitutes a taking – it should be up to the permitting authority to establish *either* (1) that the demand met the requirements of *Nollan* and *Dolan*, or (2) that denial would have ensued even if the demand had been met.[165]

In fact, the dissent ultimately concludes that summary reversal and "remand for conduct of the *Nollan-Dolan* analysis" would be warranted if the appellate court's decision was based on a finding that the owner's refusal to pay the $600,000 fee played a minimal or negligible role in the permit denial.[166] On the other hand, Scalia would have granted the petition and scheduled argu-

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160. Ehrlich v. City of Culver City, 512 U.S. 1231, 1231 (1994).

161. 529 U.S. 1045 (2000).

162. *See* Lambert v. City & County of San Francisco, 529 U.S. 1045, 1048-49 (2000) (Scalia, J., dissenting from denial of certiorari) (criticizing Court's decision to refuse to hear case involving demand by government that developer pay $600,000 to obtain permit to convert apartments).

163. *Id.* at 1045-46, 1049 (Scalia, J., dissenting from denial of certiorari).

164. *See id.* at 1048 (Scalia, J., dissenting from denial of certiorari) (noting that lower court's "refusal to apply *Nollan* and *Dolan* might rest upon the distinction that it drew between the grant of a permit subject to an unlawful condition and the denial of a permit when an unlawful condition is not met").

165. *Id.* at 1047-48 (Scalia, J., dissenting from denial of certiorari).

166. *Id.* at 1049 (Scalia, J., dissenting from denial of certiorari).

ment if the lower court premised its decision on the distinction "between the grant of a permit subject to an unlawful condition and the denial of a permit when an unlawful condition is not met."[167] In any case, the three dissenting justices assume that the essential nexus requirement applies to monetary exactions when a landowner is granted a permit subject to such a condition.

Although the Colorado Supreme Court thinks otherwise,[168] *Del Monte Dunes* does not undermine the conclusion that the essential nexus test applies to monetary exactions.[169] In fact, it is completely inapposite. This is clear when the Court's statement that it had "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on dedication of property to public use [citations]"[170] is read in context.

The *Del Monte Dunes* Court made this statement about *Dolan* while reviewing the Ninth Circuit's decision to allow application of the rough proportionality test to Del Monte Dunes' claim that *denial of a development permit* resulted in a compensable taking. Exactions contemplated by the City of Monterey were left unchallenged by Del Monte Dunes and were never an issue before the Supreme Court. Consequently, the Court's allusion to *Dolan* cannot be read as creating a rule precluding heightened scrutiny of monetary exactions. As the Texas Court of Appeals explained, "The fact that the Supreme Court has not yet applied the Dolan test to a development exaction of fees or public improvements, as opposed to a dedication of land, does not mean that the *Dolan* test does not apply."[171] Indeed, *Del Monte Dunes* simply articulates the unremarkable principle that *Dolan*'s "rough proportionality" test does not apply to outright permit denials.[172] As a result, the Court's remand of *Ehrlich* and the dissent to denial of certiorari in *Lambert* are the only viable indicators of the Court's thinking on the applicability of the essential nexus test

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167. *Id.* at 1048-49 (Scalia, J., dissenting from denial of certiorari).

168. *See supra* notes 90-98 and accompanying text (noting Colorado Supreme Court's use of *Del Monte Dunes* dicta to support conclusion in *Krupp* that *Nollan* and *Dolan* do not apply to monetary extractions).

169. *See* Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 979 P.2d 864, 871 (Wash. Ct. App. 1999) (declining to adopt dicta of *Del Monte Dunes* that *Nollan* and *Dolan* apply "only to dedications of land required to allow a development to proceed").

170. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999).

171. Town of Flower Mound v. Stafford Estates, Ltd., 2002 Tex. App. LEXIS 1209, at *26 (Feb. 14, 2002).

172. *Id.* at *25 ("The *Del Monte Dunes* holding is logical. If no exaction, i.e., no action or concession is required of the landowner, a determination cannot be made about whether the action or concession . . . is roughly proportional to the public consequences of the requested land use.").

to monetary exactions. These actions declare what the purposes of the test clearly imply: the nexus standard does not vary in applicability according to whether the government chooses to appropriate real property or money.

B. Courts Should Apply the Essential Nexus Requirement to Legislative Exactions

There is as little to support a lower level of scrutiny for exactions levied pursuant to legislative acts as there is to justify an exception from essential nexus review for monetary exactions.[173] As one commentator puts it, "[a]lthough the distinction between legislative and adjudicative functions of government has important procedural implications, it is not at all clear that the distinction should have any relevance with respect to the substantive protection of property rights."[174] In fact, the distinction is not only meaningless from the landowner's point of view, but also inconsistent with the principles underlying *Nollan* and *Dolan* and the Takings Clause in general. It is also an impracticable standard for courts to apply.

1. Nollan *and* Dolan *Apply to Legislative Acts as Part of the Unconstitutional Conditions Doctrine*

In *Dolan*, the Court suggested that its decision sprang from the broader "unconstitutional conditions" doctrine,[175] which, to simplify, holds that government may not seek a waiver of a constitutional right in return for a discretionary governmental benefit.[176] Although there are reasons for believ-

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173. *See* Callies, *supra* note 12, at 567-68 (noting that "there appears to be little doctrinal basis beyond blind deference to legislative decisions to limit [the essential nexus and proportionality doctrines] application only to administrative or quasi-judicial acts of government regulators"); Cordes, *supra* note 11, at 539 ("The better view is that *Dolan* should apply to permit conditions even when imposed pursuant to legislative requirements.").

174. James L. Huffman, Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 ENVTL. L. 143, 150 (1995).

175. *See* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994). The Court introduced the issue in *Dolan* with the following statement:

> 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 benefit sought has little or no relationship to the property.

Id.

176. *See* Thomas W. Merrill, Dolan v. City of Tigard: *Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 859 (1995) ("The unconstitutional conditions doctrine directs courts not to enforce certain contracts that waive constitutional rights.").

ing that *Nollan* and *Dolan* should not be viewed as unconstitutional conditions cases,[177] the question is clearly open to debate.[178] In any case, to the extent that *Nollan* and *Dolan* flow from the unconstitutional conditions doctrine, courts should not limit the essential nexus test to administrative exactions because no distinction between legislative and administrative conditions exists in unconstitutional conditions cases involving other constitutional provisions.[179] On the contrary, in many of these decisions, courts have held generally applicable legislation unconstitutional.[180] If the Fifth Amendment is as much a part of the unconstitutional conditions doctrine as the First Amendment,[181] the essential nexus test must be equally relevant to suspect legislative conditions.

2. *Generally Applicable Takings Are Still Takings*

The notion that legislative exactions are generally applicable, rather than directed toward particular individuals, is not a sufficient basis for diminishing the potency of the Fifth Amendment and of the Takings Clause. The assumption that exaction legislation is generally applicable is itself dubious,[182] but even if true, that trait logically cannot alter the constitutional nature of the

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177. *See* Laitos, *supra* note 35, at 904 (arguing that *Dolan* rests on purposes of Takings Clause rather than on unconstitutional conditions doctrine).

178. *See* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 179-84 (1993) (arguing that *Nollan* implicates doctrine of unconstitutional conditions); Merrill, *supra* note 176, at 886-88 (arguing that *Dolan* can be viewed as unconstitutional conditions case grounded in concern for positive externalities associated with strong Fifth Amendment).

179. Many federal unconstitutional conditions cases deal with challenges to statutorily imposed conditions. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 203 (1991) (permitting Congress to condition health care funding on restrictions on speech encouraging abortion); Regan v. Taxation with Representation, 461 U.S. 540, 550-51 (1983) (upholding power of Congress to condition tax-exempt status for nonprofit groups on their willingness to give up lobbying).

180. *See* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 457 (1995) (striking down federal statute that banned certain government employees from making speeches or writing articles); Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272-77 (1991) (striking down federal law conditioning disposal of federal property in way that undermines executive branch power); FCC v. League of Women Voters, 468 U.S. 364, 402 (1984) (holding that Congress may not condition broadcasting grants on agreement not to broadcast editorials).

181. *See* Dolan v. City of Tigard, 512 U.S. 374, 392 (1994) ("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 the Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

182. *See infra* notes 195-98 and accompanying text (explaining difficulties in determining whether exaction is product of legislative or adjudicative action, as well as noting that most local land use decisions involve individual development and thus are individualized to some degree).

underlying acts. From the landowner's point of view, there is nothing magical about the fact that a law that takes property applies equally to a large number of people. Justice Thomas drove home this point in his dissent from a denial of certiorari in *Parking Ass'n of Georgia*:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. *Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property.* The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.[183]

The assertion that legislative or generally applicable exactions are immune from the extortionate impulse[184] adds nothing to support the legislative/adjudicative distinction. Courts rarely explain in depth the idea that legislators are less likely to abuse landowners via an exaction, but the implicit justification seems to be that an open legislative process affords greater protection against governmental abuse than the insular adjudicative process.[185] While this may be true as a general proposition, it too cavalierly dismisses the fact that procedural mechanisms designed to protect the minority often break down in the legislature as well as in the administrative context.[186] Indeed, as the branch most accountable, and thus most responsive, to the majority, the legislature may be especially prone to extort disproportionate amounts of

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183. Parking Ass'n of Ga., Inc. v. City of Atlanta, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., dissenting from denial of certiorari) (emphasis added).

184. *See supra* notes 138-48 and accompanying text (noting courts that found legislative/adjudicative distinction irrelevant).

185. *See, e.g.*, San Remo Hotel v. San Francisco, 2002 Cal. LEXIS 623, at *55 (Mar 4, 2002) ("[S]uch generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election."); Curtis v. Town of St. Thomaston, 708 A.2d 657, 660 (Me. 1998) ("Because the Town's dedication requirement is a legislative rule, this requirement more likely represents a carefully crafted determination of need tempered by the political and legislative processes rather than a 'plan of extortion' directed at a particular land owner."); WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 329 (1995) (arguing that "state legislatures that create general police-power laws should receive great deference" because this type of regulation is "more like an exogenous event . . . and more subject to logrolling of pluralistic politics," both of which reduce "the demoralization of apparently being singled out").

186. *See* FISCHEL, *supra* note 185, at 100-39 (proposing a sliding scale of judicial scrutiny of property regulation that increases as level of government authority decreases). This framework is premised on the idea that smaller legislatures "would discount the welfare of underrepresented outsiders. Local insiders can use regulation in a way that subverts the Constitution's clear commands not to take property without compensation." *Id.* at 139.

property from under-represented groups.[187] As California Supreme Court Justice Brown explained in a dissenting opinion in *San Remo*:

> [T]he majority's exception for legislatively created permit fees is mere sophism, particularly where the legislation affects a relatively powerless group and therefore the restraints inherent in the political process can hardly be said to have worked. If the agency in *Nollan* had passed a rule requiring all beachfront property owners to dedicate an easement as a condition of developing their properties, those easements would have no better mitigated the effects of development (and they would have been no less objectionable) than the easement that the agency exacted adjudicatively.[188]

The founding fathers also recognized and feared the threat to minority rights presented by the legislative power:

> It would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights .... Confidence is everywhere the parent of despotism. Free government is founded in jealousy, and not in confidence. It is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power ....[189]

Their answer was, of course, the Constitution[190] and, more specifically, the Takings Clause: "In a constitutional system which values both democracy and liberty, *the beauty of the takings clause is that it provides a solution to the difficult problem of protecting individual rights in the face of legitimate government actions* which often impact arbitrarily and unevenly on isolated individuals."[191]

It is unclear why courts believe human nature or legislators have changed so much that an invasion of property rights by "men and women of our choice" should be scrutinized with more "confidence" today. Today's democratic legislative process is entirely conducive to forcing a landowning minority to shoulder an unfair portion of a general public burdens, in accordance

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187. *See* FISCHEL, *supra* note 185; Huffman, *supra* note 174, at 152 (observing that "even properly functioning democracies can abuse power at the expense of individuals and minorities. The [T]akings [C]lause, like the equal protection clause, protects against this majoritarian tyranny").

188. *San Remo*, 2002 Cal. LEXIS 623, at **122-23 (Brown, J., dissenting) (citation omitted).

189. THOMAS JEFFERSON, DRAFT KENTUCKY RESOLUTIONS (Mem'l Ed. 17:388) (1798).

190. *Id.* ("Our Constitution has accordingly fixed the limits to which, and no further, our confidence may go .... *In questions of power, then let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.*" (emphasis added)).

191. Huffman, *supra* note 174, at 145 (emphasis added).

with the will of a non-landowning majority.[192] Thus, in *San Remo*, San Francisco's elected officials legislated the burden of ameliorating a city-wide housing shortage – and the associated homelessness – upon approximately 500 hotel owners.[193] Because the risk of government extortion is present in the legislative setting, the essential nexus test cannot reasonably be limited to exactions imposed pursuant to an adjudicative process.[194]

3. The Legislative-Adjudicative Distinction Is Difficult to Apply in Any Meaningful Way

Even if there were some valid reason to uphold the principle of special deference to general legislative exactions – which there is not – the rule is extremely difficult to apply in the land use context.[195] An initial problem is that there is no logically consistent way to pinpoint the source of an exaction because they typically reach the landowner only after the involvement of both legislative and adjudicative bodies.[196] Moreover, little can be implied even when the source of an exaction is clear; in the land use process, legislative

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192. *See* James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government, in* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 4 (James D. Gwartney & Richard E. Wagner eds., 1988) ("At least with regard to economic functions and rights, we no longer possess a constitutionally limited government. Congressional majorities are now largely free to legislate as they choose, with government being limited only by the requirements of electoral competition."); Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 271 (2000) ("[L]egislative land use decisions made at the local level may reflect classic majoritarian oppression. And developers, whose interests judicial rules like *Dolan* aim to protect, are precisely the kind of minority whose interests might actually be ignored."). *See generally* TOWARD A THEORY OF THE RENT SEEKING SOCIETY (James M. Buchanan et al. eds., 1980) (describing process by which individuals and groups use the legislative process to effect transfers of wealth from one group to another).

193. *See* San Remo Hotel v. San Francisco, 2002 Cal. LEXIS 623, at **134-35 (Mar. 4, 2002) (Brown, J., dissenting).

194. *See* CAL. GOV. CODE §§ 66000-66020. In providing a procedure by which a landowner may challenge – under the "reasonable relationship" test – any type of monetary exaction, "whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis," the California legislature has recognized that there is no meaningful basis for distinguishing among exactions based on their place of origin.

195. *See* Reznik, *supra* note 192, at 257-66 (surveying proposed methods to apply legislative/adjudicative distinction in exaction arena and concluding that all are "difficult to use in practice").

196. *See, e.g.*, Loyola Marymount Univ. v. Los Angeles Unified Sch. Dist., 53 Cal. Rptr. 2d 424, 430 (Cal. Ct. App. 1996) (upholding imposition of fee on university by school district when legislature granted school district power to decide amount of fee based on findings of school board).

bodies often act in an administrative capacity and vice versa.[197] Focusing on the extent to which a decision is discretionary as a means to identify adjudicative exactions provides no solution because most local land use decisions, including exactions, must be tailored to fit an individual development at some point and, therefore, necessarily involve a certain amount of discretion.[198]

Lambert exemplifies the foregoing principles.[199] Like *San Remo*, *Lambert* involved a generally applicable law requiring hotel owners to pay a fixed percentage (raised in 1990 from forty percent to eighty percent) of the cost of replacing residential rooms as a condition of obtaining a permit to convert such rooms to tourist units.[200] However, the law allowed local government administrators to determine the underlying "replacement" value on a case-by-case basis.[201] Under this framework, an administrative board set Mr. Lambert's portion of the cost of replacing thirty-one residential rooms at $600,000, even though the city's appraisers had differed substantially in their estimates of the likely actual cost.[202] Thus, although the exaction could rightfully be described as legislative, the fee ultimately was imposed pursuant to the exercise of administrative discretion.

There will, of course, be a few cases in which exactions are clearly legislative in nature. The art fee imposed in *Ehrlich* comes to mind. That fee arose under an ordinance that required all

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197. *See, e.g.*, Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 390 (Ill. App. Ct. 1995) (refusing to recognize legislative/adjudicative distinction). In *Amoco Oil Co.*, a legislatively adopted ordinance directed a single zoning applicant to deed a portion of its property to the Village in return for favorable zoning. *Id.* at 381. The court's response to this fact is instructive:

> [W]e also note that *the so-called "ordinance" at issue here did not itself reflect a uniformly applied legislative policy. Indeed, the dedication requirement was clearly site-specific and adjudicative in character.* As such, even if we were to recognize the distinction between legislative and adjudicative actions, which we are not inclined to do under the circumstances of this case, we would still apply the two-part approach set forth in *Dolan* . . . .

Id. at 390 (emphasis added).

198. *See* Reznik, *supra* note 192, at 264 ("[T]he legislative/adjudicative test is misplaced in a land use system where development proceeds mainly on a piecemeal, individualized basis in response to developer requests, and therefore few decisions, by the terms of the [discretionary] test, can be categorized as legislative.").

199. Lambert v. City & County of San Francisco, 67 Cal. Rptr. 562, 564-68 (Cal. Ct. App. 1997) (concluding that ordinance and planning code amendment restricting landowner from converting residential hotel units to tourist hotel units was not taking), *cert. denied*, 529 U.S. 1045 (2000).

200. *Id.* at 564.

201. *See id.* at 570 (Strankman, P.J., dissenting) (noting that replacement value was determined by appraisals through Department of Real Estate).

202. *Id.* The appraisers estimated the actual cost to be between $484,584 and $612,887. *Id.*

> new residential development projects of more than four units, as well as all commercial, industrial, and public building projects with a building valuation exceeding $500,000 . . . to provide "art work" (as defined by the ordinance) for the project in an amount equal to 1 percent of the total building valuation, or to pay an equal amount in cash to the city art fund.[203]

Yet, broadly applicable and discretion-free laws are rarities in the exaction context. As such, they are exceptions that tend to prove the rule, rather than a norm that might justify a special exemption from the essential nexus standard.

V. Conclusion

Courts are increasingly rejecting the idea that *Nollan* and *Dolan* can be limited to their facts, and rightly so. The principles underlying the essential nexus requirement are as relevant to monetary exactions as they are to exactions of real property and as necessary to protect against legislative abuses of power as against administrative extortion.[204] There is, therefore, no compelling reason to avoid applying *Nollan* and *Dolan* to all exactions.[205] At the

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203. Ehrlich v. City of Culver City, 911 P.2d 429, 435 (Cal. 1996).

204. *See* Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 483 (N.Y. 1994) (applying *Nollan* and *Dolan* to a rent control law and stating that "the Supreme Court refrained from placing any limitations or distinctions or classifications on the application of the 'essential nexus' test. This suggests and supports a uniform, clear and reasonably definitive standard of review in takings cases.").

205. Judicial willingness to expand *Nollan* and *Dolan* to their logical limits could, of course, founder on the "slippery slope." The fear that stronger scrutiny of legislative monetary exactions will bring the courts perilously close to opening the door to attacks on the current system of property taxation is a potential psychological bar. *See, e.g.*, San Remo Hotel v. San Francisco, 2002 Cal. LEXIS 623, at *57 (Mar. 4, 2002). It should not be. Unlike monetary exactions, which typically flow from statutory authority, general ad valorem property taxes are almost always authorized by a constitution. In part for this reason, it is well settled that the basic form of property taxation is not subject to a takings claim unless it is arbitrary or overtly discriminatory. *See* Steward Mach. Co. v. Davis, 301 U.S. 548, 584-85 (1937) (upholding taxation scheme of Social Security Act against Fifth Amendment challenge); Brushaber v. Union Pac. R.R., 240 U.S. 1, 24-26 (1916) (determining that federal tax laws do not infringe of Fifth Amendment, as long as taxation is not "arbitrary . . . confiscation of property"). On the other side of the coin, it is important to recognize that some species of property taxation are already subject to a crude version of the essential nexus and rough proportionality tests. In particular, courts generally require special benefit assessments on property to be related to and proportional to an increase in property value flowing from expenditure of the assessments. *See* McNally v. Township of Teaneck, 379 A.2d 446, 451 (N.J. 1977) (stating that "[e]xaction of more than the special benefit to the property owner would constitute a taking of private property for public use without compensation"). The extension of the essential nexus requirement to its natural extremes simply would put property exactions in the same class, for constitutional purposes, as other, similar burdens on real property while in no way jeopardizing more general forms of taxation.

same time, a robust essential nexus test is necessary to facilitate both the broadest purposes of the Takings Clause and the narrowest holding of *Nollan* and *Dolan*. Without a strong essential nexus test, individuals often will be forced to bear burdens that properly should be borne by the public as a whole.[206] At the same time, the Court's widely accepted prescription against unrelated and excessive demands for physical dedications of land is one small step away from becoming meaningless if a local government can bypass the essential nexus test simply by "utilizing a different bureaucratic vehicle."[207] Similarly, if government may exact exorbitant sums of money freely, only the Legislature's good will can stop it from imposing such demands to raise cash to buy the same land that it could not otherwise get directly under *Nollan*. The essential nexus cannot survive long when riddled with these loopholes. Application of *Nollan* and *Dolan* to monetary exactions and legislative exactions is not only the logical end of the evolution of the essential nexus, it is also the necessary beginning to ensuring that their core outcomes are the constitutional legacy of all landowners, not just the Nollans and Ms. Dolan.

206. *See supra* notes 150-51 (explaining that Takings Clause is in place to prevent individuals from bearing societal burdens alone).

207. *See* Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 390 (Ill. App. Ct. 1995) ("Certainly, a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property.").