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LAND USE REGULATION IN AN AGE OF HEIGHTENED SCRUTINY

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In order to regulate proposed residential and commercial land development, states and localities employ a range of tools, including development prohibitions and conditions. Local regulators' discretion as to when they may impose such conditions or prohibitions varies by jurisdiction, but state courts generally have rejected claims that localities exceeded their statutory or constitutional authority in doing so. Until recently, United States Supreme Court jurisprudence paralleled this deferential state court jurisprudence; however, in the recent cases Nollan v. California Coastal Commission *and* Dolan v. City of Tigard, *the Court held that, although states and localities retain broad discretion to deny landowners permission for residential or commercial development, there are substantial constitutional limitations on the conditions such governments may impose on their grants of development permission. This Article explores the ways in which judicial review of development conditions, coupled with the absence of serious judicial scrutiny of development prohibitions, may diminish allocative efficiency in land development markets. After reviewing the law and politics of development conditions, Professor Dana argues that judicial scrutiny of development conditions may impede, rather than enhance, the efficient functioning of development markets in the United States. Using fundamental economic concepts and a model of the land development process as a game between developers and regulators, he analyzes a range of inefficiencies that may result from the constitutional tests enunciated in* Nollan *and* Dolan.

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For many years, the United States Supreme Court chose not to interfere with state and local regulation of new residential and commercial development. Although the Court repeatedly stated that the

Constitution imposes some limitations on development regulation,[1] its decisions suggested otherwise. The Court consistently held either that development regulations were constitutional or that their constitutionality was unripe for federal court review.[2]

In two recent cases, *Nollan v. California Coastal Commission*[3] and *Dolan v. City of Tigard*,[4] the Court broke with this long tradition of deference and substantially limited the constitutional authority of localities to impose conditions on their grants of development permission. Invoking the so-called "unconstitutional conditions doctrine,"[5] the Court held that the Takings Clause of the Fifth

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1. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBendictis, 480 U.S. 470, 485 (1987) (affirming that land use regulation can effect a taking when it fails to "substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land") (quoting Agins v. Tiburon, 477 U.S. 255, 260 (1980) (citations omitted)).

2. *See, e.g.*, San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 632-33 (1981) (dismissing as unripe a challenge to an open-space zoning designation); Agins v. City of Tiburon, 447 U.S. 255, 260-63 (1980) (rejecting a facial challenge to an open-space zoning ordinance); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 133 n.29, 138 (1978) (upholding landmark zoning restrictions and suggesting that takings challenges to land use regulations will be reviewed under the same rational basis test as is ordinarily applied to economic legislation).

3. 483 U.S. 825 (1987).

4. 512 U.S. 374 (1994).

5. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (defining the unconstitutional conditions doctrine as "hold[ing] that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether"). As Professor Frederick Schauer has convincingly argued, there is no single rationale that explains the unconstitutional conditions doctrine in the diverse contexts in which the courts have invoked it. *See* Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 1001-05 (1995). Moreover, the courts, and especially the Supreme Court, have been inconsistent in their adherence to the doctrine, even in cases involving ostensibly similar circumstances:

> The Court has concluded, for example, that the selective exemption of some magazines from state taxation on the basis of subject matter unconstitutionally infringes speech, but that the selective subsidy of the medical expenses of childbirth but not abortion does not unconstitutionally infringe reproductive autonomy. Having held that using funding conditions to induce public broadcasters to segregate editorializing activity would violate freedom of speech, the Court held that using tax benefit conditions to induce nonprofit organizations to spin off their lobbying activities to a separate affiliate poses no similar infringement. Having held that denial of unemployment compensation to Saturday sabbatarians unconstitutionally burdens freedom of worship, the Court has rejected every other claim that conditions on food stamps or welfare payments unconstitutionally burden rights to speech, expressive association, intimate association, or freedom from unwarranted searches.

Sullivan, *supra*, at 1416-17 (footnotes omitted). For other helpful accounts of the doctrine, see Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a*

Amendment[6] requires that conditions on government grants of development permission meet both a "nexus" and a "rough proportionality" test.[7] In order to meet the "nexus" test, a development condition must bear a "nexus" with the stated purpose of the regulations that would have authorized the state or locality to deny development permission altogether.[8] The "rough proportionality" test requires a court to compare the burden of a development condition on the property owner with the benefits of the condition in mitigating the adverse impacts of the proposed development. A condition is unconstitutional if the burden on the property owner is disproportionate to the condition's mitigation benefits.[9]

This Article explores the ways in which nexus/rough proportionality review of development conditions, coupled with the absence of serious judicial scrutiny of development prohibitions,[10] may diminish allocative efficiency in land development markets. The analysis considers the possible consequences of direct judicial review of development conditions and the possible consequences of local regulators' efforts to avoid such review. As a methodological matter, the Article builds on a body of legal scholarship emphasizing the importance of legal rules for bargaining among parties in the marketplace or, as it is often termed, "bargaining in the shadow of the law."[11]

Positive State, 132 U. PA. L. REV. 1293 (1984); Thomas W. Merrill, Dolan v. City of Tigard: *Constitutional Rights As Public Goods*, 72 DENV. U. L. REV. 859 (1995).

6. The Takings Clause provides: "Nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. This provision was held applicable to the states through the Due Process Clause of the Fourteenth Amendment in *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). State constitutions contain similar or identical language guaranteeing protection against takings of private property. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-2, at 588 n.2 (2d ed. 1988).

7. *See Dolan*, 512 U.S. at 389-91; *see also Nollan*, 483 U.S. at 834-37 (referring to the "nexus" test).

8. *See Nollan*, 483 U.S. at 837; *see also infra* notes 46-58 and accompanying text (discussing *Nollan*).

9. *See Dolan*, 512 U.S. at 391-96; *see also infra* notes 59-93 and accompanying text (discussing *Dolan* and comparing it with *Nollan*).

10. The Supreme Court continues to endorse deferential judicial review of regulatory prohibitions on new development. For a discussion of the divergence between the Supreme Court's development conditions and development prohibitions jurisprudence, see *infra* notes 94-106 and accompanying text. Some of this Article's objections to nexus/rough proportionality scrutiny of development conditions might not apply in a legal regime in which development prohibitions also were subject to serious judicial scrutiny. *See infra* text accompanying note 191-92 (discussing the adoption of heightened scrutiny of development prohibitions as a response to the inefficiencies that heightened scrutiny of development conditions otherwise might generate).

11. Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of*

Because the Article's argument builds on the concepts of "allocative efficiency" and "allocatively efficient development conditions," those concepts warrant some introductory discussion. A new development represents an efficient allocation of societal resources if, and only if, the development will generate greater total social benefits than total social costs.[12] Allocatively efficient development conditions are conditions that require developers to internalize the net social costs of their development projects.[13] Such social cost internalization is necessary to ensure that developers will proceed only with projects that are expected to generate greater total social benefits than costs.

This view regarding social cost internalization is based on the assumption that local regulators have incomplete information such that

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Strategic Behavior, 11 J. LEGAL STUD. 225, 225 (1982). *See generally* Victor P. Goldberg et al., *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 UCLA L. REV. 1083 (1987); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

12. This Article employs a Kaldor-Hicks concept of efficiency whereby a transaction is efficient if "the dollar value of the gains to the winners is greater than the dollar cost of the losses to the losers." WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 16 (1987) (discussing the Kaldor-Hicks concept of efficiency); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 13-14 (4th ed. 1992). Posner provides the following example:

> [i]n the . . . concept of efficiency . . . called the Kaldor-Hicks concept . . . if A values . . . [a] wood carving at $5 and B at $12, so that at a sale price of $10 . . . the transaction creates a total benefit of $7 . . . then it is an efficient transaction, provided that the harm (if any) done to third parties (minus any benefit to them) does not exceed $7.

Id.

13. *See* Vicki Been, *What's Fairness Got To Do With It? Environmental Justice and the Siting Of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1045-46 (1993). More precisely, developers should be required to internalize the lesser of (1) the costs to current residents of simply bearing the negative effects of new development; and (2) the costs to current residents of taking effective measures to avoid those negative effects. This "lesser of" measure avoids creating perverse incentives for current residents. Consider Professor Vicki Been's example:

> Assume, for example, that a particular neighborhood is ideal for a toxic waste dump because of its superior geological characteristics. Further assume that the dump will cause $100,000 of damage to the immediate neighbor, if that neighbor continues to behave as usual. No damage will result, however, if the neighbor takes simple precautionary measures costing $1000. Unless limited to $1000, compensation for damages would be socially inefficient because it would give the neighbor no incentive to be the least cost avoider.

Id. (footnotes omitted).

For simplicity of presentation, the discussion and examples in this Article assume either that the neighbors of proposed new development cannot take effective measures to avoid the negative effects of new development or that avoidance measures would be more costly for the neighbors than simply bearing the negative effects of new development.

they can accurately assess the negative monetary value current residents assign to proposed development, but not the positive monetary value the developer assigns to proposed development.[14] Under conditions of complete information, regulators could discourage inefficient development simply by denying development permission in those cases in which current residents valued stopping development more highly than the developer valued proceeding with development. Under conditions of incomplete information, regulators must rely on development conditions to ensure that developers do not proceed with development that will decrease current residents' welfare by more than it will increase the developer's (and by extension, future residents') welfare.[15]

Parts I[16] and II[17] of the Article provide an overview of the law and politics of development conditions. Part III[18] explains how judicial review of development conditions under a nexus/rough proportionality standard might result in the invalidation of allocatively efficient development conditions. New development sometimes generates social costs—or negative externalities—that developers or the government cannot mitigate or can mitigate only at extraordinary expense. The nexus and rough proportionality tests seem to require courts to invalidate development conditions that governments impose in response to such impossible or hard-to-mitigate negative externalities. From an allocative efficiency perspective, however, governments should require new development to internalize the dollar-equivalent cost of its net negative externalities, even if those externalities are impossible or difficult to mitigate.

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14. For further discussion of this assumption, see *infra* notes 173-76 and accompanying text.

15. The Article also assumes that substantial transaction costs might prevent current residents and developers from bargaining successfully over whether a proposed development project will proceed. The Coase Theorem predicts that, in the absence of transaction costs, developers would undertake only net socially beneficial projects because current residents would simply purchase a developer's entitlement to build whenever the current residents valued stopping proposed development more highly than the developer valued proceeding with proposed development. *See generally* LANDES & POSNER, *supra* note 12, at 31 ("The theorem holds that the efficiency with which resources will be employed is unaffected by the initial assignment of rights, provided that transaction costs are zero."). When bargaining between current residents and developers entails substantial transaction costs, current residents might fail to buy the right to stop development even when they valued stopping development more than the developer valued proceeding with development.

16. *See infra* notes 22-106 and accompanying text.

17. *See infra* notes 107-37 and accompanying text.

18. *See infra* notes 138-59 and accompanying text.

Part IV[19] of the Article examines how local regulators' efforts to circumvent the nexus/rough proportionality requirements also may reduce allocative efficiency in land markets. Facing the prospect that courts will strike down "excessive" development conditions under a nexus/rough proportionality standard, states and localities[20] may deny development permission altogether in cases in which they previously would have granted conditional permission. Nexus/rough proportionality review thus may produce greater over-regulation of new development than previously would have occurred—that is, no development at all rather than merely excessively-conditioned development.

Localities also may circumvent judicial scrutiny by choosing to make deals only with developers with whom they have a long-term, repeat transaction relationship. Such developers would be loathe to challenge any development conditions in court because doing so might undermine their ongoing relationships with local officials. A notable effect of the unconstitutional conditions doctrine in land use, therefore, may be the creation of a barrier to entry to new or outside developers in local land markets. That is a result no one—other than perhaps locally well-connected developers—could welcome.

Nexus/rough proportionality review, of course, offers possible social benefits. Such review sometimes may produce greater efficiency in land development markets. This is particularly likely to be the case where new development is expected to generate net positive externalities for the regulating jurisdiction.[21] The possible benefits of nexus/rough proportionality review, however, should be balanced against the possible costs. The purpose of this Article is to contribute

19. *See infra* notes 160-96 and accompanying text.

20. The Article focuses on localities because localities are responsible for imposing the great bulk of development conditions. *See* Vicki Been, *"Exit" as a Constraint On Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 473 n.2 (1991) (noting that "local governments are responsible for the vast majority of all exactions"). Similarly, the Article focuses on professional developers because most conditions are imposed upon them, rather than upon "ordinary" landowners who simply want to build a structure on their land for personal use. *See id.* at 476 n.19 (noting that "[m]ost exactions are levied against developers").

21. Two of my criticisms of nexus/rough proportionality review—that it may result in judicial invalidation of allocatively efficient development conditions and more frequent development prohibitions—apply to net negative externality development but not, as a general matter, to net positive externality development. *See infra* notes 140-44 and accompanying text. However, my third criticism of nexus/rough proportionality review—that such review may result in increased regulatory discrimination against new or unknown developers—applies to both types of development. *See infra* notes 173-76 and accompanying text.

to our understanding of those possible costs.

I. THE LAW OF DEVELOPMENT REGULATION: FROM DEFERENCE TO NEXUS/ROUGH PROPORTIONALITY REVIEW

States and localities employ a wide range of tools to regulate proposed new development. At a very general level, however, these tools fall into two categories. First, localities simply can prohibit certain sorts of new development at certain sites; this type of regulation will be referred to as development prohibitions. Such prohibitions are extremely common, and they have been regarded as presumptively constitutional since the Supreme Court's landmark decision in *Village of Euclid v. Ambler Realty Co.*[22]

Second, localities can regulate new development by imposing certain conditions on their grants of permission to develop. This sort of regulation is sometimes referred to as "development exactions," but this Article will employ the broader term "development conditions."[23] Development conditions take three principal forms: on-site developer dedications, off-site developer dedications, and impact fees.[24] On-site developer dedications require the developer to build some piece of public infrastructure or provide some public service at or adjacent to the development site as a precondition for receiving development permission. For example, developers are commonly required to build or enhance public access roads for new developments.[25] On-site requirements of this sort are the most well-established and least contested form of development condition.[26]

Off-site dedications require the developer to build infrastructure

22. 272 U.S. 365 (1926). In *Euclid*, the Court upheld a comprehensive zoning plan that prohibited the plaintiff from building residential and commercial buildings on its undeveloped land. *See id.* at 396-97. Shortly after *Euclid*, "the Supreme Court went out of the zoning business for nearly half a century." JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1005 (3d ed. 1993).

23. Different commentators employ different terminology, and the distinctions among regulatory devices sometimes blur in practice. *See* ALAN A. ALTSHULER & JOSÉ A. GÓMEZ-IBÁÑEZ, REGULATION FOR REVENUE 3-6 (1993) (discussing the distinction between development exactions and more traditional forms of land use regulation).

24. *See* R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 7-9, 16-19 (1987) (describing these three different forms of development conditions).

25. *See* Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW & CONTEMP. PROBS. 51, 58 (1987) (reporting on the prevalence of on-site dedications for roads).

26. *See* THOMAS P. SNYDER & MICHAEL A. STEGMAN, PAYING FOR THE GROWTH: USING DEVELOPMENT FEES TO FINANCE INFRASTRUCTURE 24 (1986).

or provide public service at some site other than the development site.[27] For example, a developer who wants to build high-income housing on one side of a town might be required to construct low-income housing on another side of town as a condition for receiving permission to build the high-income housing. Off-site requirements have become increasingly common.[28]

Finally, rather than requiring the developer to do some work or perform some activity as a development condition, a locality can require the developer simply to pay money as a precondition for receiving development permission. Such monies are typically called impact fees.[29] Impact fees are not as widely employed as on-site or off-site dedications, although in certain fast-growing jurisdictions they are central to the development regulation regime and may even account for a substantial portion of the cost of new residential units.[30]

Two common contexts for the imposition of development conditions are requests for rezoning permissions and requests for special use permits. Under traditional Euclidean zoning, each parcel in a locality is zoned for certain specified uses as part of a comprehensive or master plan; typically, residential uses are clustered together, as are commercial and industrial uses.[31] In localities that still formally adhere to such zoning, developers often find that an economically viable development plan for a certain parcel conflicts with the current zoning code. Developers, therefore, often must receive rezoning permissions to proceed with their projects.[32] Other jurisdictions have explicitly disavowed Euclidean zoning in favor of more flexible regimes. Under the special use permit regime, for example, all major development requires a special permit from zoning regulators. Those regulators operate on the basis of community guidelines for the overall mix of uses the community wishes to achieve, rather than a specific zoning map for each particular parcel.[33]

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27. *See id.* at 25.

28. *See* Smith, *supra* note 24, at 7-9 (discussing off-site dedications).

29. See ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 23, at 3 (defining impact fees).

30. *See* Charles E. Connerly, *Impact Fees as Social Policy: What Should Be Done?*, *in* DEVELOPMENT IMPACT FEES: POLICY RATIONALE, PRACTICE, THEORY, AND ISSUES 362, 362-64 (Arthur C. Nelson ed., 1988) [hereinafter DEVELOPMENT IMPACT FEES] (reporting that impact fees account for between approximately $2,000 to $10,000 of the average cost of a new dwelling in states such as California, Colorado, and Florida).

31. For a general description of Euclidean or "cumulative" zoning, see ROBERT M. ANDERSON, AMERICAN LAW OF ZONING §§ 9.14, 9.38 (2d ed. 1976).

32. *See* MIKE E. MILES ET AL., REAL ESTATE DEVELOPMENT: PRINCIPLES AND PROCESS 263-66 (2d ed. 1996) (describing the role of exactions in the rezoning process).

33. For descriptions of such flexible zoning regimes, see ALTSHULER & GÓMEZ-

Local regulators' statutory discretion as to when they can impose development conditions and what development conditions can be imposed varies by jurisdiction. In some jurisdictions, state and local ordinances dictate with considerable specificity the types and content of conditions that can be imposed under different circumstances.[34] In other jurisdictions, state and local statutes delegate virtually unfettered discretion to regulators to negotiate particular development conditions packages with developers.[35] However, even in those jurisdictions there may be norms regarding the conditions that are appropriate for different types of projects.[36]

State courts generally have rejected claims that localities exceeded their statutory authority in imposing development conditions.[37] As a matter of state constitutional law, the courts in a few states have held that development conditions may be imposed only when they respond to community problems that are "specifically and uniquely" attributable to the development in question.[38] Most

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IBÁÑEZ, *supra* note 23, at 54-55; MILES ET AL., *supra* note 32, at 254-64; Judith Welch Wegner, *Moving Toward The Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 977-82 (1987); *see also* Elizabeth A. Deakin, *The Politics of Exactions*, *in* PRIVATE SUPPLY OF PUBLIC SERVICES: EVALUATION OF REAL ESTATE EXACTIONS, LINKAGE, AND ALTERNATIVE LAND POLICIES 96, 97-98 (Rachelle Alterman ed., 1988) [hereinafter PRIVATE SUPPLY OF PUBLIC SERVICES] (noting the multitude of state approaches to determining when exactions may apply to development projects and that exactions may apply routinely to all development projects).

34. For a comprehensive review of the differences among state statutes regarding impact fees, see Martin L. Leitner & Susan P. Schoettle, *A Survey of State Impact Fee Enabling Legislation*, *in* EXACTIONS, IMPACT FEES, AND DEDICATIONS 60, 61-77 (Robert H. Freilich & David W. Bushek eds., 1995).

35. For descriptions of the widespread use of negotiated development conditions, see Joseph E. Coomes, Jr., *Practical Concerns in Drafting and Negotiating Development Agreements*, *in* DEVELOPMENT AGREEMENTS: PRACTICE, POLICY AND PROSPECTS 133, 133-47 (Douglas R. Porter & Lindell L. Marsh eds., 1989); Richard H. Cowart, *Negotiating Exactions Through Development Agreements*, *in* PRIVATE SUPPLY OF PUBLIC SERVICES, *supra* note 33, at 219, 219-20; Deakin, *supra* note 33, at 104-05; Robert H. Freilich & Terry D. Morgan, *Municipal Strategies for Imposing Valid Development Exactions: Responding to* Nollan, *in* EXACTIONS, IMPACT FEES, AND DEDICATIONS, *supra* note 34, at 21, 30.

36. *See* SNYDER & STEGMAN, *supra* note 26, at 77 (noting the existence of "informal guidelines that are used by planning and public works department staffs to determine what is required from developers").

37. *See, e.g.*, Ayres v. City Council, 207 P.2d 1, 7-8 (Cal. 1949) (upholding exaction dedication requirement); Jordan v. Village of Menomonee Falls, 137 N.W. 2d 442, 449-50 (Wis. 1965) (upholding development fee as constitutional); *see also* John J. Delaney et al., *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 LAW & CONTEMP. PROBS. 139, 146-56 (1987) (reviewing the relevant case law and outlining the various judicial tests regarding the constitutionality of land dedication regulations).

38. *See, e.g.*, Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d

jurisdictions, however, have opted for either a "reasonable relationship" test or a "rational nexus" test, both of which, in practice, require nothing more than some sort of cognizable relationship between development conditions and the adverse community impacts that the development is expected to create.[39] This "loose" standard for review rarely has resulted in the invalidation of development conditions.[40]

This Part addresses the federal constitutional law of development conditions, beginning with an analysis of *Nollan v. California Coastal Commission*[41] and *Dolan v. City of Tigard*.[42] It then compares those cases to *Lucas v. South Carolina Coastal Council*[43] in order to underscore the sharp divergence between the Supreme Court's development conditions and development prohibitions jurisprudence.

A. Nollan *and* Dolan

Richard Epstein has characterized federal land use jurisprudence before *Nollan* as a "uniform line of cases . . . begin[ning] with a narrow interpretation of the taking language, which is then bolstered by an expansive interpretation of the police power."[44] In his view, the cases merge "doctrinal error with an indefensible deference to local government."[45] Whatever one may think of Epstein's normative characterization of the case law, it clearly captures the bottom-line dynamics of land use litigation before *Nollan*: Local governments

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799, 802 (Ill. 1961) (striking down a requirement that the developer build recreational and educational facilities in return for subdivision approval because the "record does not establish that the need for [the] facilities is one that is specifically and uniquely attributable to the addition of the subdivision"). The states that apply this stricter standard of constitutional scrutiny for development conditions "are not rapidly growing and therefore do not have to cope with problems of rapid growth." James C. Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, 50 LAW & CONTEMP. PROBS. 85, 95 (1987).

39. *See* Delaney et al., *supra* note 37, at 148-49, 152-54.

40. In particular, reasonableness review in California has been "very generously weighted" in favor of the locality. Smith, *supra* note 24, at 12. For extended discussions of the state constitutional jurisprudence of development conditions and the three principal tests, see Delaney et al., *supra* note 37, at 147-56; *see also* David L. Callies & Malcolm Grant, *Paying for Growth and Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees, and Development Agreements*, *in* EXACTIONS, IMPACT FEES, AND DEDICATIONS, *supra* note 34, at 357, 364-66 (discussing the rational nexus, reasonable relationship, and specifically and uniquely attributable tests as applied to development conditions).

41. 483 U.S. 825 (1987).

42. 512 U.S. 374 (1994).

43. 505 U.S. 1003 (1992).

44. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 273 (1985).

45. *Id.*

won, aggrieved property owners lost.

In *Nollan*, the Supreme Court departed from its tradition of deference toward local land use regulators. The Nollans owned a beachfront lot in Ventura, California, which contained a small bungalow that the Nollans wanted to demolish and replace with a larger house.[46] Under California law, the redevelopment project required a permit from the California Coastal Commission.[47] The Commission granted the permit to the Nollans subject to the condition that they grant the public an easement allowing the public to walk from a public beach area on one side of the property to a public beach area on the other side. In making this determination, the Commission explained that the easement would offset the burden created by the new house:

> [T]he new 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 visit." The new house would also increase private use of the shorefront. These effects of construction of the house, along with other area development, would cumulatively "burden the public's ability to traverse to and along the shorefront."[48]

In imposing the easement condition, the Coastal Commission was following its standard practice. The Commission "similarly conditioned 43 out of 60 coastal development permits along the same tract of land .... [O]f the 17 not so conditioned, 14 had been approved when the Commission did not have administrative regulations in place allowing imposition of the condition, and the remaining 3 had not involved shorefront property."[49] The Nollans nonetheless challenged the easement condition, arguing that it constituted a taking of private property without just compensation. The California Court of Appeal rejected this challenge, holding that the easement condition was constitutional because it advanced the public purpose of encouraging public beach access and did not deprive the Nollans of all reasonable use of their property.[50]

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46. *See Nollan*, 483 U.S. at 828.

47. *See id.* (citing CAL. PUB. RES. CODE §§ 30106, 30212, 30600 (West 1986)).

48. *Id.* at 828-29 (summarizing the California Coastal Commission's findings) (citations omitted).

49. *Id.* at 829 (citing the California Coastal Commission's findings) (citations omitted).

50. *See* Nollan v. California Coastal Comm'n, 223 Cal. Rptr. 28, 30 (Ct. App. 1986),

The United States Supreme Court reversed. The majority opinion, authored by Justice Scalia,[51] emphasized that if the state had simply ordered the Nollans to open up part of their land to the public without compensating them, the order would have violated the Takings Clause.[52] But the opinion also recognized that if the Coastal Commission had denied the building permit on the grounds that the Nollans' new house would create a psychological barrier to public use of the beachfront or add to beachfront congestion, the denial would have been a constitutional exercise of the police power.[53] For the Court, the case thus presented a classic "unconstitutional conditions" question: whether the state should be prevented from achieving indirectly what it is forbidden from achieving directly (using the threat of a development permission denial to secure a "free" public easement that could not have been seized outright) or, alternatively, whether the state's greater power to deny a discretionary government benefit[54] (here, development permission) necessarily implies its lesser power to place conditions on the grant of that benefit.[55]

According to the majority opinion, the Coastal Commission's easement condition violated the Takings Clause because it "utterly fail[ed] to further the end advanced as the justification for the prohibition."[56] In the Court's view,

> [i]t 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

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rev'd, 483 U.S. 825 (1987).

51. Chief Justice Rehnquist and Justices White, Powell, and O'Connor joined the majority opinion. *See Nollan*, 483 U.S. at 827. Justices Brennan, Blackmun, and Stevens each filed dissenting opinions. *See id.* at 842 (Brennan, J., dissenting); *id.* at 865 (Blackmun, J., dissenting); *id.* at 866 (Stevens, J., dissenting).

52. *See id.* at 831.

53. *See id.* at 835-36.

54. In the majority opinion in *Nollan*, however, Justice Scalia concluded that "the right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.' " *Id.* at 833 n.2. This statement suggests that for Justice Scalia, developmental rights are in some sense rooted in natural law and hence are not properly subject to any legislative redefinition or adjustment.

55. For an interesting review and critique of the greater-includes-the-lesser argument in constitutional law, see Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371 (1995).

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

construction of the Nollans' new house.[57]

In other words, the Court's unconstitutional conditions doctrine requires that a development condition reduce or mitigate the problem that otherwise would have permitted regulators to deny development permission altogether. Development conditions that fail to meet the "essential nexus" requirement are nothing more than "out-and-out . . . extortion."[58]

Nollan's nexus requirement does not speak to the question of *how much* a constitutionally permissible development condition must reduce the problem that otherwise would have permitted regulators to deny development permission altogether. The Supreme Court took up that issue seven years later in *Dolan v. City of Tigard*.[59] In *Dolan*, Florence Dolan wanted to redevelop a parcel that included a floodplain area adjacent to a creek. Her development plans included razing her existing hardware store, building a new store twice the size of the original and another structure, and paving new parking areas.[60] Dolan's property was located in the congested Central Business District of the City of Tigard.[61]

At the time Dolan applied for the permissions necessary to redevelop her site, the City of Tigard had in place codified standards for new building permits in the Central Business District. The Community Development Code provided, in relevant part, that

> "[w]here . . . development is allowed within and adjacent to the . . . floodplain, the city shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway . . . ."[62]

Consistent with the Code provisions, the City Planning Commission granted Dolan's application for redevelopment permission subject to two conditions. The first condition was that she dedicate a portion of her property lying within the floodplain for use as a natural space or greenway ("the greenway condition"); the second was that she dedi-

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57. *Id.* at 838-39.

58. *Id.* at 837 (citations omitted). In a footnote, Justice Scalia suggested that nexus review is meant to be significantly more demanding than the rational basis review normally applied to economic legislation. *See id.* at 835 n.3.

59. 512 U.S. 374 (1994).

60. *See id.* at 379.

61. *See id.*

62. *Id.* (quoting TIGARD, OR., COMMUNITY DEVELOPMENT CODE § 18.120.180.A.8; Respondent's Brief, app. B, at B-45 to B-46, *Dolan* (No. 93-518)).

cate an additional fifteen-foot strip adjacent to the floodplain as a pedestrian/bicycle pathway ("the bicycle path condition").[63] The Commission justified the greenway condition on the ground that "the 'anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes.' "[64] As to the bicycle path, the Commission found that its construction could " 'offset some of the traffic demand ... and lessen the increase in traffic congestion' " that the larger store otherwise might generate.[65]

Dolan applied for a variance from the City Planning Commission's decision.[66] The Community Development Code provided specific criteria for variances including, among other things, a showing of " 'undue or unnecessary hardship.' "[67] The variance provisions also allowed applicants to propose alternative measures that would mitigate the expected impacts of new development.[68] Dolan proposed no such measures, and her application for a variance was denied.[69] The Oregon Court of Appeals subsequently rejected Dolan's challenge to the greenway and bicycle path conditions, concluding that both conditions satisfied *Nollan*'s essential nexus requirement.[70]

The United States Supreme Court reversed.[71] The majority opinion, authored by Chief Justice Rehnquist,[72] did not question the Commission's prerogative to deny a redevelopment permit in order to prevent increased sewer runoff or traffic congestion.[73] Chief Justice Rehnquist's opinion also acknowledged that the greenway and

63. *Id.* at 380 & n.2.

64. *Id.* at 382 (citing TIGARD, OR., Planning Commission Final Order No. 91-09 PC; Petition for Writ of Certiorari, app. G, at G-37, *Dolan* (No. 93-518)).

65. *Id.*

66. *See id.* at 380.

67. *Id.* (citing TIGARD, OR., COMMUNITY DEVELOPMENT CODE § 18.134.010; Respondent's Brief, app. B, at B-47, *Dolan* (No. 93-518)).

68. *See id.* at 380-81.

69. *See id.* Nor did Dolan's variance application address the nature or magnitude of the potential adverse impacts of her development project. *See* Respondent's Brief at 10-12, *Dolan* (No. 93-518).

70. *See* Dolan v. City of Tigard, 854 P.2d 437, 443-44 (Or. 1993), *rev'd*, 512 U.S. 374 (1994).

71. *Dolan*, 512 U.S. at 396.

72. Justices O'Connor, Scalia, Kennedy, and Thomas joined the majority opinion. *See id.* at 375. Justices Stevens and Souter each filed a dissenting opinion. *See id.* at 396 (Stevens, J., dissenting); *id.* at 411 (Souter, J., dissenting).

73. *See id.* at 387.

bicycle path conditions bore a nexus to the regulatory ends of controlling sewer runoff and congestion, and that the conditions therefore satisfied the *Nollan* nexus requirement.[74] The Court held, however, that, in addition to satisfying a nexus test, a development condition must satisfy a "rough proportionality" test.[75] This test—which the Court maintained is similar to tests previously adopted by a number of state courts[76]—requires land use regulators to establish, by means of "some sort of individualized determination," that the required condition is "related both in nature and extent to the impact of the proposed development."[77] It is the locality, not the developer, that bears the burden of proof in court.[78]

Applying the rough proportionality requirement, the Court held that the greenway condition was disproportionately burdensome because it required Dolan to cede title to the greenway area even though that transfer in itself did nothing to advance the public purpose of preventing sewer runoff.[79] Dolan, however, had never voiced any interest in retaining ownership of the area designated as a greenway; her objection to the greenway condition was that she did not

74. *See id.* at 386-88.

75. *Id.* at 391.

76. *See id.* at 390-91 (suggesting that the rough proportionality test resembles the tests adopted by the courts in Nebraska, Minnesota, Wisconsin, Texas, and Utah). In his dissent, Justice Stevens argued that the majority's rough proportionality requirement lacks any significant support in state court constitutional jurisprudence. *See id.* at 398 (Stevens, J., dissenting) ("Not one of the state cases cited by the Court announces anything akin to a 'rough proportionality' requirement."). Some commentators agree with Justice Stevens. *See, e.g.*, Julian R. Kossow, Dolan v. City of Tigard, *Takings Law, and the Supreme Court: Throwing the Baby Out with the Floodwater*, 14 STAN. ENVTL. L.J. 216, 231-32 & n.86 (1995); Suzanna Glover-Ettrich, Note, *A Newly-Minted Hurdle for City Planners:* Dolan v. City of Tigard, 28 CREIGHTON L. REV. 559, 586 (1995). Others believe that *Nollan* and *Dolan* are consistent with at least some precedents of some state courts. *See, e.g.*, Robert H. Freilich & David W. Bushek, *Public Improvements and the Nexus Factor: The Takings Equation after* Dolan v. City of Tigard, *in* EXACTIONS, IMPACT FEES, AND DEDICATIONS, *supra* note 34, at 3, 9-11.

77. *Dolan*, 512 U.S. at 391. The rationale the Court offered for the rough proportionality requirement amounts to the following: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in . . . comparable circumstances." *Id.* at 392. As Professor Merrill notes, Justice Rehnquist's opinion "fail[s] to supply a cogent explanation for why it was . . . necessary to go beyond a mere requirement of essential nexus and demand a showing of rough proportionality between a waiver of rights and stated government purposes." Merrill, *supra* note 5, at 869.

78. *See Dolan*, 512 U.S. at 389-91. Justice Stevens pointedly criticized the majority's departure from the usual rule that an aggrieved landowner bears the burden of proof in a suit challenging a local land use regulation. *See id.* at 403 (Stevens, J., dissenting).

79. *See id.* at 393.

want that area of the parcel to be maintained as a greenway at all.[80] She simply wanted to develop that area of the parcel for her own private business purposes. Thus, the *Dolan* majority opinion appears to have fabricated an objection to the greenway condition and then declared the fabricated objection persuasive.

The Court's analysis of the "rough proportionality" of the bicycle path condition is somewhat less disingenuous and hence more revealing. The Court noted that "the city [had] estimate[d] that the proposed development would generate roughly 435 additional [car] trips per day," and that "[d]edications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use."[81] The Court concluded, however, that "the city ha[d] not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement."[82] In the Court's view, the finding that the easement "could offset" some congestion was insufficient: "[T]he city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway . . . ."[83] The Court thus suggested that some reduction of congestion could justify the bicycle path, although it left open the critical question of whether, for example, a ten or twenty or even fifty percent reduction in congestion resulting from the new store would be sufficient justification for burdening Dolan with the bicycle path condition.

In addition to the question of how courts should assess whether the benefits of development conditions are roughly proportionate to the burdens they impose on landowners, *Dolan* leaves open substantial questions about the scope of cases to which the nexus/rough proportionality tests apply. Notably, language in both *Nollan* and *Dolan* suggests that the Court intends the nexus/rough proportionality requirements to apply only to development conditions that entail landowners actually ceding land interests to the state.[84] Recognizing

80. *See id.* at 404 (Stevens, J., dissenting). Indeed, Florence Dolan apparently declined the option of a permit in which she would retain title to the area restricted for use as a greenway. *See id.* (citation omitted).

81. *Id.* at 395.

82. *Id.*

83. *Id.* at 395-96.

84. *See, e.g., id.* at 385 (noting that "the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city"); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987) ("We are inclined to be particularly careful . . . where the actual conveyance of

that development conditions may be severely burdensome to landowners regardless of their form, a number of state courts nonetheless have construed *Nollan* and *Dolan* to apply to all sorts of development conditions, including monetary fees.[85] The Supreme Court's remand in *Ehrlich v. City of Culver City*[86]—a case in which the state court had upheld a development fee[87]—seems to support this broad interpretation of *Nollan* and *Dolan*.[88]

A few state courts have interpreted the nexus/rough proportionality requirements as applicable when land use regulators have used their discretion to tailor development conditions for specific projects, but inapplicable when regulators imposed conditions pursuant to rigid or formulaic government policies or ordinances, such as an ordinance that dictates particular road and sewer dedications for projects of different magnitudes.[89] This narrow reading of *Nollan* and

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property is made a condition to the lifting of a land-use restriction."). Some courts have interpreted the nexus and rough proportionality tests as applicable only to land dedication requirements. *See, e.g.*, Commercial Builders v. City of Sacramento, 941 F.2d 872, 874 (9th Cir. 1991) (holding that the nexus test applies only where "regulations . . . constitute a physical encroachment on land").

85. *See, e.g.*, Ehrlich v. City of Culver City, 911 P.2d 429, 438-39 (Cal.), *cert. denied*, 117 S. Ct. 299 (1996) (applying rough proportionality test to development fees); Northern Ill. Home Builders Ass'n v. County of Du Page, 649 N.E.2d 384, 388-90 (Ill. 1995) (applying rough proportionality test to development fees); Trimen Dev. Co. v. King County, 877 P.2d 187, 194 (Wash. 1994) (applying rough proportionality test to fee paid in lieu of an open space dedication requirement); Building Indus. Ass'n v. City of Oxnard, 267 Cal. Rptr. 769, 770 (Cal. Ct. App. 1990) (applying the nexus test to development fees); Lexington-Fayette Urban County Gov't v. Schneider, 849 S.W.2d 557, 559-60 (Ky. Ct. App. 1992) (applying the nexus test to a condition requiring the developer to fund the construction of a bridge).

86. 512 U.S. 1231 (1994) (mem.).

87. In *Ehrlich*, the California Court of Appeal had upheld a city's imposition of approximately $300,000 in fees on a landowner as a condition of granting development permission. *See* Ehrlich v. City of Culver City, 19 Cal. Rptr. 2d 468, 483 (Ct. App. 1993), *vacated*, 512 U.S. 1231 (1994) (mem.). One day after deciding *Dolan*, the United States Supreme Court granted certiorari and then vacated and remanded the California Court of Appeal's opinion for proceedings consistent with the decision in *Dolan*. *See Ehrlich*, 512 U.S. 1231 (1994) (mem.). The remand may signal that the Court intends the nexus/rough proportionality tests to extend to monetary development conditions.

88. Moreover, unless nexus/rough proportionality review is deemed to extend to both non-monetary and monetary conditions, such review may lack any practical significance. If nexus/rough proportionality review applied only to non-monetary conditions, states and localities could rely on monetary conditions to reach the same objectives they previously achieved by means of non-monetary conditions. In a case like *Nollan*, for example, the government could set a monetary condition or fee for its development permission equal to the fair market value of a public access easement, and then use the fee money to fund the acquisition of the easement by eminent domain. *But see infra* note 163 (noting that courts might not permit localities to use their eminent domain power to avoid nexus/rough proportionality review).

89. *See, e.g.*, *Ehrlich*, 911 P.2d at 439 (holding that *Nollan* and *Dolan* apply only to

Dolan assimilates those cases into a body of state zoning law jurisprudence that is suspicious of individual regulators' exercises of discretion.[90] Other state courts implicitly or explicitly have rejected this narrow interpretation.[91] That rejection is well-founded;[92] as stated above, both *Nollan* and *Dolan* involved the straightforward application of general policies or statutes to specific parcels rather than individual regulators' exercise of case-specific discretion.[93]

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the "discretionary deployment of the police power"); Home Builders Ass'n v. City of Scottsdale, 902 P.2d 1347, 1352 (Ariz. Ct. App. 1995) (refusing to apply the nexus/rough proportionality test to development fees that are "standardized and uniform" so that "a prospective developer may know precisely the fee that will be charged").

90. For an excellent analysis of this tradition, see Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 857-67 (1983) (reviewing academic and judicial hostility toward ad-hoc, case-by-case decision-making regarding local land use development). The most famous case in this tradition is *Fasano v. Board of County Commissioners*, 507 P.2d 23 (Or. 1973). The *Fasano* court held that small-scale rezonings by a local government authority may constitute adjudicative rather than legislative acts and thus may not warrant the traditional judicial deference accorded legislation. *See id.* at 25-30.

91. For examples of cases applying nexus/rough proportionality review outside the context of case-by-case, discretionary decision-making, see Northern Ill. Home Builders Ass'n v. County of Du Page, 649 N.E.2d 384, 388-90 (Ill. 1995) (applying rough proportionality test to development fees imposed pursuant to formulas set out in county ordinances); Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 482-85 (N.Y. 1994) (applying nexus test to a state statute requiring landlords to offer lease renewals to nonprofit hospitals), *cert. denied*, 115 S. Ct. 1961 (1995); Trimen Dev. Co. v. King County, 877 P.2d 187, 194 (Wash. 1994) (en banc) (applying rough proportionality review to fee in lieu of dedication imposed pursuant to a formula set out in county ordinances); Kottschade v. City of Rochester, 537 N.W.2d 301, 307-08 (Minn. Ct. App. 1995) (applying rough proportionality test to land dedication requirement applied pursuant to a city ordinance).

92. The narrow interpretation of *Nollan* and *Dolan*, while probably insupportable as a matter of interpretation, may make some sense as a matter of policy. By limiting nexus/rough proportionality review to development conditions that were *not* imposed pursuant to formulaic statutes or government policies, courts would encourage localities to rely more heavily on formulaic statutes or government policies in imposing conditions. Such statutes and policies may offer developers more *ex ante* certainty regarding the cost of prospective development projects; greater certainty, in turn, may facilitate socially productive investments by developers. *See* Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1700-01 (1988) (making this argument). Certainty and consistency, in any event, are what many developers say they most value in a regulatory regime. *See, e.g.*, Douglas R. Porter, *Will Developers Pay To Play?*, *in* DEVELOPMENT IMPACT FEES, *supra* note 30, at 73, 76 (reporting that developers "may yearn for the relative certainty of prestated fees"). Formulaic statutes and policies also may help prevent undesirable discrimination by local regulators in favor of politically well-connected developers and against other developers. *See infra* notes 193-96 and accompanying text (discussing how limits on individual regulators' discretion may temper some of the possible perverse effects of nexus/rough proportionality review).

93. To be fair to the courts that have limited *Dolan* to discretionary, case-by-case impositions of development conditions, Chief Justice Rehnquist's opinion does state that heightened review of the City of Tigard's development conditions was appropriate because "here the city made an adjudicative decision to condition petitioner's application

B. *The Comparison with* Lucas

Five years after *Nollan* and two years before *Dolan*, the Supreme Court decided *Lucas v. South Carolina Coastal Council.*[94] *Lucas* involved a development prohibition rather than a conditional grant of development permission.[95] Commentators who identify a general property-rights revival in the Supreme Court's recent takings jurisprudence sometimes group *Nollan* and *Dolan* with *Lucas.*[96] A comparison of *Nollan* and *Dolan* with *Lucas*, however, underscores the marked divergence in the Court's posture toward development conditions and development prohibitions.

Lucas, like most Takings Clause cases, involved a situation in which the rules of the development game changed after the plaintiff landowner took title. Soon after David Lucas bought two beachfront lots for approximately one million dollars, the South Carolina legislature enacted the Beachfront Management Act.[97] That Act had the effect of prohibiting Lucas from building any structure on the lots he had purchased.[98] The South Carolina Supreme Court upheld the constitutionality of the development prohibition, reasoning that the prohibition advanced the public purpose of controlling beach erosion.[99]

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for a building permit on an individual parcel." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). As Justice Souter noted in dissent, however, "[t]he majority characterizes this case as involving an 'adjudicative decision' to impose permit conditions, but the permit conditions were imposed pursuant to Tigard's Community Development Code. The adjudication here was of Dolan's requested variance from the permit conditions otherwise required to be imposed by the Code." *Id.* at 413 n.* (Souter, J., dissenting) (citations omitted).

The Supreme Court recently denied certiorari in a case that raised the issue of whether *Dolan*'s rough proportionality requirement applies to broadly-imposed, legislative requirements. *See* Parking Ass'n v. City of Atlanta, 115 S. Ct. 2268 (1995) (mem.) (*denying cert. to* 450 S.E.2d 200 (Ga. 1994)). Justices Thomas and O'Connor dissented from the denial of certiorari. *See id.* at 2268 (Thomas, J., dissenting). In his dissent, Justice Thomas urged the Court to resolve the split among the lower courts, arguing that "[t]he distinction between sweeping legislative takings and particularized administrative takings [is] a distinction without a constitutional difference." *Id.* at 2269 (Thomas, J., dissenting).

94. 505 U.S. 1003 (1992).

95. *See id.* at 1007.

96. *See, e.g.*, James H. Freis, Jr. & Stefan V. Reyniak, *Putting Takings Back Into the Fifth Amendment: Land Use Planning After* Dolan v. City of Tigard, 21 COLUM. J. ENVTL. L. 103, 135-36 (1996); James A. Kushner, *Property and Mysticism: The Legality of Exactions as a Condition for Public Development Approval in the Time of the Rehnquist Court*, 8 J. LAND USE & ENVTL. L. 53, 56-60 (1992).

97. *See Lucas*, 505 U.S. at 1006-07 (citing S.C. CODE ANN. § 48-39-250 (Law Co-op. amended 1990, 1993)).

98. *See id.* at 1007.

99. *See* Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 896 (S.C. 1991),

The United States Supreme Court reversed.[100] The opinion, authored by Justice Scalia, explained that just compensation generally is required when (1) a development prohibition is imposed after the plaintiff landowner takes title to the property at issue; and (2) the prohibition "denies all economically beneficial or productive use" of the property,[101] thereby virtually reducing the property's market value to zero. Justice Scalia's opinion, as well as the other opinions in *Lucas*, is consistent with the well-established principle that Takings Clause limitations on uncompensated development prohibitions do not apply when a party takes title to property already subject to a development prohibition. In such cases, the purchase price for the plaintiff's property presumably includes a discount for the development prohibition.[102]

By contrast, in *Nollan* and *Dolan*, the Court seemed to endorse heightened scrutiny of development conditions that were part of the established regulatory regime when the plaintiff took title. Neither opinion indicates that the nexus/rough proportionality tests apply only when a change occurs in the applicable development conditions regime after the plaintiff acquires title. Indeed, in *Nollan* the California Coastal Commission had established a practice of requiring easement conditions before the Nollans took title.[103] Likewise, in *Dolan* the Court nowhere suggested that Dolan took title with the reasonable expectation that the city would not place greenway or bicycle path conditions on any permission she later might seek to redevelop her site.

Nollan and *Dolan*, moreover, do not limit nexus/rough proportionality review to cases where the burdens on landowners are so severe as to qualify as a *Lucas*-type "total loss." Indeed, the *Nollan*

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rev'd, 505 U.S. 1003 (1992).

100. *See Lucas*, 505 U.S. at 1032.

101. *Id.* at 1015-16; *id.* at 1026-29. For analyses of *Lucas*, see David A. Dana, *Natural Preservation and the Race to Develop*, 143 U. PA. L. REV. 655, 664-68 (1995) (criticizing the reasoning in *Lucas*, but arguing that its limited guarantee of compensation may prevent undesirable accelerated development of natural or open spaces); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1435-42 (1993) (discussing Justice Scalia's pro-development conception of land).

102. *Cf.* Note, *Condemnations, Implicit Benefits, and Collective Losses: Achieving Just Compensation Through "Community,"* 107 HARV. L. REV. 696, 704 n.39 (1994) ("[T]he price an owner paid for his property is often discounted for the risk of a future regulation or condemnation. To the extent that there is such a price discount, the owner has been compensated *ex ante*.").

103. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) (acknowledging that the Nollans "acquired the land well after the Commission had begun to implement its policy").

and *Dolan* majority opinions make no mention of the difference in value of the Nollans' or Dolan's investments with and without the challenged development conditions,[104] and there is no reason to believe those differences were substantial.[105] State case law is consistent with the view that the nexus/rough proportionality requirements apply even when there has been no change in the applicable regulatory regime and no claim of total, or even substantial, loss in market value.[106]

II. JUDICIAL COMPETENCE, POLITICAL CORRUPTION, AND DEVELOPMENT CONDITIONS

One question raised but not specifically addressed by the *Nollan* and *Dolan* opinions is *why* courts should be concerned about development conditions. Much of the standard academic literature justifying the Takings Clause is inapplicable to *Nollan* and *Dolan* because that literature conceptualizes "the takings problem" as a problem of transitions in legal regimes. According to this literature, a requirement of just compensation is a means of providing citizens with some security against losses due to changes in regulatory regimes.[107] Such security is important because otherwise risk-averse investors will under-invest in the economy and overall social welfare will not be maximized.[108] This risk-aversion rationale for Takings

104. The Nollans's and Dolan's Supreme Court briefs did not even contain any argument regarding market value losses. *See* Brief for Petitioner, Dolan v. City of Tigard, 512 U.S. 374 (1994) (No. 93-518); Brief for Appellant, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (No. 86-133).

105. *Cf.* Porter, *supra* note 92, at 77 (stating that development fees "usually amount to a small percentage of total development costs" and "represent an irritant rather than a fatal blow to a project").

106. As stated above, some state courts have construed *Nollan* and *Dolan* as applying nexus/rough proportionality review only to circumstances where regulators exercised discretion in tailoring conditions for particular parcels. *See supra* notes 89-90 and accompanying text. These courts have not held, however, that the plaintiff landowner must show that, after she took title, there was a shift from a non-discretionary conditions regime to a discretionary conditions regime or that individual regulators exercised their discretion with respect to her parcel in a manner inconsistent with their past practice.

107. *See* Thomas J. Miceli & Kathleen Segerson, *Regulatory Takings: When Should Compensation Be Paid?*, 23 J. LEGAL STUD. 749, 753-56 (1994) (discussing possible rationales for Takings Clause compensation).

108. Professors Blume and Rubinfeld have provided a nuanced argument that compensation may be necessary in order to prevent underinvestment in socially productive activity. Their argument, in essence, relies on three propositions. First, they posit that some participants in the market for land are risk averse—that is, they value risky investments at a lower value than risk-free investments that have the same expected value. *See* Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 582-92 (1984). Second, they posit that risk aversion nor-

Clause compensation cannot explain *Nollan* and *Dolan* because, as previously discussed, those cases did not involve a transition or change in applicable development regulations.[109]

Another strand in the academic literature—one that is arguably applicable to *Nollan* and *Dolan*—conceives of the Takings Clause as a response to distortions in the democratic political process. In this account, the takings problem is not one of adjustment to regulatory change—change that on its own terms might be fully justifiable—but rather the ever-constant threat of political malfeasance and corruption. The focus of this literature is on distortions in the political process that lead to excessive regulatory burdens on new development.[110]

This Part evaluates the argument that distortions in the democratic political process justify judicial policing of development conditions. The Part first briefly explores the inherent difficulties in ascertaining whether a particular development condition is allocatively efficient, and concludes that judges may be no better positioned—and arguably are *less* well-positioned—than local officials and regulators to grapple with these difficulties.[111] The Part then examines two accounts of the democratic political process that sug-

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mally generates a demand for risk-spreading through insurance and that, but for failures in the insurance market, we would observe commercially available insurance against regulatory diminutions in property value. Such insurance does not exist, they believe, because of two "imperfection[s]" in the insurance market: "moral hazard," which "occurs when the party to be insured can affect the probability or the magnitude of the event that triggers payment," and "adverse selection," which "arises because insurers are not always as accurate as policymakers in assessing the probabilities of the events they are insuring." *Id.* at 592-97. Third, they propose that *ex post* compensation for regulatory losses can serve as a substitute for insurance and thereby eliminate the under-investment that otherwise would result from risk-averse investors' awareness of the existence of the risk of uncompensated regulatory losses. In their view, *ex post* compensation solves the moral hazard problem that would beset any scheme for *ex ante* insurance. *See id.* at 597-99. *But see* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 527-36 (1986) (criticizing this economic rationale for Takings Clause compensation and arguing that compensation requirements may encourage overinvestment, rather than underinvestment). *But cf.* Dana, *supra* note 101, at 681 (arguing that neither the Blume and Rubinfeld model nor the Kaplow model take adequate account of how compensation requirements or the absence thereof may affect the timing of development).

109. *See supra* note 104 and accompanying text.

110. *See, e.g.*, Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721, 723 (1993) (discussing the view that a compensation requirement is "a necessary and desirable check on the potential misuse by the legislature of its authority over property rights"); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 867-78 (1995) (exploring political process failure rationales for a constitutional compensation requirement).

111. *See infra* notes 113-22 and accompanying text.

gest contradictory conclusions as to whether judicial scrutiny of development conditions is nonetheless justified.[112]

A. What Is Allocatively Efficient Development Regulation?

In order to assess whether a particular development condition is allocatively efficient, five inquiries must be completed. First, it must be determined which of the anticipated externalized effects of the new development are legitimately labeled externalized social costs or benefits. Second, "legitimate" externalized social costs and benefits each must be measured. Third, the externalized social costs and benefits must be offset against each other to arrive at a determination of the net externalized social cost or net externalized social benefit. Fourth, the cost to the developer resulting from the developmental conditions at issue must be assessed. Finally, that cost must be compared with any anticipated net externalized social costs of development to determine whether the regulatory burdens on the landowner equal the anticipated net externalized social costs of the proposed development project.[113]

All of these inquiries involve difficult questions of judgment. Social cost, like beauty, often is in the eye of the beholder; for example, some may regard the introduction of a modern apartment building into a historic district as a social cost in terms of historic heritage and aesthetics, whereas others may regard it as a welcome addition to an architecturally staid and dull neighborhood.[114] Moreover, normative principles of non-discrimination may render certain arguable social costs illegitimate for allocative efficiency consideration. For example, low-income housing may well externalize more costs onto a community than high-income housing because low-income residents may require more local social services.[115] Yet, while

112. *See infra* notes 123-37 and accompanying text.

113. In making this allocative efficiency assessment, localities also should credit the new development for "taxes and other nonimpact fee payments that the ... development may make over time and that would pay for the same facilities financed from fees." Mark P. Barnebey et al., *Paying for Growth: Community Approaches to Development Impact Fees*, *in* DEVELOPMENT IMPACT FEES, *supra* note 30, at 37, 50.

114. For discussions of aesthetic and historic preservation zoning, see Mark Bobrowski, *Scenic Landscape Protection Under the Police Power*, 22 B.C. ENVTL. AFF. L. REV. 697 (1995); John J. Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355 (1982).

115. Similarly, housing for large families may generate more social costs than housing for small families or single people because large families place greater strains on educational resources. *See* Robert A. Blewett & Arthur C. Nelson, *A Public Choice and Efficiency Argument for Development Impact Fees*, *in* DEVELOPMENT IMPACT FEES, *supra* note 30, at 281, 283-84 (noting that households with children create greater local

a considerable degree of exclusionary zoning is in fact tolerated by courts,[116] there are constitutional and, in some jurisdictions, statutory limits on such zoning.[117]

Even when no question exists as to the legitimacy of a locality's concerns about the social costs of a particular project, difficulties may arise in measuring those costs. Consider, for example, a Wal-Mart proposed for construction on a large piece of open land. The Wal-Mart presumably will impose certain costs on the community, including increased noise and congestion from customers and the loss of open space that may have provided the community with visual and environmental benefits. On the other hand, the Wal-Mart also will create positive externalities in the form of providing jobs for local youth and retail services that otherwise might have been inaccessible to many in the community.[118] None of these costs or benefits has an obvious market or dollar value; a five percent increase in traffic congestion conceivably could be valued as a $10,000 or a $100,000 equivalent in lost welfare. The loss of open space similarly could be assigned a range of values.[119] Yet to meaningfully assess the net social

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financial burdens for localities, but "social equities" preclude differential taxation on that basis).

The low-income housing example also highlights how the geographic *distribution* of social costs and benefits complicates assessments of allocative efficiency. The construction of low-income housing in one community and the burdening of that community with localized costs may mean that similar housing will not be built in another community and that the second community will be spared the localized social costs of such a project. In this sense, the construction of the low-income housing in the first community creates both costs and benefits, yet the costs are borne solely by the first community and the benefits solely by the second community. In the absence of some mechanism to require the second community to compensate the first community, the first community quite understandably may wish to regulate low-income housing as if it produces only social costs. From a larger societal perspective, this may mean that the first community will try to over-regulate new low-income housing.

116. For example, courts routinely uphold minimum lot-size requirements that limit the availability of low and moderate income housing. *See, e.g.*, Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956, 963 (1st Cir. 1972) (upholding minimum lot-size zoning); Napro Co. v. Town of Cherry Hills Village, 504 P.2d 344, 348 (Colo. 1972) (same).

117. For discussions of constitutional and statutory limitations on exclusionary zoning by localities, see Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.-C.L. L. REV. 623 *passim* (1987) (discussing statutory limitations on zoning laws in order to promote affordable low-income housing); Paul K. Stockman, Note, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535, 547-59 (1992) (discussing statutory limitations).

118. For a report of the kind of heated political debate that arises when Wal-Mart proposes the construction of a new store, see T.J. Quinn, *Debate Brews As Centerville Expands Development*, SALT LAKE TRIB., Nov. 25, 1994, at B1.

119. For discussions of the intractable problem of reducing environmental costs and benefits to monetary terms, see David A. Dana, *Setting Environmental Priorities: The*

costs or benefits of the proposed Wal-Mart, the locality, in theory, must reduce each of the externalized costs and benefits to a common metric, presumably dollars. Having done that much, if the community wants to condition the grant of development permission on the developer's commitment to, for example, provide in-kind services such as road construction, then the cost of that condition to the developer must be assessed and compared to the anticipated net social costs of the project.

Often, these estimates and comparisons will entail mere "guesstimates" regarding the impact of development projects.[120] A standard explanation for the imposition of inefficiently lax development conditions is that sophisticated developers sometimes mislead unsophisticated local officials into holding the developers responsible for lesser adverse community impacts than in fact will occur.[121] Conversely, one explanation for "excessive" development conditions is that sophisticated regulators sometimes mislead unsophisticated developers into conceding responsibility for greater adverse community impacts than in fact will occur.[122] To the extent that under-regulation or over-regulation of new development reflects differences in the sophistication of developers and local officials, the litigation process and judicial review may not improve matters; those same differences may be reproduced in the quality, and hence persuasiveness, of the litigants' submissions to the court. The courts, moreover, arguably

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Promise of a Bureaucratic Solution, 74 B.U. L. REV. 365, 381-85 (1994) (reviewing STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993)); Daniel A. Farber, *Environmentalism, Economics, and the Public Interest*, 41 STAN. L. REV. 1021, 1024-28 (1989) (reviewing MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT (1988)); *cf.* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 795-808 (1994) (discussing definitions of incommensurability).

120. As Justice Stevens explained in his dissent in *Dolan*, "[i]n our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms." *Dolan v. City of Tigard*, 512 U.S. 374, 411 (1994) (Stevens, J., dissenting); *see also* Robert H. Freilich & Terry D. Morgan, *Municipal Strategies for Imposing Valid Development Exactions: Responding to* Nollan, *in* EXACTIONS, IMPACT FEES, AND DEDICATIONS, *supra* note 34, at 21, 29 (noting the difficulty of quantifying the impacts of new development).

121. *See* ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 23, at 58 ("Developers ... are often more adept negotiators than local officials, particularly the officials of small and medium-sized jurisdictions."); WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS 188-89 (1985) (discussing the bargaining advantages of developers in negotiations with local regulators).

122. *See* SNYDER & STEGMAN, *supra* note 26, at 78 (noting that "many smaller developers ... often depend upon the city to tell them what infrastructure they must provide to gain local approval of their projects. These inexperienced developers are more likely to make concessions that are not in their best interests ....").

stand at greater remove from the community than local officials or regulators and hence may be less well-equipped to understand, for example, the magnitude of the loss in community welfare that would result from an increase in traffic congestion.

B. Political Distortions as a Justification for Judicial Review

Even if local officials are better equipped than judges to assess allocative efficiency, they might not have the same incentive to do so in a forthright manner. Where local politics are majoritarian, that is, dominated by the numerical majority of citizens, local politicians may seek to over-regulate new development. That is so because such over-regulation may benefit the dominant political majority even though it does not maximize the welfare of the community as a whole. The bias toward over-regulation in local majoritarian politics might justify judicial policing of "excessive" development conditions notwithstanding the competency limitations of judges.[123]

The "players" in the majoritarian account of over-regulation are "ordinary" landowners who own undeveloped parcels and hope to sell to developers in the near term, developers who already have bought undeveloped parcels in the locality, future residents of the community, and a politically dominant majority of current residents. Landowners who wish to sell to developers in the near term will oppose development restrictions on their parcels because the restrictions will lower the market price of the parcels. Similarly, developers who hold land obviously have an interest in persuading local officials to allow as unconstrained development as possible. This is true whether or not the developers bought their land with the expectation that land development would be stringently regulated.[124]

Where the cost of over-regulation will be borne in part by future purchasers of developed units in the form of higher purchase prices, these future purchasers also have an interest in combating over-

123. For analyses suggesting that majoritarian politics justify compensation requirements, see WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 204-07 (1995); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 405-07 (1977).

124. If a developer buys a parcel at a relatively high price and the applicable zoning is then made more restrictive, she might lose money on her investment; this contingency obviously is one the developer will work very hard to prevent. But even if the developer purchased the parcel at a relatively low price with the expectation that only modest development probably would be permitted, she still might decide to work to obtain permission for intensive development. That permission then might result in greater profits—windfall profits—than she (and the market) had assumed were likely when she acquired title.

regulation. Almost by definition, however, future purchasers will constitute an inchoate and hence wholly ineffectual "group" until it is too late—that is, until new development subject to excessive regulatory constraints has been completed.[125] The sole voice against overregulation of a given parcel, therefore, may be that of the landowner hoping to sell or, if that sale already has occurred, the developer.[126]

This voice, however, may be overwhelmed by the locality's political majority. Even when a new development project would create no net negative externalities, a dominant local majority might seek to prohibit it. For example, prohibitions on new housing development in a locality restrict the supply of housing units that otherwise would be available in the locality. Simple economic theory predicts that restrictions on the supply of a good such as housing will result in a market increase in the price of the good (assuming unchanged demand). By restricting the total supply of housing, a dominant local majority of homeowners can increase the market value of their homes.[127] Alternatively, a dominant political majority might seek to extract wealth from the new housing development in the form of development conditions. That wealth could benefit the political majority in the form of enhanced public services or infrastructure, such as better roads or new parks, or lower taxes.

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125. This may not be the case, however, if many of the prospective purchasers of new housing units in a locality already live there and are active in local politics. *See* SNYDER & STEGMAN, *supra* note 26, at 34, 97.

126. Even that voice may be muted when the developer anticipates that she will be able to "pass along" the full cost of development conditions to future purchasers of developed units. *See* Timothy Beatley, *Ethical Issues in the Use of Impact Fees to Finance Community Growth*, *in* DEVELOPMENT IMPACT FEES, *supra* note 30, at 339, 350 (explaining that "developers may not be as adamant in their opposition to impact fees if they know that they can pass much of the cost along"). For general analyses of who bears the costs of development exactions, see ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 23, at 97-106; Forrest E. Huffman et al., *Who Bears the Burden of Development Impact Fees?*, 54 J. AM. PLAN. ASS'N 49 (1988).

127. *See* Timothy J. Choppin, *Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs*, 82 GEO. L.J. 2039, 2055 (1994) ("[C]urrent residents suffer few negative consequences from restrictive development policies. In fact, the value of their homes may rise . . . ."); David G. Andersen, Comment, *Urban Blight Meets Municipal Manifest Destiny: Zoning at the Ballot Box, the Regional Welfare, and Transferable Development Rights*, 85 NW. U. L. REV. 519, 549 (1991) (providing an example of a community's use of development prohibitions that resulted in an increase in housing prices). For more theoretical treatments of the connections between growth restrictions and housing prices, see Dean J. Misczynski, *Land-Use Controls and Property Values*, *in* WINDFALLS FOR WIPEOUTS 75 (Donald G. Hagman & Dean J. Misczynski eds., 1978); Michelle J. White, *Fiscal Zoning in Fragmented Metropolitan Areas*, *in* FISCAL ZONING AND LAND USE CONTROLS: THE ECONOMIC ISSUES 31 (Edwin S. Mills & Wallace E. Oates eds., 1975).

If we assume that the political majority rationally maximizes its own welfare, that majority would need to (1) assess how much its members would gain in the market value of their homes if the new housing development were prohibited, and then (2) compare that gain with the maximum gain that could be extracted from the developer by means of development conditions. For example, imagine that the aggregate gain in housing value for current residents would be $200,000 if the new housing development was prohibited. If the developer would proceed with the project despite an impact fee in excess of $200,000, then the dominant political majority would be better off allowing conditional development. If the developer would abandon the project with a required impact fee exceeding $200,000, however, the dominant majority would be better off supporting a development prohibition.[128]

There is no *a priori* reason to think that over-regulation via high development conditions will be any more attractive to oppressive local majorities than over-regulation via development prohibitions. Consequently, it is not clear why courts would choose to scrutinize conditional grants of development permission, while according great deference to flat development prohibitions.[129]

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128. Alternatively, the majority could support an impact fee in excess of $200,000, knowing that such a fee would have the same effect as a prohibition.

129. Moreover, even if development politics generally are dominated by greedy local majorities, and even if those majorities ideally would like to impose excessive development conditions, competition among localities may prevent the imposition of such conditions. As Professor Been has cogently explained, developers can pit localities competing for new development against each other by threatening to shift capital from localities that impose excessive conditions to ones that charge non-excessive or reasonable conditions. *See* Been, *supra* note 20, at 512.

Richard Epstein has questioned the effectiveness of exit as a constraint on majoritarian oppression of developer minorities. In particular, he emphasizes that developers lack an effective exit option once they have invested substantial capital into a particular site in a particular locale. At that point, they may be, in effect, stuck. *See* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 184-85 (1993). However, when a locality takes advantage of "stuck" developers, it presumably sends a negative signal to the development market as a whole. That signal may persuade developers to forego making future investments in the locality. For localities that do wish to maximize new development, taking advantage of stuck developers is a poor long-term strategy.

Some localities, of course, may not want to maximize new development. A locality's practice of insisting upon excessive development conditions may cost the locality some new development opportunities. But in a majoritarian political milieu, that outcome may be unproblematic or even affirmatively desirable. As discussed above, a local majority may reap benefits from restrictions on the growth of the total supply of developed parcels. *See* Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831, 834-35 (1992) (arguing that municipalities often do not compete for new residents).

Moreover, under certain market conditions, a locality may not lose much new devel-

In any event, it is unclear that majoritarian dominance is the only, or even principal, dynamic in local land use politics. In sharp contrast to the majoritarian story about development politics, there is a competing story about political corruption resulting in under-regulation of new development. The under-regulation account has comparable intuitive plausibility and possibly as much anecdotal support.[130]

In this account, a small minority of developers and their allies capture the local political process by virtue of their monetary resources and high degree of political organization. This story might be called a "public choice" story because a basic insight of public choice theory is that small groups with large individual member stakes in the outcome of a dispute enjoy organizational advantages over large groups—indeed, political majorities—with equal or larger aggregate stakes, but much smaller individual member stakes.[131] For one thing, large groups are simply more costly to organize than small groups: It is cheaper and easier to arrange communications and meetings among a coalition of four or five prominent developers than among a coalition of, for example, 30,000 homeowners.[132] Moreover, where

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opment as a result of imposing excessive development conditions: When developers perceive the opportunities in a locality as unique or non-fungible (as for example, where the locality is the established commercial center in a metropolitan area), developers may tolerate excessive conditions rather than transfer their capital to another locality that promises not to impose excessive conditions. *See* EPSTEIN, *supra*, at 184-86; Sterk, *supra*, at 858-65.

130. In Ellickson's terminology, the counterpoint to the majoritarian model is the "[d]eveloper influence" model of local politics. Ellickson, *supra* note 123, at 407-08. For anecdotal accounts that suggest the considerable power developers exercise in local politics by legal and not-so-legal means, see Gregg Herrington, *Commissioner Mel Gordon Nutley He's Not*, COLUMBIAN, Oct. 1, 1995, at A1; John King, *Growth Opponents Speak Up at the Polls*, S.F. CHRON., Jan. 7, 1993, at A19; Susan Kuczka, *Land Locks County into Election Battle*, CHI. TRIB. (Lake ed.), Jan. 19, 1996, at 1; Carol Lewis, *Annexation, Gas Station Gets OK*, FORT LAUDERDALE SUN-SENTINEL, Nov. 21, 1995, at 8B; Jim Newton & Rose Ellen O'Connor, *Mission Viejo Co. Plays Politics with Vengeance*, L.A. TIMES (Orange County ed.), Aug. 19, 1990, at A1; Susan Schmidt, *Developer Kenneth Michael: A Mix of Politics and Business in Prince George's County*, WASH. POST, Aug. 20, 1989, at D1; Genelle Treaster, *Supervisors Favor Wilton Housing Project*, SACRAMENTO BEE, Feb. 25, 1996, at N1; *Victory for Public, Environment*, L.A. TIMES (Orange County ed.), May 28, 1989, at Metro 10.

131. *See* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 286-87 (1988).

132. *See* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 48 (rev. ed. 1971) ("[T]he larger the number of members in the group the greater the organization costs, and thus the higher the hurdle that must be jumped before any of the collective good at all can be obtained."). For analyses of the disadvantages of small groups and individuals in the political process, see Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 132-36 (1992); William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient*

the members of a large group have relatively small individual stakes in the outcome of the dispute, they may be particularly tempted to "free ride"—to rely on the other members of the large group to provide the money, time, and energy necessary to influence the outcome of the dispute.[133]

In the development regulation context, developers often have large individual stakes in ensuring that as much new development as possible will be permitted. While landowning majorities may have an interest in opposing new development or imposing excessive development conditions on developers, that interest may not be large on a per individual basis for any significant number of citizens. Accordingly, there may be no critical mass of citizens willing to make an issue of development regulation in local elections or to appear at public hearings regarding specific development projects. Nor may diffuse political majorities have the cohesion to raise the money necessary to influence local officials where legal or illegal campaign contributions or gifts are an essential part of the political regime. There are documented accounts of developers bribing local officials,[134] but apparently no such accounts exist of bribery by the opponents of new development.

This analysis suggests that the more majoritarian a community's politics are, the more we should be concerned about over-regulation of development. To the extent that small locality politics tend to be more majoritarian than large locality or state politics, over-regulation is a greater concern in small localities.[135] Theoretical constructs aside, however, there seems to be a slim empirical basis for concluding that small locality politics are generally rife with majoritarian abuse of power.[136] Moreover, even if small localities generally are subject to

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Regulation a Taking of Property?, 67 CHI.-KENT L. REV. 865, 892-94 (1991); Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1355 (1991).

133. DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 23 (1991) (explaining that where "any single person's efforts . . . can have only an infinitesimal effect[,] . . . a rational person will try to 'free ride' on the efforts of others").

134. On bribery in development politics, see Donald G. Hagman, *Windfalls for Wipeouts*, *in* WINDFALLS FOR WIPEOUTS, *supra* note 127, at 20, 22.

135. *See* FISCHEL, *supra* note 123, at 334 (concluding that "judicial discipline is more necessary in the smaller than in the larger units" of government); Ellickson, *supra* note 123, at 409 ("The [developer] influence model best fits central cities, and the majoritarian model, elite suburbs.").

136. *See* Vicki Been, *The Perils of Paradoxes—Comment on William A. Fischel, "Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?"* 67 CHI.-KENT L. REV. 913, 920 (1991) (stating that "there is enormous room for debate about whether all or even most local governments fit [the majoritarian] model"); Deakin, *supra* note 33, at 106 (noting that "many elected officials, particularly in the sub-

majoritarian domination, that does not mean that developers necessarily lack effective recourse within the democratic political process. Developers quite often have been successful in countering local regulatory "abuses" by enlisting state legislatures to act on their behalf.[137]

III. THE SUBSTANCE OF NEXUS/ROUGH PROPORTIONALITY REVIEW: SACRIFICING ALLOCATIVE EFFICIENCY TO ADVANCE A NARROW CONCEPTION OF EXPENDITURE EFFICIENCY

Even if we assume that the risk of majoritarian oppression justifies judicial policing of development conditions, the question remains whether the Supreme Court's nexus/rough proportionality standard is a suitable vehicle for such policing. This Part argues that nexus/rough proportionality review may be undesirable because it may lead courts to invalidate allocatively efficient development conditions.

As discussed above, a development condition ensures allocative efficiency in a land market if it imposes costs on the developer that are equivalent to the net costs that the development project externalizes onto the community at large. For example, an impact fee is allocatively efficient if it imposes a $100,000 cost on the developer of a project that creates net social costs with a money equivalent of $100,000. From the perspective of allocative efficiency, the important consideration is the amount of the fee or fee equivalent imposed on the development, not the manner in which the fee or fee equivalent is spent.[138]

A development condition, however, can be conceptualized as

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urbs, are involved in real estate or associated professions" and need to "[m]aintain[] good relations with the development community"); Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1131-32 (1996) (reviewing FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995)) (criticizing the majoritarian model of local politics as an example of "localism bashing").

137. *See* ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 23, at 53 ("In general it is developers who have taken the lead in pursuing legislation—primarily to secure state protection against new local practices that they find threatening."); Jane H. Lillydahl et al., *The Need for a Standard State Impact Fee Enabling Act*, 54 J. AM. PLAN. ASS'N 7, 9, 12 (1988) (describing developers' success in securing state legislative protection against local fee practices); Note, *Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992, 1010 (1989) (explaining that "land development interests that have little influence with particular localities still wield formidable political power at the state level").

138. The imposition of the $100,000 development condition ensures that the developer will proceed with the project only if her expected profits exceed the $100,000 social cost of development. The $100,000 condition will achieve that efficiency-enhancing result regardless of the use to which the locality puts any money it collects from the developer.

something other than a means of forcing development to internalize net social costs. Most notably for our purposes, development conditions often are conceived as a source of financing for direct government expenditures or government-mandated private expenditures aimed at the correction or mitigation of some societal problem.[139] From this perspective, the effectiveness or efficiency of a given development condition would be measured by the amount of social cost reduction or social need satisfaction achieved per dollar or dollar equivalent of expenditure. The greater the ratio of social cost reduction to dollar of expenditure, the greater is what this Article will call the "expenditure efficiency" of the development condition. This expenditure efficiency inquiry is not concerned with whether the cost imposed upon new development equals the externalized net social cost of new development.

Both the nexus and rough proportionality tests are concerned with expenditure efficiency, rather than allocative efficiency.[140] The nexus test asks whether the costs borne by a developer as a result of a development condition will mitigate any of the specific social costs caused by the development. The rough proportionality test asks whether the amount of mitigation achieved by a development condition is sufficiently great to justify the developer's expenditure; that is, is the return on the expenditure (measured by social cost reduction) sufficiently large to pass a constitutional threshold for expenditure efficiency? Neither test compares the magnitude of social costs created by a development project with the magnitude of the developer's costs in meeting development conditions.[141]

In most contexts, the allocative efficiency inquiry and the expenditure efficiency inquiry are temporally separated, so there are no obvious tensions between the two inquiries. For example, consider the case of a plant that spews fumes into the air. Assume that the pollution caused by the plant has a social cost equivalent of $3000 per day, and that a daily pollution tax is imposed on the plant. The tax

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139. *See, e.g.*, ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 23, at 7 (describing "exactions [as] at once instruments for shaping the physical environment [and] for generating public revenue").

140. For a reading of *Dolan* that similarly interprets the rough proportionality test as entailing a comparison between "the reduction in external costs of the development flowing from the exaction and the opportunity costs of the proposed exaction," see Merrill, *supra* note 5, at 885.

141. The *Dolan* Court, for example, did not compare or suggest that the City of Tigard should have compared the social costs of the several hundred car trips that the hardware store expansion would generate with the cost to Florence Dolan of the greenway and bicycle path conditions. *See Dolan*, 512 U.S. at 395-96.

money is paid into the general United States Treasury, which finances the operation of the government, including programs ranging from public safety to Medicare.

In this context, the allocative efficiency inquiry would focus on whether the pollution tax equaled the $3000 per day social cost of the plant's pollution. The efficiency expenditure inquiry would have nothing to do with the magnitude of that tax per se, but rather would focus on the social gain achieved by the marginal increase in expenditure of United States Treasury funds made possible by the collection of the pollution tax. The relevant question would be, for example, whether the United States' expenditure of an additional $3000 on a community policing grant would generate the equivalent of a $3000 reduction in social costs from crime.

Because development conditions serve as both a means of forcing development to internalize social costs and a means of financing government or government-mandated expenditures for the reduction or elimination of social costs, development conditions expose the potential tension between efforts to achieve allocative efficiency and efforts to achieve expenditure efficiency. A development condition might meet the criteria for allocative efficiency but fail to meet the criteria for expenditure efficiency embodied in the nexus/rough proportionality tests. Nexus/rough proportionality review, therefore, might lead courts to invalidate some allocatively efficient conditions. As a result, such review might lessen allocative efficiency in land development markets.

A. Traffic Congestion Hypothetical

In the following discussion, a simple hypothetical example illustrates the possible tensions between allocative efficiency and expenditure efficiency in the development conditions context. The hypothetical involves a proposed subdivision development. Three scenarios are considered in turn: the scenario in which the subdivision development will generate no negative externalities, the scenario in which the development will generate no *net* negative externalities, and the scenario in which the development will generate net negative externalities.

1. Development Generating No Negative Externalities

In the case of a subdivision development that generates no negative externalities, any development condition would be allocatively inefficient. Local regulators would not be able to establish that a development condition would reduce the social costs created by such a

development because the development would create no costs. Accordingly, any development condition would fail the nexus test and be invalidated. Thus, where a new development would generate no negative externalities, nexus/rough proportionality review reaches the same results as—and is a very good proxy for—direct allocative efficiency review.

2. Development Generating No Net Negative Externalities

Now imagine that the subdivision development would generate negative externalities, but those negative externalities would be outweighed by positive externalities. Again, any development condition would be allocatively inefficient. Nexus/rough proportionality review, however, would not necessarily result in the invalidation of a development condition in this context. If the locality's development condition would reduce the subdivision's anticipated negative externalities only at relatively high cost to the developer, a court might strike down the condition as disproportionate on, in essence, expenditure efficiency grounds. But if the condition would reduce negative externalities at relatively low cost to the developer, a court might well uphold the condition as proportionate. Nothing in the *Nollan* or *Dolan* majority opinions (or the subsequent state court case law) indicates that a court may or should consider the anticipated positive externalities of a development project in determining "proportionality" under the nexus/rough proportionality standard.[142] With respect to development that generates negative externalities, but even greater positive externalities, nexus/rough proportionality review thus has limited appeal. Such review would not result in the invalidation of any allocatively *efficient* conditions. On the other hand, it would not consistently result in the invalidation of allocatively *inefficient* conditions.

3. Development Generating Net Negative Externalities

Where the subdivision development would generate net negative externalities for the regulating community, nexus/rough proportionality review might result in the invalidation of allocative efficiency development conditions. Imagine, for example, that the proposed new development borders an already-crowded road. The new devel-

142. *But see* Douglas T. Kendall & James E. Ryan, *"Paying" for the Change: Using Eminent Domain to Secure Exactions and Sidestep* Nollan *and* Dolan, 81 VA. L. REV. 1801, 1815 (1995) ("A reasonable argument could be made that courts, in applying this test, can and should consider any offsetting benefits a community will receive from development when determining its impact.").

opment would generate even more traffic congestion, which in turn will diminish the quality of life in the community. The social cost of congestion, of course, has no readily ascertainable dollar value, but (as discussed above) if the dollar costs borne by developers are to be compared with the social costs of congestion, both costs clearly must be reduced to a common metric. Let us assume, therefore, that one additional car added to rush-hour traffic each day over the next five years has a present value of negative $1000. Also assume that the development project in question would add 100 cars to each rush hour over the next five years, so that the congestion cost of the new project to society is, in money terms, negative $100,000.[143] Assume also that the development would generate no positive externalities, so that the anticipated net social cost of the development is $100,000.

Now imagine the municipality proposes, as a condition for granting the subdivision developer the necessary permissions, that the developer finance a commuter bus route from the subdivision to a commuter rail station. Municipal officials believe that the new bus line might entice some residents of the new subdivision not to commute to work by car. The municipality's best estimate is that the new bus would reduce the number of new cars on the road added by the development from 100 per day to 60 per day over the next five years. The cost of financing the new bus would be $60,000.

Under *Dolan* rough proportionality review, the commuter bus condition might well be deemed unconstitutional even though it is allocatively efficient. Figure One shows why this is so. Column II represents the externalized social costs of congestion created by the project. Column III represents the marginal reduction in externalized congestion costs between the unconditional development scenario and the bus condition development scenario. Column IV represents the regulatory costs imposed by the town on the developer. Column V represents the marginal increase in regulatory costs for the developer between the unconditional development scenario and the bus condition development scenario.

143. This arguably is a low estimate. Traffic congestion is perhaps the most important issue in local political debates regarding growth. *See* Robert H. Freilich & S. Mark White, *Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America's Major Quality of Life Crisis*, 24 LOY. L.A. L. REV. 915, 917-18 (1991) ("In many rapidly growing areas, citizens perceive traffic congestion as the greatest public problem, outdistancing crime, the economy and housing shortages .... Traffic congestion now constitutes a predominant motivating factor behind recent growth control movements in rapidly growing states such as California, Florida and New Jersey.").

Figure One

I	II	III	IV	V
Development Scenario	Externalized Social Costs	Marginal Decrease in Externalized Social Costs	Developer's Regulatory Costs	Marginal Increase in Developer's Regulatory Costs
Unconditional Development	100,000	---	-0-	---
Conditional Development	60,000	40,000	60,000	60,000

An allocative efficiency inquiry focuses on the comparison between columns II and IV: When the figures in those two columns are identical, the regulatory system is properly requiring full cost internalization by developers. In this hypothetical, the $60,000 bus condition is equal to—and hence effects a full internalization of—the $60,000 in externalized congestion costs the project will create when it is built along with the establishment of a new commuter bus.

By contrast, the nexus/rough proportionality inquiry focuses on the comparison between columns III and V: The greater the ratio of marginal social cost reduction to marginal increase in developer cost, the more likely a court would be to deem a condition roughly proportionate. Here, only a $40,000 marginal reduction in congestion costs results from a $60,000 marginal increase in developer expenditure. A court following *Nollan* and *Dolan* could rule that a $40,000/$60,000 or 2/3 mitigation ratio is too low to pass muster under the nexus/rough proportionality criteria for expenditure efficiency.

According to proponents of unconstitutional conditions scrutiny in land use, judicial invalidation of conditions such as the $60,000 bus condition will prompt governments to select less burdensome conditions or simply allow unconditional development.[144] If the government in this hypothetical responds to the striking down of the $60,000 condition by selecting unconditional development, allocative efficiency clearly is not served; under that scenario, the developer will not be required to internalize any of the $100,000 in congestion costs that the subdivision project would create.

The locality, of course, could opt for a condition that will cost the developer less than the $60,000 bus condition. For example, the

144. *See, e.g.*, Epstein, *supra* note 5, at 63 (concluding that heightened judicial review of development conditions will lead governments to ease regulatory burdens on development).

locality could devise a plan where the developer would be required to expend only $40,000. However, if the ratio of social cost reduction to developer expenditure continues to be 2/3, then the $40,000 developer investment will reduce congestion costs by only $27,000 (from $100,000 to $73,000), and the developer will fail to internalize $33,000 in congestion costs attributable to its development. Moreover, even the $40,000 condition could be struck down under rough proportionality review because the ratio of social cost reduction to developer expenditure still would be low.

If the locality could devise a way to raise that ratio to 1/1, a $40,000 condition presumably would be upheld, but in that case, there still would be $60,000 in congestion costs produced by the development and $20,000 under-internalization of congestion costs by the developer. The only way that the locality surely could pass muster under nexus/rough proportionality review and ensure allocative efficiency with a $40,000 condition is if it devised a remarkably effective new mitigation plan—a plan so effective that the $40,000 expenditure would reduce congestion costs by $60,000 (from $100,000 to $40,000). In that case, there would be a 3/2 ratio ($60,000/$40,000) of marginal social cost reduction to marginal increase in developer's regulatory cost, and an equivalence between the externalized social costs of the project ($40,000) and the developer's regulatory cost ($40,000).

Figure Two illustrates the relevant variables with a $40,000 bus condition under varying assumptions of expenditure efficiency:

Figure Two

I	II	III	IV	V	VI
Development Scenario	Expenditure Efficiency Ratio	Externalized Social Costs	Marginal Decrease in Externalized Social Costs	Developer's Regulatory Costs	Marginal Increase in Developer's Regulatory Costs
Unconditional Development	---	100,000	---	-0-	---
Conditional Development	2/3	73,000	27,000	40,000	40,000
Unconditional Development	---	100,000	---	-0-	---
Conditional Development	1/1	60,000	40,000	40,000	40,000
Unconditional Development	---	100,000	---	-0-	---
Conditional Development	3/2	40,000	60,000	40,000	40,000

B. The Slothful Regulators Objection

One potential objection to the preceding analysis is that judicial rejection of the original $60,000 bus line condition makes some sense because it provides the locality with an incentive to devise a development condition that yields more benefits than costs.[145] According to this objection, regulators could make development pay for its externalized social costs *and* utilize those payments in a manner that maximizes societal return if only they invested the effort.[146]

145. A number of commentators argue that, in the absence of a constitutional bar against uncompensated government regulation, politicians sometimes will succumb to the "fiscal illusion" that regulatory interventions in the private marketplace are costless. Accordingly, they sometimes will institute regulatory measures whose actual costs exceed their benefits—measures that are, in this Article's terminology, "expenditure inefficient." *See, e.g.*, Blume & Rubinfeld, *supra* note 108, at 621 ("Fiscal illusion arises because the costs of governmental actions are generally discounted by the decisionmaking body unless they explicitly appear as a budgetary expense. Compensation removes fiscal illusion ...."); Merrill, *supra* note 5, at 883 ("Without the compensation requirement, the government would acquire inefficiently large stockpiles of ... resources that could be put to better use in other applications.").

146. Another possible objection is that localities need not use development conditions at all in order to achieve full social cost internalization. Most notably, user fees can achieve the same purpose as development conditions without the same constitutional obstacles and arguably with greater efficiency. *See* ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 23, at 137 (stating that "virtually all economists agree ... that governments should rely more heavily on use efficient charges"). For example, in response to the traffic congestion engendered by new development, a locality could require commuters on

However, the nexus/rough proportionality criteria might leave even the best-intentioned, most hard-working, and sensible local government officials unable to utilize development conditions that would achieve the goal of full cost internalization by new development. First, it is important to grasp the narrowness of the nexus/rough proportionality test's conception of expenditure efficiency. Imagine, for example, that in the case of the $60,000 bus line, the bus line also would attract some long-time residents who previously drove to work and thus contributed to congestion. Consequently, the bus line would reduce $40,000 worth of congestion attributable to the new development and $40,000 of congestion that existed prior to—and thus is not attributable to—the new development. Under these assumptions, the bus line would seem to be a highly cost-effective expenditure; the return on a $60,000 expenditure would be a total of $80,000 in social cost reduction.

Under nexus/rough proportionality review, however, the bus condition still would be unacceptable; indeed, it would be unacceptable even if the bus line would reduce $100,000 in congestion that existed prior to, and hence was not attributable to, the new subdivision. According to the clear reasoning of *Nollan* and *Dolan*, the only social costs that can figure in nexus/rough proportionality evaluations are costs the new development project itself would create.[147]

Second, some development projects may create real external social costs that simply cannot be mitigated by development conditions, at least not in the specific, direct way demanded by the nexus/rough proportionality tests. Consider, for example, a development project

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crowded roads to pay tolls that force them to internalize the social costs of their daily commuting. However, as a practical matter, tolls may be technically or economically infeasible on smaller roads. *See id.* at 117-20 (describing the practical challenges to user fees). They also may be politically impossible. *See id.* at 137 ("Politicians are highly skittish about [user charges] ... because they doubt their ability to persuade ordinary voters and media commentators that such charges are equitable.").

In theory, localities also could use their taxing power to force new development to internalize its net social costs. For example, a locality could establish a higher property tax rate for any new development that is expected to generate unusually great social costs; such taxes might pass federal constitutional muster under rational basis review. *See* Nordlinger v. Hahn, 505 U.S. 1, 11-17 (1992) (applying the rational basis standard to an equal protection challenge to California's acquisition price formula for assessing property taxes). State constitutional and statutory law, however, severely limit localities' flexibility in imposing property taxes. *See, e.g.*, CLAYTON P. GILLETTE, LOCAL GOVERNMENT LAW 511-93 (1994) (exploring state law limitations on local taxation).

147. *See, e.g.*, 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, 893 (1995) (explaining that a central inquiry in *Dolan* "involves causation: does the exaction relate to the harm 'caused' by the new development?").

that involves the building of a structure which is much taller than other structures in a commercial area; the structure would make the street less sunny and airy than it currently is, and would compromise some of the aesthetic appeal of the commercial area. Under accepted zoning and constitutional law, a community almost certainly could prohibit the structure based on scale or even direct aesthetic grounds.[148] If the locality allows the building to be constructed, it will incur some social costs as a result of the scale of the building. Yet no development conditions may exist that can mitigate scale effects: If sunlight is blocked, it is blocked, period.[149] Under a regime without unconstitutional conditions review, the locality could allow the building but place conditions on the development permission that compensate the locality for the social cost of lost sunlight and aesthetic appeal, thereby satisfying the goal of full social cost internalization by new development. Under the *Nollan* nexus test, however, the locality cannot impose any conditions on its development permission because there simply are no conditions that mitigate the specific social costs of the project.

The *Nollan* case itself arguably involved such an impossible-to-mitigate social cost. As discussed above, the California Coastal Commission was concerned that construction of large beachfront houses (such as the one the Nollans built) would create a physical environment that suggested to potential beach visitors that the beach was essentially off-limits or private.[150] The *Nollan* Court suggested that the Coastal Commission could have placed conditions on the permit that actually would mitigate the "psychological barrier" cost entailed in having a string of large houses along a beachfront.[151] Yet it is not at all clear that such a psychological barrier cost could be mitigated. If people driving by a beach see a series of large homes with hardly any area of beach visible, they are likely to move on to find another area that seems more genuinely open to the public, even

148. *See generally* Samuel Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. REV. 125, 127 (1980) (surveying judicial attitudes toward aesthetic zoning).

149. Similarly, it may be impossible to mitigate the adverse impacts of increased noise from new development. *See, e.g.*, Steven N. Brautigam, *Rethinking the Regulation of Car Horn and Car Alarm Noise: An Incentive-Based Proposal to Help Restore Civility to Cities*, 19 COLUM. J. ENVTL. L. 391, 400 (1994) (discussing severe effects of noise pollution and difficulties of mitigating those effects); Tom Neuhoff, Jr., *Obstacles to Increasing Airspace: Jumping Through Environmental Law Hoops*, 58 J. AIR L. & COM. 221, 252 (1992) (noting limits in our capacity to mitigate noise).

150. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 838 (1987) (noting that the Commission regarded the house as a "psychological barrier" to access).

151. *Id.*

if there are "viewing spots" tucked between the houses.[152] Under a nexus/rough proportionality regime, the Coastal Commission does not really have the option of imposing development conditions that will achieve social cost internalization, because no conditions exist that would reduce the particular social costs created by new building.

Third, even when mitigation is possible, it may be unavoidably expensive and thus might be rejected by a court as disproportionately burdensome under *Dolan*'s rough proportionality test. Sometimes the only means of mitigation available to a locality imposes very large financial burdens on the developer for seemingly small, and perhaps uncertain, mitigation results. For example, imagine that a community waives a wetlands preservation requirement to allow the filling of wetlands because the filling is necessary for the completion of a shopping mall project. The wetlands serve certain ecological and health functions,[153] and their destruction might well be regarded as a real social cost. The community could require the developer to mitigate the wetlands loss by creating wetlands elsewhere, but such mitigation efforts are extremely expensive and are unlikely to recreate the ecological and other functions served by natural wetlands.[154]

The same limited mitigation options may confront a community dealing with traffic congestion. A commuter bus line may cost a great deal and reduce congestion only modestly, but it may be the best option available. Ecological, technological, and legal constraints often make the mitigation of traffic congestion extremely problem-

152. *Id.* at 836 (suggesting that the Court would have upheld a condition that "consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere").

153. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 965-66 (1992) (outlining the values of wetlands).

154. *See, e.g.*, David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 HARV. ENVTL. L. REV. 303, 369 (1995) ("[W]etlands restoration and creation as compensation for further destruction of wetland values is riddled with problems."); Mark C. Rouvalis, *Restoration of Wetlands Under Section 404 of the Clean Water Act: An Analytical Synthesis of Statutory and Case Law Principles*, 15 B.C. ENVTL. AFF. L. REV. 295, 319 (1988) ("The restoration process may take twenty to thirty years before the damaged wetland will closely approximate its formerly undisturbed state. Even such a lengthy period does not ensure that the wetlands' former plant and animal life will recover fully . . . ." (footnote omitted)); *Energy and Natural Resources—Wetlands: Restoration Difficult, Maine Officials Find*, GREENWIRE, Nov. 30, 1993, *available in* WL at 11/30/93 APN-GR 12 (discussing "how hard it can be to replace natural wetlands that are sacrificed to development"); *Past Time to Curtail the Loss of Wetlands: Mitigation Projects Are No Substitute for the Real Thing*, L.A. TIMES (Orange County ed.), Aug. 9, 1992, at B10; William K. Stevens, *Restoring Lost Wetland: It's Possible But Not Easy*, N.Y. TIMES, Oct. 29, 1991, at C1 (noting that "according to proliferating studies . . . [restoration] efforts are ending in failure").

atic.[155] Indeed, in *Dolan*, although the City of Tigard's use of bicycle and pedestrian paths as a means of mitigating traffic congestion might have been somewhat burdensome to developers and only modestly effective at reducing congestion from new development,[156] it nonetheless might have been the city's best mitigation alternative. The city already had a public transportation system, and road-widening might have been very expensive and attracted even more cars,[157] thus causing more pollution problems.[158]

The preceding analysis suggests that nexus/rough proportionality review may yield a lower net level of social welfare than the absence of any review of development conditions. As discussed above, nexus/rough proportionality may produce social welfare losses in the form of lesser allocative efficiency. Such review may even discourage conditions that are highly expenditure efficient, as illustrated by the example of the commuter bus that would eliminate congestion both attributable and not attributable to new development.

At a minimum, nexus/rough proportionality review should not apply when, as was arguably the case in both *Nollan* and *Dolan*, regulators can make a plausible claim that new development will (1) produce real social costs that equal or exceed the developer's

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155. *See, e.g.*, Marilyn Newman, *The "New" Curb-Cut Permits: Highway Access and Environmental Regulation*, BOSTON B.J., Mar.-Apr. 1991, at 25, 27 (noting the "adverse environmental or other impacts" that may result from traffic mitigation efforts); G. Kenneth Orski, *Transportation Management Associations: Bottling Suburban Traffic Congestion*, URB. LAND, Dec. 1986, at 2, 3 (noting that "unacceptable levels of disruption" may result from road widening or the construction of new roads and explaining that even "well-conceived and aggressively promoted" traffic control programs may reduce congestion by only "10 to 15 percent").

156. *But see* David Ackerly, Note and Comment, *Exactions for Transportation Corridors After* Dolan v. City of Tigard, 29 LOY. L.A. L. REV. 247, 293 (1995) (arguing that bicycle paths are reasonably effective in curbing congestion).

157. *See, e.g.*, Robert Cervero, *Unlocking Suburban Gridlock*, 52 J. AM. PLAN. ASS'N 389, 400 (1986). Cervero explained:

> [p]erhaps the most serious flaw in all supply-side responses to traffic congestion is that they all too often exacerbate the very problem they attempt to solve. The literature is replete with examples of expanded roadways generating new traffic, which in turn necessitates further expansion, which induces more traffic, and so on and so on.

Id. (citation and footnote omitted); *see also* Shirley S. Gregory, *Driving Time May Double in a Decade*, CHI. TRIB., Jan. 28, 1996, Metro Du Page, at 3 ("[R]oad-building is not always the answer to growing traffic demands . . . because better roads tend to attract more traffic . . . . 'That's always the problem—you build something and everybody comes.' ").

158. *See* F. Kaid Benfield, *Running on Empty: The Case for a Sustainable National Transportation System*, 25 ENVTL. L. 651, 654-57 (1995) (discussing links between traffic congestion and air pollution); Ackerly, *supra* note 156, at 293 (noting that "[b]icycles are the most energy-efficient form of transportation, as well as one of the least polluting").

costs of fulfilling the requested development conditions; *and* (2) the specific and direct sort of mitigation required by nexus/rough proportionality review is either impossible to achieve or impossible to achieve in a cost-effective manner. In such cases, constitutional invalidation of the locality's development conditions on nexus/rough proportionality grounds does nothing to encourage greater expenditure efficiency. At the same time, that invalidation may reduce allocative efficiency by allowing developers to escape responsibility for the externalized social costs of their projects.[159]

IV. ALLOCATIVE EFFICIENCY AND THE CIRCUMVENTION OF NEXUS/ROUGH PROPORTIONALITY REVIEW

Many commentators have suggested that nexus/rough proportionality review has had—or will have—a dramatic effect on the ability of localities to employ development conditions.[160] According to this view, "[t]he obstacles that *Nollan* and *Dolan* place before municipalities are undeniably significant .... Not only will the general prospect of litigation render municipalities more cautious in approaching exactions, the burden-of-proof allocation also will make it easier for landowners to reduce the exaction sought by threatening to sue."[161] The ramifications of *Dolan*, it is argued, are incalculable: "[E]very dissatisfied property owner becomes a potential plaintiff."[162] There will be, in short, "a chilling effect" on land use planning.[163]

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159. Application of this test for development conditions might well require courts to make difficult assessments of, and comparisons among, social costs and benefits. *See supra* notes 113-22 and accompanying text (discussing the difficulties of assessing and comparing social costs and benefits). However, this test would not require courts to make any *more* difficult assessments and comparisons than are required by *Dolan*'s rough proportionality test.

160. *See, e.g.*, Been, *supra* note 20, at 545 (suggesting that *Nollan*'s nexus requirement will chill creative land use regulation); Paul D. Kamenar, *Review of the Supreme Court's 1993-1994 Term: Property Owners Get a Tool*, LEGAL TIMES, July 25, 1994, at S42 (arguing that *Dolan* "will ... have a profound effect on those exaction cases currently in litigation").

161. Kendall & Ryan, *supra* note 142, at 1813-15.

162. Kossow, *supra* note 76, at 239.

163. Kendall & Ryan, *supra* note 142, at 1815. Kendall and Ryan argue that localities could use their eminent domain power to circumvent nexus/rough proportionality review. *See id.* at 1803 ("[W]here the value of a development permit exceeds the value of the land exaction sought by the town, the town should take the land through eminent domain and give the landowner a choice between cash compensation and compensation in the form of a development permit."). Their proposal would allow localities to continue the same practices as before but under a different label (eminent domain, rather than police power). For just this reason, it is unclear whether the courts would uphold the constitutionality of their proposal. *See id.* at 1876 (acknowledging that "[i]t is possible that a court, or the Supreme Court if it came to it, would deem our proposal no more 'than an

There are, however, reports that *Dolan* has had little effect on the frequency or magnitude of the conditions demanded and obtained by local regulators.[164] It is difficult to know how much weight to accord these essentially anecdotal reports. Moreover, even if *Nollan* and *Dolan* have had little effect to date, that may simply reflect their relative newness. Under prevailing federal ripeness doctrine, it is extremely difficult for a landowner to challenge development conditions in federal district court; as a result, state courts occupy the predominant role in giving meaning to federal constitutional rules regarding land use.[165] Many state courts are still "sympathetic" toward land use regulators, and the United States Supreme Court has limited resources with which to police state court misapplications or non-applications of the nexus/rough proportionality tests.[166] Accordingly, some state courts may inject more deference into the nexus/rough proportionality inquiry than would a majority of Supreme Court Justices.[167] Until it is clear that this will not be the case, rational regulators may continue to operate as if their range of

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exercise in cleverness and imagination' " (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987))).

164. *See, e.g.*, FISCHEL, *supra* note 123, at 346 (reporting on *Nollan*'s lack of impact on regulators' demands); Timothy V. Ramis et al., Dolan v. City of Tigard: *First Reaction*, *in* INVERSE CONDEMNATION AND RELATED GOVERNMENT LIABILITY, at 233, 246 (ALI-ABA Course of Study, May 4, 1995), *available in* WL at C997 ALI-ABA 233 (concluding that interviews of local planners "show that the *Dolan* decision is having, at most, modest effects"); Deena Higgs, *Developers Eagerly Await Key State Court Decisions*, L.A. BUS. J., July 25, 1994, § 2, at 14 (reporting the opinion of a local planner that *Dolan* has not had "a big impact" in California).

165. *See* Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91, 92 (1994) ("In effect, the ripeness doctrine excludes land use cases from federal court and requires a property owner to litigate a taking case in state court."); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 17-32 (1995) (discussing federal ripeness requirements for takings challenges to state or local land use regulation).

166. For an interesting model of how resource constraints affect Supreme Court decisions, see McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995).

167. *See* John J. Delaney, *Development Agreements: The Road from Prohibition to "Let's Make A Deal!"*, *in* EXACTIONS, IMPACT FEES, AND DEDICATIONS, *supra* note 34, at 384, 386 (arguing that "not all state courts" are applying the nexus test dictated by *Nollan*); William Funk, *Reading* Dolan v. City of Tigard, 25 ENVTL. L. 127, 140 (1995) ("Given the practical inability of the Supreme Court to ride herd over the various states in their individual applications of the rough proportionality test, state court proclivities rather than the policies of the U.S. Supreme Court are likely to predominate."); Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVTL. L.J. 523, 555 (1995) ("There has certainly been no rush to conservative economic constitutionalism . . . as an outgrowth of the *Nollan*, *Lucas*, and *Dolan* decisions.").

lawful authority had not been constricted.

This Part provides a theoretical basis for challenging the predictions that nexus/rough proportionality review will lead regulators to reduce significantly their development conditions demands. The analysis conceptualizes the development regulation process as involving two distinct types of transactions or games—one-time games and repeat games.[168] In the one-time game context, the prospect of nexus/rough proportionality review sometimes may lead regulators to impose less severe development conditions, or even allow unconditional development in some cases. In that context, however, the prospect of nexus/rough proportionality review sometimes may lead localities to deny development permission altogether, in which case developers actually would be worse off and the resulting inefficiencies in development markets might be even greater.[169]

In the repeat-game context, the prospect of nexus/rough proportionality review may make little difference, because developers will not risk their goodwill with regulators by suing to challenge development conditions that they previously had purported to accept.[170] In the substantial portion of the new development market that already is dominated by ongoing regulator-developer relationships, this analysis suggests that the nexus/rough proportionality review may have a notably modest impact. Moreover, because the prospect of nexus/rough proportionality review decreases the attractiveness for regulators of "making deals" with new or unknown developers, nexus/rough proportionality review may intensify cronyism and insularity in development markets and increase the attendant inefficiencies.

A. Development Conditions in a One-Time Game

As discussed below, many developers specialize in particular localities. In some settings, however, a developer and regulator will interact regarding possible development conditions in a context in which both parties assume they will have no substantial relationship

168. For an excellent introduction to game theory and its applications to legal issues, see DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW (1994).

169. For an analysis also exploring the possibility that judicial scrutiny of development conditions will result in more frequent development prohibitions, see FISCHEL, *supra* note 123, at 346-47.

170. On the importance of reputation in repeat game settings, see ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 220-29, 232-33 (1991); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 138-43 (1992); David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 375, 412-26 (1990).

once the development is completed and no particular reason to care about the long-term impression they make on each other.

At first blush, it would seem that the introduction of nexus/rough proportionality review would have no effect on the pre-construction dynamic between developers and regulators in such one-time transactions. Before a developer receives permission to develop and actually constructs a project, the constitutional standard for development conditions is irrelevant because the developer cannot credibly threaten to sue to challenge the development conditions that the locality seeks to impose. For one thing, litigation takes time, and for most developers, delay is extremely expensive and possibly ruinous.[171] More fundamentally, the threat to sue is not credible because a locality could respond to the threat simply by denying development permission altogether.[172]

Nexus/rough proportionality review becomes significant once construction of a new development has been completed. At that point, the locality's leverage over the developer is severely limited or

171. *See, e.g.*, Michael H. Crew, *Development Agreements After* Nollan v. California Coastal Commission, 483 U.S. 825 (1987), 22 URB. LAW. 23, 52 (1990) (noting that developers " 'willingly' " pay exactions they deem excessive in order to avoid "the expense of litigation and the accompanying project delays"); Keith Kraus, Dolan v. City of Tigard: *Property Owners Win the Battle But May Still Lose the War*, 48 WASH. U.J. URB. & CONTEMP. L. 275, 296 (1995) ("Because of the delays, costs, and risks of judicial appeal, developers may have little choice but to succumb to local governments' demands."); Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 518 (1988) ("The fact that developers are willing to pay suggests the power of the local government's position, not the reasonableness of the exaction."); Brian C. Levey, *Limiting Conditions on Land Use Permits and the Supreme Court's Decision in* Dolan v. Tigard, MASS. LAW. WKLY., Dec. 5, 1994, at S2 (noting that *Dolan* may have limited impact because developers remain "averse to . . . lawsuits").

172. *See Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. App. Ct. 1995) (describing a village government that revoked development permission after the landowner objected to a road dedication requirement in a building permit), *appeal denied*, 667 N.E.2d 1055 (Ill.), *and cert. denied*, 117 S. Ct. 413 (1996).

In his majority opinion in *Nollan*, Justice Scalia suggested that judicial scrutiny of development conditions will lead to less restrictive, but better enforced, land use regulations:

> One would expect that a regime in which . . . leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but non-tradeable) development restrictions.

Nollan, 483 U.S. at 837 n.5. A rational locality, however, might well respond to the advent of nexus/rough proportionality review by making its formal zoning law and procedures even more restrictive. A restrictive zoning code bolsters the credibility of a locality's implicit or explicit threats to developers that, if the developers refuse to comply with development conditions, the locality will deny development permission altogether.

non-existent, again assuming that the developer does not need the regulators' goodwill to successfully pursue future projects. The developer at this point can threaten to sue for restitution of any money spent or property ceded in satisfaction of the development conditions. Such post-construction restitution suits are permissible provided that the development conditions at issue were unconstitutional; the developer's pre-construction assent to unconstitutional conditions does not constitute a waiver of the right to challenge them at a later date.[173]

Assuming that regulators are rational, they will understand that nexus/rough proportionality review means that any pre-construction development condition "deals" may be undone in post-construction restitution litigation. Regulators' response to the risk of restitution litigation will depend on whether they prefer development without the conditions that the nexus/rough proportionality tests render unconstitutional or, alternatively, no development at all. When regulators prefer unconditional development to no development at all, the perceived risk of restitution litigation may lead regulators to allow unconditional development. This may be true even if developers at the pre-construction stage continue to express a willingness to accept some conditions. Because regulators would only have to make restitution after the development was completed, and the process of imposing conditions and then being sued for restitution would consume at least some administrative resources, the regulators might conclude that they are better off not even asking for or accepting any development conditions. By contrast, if the regulators prefer no new development to unconditional development, the introduction of nexus/rough proportionality review might lead them to deny development permission. They may even refuse developers' offers to discuss conditions because, again, they would have no means of assuring themselves that any agreement on development conditions would be honored after construction was completed.

173. There are at least two reported post-*Dolan* cases in which a court has acknowledged a developer's right to challenge a development condition to which the developer had assented before construction of the project in question. *See* Trimen Dev. Co. v. King County, 877 P.2d 187, 190-91 (Wash. 1994); Sarasota County v. Taylor Woodrow Homes Ltd., 652 So. 2d 1247, 1251-52 (Fla. Dist. Ct. App. 1995); *see also* John J. Delaney, *Negotiating Exactions Through Development Agreements: Current Issues*, *in* PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION, at 153, 162-63 (ALI-ABA Course of Study, July 31, 1991), *available in* WL at C629 ALI-ABA 153 (reviewing the relevant case law and concluding that "court[s] refuse[] to require performance by the developer... where enforcement of the development agreement would result in a taking of private property").

Whether regulators will prefer no development or unconditional development, in turn, depends substantially on two factors: (1) whether or not they are responsive to majoritarian pressures to exploit developer minorities; and (2) their assessment of whether the proposed development, in the absence of any "disproportionate" and hence unconstitutional conditions, would generate net positive or net negative externalities for the community. The following hypothetical illustrates the relevance of these factors.

Consider a proposed townhouse development that local regulators believe would generate $200,000 in negative externalities for the community at large. Local regulators suspect that the developer's gain from the project will be $ 1,000,000, but recognize the possibility that the gain actually may be as little as $50,000. From an allocative efficiency perspective, the regulators should approve the project because its anticipated net social value, including the developer's gain and the community's loss, is $800,000. In order to ensure allocative efficiency, however, the regulators also should require a $200,000 payment to the community as compensation for the negative externalities. The $200,000 compensation requirement ensures that the project will proceed only if its expected social benefits exceed its expected social costs. If there is no compensation requirement and the developer knows her gain actually will be only $50,000, the developer will proceed with the project even though the project will result in a $150,000 net *decrease* in social welfare. If the locality imposes a $200,000 compensation requirement, the developer will proceed with the project only if the developer anticipates a gain in excess of $200,000.

Imagine that the local government in question is neither dominated by a greedy majority nor captured by development interests. Instead, it is a well-intentioned government that seeks to make socially-optimal decisions. Prior to the adoption of a nexus/rough proportionality regime, such a government would allow development to proceed subject to a $200,000 development condition. As discussed in Part III, however, nexus/rough proportionality review might allow the developer to recover a $200,000 development fee in a post-construction restitution suit even though the project created $200,000 in negative externalities. If that occurred, the community would be worse off than before. To avoid that unwelcome result, even a well-intentioned local government might choose to "play it safe" and simply deny development permission altogether.

Now imagine that the local government is dominated by a greedy majority intent upon exploiting developers. Prior to the adop-

tion of nexus/rough proportionality review, such a government might, for example, demand and receive a $400,000 development fee even though the project would create only $200,000 in negative externalities. Like the well-intentioned government, the greedy government presumably would shift to a flat development prohibition if it believed that the full $400,000 might be recovered by the developer in a post-construction restitution suit.

The same shift might occur even if the greedy government believed that nexus/rough proportionality review would allow it to charge and retain up to $200,000 as compensation for the project's negative externalities. If the locality were able to charge and retain $200,000, the community would be no worse off after development than before. Accordingly, one might think that the local government would be indifferent as to whether no development occurred or development occurred subject to a $200,000 condition. Recall, however, that development prohibitions often confer some benefit on local majorities by restricting the overall supply of developed units in the market. The financial benefits to the local majority of restricting supply might be sufficient to tip the greedy majoritarian government in favor of a flat development prohibition. Consequently, rather than an efficient project proceeding, albeit subject to an excessive $400,000 condition, the project might not happen at all.

Allocatively inefficient shifts to development prohibitions are much less likely where a development project is perceived as generating net positive externalities for the community at large. Imagine, for example, that the townhouse development would generate no negative externalities and $200,000 in positive externalities for the community. In that case, the well-intentioned government presumably would demand no development conditions. Prior to the adoption of nexus/rough proportionality review, the greedy majoritarian government still might demand and receive $400,000 in return for its grant of development permission. Under a nexus/rough proportionality regime, the greedy government would understand that the developer could collect the full $400,000 fee in a post-construction suit, so any pre-construction imposition of conditions would be futile. The government probably would respond by allowing unconditional development because even without any conditions the dominant political majority would be $200,000 better off after development than before. The dominant majority, of course, might receive some property value benefits from preventing an increase in the overall supply of developed units. However, unless those property value benefits exceeded $200,000, a development prohibition would make no

sense.[174]

Not surprisingly, development conditions are used most frequently and most aggressively in communities whose electorate is significantly concerned about the effects of growth—that is, where, in my previous terminology, development is generally perceived as creating net negative externalities rather than net positive externalities.[175] Developers who operate in such anti-growth or growth-leery milieus generally oppose legal reforms that would radically curtail or abolish the use of development conditions.[176] Their stance reflects their understanding, as informed by their experience in local politics, that development conditions render a significant

174. Indeed, more net positive externality projects may be completed under a nexus/rough proportionality regime than under a regime in which there are no constitutional limitations on development conditions. In a regime without nexus/rough proportionality review, regulators might be tempted to push a developer just short of the point where the developer would decide that the demanded development conditions would render the project unprofitable. One might call this point the developer's "walk-away point." The developer might well lie to the regulators about her walk-away point in an effort to limit the development conditions she must pay. The regulators presumably would know that the developer might lie, so that regulators and the developer might reach an impasse where the developer announces she simply cannot proceed with the project with the demanded development conditions and disbelieving regulators decide to hold firm and wait for the developer to concede. The developer, however, may not back down, either because the developer believes she can win a test of wills with the regulators or because, in fact, the demanded conditions really do meet or exceed the developer's walk-away point. Impasses of this sort might result in the abandonment of projects that would have provided net benefits for both developers and regulating localities. A developer's walk-away point becomes irrelevant under a nexus/rough proportionality regime because, as previously explained, local regulators would have little or no incentive to bargain hard for the maximum amount of development conditions. The absence of protection for localities against post-construction suits means that regulators will not bargain for a maximum share of the developer's anticipated surplus or profits, which in turn means that fewer projects will falter as a result of bargaining breakdown.

175. *See, e.g.*, ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 23, at 58 (noting that "[c]ommunities in the vanguard of exaction utilization tend to be among those least concerned about attracting investment"); Robert A. Peters, *The Politics of Enacting State Legislation to Enable Local Impact Fees: The Pennsylvania Story*, 60 J. AM. PLAN. ASS'N 61, 67 (1994) (reporting that the communities least concerned with discouraging growth support the most aggressive development conditions policies).

176. *See, e.g.*, SNYDER & STEGMAN, *supra* note 26, at 34 (finding support for development fees is "almost universal among developers... interviewed in California, Colorado, and Florida," with the "strongest support... in areas where there were building moratoria or strong sentiments against development and higher taxes"); Deakin, *supra* note 33, at 101-07 (noting that even developers often embrace development conditions as a means of fending off anti-growth sentiment); Porter, *supra* note 92, at 76 (explaining that where "developers have experienced active citizen resistance to growth or have seen the adoption of [building] moratoria due to inadequate facilities of one kind or another, they are likely to embrace development fees as a workable alternative to stopping all development").

fraction of their development projects politically viable.

B. *Development Conditions in a Repeat Game*

The scenario depicted above—one in which the land use regulators and the developer *ex ante* know that they will be engaged in a single transaction or game—is not the predominant scenario in land development. Especially in the context of residential development and small-scale commercial development, local specialization appears to be the norm. The "typical" developer in these categories focuses on a few communities or counties and rarely crosses state boundaries.[177] The often cumbersome nature of local land use regulation, as well as the idiosyncratic nature of local land markets, makes it rational for many developers to invest in local knowledge and local "connections," and to seek a return on that investment by means of local specialization.[178] A "reputation as a responsible developer is important" for any developer who "plans to work in ... [an] area for several years."[179]

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177. This characterization of the real estate development industry is based in part on telephone interviews conducted in the spring of 1995 with real estate development experts, including Gopal Ahluwalia, Research Economist, National Association of Home Builders; Thomas Black, Research Director, Urban Land Institute; Professor Bernard Frieden, Center for Real Estate at the University of California at Berkeley; and Professor Lynne Sagalyn, Columbia Business School (notes on file with the author). The level of regional and local concentration in the real estate development industry, especially the residential development industry, is suggested by the geographical preferences developers indicate in the NATIONAL REGISTER PUBLISHING COMPANY, THE REAL ESTATE DIRECTORY OF MAJOR INVESTORS, DEVELOPERS AND BROKERS *passim* (1992), and by Census statistics showing that development and building firms overwhelmingly operate out of a single office or place of business, *see* UNITED STATES DEP'T OF COMMERCE, 1992 CENSUS OF CONSTRUCTION INDUSTRIES: LEGAL FORM OF ORGANIZATION AND TYPE OF OPERATION 2-4, 8-10 (1995).

178. *See* MILES ET AL., *supra* note 32, at 208, 232 (explaining that "real estate development is a shared process in which the private and public sectors continually interact.... Thus, developers should acquire a keen knowledge of local regulations affecting development.... [D]evelopers will find it good business practice to know local public officials and administrators and to participate in community decision making...."); JIM POWELL, RISK, RUIN, & RICHES 245 (1986) (concluding that "real estate remains a business fought on local issues.... A respected local developer... can do very well against a much bigger competitor."); SNYDER & STEGMAN, *supra* note 26, at 79 (noting that developers work "very hard to create a favorable image" with local officials and regulators).

179. Patrick O'Donnell, *Developer Wields 'Power'; Schneider Scores with Four Projects*, PLAIN DEALER (Cleveland), Dec. 19, 1993, at 6B (quoting a major local developer). Numerous anecdotal accounts suggest the importance to developers of maintaining a favorable reputation with local officials and regulators. *See, e.g.*, Alan Achkar, *Developer Wants to Squeeze a Giant Mall in Harrisville*, PLAIN DEALER (Cleveland), June 12, 1994, at 12B (describing a developer's efforts to build a mall in a small Oklahoma town); Monica Davey, *Resorts Close in on "Our Little Mecca,"* ST. PETERSBURG TIMES, Sept. 18,

It is only in certain large-scale specialized development fields, such as shopping mall and hotel development, that developers typically operate on a broad geographic basis.[180] Even in those contexts, when a national developer might anticipate having only one project in any given locality, the developer may anticipate a long-term relationship with local regulators. For instance, the developer may anticipate retaining ownership of the fully-constructed development for a substantial period of time, in which case the developer may need cooperation from the locality at various points in the future.[181] Finally, even when a developer anticipates no post-construction dealings with a given set of regulators, the developer still may be concerned that her reputation with those regulators will "travel" to other communities where she might hope to undertake projects. In that case, the developer may deal with regulators just as if she were

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1995, at 1B (describing a resort development on America Island in Florida); Gary Gately, *History Helped as Cordish Landed Power Plant Job*, BALTIMORE SUN, Nov. 17, 1995, at 1C (emphasizing importance of reputation in firm selection); *The Hahn Co. to Develop Colorado's Next Shopping Center*, BUSINESSWIRE, Mar. 21, 1995, *available in* WL, Buswire (Dialog) Database; Tracey Kaplan & Daryl Kelley, *Plans for Planting Another Suburb*, L.A. TIMES, July 12, 1994, at B1; Alex Montague, *Struever Plans Two Industrial Parks*, BALTIMORE BUS. J., June 8, 1987, at 1, *available in* 1987 WL 2289467 (highlighting developer's successful reputation in Baltimore); Dina Nelson, *Voters to Decide on Proposed Giveaway for Jacobson's*, PALM BEACH POST, Mar. 11, 1995, at 1B, *available in* WL, PB-Post (Dialog) Database (describing political debate surrounding plans in Florida town for retail development); Morris Newman, *Building in "Soviet Monica": Developers Find Artful Ways of Meeting Community Concerns*, L.A. BUS. J., Jan. 18, 1988, at 6, *available in* LEXIS, News library, BUSDTL file (discussing the necessity for developers to be involved in Santa Monica politics); *Progress Downtown*, COLUMBUS DISPATCH, Dec. 25, 1994, at 2C, *available in* 1994 WL 9351406 (citing developer's good reputation as reason for city's encouragement of condominium development along the Scioto River); Rudolph A. Pyatt, Jr., *For Fairfax Developers, Truce—and Partnership—May Be the Best Defense*, WASH. POST, Dec. 14, 1989, at E3 (discussing developer's resistance to growth control measures); Joseph Rocha, *Opposition Voiced to Super KMart Plan*, HARTFORD COURANT, Aug. 11, 1994, at D5, *available in* 1994 WL 6634697 (discussing public opposition to retail store development); *The View From Tampa*, NEW BUS., May 1985, at 53, *available in* LEXIS, News library, ARCNWS file; Nina Walfoort, *Raleigh, N.C., Proves That Restrictions Can Work*, COURIER-J. (Louisville), Feb. 28, 1996, at A8 (discussing tree ordinance in Raleigh, North Carolina); Steve Wright, *Lashutka Rips Foes of Mall*, COLUMBUS DISPATCH, Mar. 26, 1993, at 1A, *available in* WL, Col-Disp (Dialog) Database.

180. Even within the large commercial development context, "[f]ew developers... [are] national in scope; most... [are] regional in their focus." Michael L. Evans, *Top Office Developer Survey: Is 1992 a Replay of 1991?*, NAT'L REAL EST. INVESTOR, June 1992, at 52.

181. *See, e.g.*, BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC., HOW AMERICA REBUILDS CITIES 150-53 (1989) (emphasizing the long-term relationships between local officials and developers of large commercial shopping areas); MARY ALICE HINES, SHOPPING CENTER DEVELOPMENT AND INVESTMENT 4 (1983) (noting that shopping centers represent long-run investments for developers).

engaged in a repeat—rather than a one-time—relationship.

The responses of regulators and developers to the prospect of nexus/rough proportionality review may be quite different in the repeat-game context than in the one-time context. Consider, for example, the townhouse developer in our previous example. Assume that the developer anticipates having one project per year in the locality for the foreseeable future. It is now Year One, and the developer will agree to any requested conditions in order to obtain development permission for the Year One project. The more interesting question is whether the developer will sue for restitution at the beginning of Year Two. The developer may fear that, if she sues for restitution, the locality will retaliate by denying her development permission for future projects (e.g., Year Two and Year Three projects) or, less drastically, by requiring more studies and paperwork than are truly necessary or by delaying grants of permission.

To decide whether a restitution suit is the best course, the developer would have to compare the expected benefits of restitution and the expected costs of the locality's retaliation. That cost will depend upon, among other factors: (1) the anticipated profits, in present value terms, that could be derived from the projects planned for Years Two, Three, and beyond; (2) the likelihood that regulators could and would seek retaliation; and (3) the expected loss or diminution in profit that would result from such retaliation. The greater the number and size of the projects the developer hopes to complete in the locality, the greater the continuity in the political and regulatory regime in the locality from one year to the next, and the greater the local regulators' reputation for "tough" retaliation, the more likely it is that the developer will forego seeking restitution.

In Year One, before any construction, local regulators presumably will understand that the developer will calculate the cost of suing for restitution at the beginning of Year Two. In order to maximize the likelihood that the developer will forego litigation in Year Two, local regulators may temper their development conditions demands for the Year One project.[182] Thus, while the prospect of nexus/rough proportionality review may not have dramatic effects on the severity

182. Nexus/rough proportionality review also may lead to a reduction in the overall severity of development conditions because, in effect, it lessens meaningful competition among developers for development opportunities. As discussed below, local regulators may respond to nexus/rough proportionality review by doing business only with established, repeat-player developers. As a result of the constriction on the pool of developers, local regulators may not be able to command as high a price for development permission as they would in an unconstrained or open market.

of development conditions in the repeat-transaction context, it may have some modest tempering effects.[183] Local regulators, however, may respond to any subsequent developer restitution suit or threat of suit with extreme and highly public ostracism of the developer, so as to establish and maintain a reputation for effective retaliation.

C. *Nexus/Rough Proportionality Review as a Barrier to Entry*

The preceding analysis suggests that nexus/rough proportionality review provides localities with an incentive to discriminate in favor of established developers and against new or unknown developers in the pre-construction stage of development projects. New entrants into a development market lack an established relationship with regulators and, for that very reason, have relatively little to lose by suing for restitution and hence alienating regulators.[184] Conversely, established

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183. For a discussion of the literature modeling disproportionate or extreme retaliation as a rational response in repeat games, see IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 41-44 (1992).

The preceding analysis applies only where the "game" between the developer and regulator is expected to repeat indefinitely or at least until an as-yet-undetermined point. When the game is an iterated or repeat game with a pre-set ending point, the game dynamics actually may resemble those of one-time or non-repeat games. For example, imagine that a developer is interested in two—and only two—projects in a particular locality. The first project is planned for Year One; the second is planned for Year Four. The first project is a net negative externality project for the locality. Unless the locality can obtain and keep $100,000 in development conditions in return for its permission to allow the project to proceed, the majority of residents would favor a development prohibition. The second project is a net positive externality project for the regulating locality, so that the majority would favor even an unconditional grant of development permission. The game between the developer and regulators involves only two rounds—the project Year One round and the project Year Four round.

For local regulators deciding whether to deny or grant permission for the Year One project, the relevant question is when, if ever, the developer would be barred from suing for restitution of the $100,000 collected in connection with the Year One project. If the applicable statutory or equitable limitation on suits requires a developer to file suit for restitution of unconstitutional development fees within, for example, two years or less, then local regulators might feel adequately protected against post-construction litigation regarding the Year One project; in such a legal regime, the developer would have to sue the locality for restitution before receiving permission for the Year Four project, and the developer understandably is unlikely to do so. If there is no time limitation on developer suits, the developer could simply wait until the Year Four project is completed and then sue for restitution of the $100,000 collected in connection with the Year One project. If local regulators are operating in such a legal regime, they might well decide, *ex ante*, to deny permission altogether for the Year One project, which is exactly the same result as would obtain in a one-time game between the developer and local regulators regarding the Year One project.

184. There is a broad consensus that, even before the advent of nexus/rough proportionality review, local land use regulations operated as a barrier to entry for new

developers whose businesses flourish on the basis of their relationships with regulators have a great deal to lose by seeking restitution and hence are less likely to do so.

Local regulators' incentive to discriminate against new developers may be enhanced by the regulators' risk aversion with respect to future restitution judgments against their localities.[185] Restitution suits and judgments might well generate public criticism of local planning staff, and "bureaucrats, like most persons, are sensitive to possible embarrassment."[186] Moreover, in public administration, firm expectations of entitlement develop once funds are budgeted, and regulators thus may receive more disapproval by eliminating a previously budgeted program in order to pay a restitution judgment than they would have if they had never budgeted the program in the first place.[187]

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developers in many land markets. *See, e.g.*, Charles J. Delaney & Marc T. Smith, *Development Exactions: Winners and Losers*, 17 REAL EST. L.J. 195, 200 (1989) (concluding that "land use controls, including impact fees . . . limit the entry of outside builders to a particular market"); David E. Dowall, *The Effect of Land Use and Environmental Regulations on Housing Costs*, 8 POL'Y STUD. J. 277, 283 (1979) ("Land use and environmental regulations that rely on complex administrative procedures act as barriers to market entry. If the level of complexity is great, potential developers will be reluctant to enter local markets. The costs of adjusting to new and unknown administrative programs is high. Developers who have established good working relationships with local planners are more likely to obtain development permission."); Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495, 507 (1994) (noting that land use regulations can "discourage new developers from entering the market"); John D. Landis, *Land Regulation and the Price of New Housing*, 52 J. AM. PLAN. ASS'N 9, 10 (1986) (presenting case studies of regulatory and other barriers to entry in three California cities); S. Mark White, *Development Fees and Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Objectives*, 6 J. LAND USE & ENVTL. L. 25, 29 (1990) (noting that "strict land use regulations" can constitute " 'barriers to developer entry' " (citations omitted)).

185. For an interesting discussion of the definitions of risk-aversion employed in economics, see KENNETH J. ARROW, ESSAYS IN THE THEORY OF RISK-BEARING 103-04 (1971).

186. Glen O. Robinson, *Stalking the Washington Bureaucrat*, 68 CORNELL L. REV. 269, 276 (1983) (reviewing HERBERT KAUFMAN, THE ADMINISTRATIVE BEHAVIOR OF FEDERAL BUREAU CHIEFS (1981)); *see also* John C. Coffee, Jr., *The SEC and the Institutional Investor: A Half-Time Report*, 15 CARDOZO L. REV. 837, 859 (1994) (suggesting that civil servants are generally risk-averse "because a visible mistake could be embarrassing . . . but a below-market performance will not cost them their jobs"); Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 ENVTL. L. 1647, 1676 (1991) (discussing bureaucratic risk-aversion with respect to the risk of public criticism); Robinson, *supra*, at 276 (noting that "too great a sensitivity [to public criticism] may induce a degree of risk aversion that is harmful to the public interest" and that "[t]here has been speculation that just such risk aversion underlies some regulatory attitudes").

187. Substantial empirical research confirms what we all (local officials included) intuitively know: "[P]eople consistently attach more disutility to losing a sum of money or a

For their part, potential new entrants in local land development markets also may be risk-averse with respect to the risk that regulators will discriminate against them by, for example, denying or delaying development permission. Even when developers are not risk-averse,[188] the lenders underwriting them may be.[189] As a result, nexus/rough proportionality review not only may make it more difficult for new entrants to flourish in land development markets, it also may discourage potential new entrants from even trying.

The exclusion of new entrants from development markets is socially costly. In some instances, new entrants might be able to derive more value from a parcel than established developers. For example, a new entrant might be able to generate $1,000,000 in wealth from the development of a given parcel while an established developer could derive only $500,000. In a competitive market, the new entrant would outbid the established developer and societal wealth-creation would be maximized. When potential new entrants are excluded, however, wealth-creation will not be maximized. For their part, potential new entrants will have to allocate their capital to alternative and presumably less profitable investments.[190]

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valuable possession than they do to failing to gain the same sum or good . . . ." Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1861, 1874 (1994) (summarizing the theoretical and experimental literature).

188. As a general matter, risk-aversion tends to vary inversely with the investor's wealth and, holding wealth constant, it varies with the magnitude of the possible losses. *See* Blume & Rubinfeld, *supra* note 108, at 601-02. Some land developers have relatively limited assets and hence limited capacity to self-insure through investment portfolio diversification. *Cf.* Lettice Stuart, *Housing The Elderly: "Assisted Living" Builders Regroup for the 90s*, N.Y. TIMES, Jan. 3, 1993, at 3 (discussing "undercapitalization" of many developers in the 1980s).

189. Although lending institutions engaged in aggressive lending during the real estate boom of the 1980s, they traditionally have been regarded as fairly cautious or risk-averse business enterprises; an extensive body of state and federal bank underwriting regulation is intended to ensure that such institutions place their solvency above profit considerations. *See generally* 1 ALFRED M. POLLARD ET AL., BANKING LAW IN THE UNITED STATES § 11.01 (2d ed. 1992) ("[M]aintaining bank safety and soundness is the pervasive theme of the banking law of the United States and is pursued . . . through many devices.").

190. The preceding analysis assumes that the only party who may challenge development conditions under the nexus/rough proportionality standard is the developer who has been asked to, or already has complied with, the conditions. One could imagine a legal regime in which, in addition, (1) community groups challenge conditions as too lax; and (2) developers challenge conditions imposed on their competitors as too lax. It is quite clear, however, that such suits are not permissible under *Nollan* and *Dolan* because those cases are concerned only with the Takings Clause implications of excessively strict development conditions. Only a developer subject to excessive conditions would have standing to bring a nexus/rough proportionality case. *But see* FISCHEL, *supra* note 123, at 349-50 (suggesting that *Nollan* might "offer . . . leverage to third parties" such as community groups).

D. Curtailing Circumvention

One possible objection to this analysis is that it seems to assume that nothing can be done to curtail regulators' avoidance or circumvention of nexus/rough proportionality review. If the current legal regime could be altered to limit the possibilities for, and hence costs of, circumvention, nexus/rough proportionality review might not engender inefficient development prohibitions and discrimination against new entrants in development markets.

There are two possible means of effectively limiting circumvention, but neither is likely to be implemented. The first entails an expansion in the scope of judicial scrutiny—more judicial review rather than less. If courts reviewed development prohibitions with the same scrutiny as development conditions, regulators could not circumvent judicial review by denying development permission rather than granting conditional permission. Nor could they readily discriminate against new entrant developers by denying them development permission for their projects while granting established developers conditional permission for comparable projects. The extension of judicial scrutiny to development prohibitions makes theoretical as well as practical sense because, as discussed in Part II, there seems to be no theoretical basis for differentiating between the level of judicial review accorded development prohibitions and that accorded development conditions.

That extension, however, probably will not occur. The ability of a community to prohibit certain uses of property, subject only to relatively peripheral Takings Clause limitations, is deeply established in our legal and political culture.[191] Significant judicial limitations on that ability almost certainly would be greeted as a radical judicial encroachment on the democratic political sphere. Indeed, even avid property rights advocates regard such judicial policing of local decision-making as, at least at present, an unattainable constitutional

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Note also that nexus/rough proportionality review may constitute a socially costly barrier to entry for new developments that will generate net negative externalities *and* for developments that will generate net positive externalities. As discussed above, nexus/rough proportionality review will not result in the invalidation of allocatively efficient development conditions or more flat development prohibitions in cases involving net positive externality development. But it may be in local regulators' interest to discriminate in favor of established developers even in the context of net positive externality development: Such discrimination will ensure that regulators reap the net positive externalities of new development, the additional benefits that flow from development conditions, and some protection against post-construction restitution suits.

191. *See supra* note 22 and accompanying text.

ideal.[192]

Another possible means of limiting circumvention is legislative, rather than judicial. As noted above, jurisdictions vary dramatically in the discretion their statutes accord local regulators in making case-specific development prohibition and condition decisions.[193] The argument in favor of case-by-case regulator discretion, of course, is that it allows regulators to take full account of the myriad real distinctions among development projects; strict statutory requirements may force regulators to treat unlike situations alike.[194] The argument against discretion is that it allows for covert illegitimate decision-making by regulators. The adoption of nexus/rough proportionality review increases the incentives for covert illegitimate decision-making by giving regulators an incentive to use their discretion to disfavor new entrants and favor established developers. In that sense, the adoption of nexus/rough proportionality review strengthens the argument for statutory requirements limiting local land use regulators' case-by-case discretion.[195]

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192. *See, e.g.*, Epstein, *supra* note 5, at 63 (defending the unconstitutional conditions doctrine as a "second-best" solution to the problem of governmental intrusion upon property rights).

193. *See supra* notes 34-36 and accompanying text.

194. *See* SNYDER & STEGMAN, *supra* note 26, at 30 (noting that uniform fees will not promote "efficient development" to the extent that they fail to "reflect the actual differences in the costs to the city of providing infrastructure and services to developments of different types and at different locations"); Laurie Reynolds, *Local Subdivision Regulation: Formulaic Constraints in an Age of Discretion*, 24 GA. L. REV. 525, 528 (1990) (discussing the merits of discretion for local land use regulators).

195. Similarly, the adoption of nexus/rough proportionality review might strengthen the argument for a new equal protection jurisprudence that would facilitate developers' suits against localities for unequal treatment in the regulatory permitting process. Under current equal protection principles, such suits are reviewed under a rational basis standard which virtually assures that localities will prevail. *See* Candid Enters. v. Grossmont Union High Sch. Dist., 705 P.2d 876, 885 (Cal. 1985) (a developer's equal protection suit must be reviewed under " 'the basic and conventional standard,' which . . . ' "requir[es] merely that distinctions drawn . . . bear some rational relationship to a conceivable legitimate state purpose." ' . . . We may not review the challenged local measure under any stricter standard: developers do not constitute a 'suspect class,' and development is not a 'fundamental interest.' " (citations omitted)); Susan M. Denbo, *Development Exactions: A New Way to Fund State and Local Government: Infrastructure Improvements and Affordable Housing?*, 23 REAL EST. L.J. 7, 15 (1994) (suggesting that traditional judicial deference would undermine developers' efforts to challenge development fees on equal protection grounds); *see also* Juster Assocs. v. City of Rutland, 901 F.2d 266, 270-72 (2d Cir. 1990) (holding that, under the *Noerr-Pennington* doctrine extending antitrust immunity to private citizens' petitions of government tribunals, a developer who enters into favorable agreements with a locality for building permission is immune from antitrust suit by another developer (citing, *inter alia*, United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961))).

The catch-22 is that local political majorities have no incentive to enact such statutory requirements as a response to nexus/rough proportionality review. Recall that the basic "story" of excessive development conditions is that they are imposed to benefit a dominant political majority at the expense of developers and future residents.[196] As long as regulators' informal discrimination against new entrants helps to ensure that the dominant political majority will continue to reap the benefits of excessive development conditions, the majority has no cause to constrain the regulators. Thus, while legislative measures could be taken to limit the circumvention costs associated with nexus/rough proportionality review, there is little reason to predict that those measures will be taken.

V. CONCLUSION

Nexus/rough proportionality review probably cannot be justified on allocative efficiency grounds. Indeed, rather than enhance the efficiency of land development markets, nexus/rough proportionality review may make matters worse. The nexus and rough proportionality tests may force courts to invalidate development conditions that are allocatively efficient, even when localities lack other means of forcing new development to internalize its net social costs. In order to avoid nexus/rough proportionality review, local regulators may deny development permission in cases where they previously would have approved projects. Finally, and perhaps most significantly, local regulators may protect themselves against post-construction suits for restitution by limiting development permission to repeat players in development markets. Any overall assessment of nexus/rough proportionality review should take account of its possible perverse effects.

Of course, the preceding analysis of the possible perverse effects of nexus/rough proportionality review does not prove that such review is socially undesirable in practice. At this point, any direct empirical study of the effects of nexus/rough proportionality review probably would be infeasible because, at least arguably, the state courts have not yet begun to apply the nexus and rough proportionality tests in earnest.[197] If the United States Supreme Court wishes the state courts to apply the nexus and rough proportionality tests in earnest, the Court may need to accept certiorari on additional development conditions cases and strongly reaffirm the nexus and rough

196. *See supra* notes 123-29 and accompanying text.

197. *See supra* note 167 and accompanying text.

proportionality tests in those cases. This Article, at the least, raises questions as to whether that would be a desirable strategy for the Court to adopt.