No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

—CONSTITUTION OF THE UNITED STATES, AMENDMENT V

A Warning to Local Governments on the Take

Property Rights Advocates Are Standing Their Ground

Anthony W. Crowell

Local governments have the critical responsibility of regulating land use and development to maintain public health and safety, ensure environmental protection, and achieve local economic stability. While the Supreme Court has recognized this integral function, it has horrified local governments and environmentalists alike with its recent trilogy of decisions—*Dolan v. City of Tigard* (1994), *Lucas v. South Carolina Coastal Council* (1992), and *Nollan v. California Coastal Commission* (1987)—regarding regulatory takings. Equally horrifying to these interests is the momentum that property rights advocates are gaining in their move to strong-arm state and federal agencies to abide by their interpretation of the Fifth Amendment to the United States Constitution.

The Supreme Court has broadly interpreted the Fifth Amendment Takings Clause to mean that the government may take private property to effectuate a legitimate public purpose provided that it justly compensates the owner. If the public purpose test is not met, the government may not expropriate the property.

Regulatory takings arise when government action to regulate private land use for the public good has a negative impact on the ability of owners to use their property. Currently, there are two categories of regulatory takings: takings that involve physical invasion of the property, as in *Dolan* and *Nollan,* and takings that result in denial of all economically beneficial use of the land, as in *Lucas.*

This article addresses the impact that the Court's most recent decision, in *Dolan v. City of Tigard,* will have on local government land use regulations and planning. It also looks at the efforts that property rights advocates have taken to get federal takings legislation passed that would codify constitutional property rights.

Court Calls for Necessary Roughness

Last summer, in a five-to-four opinion that reflected the Supreme Court's ideological rift regarding limits for local government land use regulation, a conservative majority in *Dolan v. City of Tigard* held that the constitutional property rights of Florence Dolan, a plumbing and electrical supply store owner, had been violated when Tigard, Oregon (population 30,000), sought to condition Dolan's request for a permit to redevelop her downtown commercial site.

Dolan proposed to demolish her existing plumbing store to construct a new and larger 17,600-square-foot facility, along with another smaller structure and a paved parking lot. Pursuant to Tigard's Community Development Code, Dolan's request was granted with two stipulations. First, she was required to transfer the title for a portion of her land—a greenway within the 100-year floodplain along Fanno Creek—to the city for improvement of a storm drainage system. Second, she was required to dedicate an adjacent 15-foot strip of land for a pedestrian and bike path.

Tigard officials argued that increased floodplain controls were necessary because the paved parking lot would augment drainage into the creek. The city also reasoned that the pedestrian and bike path could offset some of the traffic demand on nearby streets and lessen the increase in downtown traffic congestion that would be caused by Dolan's business expansion. The aggregated dedications, amounting to 7,000 square feet, or roughly 10 percent of the total 1.67 acre site, could be used to satisfy the city's 15-percent open space requirement for developed parcels.

Dolan requested a variance from the requirements but it was denied. She appealed to Tigard's Land Use Board of Appeals (LUBA), which affirmed the city planning commission's decision. Dolan then invoked her Fifth Amendment constitutional rights and filed a suit claiming that the city's dedication requirements were unrelated to her proposed development, constituting an uncompensated taking of her property.

Both the Oregon Court of Appeals and Oregon Supreme Court affirmed the LUBA decision. The Supreme Court granted Dolan's petition for review in order to resolve a question left open by its 1987 decision in *Nollan v. California Coastal Commission* regarding the required "degree" of connection between specific land use or dedication requirements (known as exactions) imposed by the city and the projected impacts of the proposed development.

In *Nollan,* the petitioners applied for a permit to tear down an existing beachfront bungalow to build a new one. The California Coastal Commission required that the Nollans grant the public lateral access across the beachfront of their new private residence to comply with a state regulation giving the public visual access to the beach. The Supreme Court reaffirmed that local governments may legitimately invoke their land use powers to impose conditions on development as well as to prohibit development entirely. However, the Court held that in the absence of any direct relationship or nexus between the imposed condition on the Nollans' property and the concerns that the commission sought to address resulted in a taking. The public easement condition was invalidated.

By applying the *Nollan* test to the specific facts in *Dolan,* the Supreme Court found legitimacy in the city's desire to alleviate traffic congestion and prevent flooding, and it deemed that an essential nexus existed between those public interests and

Regulatory Takings: All Economically Beneficial Use Test

Although the majority in *Dolan* did not cite *Lucas v. South Carolina Coastal Council* in the drafting of their rough proportionality test, Lucas established a new category of compensable regulatory takings.

In this case, David Lucas, a developer, sought a permit to build on beachfront property he owned. However, because of amendments to South Carolina's Beachfront Management Act (BMA) that were adopted after Lucas purchased the land, any development that would promote beach erosion was prohibited. The Supreme Court held that "where the state seeks to sustain regulation that deprives land of *all* economically beneficial use . . . it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the prescribed use interests were not part of his title to begin with."

The majority stressed that its categorical rule applied only to regulatory takings where there is a *total* loss of value or a loss of 100 percent of the value of the real property. In such cases, the land owner is due compensation. Because the BMA rendered Lucas' property useless, he was awarded $1.2 million. Today, David Lucas is a leader in the property rights movement heading a national activist group called the Council on Property Rights.

Dolan's permit conditions. The Court's more difficult task, however, was to determine whether the degree of exactions demanded by the city's permit conditions bore the required relationship to the projected impact of Dolan's proposed development to pass constitutional muster.

Writing for the majority, Chief Justice Rehnquist noted that state courts have approached the question of degree in various ways. He pointed out that some states require "very generalized statements" to establish the necessary connection between the required dedication and the impact of the proposed development, while others have required that there be a "reasonable relationship."

Still other states have taken a hard-line approach and imposed a "very exacting correspondence" test requiring local governments to show direct proportionality between the exaction and the public interest. Finding the hard-line approach to be too stringent and the generalized approach too lax, Rehnquist found that the reasonable relationship test was closest to the federal constitutional norm, although the Court did not explicitly adopt it as such.

Because the term *reasonable relationship* creates confusion with the term *rational basis,* which is used as a test for questions of 14th Amendment Equal Protection, the Court chose *rough proportionality* as the name for the troublesome test that local governments must employ when conditioning property development. Although the Court made clear that its rough proportionality test does not require a precise mathematical calcu-

Avoiding the Takings Trap: A Checklist for Local Governments

✓ **Fifth Amendment Takings Clause.** Local governments may take private property to effectuate a legitimate public purpose provided that they compensate the owner.

✓ **Regulatory Takings.** Those takings that involve physical invasion of the property or result in a denial of all economically beneficial use of the land.

A. Local governments have the burden of showing a rough proportionality between the required dedication and the public interest. They also must make some individualized determination of the relationship between the exaction and the impact of the proposed project.

B. Local governments must show a reasonable relationship, a nexus, between the public interest and conditions imposed on private property.

C. Local governments must compensate property owners if a regulation deprives them of *all* economically beneficial use of their land.

✓ **Legislative Actions.**

A. **Federal:** Local governments should monitor federal legislative initiatives that may have spill-over effects on their states.

B. **State:** Local governments in Mississippi should secure a copy of the state's takings compensation law. Local governments in Delaware, Idaho, Indiana, Missouri, Tennessee, Utah, Washington, and West Virginia should secure a copy of their state's takings assessment law. Finally, local governments should continually monitor their state legislatures for any development of takings legislation.

lation, it held that local government planners now must bear the burden of making some sort of "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."

Using the new test, the Court determined that the city had failed to make an individualized determination as to why a public greenway, as opposed to a private one, was necessary in the interest of flood control. It held that Tigard's floodplain requirement was unconstitutional. Regarding the pedestrian and bicycle pathway, the Court found that the requirement could offset some traffic demand, but Tigard would have to make some effort to quantify its findings in support of the dedication. The Supreme Court then reversed the Oregon Supreme Court's decision and remanded the case back to Tigard for action that was consistent with its opinion.

Like the decisions in *Nollan* and *Lucas* (see box on page 5), Dolan creates confusion and leaves many questions unanswered. The most uncertainty probably stems from the Court's intentionally ambiguous term *rough proportionality*. While sounding broadly consistent with responsible planning, the term begs the question of how rough "rough" can be.

Depending on the level at which a local government already conducts planning impact studies, planning budgets may not be drastically affected by this new requirement. But local planning commissions and governing bodies will have to exercise more caution when developing land use regulations or formulating land dedication requirements. Local governments must be able to justify land use planning decisions under closer scrutiny and with more site-specific precision than has been required to date. In turn, this may save local governments money on future legal services. Tigard spent at least $100,000 to respond in the Supreme Court alone.

Property Rights Advocates Take to the Hill

The decisions in *Dolan, Lucas,* and *Nollan* are by no means an automatic trigger for congressional action. But it appears that the 104th Congress is heeding the call of property rights advocates who have mobilized to push for the passage of takings legislation. It is rare, at a time when local governments are protesting to Capitol Hill about burdensome environmental regulations and pushing for the adoption of unfunded mandate reforms, risk assessments, and cost/benefit analyses, that environmentalists, who oppose such measures, and local governments agree on a legislative debate. But they have found common ground opposing property rights advocates who insist that governmental regulation, especially environmental regulation, has gone too far in impacting the viability of private property. Among many arguments, advocates claim that any decrease in property value due to governmental regulation constitutes a compensable taking.

Although several takings bills were introduced in the last Congress to establish, among other things, a Private Property Owners' Bill of Rights, the concerns of property rights advocates are receiving heightened attention in the House Republican Contract with America. At the time this article was written, H.R. 9, the Job Creation and Wage Enhancement Act of 1995, introduced by Representatives Bill Archer (R-Texas) and Billy Tauzin (D-La.), included the first of several legislative takings measures in the 104th Congress.

H.R. 9 would mandate that the federal government compensate private property owners when a measurable limitation or condition is imposed by a federal agency on the use of property that would be a lawful

The Battle Fallout on Tigard

As this article was researched, Tigard was reviewing its codes and planning to update them accordingly. Most significant is that the city will be taking a different approach in its application review process. Liz Newton, Tigard's community involvement coordinator, notes, "The city will be more careful about the applications they take in."

A major difference will be that the city will ask property owners to propose how they will manage such potential problems as stormwater drainage before applying to the city for approval to develop land. This way, the city can decide whether a developer's proposal meets community standards before imposing a condition that could have devastating ramifications such as those in *Dolan v. City of Tigard.*

When this was written, the Dolans' had yet to request a building permit. However, they have filed a separate civil suit against the city for monetary damages resulting from lost business. The subsequent suit is being handled by Tigard's insurance company.

use but for the agency action and when that limitation results in a reduction in the value of property equal to 10 percent or more. Whether the 10-percent requirement is met would be determined by calculating any decrease in fair market value (FMV) of the property by comparing its FMV before the agency action to its FMV after the action was implemented. The bill also provides for arbitration procedures and requires a stay of agency action pending resolution of the property owner's claim. The concept embedded in H.R. 9 (the loss of property value of 10 percent or more must be compensated) could change existing case law under *Lucas,* which requires compensation only if all economically beneficial use of the land is diminished in the pursuit of a legitimate governmental interest.

Senate Minority Leader Bob Dole (R-Kan.) has introduced a bill similar to an executive order issued by President Reagan in 1988. This bill would require the federal government to prepare takings impact analyses similar to environmental impact statements for all proposed regulations. Dole's proposal resembles the assessment-type takings provision he offered last term in the Senate's bill to reauthorize the Safe Drinking Water Act. The takings assessment language was a factor in the failure of the House and Senate to reach a compromise before the term ended.

Supporters of the measures assert that their real objective is not to get compensation but to discourage government agencies from imposing regulations that could encumber the use of private property. While the mining, timber, oil, agri-business, and real estate development industries would benefit greatly from the proposals, state, local, and environmental interests have been warning lawmakers about adverse impacts.

State attorneys general have asserted that regulatory agencies would be saddled with an extremely costly and virtually impossible bureaucratic task that could inhibit agencies responsible for protecting the public welfare from acting at all. The National Wildlife Federation declared that such legislation would undermine federal regulatory programs including wetlands conservation, endangered species protection, and pollution prevention. Similarly, the American Planning Association contends that the proposed measures constitute an attack on the legitimacy of local land use planning and zoning regulations that support important state and local objectives. In effect, the bills could place fair housing, civil rights, historic preservation, and clean air and water, flood control, and other environmental laws in jeopardy.

Opponents also fear that in order to compensate affected property owners, new taxes would have to be levied, federal programs cut, or the federal budget deficit increased. At this time, it is unclear whether a regulatory agency would be required to compensate a landowner from its annual appropriations or from an agency judgment fund typically used to pay claims against the federal government.

Although the compensation and assessment measures would only apply to the federal government if passed, long-term state and local government environmental plans as well as annual budgets would face potential devastation if property rights advocates push state legislatures to act.

Since 1991, compensation bills like H.R. 9 have been introduced in 23 states. So far, the only one that has been adopted is a Mississippi law that applies to forestry land and requires compensation if a devaluation of 40 percent or more occurs. Takings assessment laws similar to the Dole proposal have passed in eight states since 1991, including Delaware, Idaho, Indiana, Missouri, Tennessee, Utah, Washington, and West Virginia. Local governments should monitor new developments in their state legislatures as well as on the federal level. PM

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