

**A TALE OF TWO CITIES:
RECONSIDERING THE DOCTRINAL TREATMENT OF MONETARY EXACTIONS**

“IT WAS THE BEST OF TIMES, IT WAS THE WORST OF TIMES”¹

Jaime Garcia leaves work at the end of a long day. Jaime lives on the outskirts of downtown in a major American city. It is a charming urban community, primarily built-out at the turn of the century. In recent years, however, the community’s aging infrastructure has fallen into disrepair.

On his way to pick up his children, Jaime swerves to avoid hitting a pothole. He pulls up to the curb next to a small community library where his daughter and son are waiting impatiently on the front steps. The afternoon has been disappointing for both of them. The neighborhood’s small branch library lacks the book his daughter needs for her school project, so they will have to visit another library. And his son and friends were not able to play baseball at the nearby park because all of the ball fields were in use. Many of the neighborhood’s amenities, including the amount of library and park space, are insufficient to meet the community’s needs.

Meanwhile, another father is heading home as well. Jim Smith lives in a suburb on the edge of the city, only miles from Jaime’s family. Only a decade ago, his community was a hilly pasture located three miles off a major highway. Today, the growing population benefits from new streets, schools, libraries, parks, and community centers – all paid for by fees on the development that has occurred during the last decade. The fees, generally called monetary exactions or development impact fees, were assessed on the developers of the new subdivision to reimburse the local government for the costs of providing public facilities, infrastructure, and services for the community.

¹ CHARLES DICKENS, A TALE OF TWO CITIES 5 (Richard Maxwell ed., Penguin Books 2000) (1819).

The monetary exactions that the developers paid play a key role in determining the quality of life in Jaime and Jim's communities. Since developers only pay the assessments when new development occurs, Jaime's densely developed turn-of-century urban community rarely benefits from the improvements provided by the fees. And other traditional sources of infrastructure funding have been severely restricted in recent decades. As a result, Jaime's community is suffering from a declining quality of life due to ill-maintained and insufficient roads, schools, parks, and other amenities. By contrast, the quality in life for the residents in Jim's community is high due to modern amenities sufficient to meet the needs of all. Unfortunately, the dichotomy that exists between Jaime and Jim's communities is not unique. In fact, the "Two Cities"² distinction between urban and suburban communities is common in our nation's cities. This is because the fiscal challenges that have led to the conditions in this municipality are prevalent in cities throughout the nation.

The roots of the problem are traceable to the late 1970's. At that time, cities throughout the nation faced a number of dynamic and conflicting factors which manifested in cash-strapped municipal governments.³ Most significantly, the decade's "taxpayer revolt" resulted in drastic cuts to municipal general fund revenues throughout the nation.⁴ Many cities historically used these general fund revenues, typically supported by broad-based taxes, to pay for community facilities, services, and infrastructure.⁵ Commonly, the cuts accompanied a wave of rapid population growth and haphazard development patterns.⁶ As a result, many cities faced

² *Id.*

³ Ronald H. Rosenberg, *The Changing Culture Of American Land Use Regulation: Paying For Growth With Impact Fees*, 59 SMU L. REV. 177, 180 (2006).

⁴ See Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1525 (2006).

⁵ See *id.* at 1524-26.

⁶ See Michael T. Kersten, *Exactions, Severability and Takings: When Courts Should Sever Unconstitutional Conditions from Development Permits*, 27 B.C. ENVTL. AFF. L. REV. 279, 284-86 (2000) (discussing pro-growth

exponential growth in demand for infrastructure without the benefits of traditional funding options. The timing of these trends exacerbated the conditions. As one scholar noted, “[t]his occurred at a time when shortages in the quantity and quality of basic infrastructure was predicted to reach crisis proportions by the year 2000.”⁷

Cities struggled to identify alternative means for covering expenses previously paid for by general fund revenues. If cities desired to continue supporting basic community facilities, such as streets, sewers, schools and parks, they would have to be innovative in their approaches to securing new revenue sources. One method identified by cities was to shift the funding burden to new development to offset the cost of the infrastructure needed to support it.⁸ Basing their regulatory authority on state police powers, the use of development fees or monetary exactions allowed the municipality to condition the approval of a development permit on the payment of fees that were sufficient to offset the costs of public services and facilities that the new project would necessitate.⁹ The result was that growth would pay for itself rather than being the burden of the city and taxpayers.

These fees became increasingly popular in municipal finance throughout the subsequent decade.¹⁰ As the movement built steam, however, the validity of the funding mechanism came under legal scrutiny. By the end of the next decade, the question of validity reached the United States Supreme Court.

sentiment, poor planning for supporting infrastructure, inefficient development, and causes for municipal revenue shortages).

⁷ See Rosenberg, *supra* note 3, at 228-29.

⁸ *Id.* at 180.

⁹ See Kersten, *supra* note 6, at 280 (defining monetary exactions); See also *id.* at 286-88 (noting that public services and facilities traditionally included on-site public infrastructure such as streets, sidewalks, sewers and evolved to include off-site improvements such as schools, libraries, and parks); See Rosenberg, *supra* note 3, at 205 (noting that, in some cases, monetary exactions have expanded to include fees to mitigate impacts of development, such as noise, traffic, and environmental impacts and that fees for off-site improvements and to mitigate impacts are commonly called development impact fees).

¹⁰ See Rosenberg, *supra* note 3, at 207.

In two landmark cases, *Nollan v. California Coastal Commission*¹¹ and *Dolan v. City of Tigard*,¹² the Court purportedly moved the regulation of monetary exactions into the realm of Constitutional review under the Fifth Amendment Takings Clause.¹³ In these two ambiguously written opinions, the Court applied a heightened level of review to land exactions under the Takings Clause.¹⁴ The ambiguity occurred, in part, because it was unclear whether the Court intended the term “exaction” to encompass both land and monetary exactions. The terminology used by the Court allowed for broad interpretation and application of the holdings.¹⁵ Indeed, in the wake of *Nollan* and *Dolan*, lower courts disagree whether to extend the holdings to monetary exactions.

The Court’s ambiguity has negative consequences for all stakeholders. Cities, property developers, and ultimately communities, such as those that Jim and Jaime live in, have been caught in the middle. Municipalities face the unfortunate task of balancing a depleted general fund with growing infrastructure needs. The cities that apply the analysis required under *Nollan* and *Dolan* face potential litigation from all sides. As a result, municipal governments are often reluctant to approve new development. In turn, developers may face long delays in receiving development permits or may be denied permits altogether. The public is frequently cynical of the developers’ motives and distrustful of the government. Public fears stem from a desire to protect of neighborhood quality of life by ensuring that development provides the appropriate

¹¹ *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

¹² *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

¹³ U.S. CONST. amend. V. The Amendment states, in relevant part that “[n]o person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.”

¹⁴ *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374. The two-pronged test established by the *Nollan* and *Dolan* cases requires that a municipality prove that an exaction's purpose has an essential nexus to the type of harm that the development will cause and that a rough proportionality exists between the exaction and the development's projected costs. In the subject cases, the Court was concerned that the public entities issued building permits conditioned on the owners’ transfer of property to public uses. The cases did not address the payment of a fee.

¹⁵ *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374. The subject regulation in both *Nollan* and *Dolan* was a requirement for a land dedication.

amenities in their community. In all cases, the best interest of the stakeholders is in gaining more certainty in the provision of neighborhood infrastructure. However, certainty is unlikely to occur without a clear understanding of the legal parameters in which municipal governments act when imposing development fees.

This Note asserts that the United States Supreme Court should directly address the ambiguity that exists in this area of the law. In order to provide the reader with context, Part I of this Note begins with a brief discussion of the factors leading to the increased use of, and dependence on, monetary exactions. It also provides a short discussion of the evolution of takings jurisprudence with specific attention on regulatory takings and the treatment of exactions. The emphasis of Part II is a consideration of whether it was the intent of the Court to apply a heightened standard of scrutiny to monetary exactions. In doing so, the section examines a sample of relevant state cases decided in the wake of the *Nollan* and *Dolan* decisions. The varied jurisprudence demonstrates that the Supreme Court's cases have left states uncertain of how they should regulate the use of monetary exactions. Also, in response to the question, Part II considers two subsequent United States Supreme Court cases that have provided some clarification of the Supreme Court's intent.¹⁶ The second of the cases, *Lingle v. Chevron U.S.A. Inc.*, established a framework that serves as a basis for analyzing when government action should be subject to the Takings Clause.¹⁷ Lastly, Part III considers a number of detrimental impacts of applying the *Nollan/Dolan* test to monetary exactions. Additionally, it examines the foundational principles of takings jurisprudence which suggest that a logical and legally sound approach would be to completely remove monetary exactions from the purview of the Takings Clause.

¹⁶ *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

¹⁷ *Lingle*, 544 U.S. at 537-40.

This Note ultimately finds that the United States Supreme Court should clarify its intent with regard to the applicability of the Takings Clause to monetary exactions and asserts that the most logical reading of the applicable principles and law leans towards the removal of monetary exactions from the purview of the Takings Clause.

I. GREAT EXPECTATIONS¹⁸ MEETS HARD TIMES¹⁹

In order to clearly understand the importance of the doctrinal treatment of monetary exactions in the municipal finance scheme, it is helpful to begin with some context. The following section provides background on their origin and evolution and orients the reader to their treatment in the broader area of takings jurisprudence.

A. The Fiscal Realities of Funding Community Infrastructure

Throughout the early to mid-twentieth century, citizens typically embraced growth and development as symbols of progress and the “superiority of the American political system.”²⁰ New development brought with it modern sidewalks, curbs and gutters, streets, libraries, emergency services, as well as public schools and public parks – all were viewed as sources of community pride. While private entities would occasionally provide these improvements, more often the responsibility fell on local government.²¹ Due to the public’s acceptance of growth during this era, residents and businesses were typically willing to pay for the improvements through a variety of broad-based funding mechanisms.²²

¹⁸ CHARLES DICKENS, *GREAT EXPECTATIONS* (Penguin Books 1996) (1860).

¹⁹ CHARLES DICKENS, *HARD TIMES* (Kissinger Publishing 2004) (1854).

²⁰ See Rosenberg, *supra* note 3, at 177.

²¹ *Id.* at 179-80.

²² *Id.* at 228-29 (“[C]ommunities paid for growth-related costs with annually-generated general tax revenues and general obligation debt financing.” and “The payment of these growth-related capital costs which previously had been borne as a community-wide development expense.”).

In the 1970s, however, there was a considerable shift in the public's perception of growth.²³ Decades of unfettered development and minimal land use regulation resulted in sprawl, inner city decay, and environmental degradation.²⁴ Diminished public support for growth contributed to the 1970's "taxpayer revolt," in which voters in many states rejected general obligation bonds for capital improvements and severely restricted broad-based tax revenue.²⁵ The state of California serves as the first, and probably most dramatic, example in this detrimental trend.²⁶ In 1978, California voters went to the polls to overwhelmingly support Proposition 13.²⁷ When enacted, the law would roll back property taxes to 1975 levels, limit their initial assessment to a maximum of one percent of the property's value, restrict their annual increase to two percent, and severely restrict the ability of state and local government to raise alternative sources of funding.²⁸ The intent of the state initiative was to address one of the ill-effects of the hot real estate market – rapidly escalating property taxes.²⁹ Few imagined, however, the negative impacts to the fiscal stability of California's cities that would result in the following decades. The impact to local governments in the first year alone was a staggering seven billion dollars.³⁰ The immediate impacts were cuts in summer school and sports programs, reductions in library hours, and reduced maintenance to parks and recreation facilities.³¹ Consequently, deferred maintenance to public facilities and infrastructure grew increasingly common in subsequent years.³²

²³ *See id.* at 206.

²⁴ *Id.* at 188.

²⁵ *See Ball, supra* note 4, at 1525.

²⁶ PETER SHRAG, PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE 17, 132-33 (University of California Press 1999).

²⁷ *Id.* at 132, 151.

²⁸ *Id.* at 140; Cal. CONST. art. XIII A § 1 (enacting Proposition 13).

²⁹ SHRAG, *supra* note 26, at 133.

³⁰ *Id.* at 141.

³¹ *Id.* at 155.

³² *Id.*

Despite revenue restrictions, city populations continued to swell.³³ In order to accommodate the growth, development extended further from the urban core.³⁴ The sprawl exacerbated the ever-expanding demand for infrastructure. At the same time, the federal government reduced grants to state and municipal governments which supported local infrastructure development.³⁵ The culmination of these circumstances was that cities could no longer afford to support new development the way they had traditionally. Consequently, they sought alternative ways to cover the cost of the new infrastructure. A prevailing method identified by local governments was the assessment of various monetary exactions on developers to recoup the costs of the supporting infrastructure.³⁶

Early in this trend, municipalities found the authority for imposing monetary exactions under the exercise of state police power and enabling legislation.³⁷ Police powers allow municipalities to enact regulations to protect the public health, safety, morals, and general welfare.³⁸ In its 1926 decision, *Village of Euclid v. Ambler Realty Co.*, the United States Supreme Court held that municipal discretion to condition a development permit was presumptively constitutional under the police power.³⁹ Under this authority, cities found that they could condition approval of a development permit on the payment of the development impact fees. The only limitation on the manner and extent to which municipalities could impose the exactions, at that time, was enabling legislation specific to each state.⁴⁰

³³ See Rosenberg, *supra* note 3, at 217, 228.

³⁴ *Id.* at 180.

³⁵ *Id.* at 208.

³⁶ See Kersten, *supra* note 6, at 281.

³⁷ See *id.* at 280; Rosenberg, *supra* note 3, at 218-20.

³⁸ See Rosenberg, *supra* note 3, at 228-29.

³⁹ 272 U.S. 365, 393, 395-97 (1926).

⁴⁰ Thomas W. Ledman, Note, *Local Government Environmental Mitigation Fees: Development Exactions, The Next Generation*, 45 FLA. L. REV. 835, 842-43 (1993).

Not surprisingly, some did not embrace the increased use of monetary exactions to fund infrastructure.⁴¹ As a result, there were a number of challenges to local government authority to assess such fees on development.⁴² Initially, the challenges frequently concerned whether a municipality possessed the requisite enabling authority to assess a specified type of fee and questioning the nature of the exaction as actually being the illegal imposition of taxes.⁴³ States courts generally addressed these cases.⁴⁴ However, beginning in the 1980s, a new method for challenge arose in federal courts under the Takings Clause.

B. *The Evolving Application of the Takings Clause*

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public use without just compensation.⁴⁵ The application of the Takings Clause was originally limited to government actions which that resulted in direct appropriation or physical invasion of private property.⁴⁶ However, beginning with the Supreme Court's 1922 decision, *Pennsylvania Coal Co. v. Mahon*,⁴⁷ the scope of takings law expanded to include a separate category of takings, generally referred to as regulatory takings.⁴⁸ In this decision, the Court recognized that government regulation of private property can become so burdensome to the property owner that its effect is equivalent to a "direct appropriation or ouster."⁴⁹ The Court

⁴¹ See Rosenberg, *supra* note 3, at 218.

⁴² *Id.* at 217-18, 229.

⁴³ *Id.* at 217-18.

⁴⁴ *Id.*

⁴⁵ U.S. CONST. amend. V.

⁴⁶ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

⁴⁷ 260 U.S. 393 (1922).

⁴⁸ See, e.g. *Dolan v. City of Tigard*, 512 U.S. 374, 406-07 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

⁴⁹ *Lingle*, 544 U.S. at 537 (interpreting *Pennsylvania Coal Co.*, 260 U.S. at 413).

responded by creating a broad new category of *per se* takings under the Fifth Amendment for overly onerous regulatory actions.⁵⁰

Subsequently, the Court has attempted to more clearly define, and in many cases, has expanded the category of regulations that constitute regulatory takings.⁵¹ Most important to the analysis of this note are two cases which substantially changed the landscape in which municipalities could impose development exactions. These landmark cases, *Nollan v. California Coastal Commission*⁵² and *Dolan v. City of Tigard*⁵³ held that exactions were a class of regulatory takings which should be subject to a heightened standard of constitutional scrutiny.⁵⁴

In *Nollan*, the plaintiff-property owners requested a building permit from the California Coastal Commission to demolish and replace their dilapidated beach-front bungalow with a larger three bedroom house.⁵⁵ The Commission conditioned the permit on the Nollans' transfer of a public easement across their property between their seawall and the mean high tide line.⁵⁶ Its rationale was that the increased size of the Nollans' home would act as a psychological barrier to public beach access.⁵⁷ The Nollans objected to the condition on the ground that it was an unconstitutional taking of private property without just compensation, and the Court agreed.⁵⁸ It found that requiring the Nollans to grant an easement across their property was equivalent to a permanent physical occupation of their property.⁵⁹

⁵⁰ *Id.* at 538.

⁵¹ See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (establishing a balancing test to determine when regulation constitutes a taking); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that permanent government occupation results in a taking); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (holding that government action that deprives the property owner of "all economically beneficial or productive use" constitutes a taking).

⁵² 483 U.S. 825 (1987).

⁵³ 512 U.S. 374 (1994).

⁵⁴ *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 388.

⁵⁵ *Nollan*, 483 U.S. at 827-28.

⁵⁶ *Id.* at 828.

⁵⁷ *Id.*

⁵⁸ *Id.* at 829-31, 842.

⁵⁹ *Id.* at 831.

The holding was a substantial shift for land use regulation in two significant ways. First, the scope of regulatory takings law was expanded to specifically encompass development exactions.⁶⁰ Second, the Court established a higher level of review for exactions. Following this case, a government entity seeking to impose a condition on development must establish a nexus between the condition to be imposed and the purpose of the regulation.⁶¹ In other words, the Commission should have shown that the transfer of the easement was necessary in order to achieve its purpose of providing the public “visual access” to the beach.⁶²

In 1997, the Court added a second tier of review for exactions in *Dolan*. In this case, the owner of a hardware store requested a building permit to expand her store and parking areas and to construct a second building on the lot.⁶³ The city approved her permit subject to two conditions.⁶⁴ First, Dolan would have to dedicate a portion of her lot adjacent to a creek for flood control.⁶⁵ Second, she would have to provide an additional fifteen-foot strip of land, adjacent to the floodplain, for use as a public pedestrian/bicycle pathway.⁶⁶ Dolan challenged the land dedications as takings arguing that the dedications had no relationship to the redevelopment of her property.⁶⁷ The Court agreed in part.

In its opinion, it concurred with the City of Tigard that the “*Nollan*” essential nexus existed between legitimate state interests and the two conditions in question.⁶⁸ However, it found that the nexus was insufficient to impose the conditions. Although the nexus existed, the Court held that the City must also show that the degree of the exactions demanded by the

⁶⁰ *Id.* at 837.

⁶¹ *Id.*

⁶² *Id.* at 836.

⁶³ *Dolan v. City of Tigard*, 512 U.S. 374, 379 (1994).

⁶⁴ *Id.*

⁶⁵ *Id.* at 379-80.

⁶⁶ *Id.* at 378.

⁶⁷ *Id.* at 382.

⁶⁸ *Id.* at 387.

regulatory conditions bear a sufficient relationship to the projected impact of a party's proposed development. That is, the magnitude of the condition must be “roughly proportionate” to the projected impact of the proposed development.⁶⁹ In *Dolan*, the Supreme Court found that the City's findings failed to satisfy the requirement of showing rough proportionality, because it failed to show why a public greenway, as opposed to private one, was required for flood control and to demonstrate a reasonable proportionality between the transportation needs of the development and the requirement for a pedestrian/bicycle pathway. As a result, the Supreme Court ruled in favor of Dolan and established a second tier of review for exactions.

In sum, the two-pronged test established by the *Nollan* and *Dolan* cases requires that a municipality prove that an exaction's purpose has an essential nexus to the type of harm that the development will cause. Second, a rough proportionality must exist between the exaction and the development's projected impacts.⁷⁰ If the exaction does not satisfy this two-prong test, it is deemed a “taking” in violation of the Fifth Amendment of the United States Constitution.

II. PUTTING AN OLIVER TWIST⁷¹ ON NOLLAN AND DOLAN

The *Nollan* and *Dolan* decisions were landmark cases in the areas of administrative and municipal law. States and local governments had imposed exactions for years under the authority of police power when the Court held that they would necessitate scrutiny under the Takings Clause. Many questions arose out of the decisions. One question considered by state courts across the nation was whether it was the intent of the Court to apply a heightened standard of scrutiny to monetary exactions or only in the context of land exactions. Years later, the

⁶⁹ *Id.* at 388.

⁷⁰ *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan*, 512 U.S. 374.

⁷¹ CHARLES DICKENS, *OLIVER TWIST* (Collector's Library 2003) (1838).

United States Supreme Court decided two cases which provided some clarification.⁷² However, these cases were decided too late to assist most states in navigating the tumultuous waters of the takings jurisprudence.

A. Applying *Nollan* and *Dolan* to Monetary Exactions

The application of the *Nollan/Dolan* test has been the subject of considerable confusion and debate, especially in the context of monetary exactions. Although the challenged regulation in each of the cases was an exaction of land rather than money, the Court's exclusive use of the term "exaction" in both of the cases allowed for a broad interpretation which could encompass both land and monetary exactions.⁷³ The ambiguity of the opinions has led states to adopt widely differing interpretations of the test.

Lower courts have understandably been divided on whether the tests should be applied to monetary exactions. Although several states have fully adopted the *Nollan/Dolan* analysis for monetary exactions, others have declined to apply it.⁷⁴

For instance, in *Krupp v. Breckenridge Sanitation District*,⁷⁵ the Colorado Supreme Court refused to apply the *Nollan/Dolan* analysis to an impact fee assessment, asserting that its application is restricted to land exactions. The court specified that the *Nollan/Dolan* analysis was inapplicable because the government did not specifically demand "real property."⁷⁶

⁷² *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

⁷³ *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374. It should be noted that, for purposes of this discussion, monetary exactions are those fees assessed for the purpose of offsetting or reimbursing government for the cost of providing public facilities, infrastructure or services and which have been enacted through a legislative process.

⁷⁴ *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687 (Colo. 2001); *Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park & Rec. Dist.*, 62 P.3d 404 (Or. Ct. App. 2003) (limiting the application of *Nollan* and *Dolan* to land exactions); *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996); *Benchmark Land Co. v. Battle Ground*, 14 P.3d 172 (Wash. Ct. App. 2000); *Home Builders Ass'n of Dayton v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000) (extending *Nollan* and *Dolan* to monetary exactions).

⁷⁵ 19 P.3d 687 (Colo. 2001).

⁷⁶ *Id.* at 697.

Similarly, the Oregon Court of Appeals held that *Nollan/Dolan* was inapplicable when the exaction at issue was monetary.⁷⁷ This court found that applying the test to monetary exactions would lead to an "incoherent result."⁷⁸ The city would be required to compensate a property owner with the very money that the developer paid to reimburse the government for the benefits provided to the developer.⁷⁹ As a result, the developer would receive substantial improvements to its property without a cost.

On the other hand, the California Supreme Court applied the *Nollan/Dolan* test to a permit conditioned on a monetary exaction in *Ehrlich v. City of Culver City*.⁸⁰ In that case, the court reasoned that there was little difference in a demand for a payment of money and a demand for a conveyance of property. Other state courts have agreed.

In *Benchmark Land Co. v. City of Battleground*,⁸¹ the Washington Court of Appeals also applied the analysis to a monetary exaction. Here, the city conditioned a permit approval on the payment of an assessment for making improvements to a road adjoining the property.⁸² After close analysis, the court held the municipality violated the rough proportionality requirement established by *Dolan*.⁸³ Although the court acknowledged that the facts of *Nollan* and *Dolan* were distinguishable from the facts of this case because the condition required a dedication of property rather than money, it found that the fundamental question was the same as those found in *Nollan* and *Dolan*.⁸⁴ The court stated: "[s]urely if the issues for an exaction of money are the

⁷⁷ *Homebuilders Ass'n of Metro. Portland*, 62 P.3d 404.

⁷⁸ *Id.* at 411 ("Government can take money, but only if it pays for it - that is, only if it gives the money back.").

⁷⁹ *Id.*

⁸⁰ *Ehrlich*, 911 P.2d 429.

⁸¹ 14 P.3d 172 (Wash. Ct. App. 2000).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 175.

same as for an exaction of land, the test must be the same: a showing of ‘nexus’ and ‘proportionality.’”⁸⁵

Finally, in *Home Builders Ass'n of Dayton v. City of Beavercreek*,⁸⁶ the Ohio Supreme Court applied the *Nollan/Dolan* analysis to an "impact fee."⁸⁷ The court explicitly recognized the distinction between the monetary assessment it was considering and the land exaction that had been the subject of the United States Supreme Court cases.⁸⁸ The court also conceded that the fees did not threaten property rights to as great an extent as would a land exaction.⁸⁹ In applying the *Nollan/Dolan* test, the court took great care to recognize the needs of local government by considering their ability to reasonably address the need to pay for the community’s needs “without being subject to unduly strict review.”⁹⁰ The court stated that an “appropriate test is one that balances the interests of the city and developers of real estate without unduly restricting local government.”⁹¹ The court upheld the city’s fee against the challenge.⁹²

It is evident from the diversity of opinions adopted in the lower courts that the United States Supreme Court’s holdings in *Nollan* and *Dolan* are subject to a variety of interpretations. Furthermore, state courts have dedicated vast amounts of time and attention to determining the proper application of the test in their respective jurisdictions. Although overdue, the Court should now clarify its intentions as to the applicability of the test to monetary exactions.

⁸⁵ *Id.*

⁸⁶ 729 N.E.2d 349 (Ohio 2000).

⁸⁷ *Id.* at 354-55.

⁸⁸ *Id.* at 355.

⁸⁹ *Id.*

⁹⁰ *Id.* at 356.

⁹¹ *Id.* at 355-56.

⁹² *Id.* at 353.

B. Lingle and City of Monterey

The United States Supreme Court has taken steps toward providing some clarification to the application of the *Nollan/Dolan* test. At least two of its decisions suggest that monetary exactions are distinguishable from land exactions. More importantly, the cases put into question whether the Court intended to apply a heightened standard of scrutiny to monetary exactions in the first place. In its 1999 decision, *City of Monterey v. Del Monte Dunes*,⁹³ the Court explicitly stated that it has “not extended the rough-proportionality test of *Dolan* beyond the special context of land exactions.”⁹⁴ Thus, it removed the requirement for meeting the second prong of the *Nollan/Dolan* test, which requires a finding of rough proportionality, outside of the narrow context of land exactions. Although the Court has not directly addressed the first prong of the exactions test established in *Nollan*, it puts the validity of its application to monetary exactions into question. It is doubtful that the Court intends to only apply one prong of the analysis to development impact fees.

Subsequently, the Court considered both prongs of the *Nollan/Dolan* test in *Lingle v. Chevron U.S.A. Inc.*⁹⁵ In this case, the Court analogized its various tests for regulatory takings to the physical takings that were the focus of early takings jurisprudence. It noted that the tests established by *Loretto*, *Lucas* and *Penn Central*⁹⁶ aimed “[t]o identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”⁹⁷ In doing so, the Court, in each case, focused

⁹³ 526 U.S. 687 (1999).

⁹⁴ *Id.* at 702-03.

⁹⁵ 544 U.S. 528 (2005).

⁹⁶ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

⁹⁷ 544 U.S. at 539 (discussing the commonalities in its previous takings cases in *Loretto*, *Lucas* and *Penn Central*); *See supra* note 51 (providing a description of each test).

directly on the physical or economic burden that the government regulation imposed on private property rights to determine whether a taking had occurred.⁹⁸

The *Lingle* Court then turned to specifically consider where *Nollan* and *Dolan* fit in the regulatory takings framework. Up front, the Court acknowledged the limited scope of the cases, which both involved challenges to land use exactions.⁹⁹ It then tailored the question of whether the regulations were functionally equivalent to a classic taking.¹⁰⁰ Again, the focus of the Court was the extent of physical or economic burden that the government regulation imposed on private property rights.¹⁰¹ The Court found that “*Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings.”¹⁰² Of great importance here is that the Court reiterated that the findings were highly dependent on the fact that the exactions were dedications of land.¹⁰³ It is this critical element that allowed the Court to conclude that physical takings had occurred. As will be discussed below, it is doubtful that the Court could use the same logic if the regulatory act was a monetary exaction.

Unfortunately, the *Lingle* Court did not extend its analysis to consider monetary exactions. However, one could build on the reasoning used by the Court. By carrying the *Lingle* analysis one step further, the question in the context of monetary exactions is whether the imposition of a monetary exaction could be the functional equivalent of the classic taking. As discussed above, in making this determination, the Court focused directly on the physical or

⁹⁸ 544 U.S. at 539.

⁹⁹ *Lingle*, 544 U.S. at 546-47 (noting the limitation on the Dolan test specified in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702-03 (1999)).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 547.

¹⁰³ *Id.*

economic burden that the government regulation imposed on the private property rights.¹⁰⁴ As will be discussed below, an analysis of relevant legal and policy principles strongly suggests that a monetary exaction does not impose the requisite burden envisioned by the Takings Clause.¹⁰⁵

C. Distinguishing Monetary Exactions from Land Exactions

The expansion of the *Lingle* takings analysis first prompts the question of whether a monetary exaction can be analogized to a classic physical taking. Unlike a land exaction, a requirement to pay a fee cannot be classified as a per se *physical* taking whether imposed unilaterally or as a condition. In *Yee v. City of Escondido*,¹⁰⁶ the Court held that “[t]he government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land.”¹⁰⁷ The imposition of a monetary exaction does not require a property owner to submit to occupation of his land in any way. Therefore, the imposition of the fee does not impose a physical burden to the property owner.

The next step of analysis is to determine whether a monetary exaction is equivalent to a taking on the basis of the imposition of an economic burden. The assessment of a fee may appear to be an economic burden on its face. However, the mere requirement to pay a fee is not in itself a taking. In order to affect a taking the fee must rise to a level “so onerous that its effect is tantamount to a direct appropriation or ouster.”¹⁰⁸ Furthermore, to the extent that a fee is reasonable, the United States Supreme Court has established that it is not takings.¹⁰⁹ The Court

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 537. The Court reiterates that standard is that the regulation is “so onerous that its effect is tantamount to a direct appropriation or ouster.”

¹⁰⁶ 503 U.S. 519 (1992).

¹⁰⁷ *Id.* at 527.

¹⁰⁸ *Lingle*, 544 U.S. at 537; *Id.* at 547 (finding that takings occurred because “Nollan and Dolan both involved dedications of property *so onerous* that . . . they would be deemed per se physical takings”).

¹⁰⁹ *United States v. Sperry Corp.*, 493 U.S. 52, 63 (1989) “[A] reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services.”

rested its findings, in part, on the notion that money, unlike real property, is fungible.¹¹⁰ In the case of monetary exactions, the money collected by the fees are exchanged for goods and services provided by the city.

Additionally, as will be discussed below, the property developer receives sufficient reciprocal benefits in the form of increased property values to offset any short term economic burden. Therefore, if a monetary exaction could be assessed outright as a property fee, without triggering a right to compensation, the heightened judicial review established in *Nollan* and *Dolan* should not apply when a city takes the lesser step of making the fee a condition of property development.

III. REBUILDING THE BLEAK HOUSE¹¹¹

Despite the confused state of takings jurisprudence, there are a number of principles that have remained constant in the decades since the Supreme Court began to expand the scope of the Takings Clause. These principles, which serve as the foundation of takings jurisprudence, provide further support for the proposition that monetary exactions should remain outside the purview of takings law. Additionally, as discussed below, a number of policy concerns are instrumental in coming to this conclusion.

A. Considering the Foundational Principles of the Takings Clause

The Court has consistently cited the “Armstrong principle” as justification for the Takings Clause.¹¹² This doctrine states that the intent of the Takings Clause is “[t]o bar

¹¹⁰ *Id.* at 62.

¹¹¹ CHARLES DICKENS, *BLEAK HOUSE* (Richard Maxwell ed., Wordsworth Editions Limited 1993) (1852-53).

¹¹² *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1071 (1992); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002).

Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹¹³ The imposition of monetary exactions is consistent with this principle. The costs imposed by monetary exactions are generally distributed widely between landowners, developers, and the end users of the property being assessed.¹¹⁴ Additionally, the fees are generally distributed either on a proportional basis to those undertaking development in a defined geographic area or based upon a specified amount of estimated impact that the development will generate.¹¹⁵ Therefore, the entity paying the fee does not exclusively bear the costs of supplying infrastructure that the Armstrong principle holds should be shouldered by the public as a whole. Consequently, monetary exactions do not conflict with the Armstrong principle.

A second foundational principle supporting takings jurisprudence is the doctrine of reciprocity of advantage.¹¹⁶ At the time that the United States Supreme Court extended the Takings Clause to regulatory actions, the Court also indicated that regulations may be constitutional when they promote an “average reciprocity of advantage.”¹¹⁷ The long-held doctrine rests on the idea that the burden of regulation should be weighed against the reciprocal benefits that result from the regulation.¹¹⁸ When the benefits accrued to the property owner are greater than the burden imposed, it is not likely that a court will find a taking.¹¹⁹ In order to

¹¹³ *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Tahoe-Sierra Pres. Council*, 535 U.S. at 321.

¹¹⁴ *See Rosenberg*, *supra* note 3, at 213-14.

¹¹⁵ *Id.* at 204-06.

¹¹⁶ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

¹¹⁷ *Id.* at 415.

¹¹⁸ *See Ball*, *supra* note 4, at 1554.

¹¹⁹ *Id.*; *Pennsylvania Coal Co.*, 260 U.S. 393, 417 (establishing average reciprocity of advantage as prominent consideration in regulatory takings jurisprudence).

measure the benefit, the Supreme Court has considered both the direct benefits to the property owner as well as the indirect benefits that accrue to the community at large.¹²⁰

In the context of monetary exactions – fees assessed through legislative action for the purpose of reimbursing government for the cost of providing public infrastructure and services – a burdened property owner will receive both direct and indirect benefits. Direct benefits will accrue as a result of increased property value due to the provision of improvements. In 2002, the Supreme Court held that increases in property values were a sufficient benefit to withstand a Takings challenge.¹²¹ In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Supreme Court rejected a takings challenge to a development moratorium because the values of the restricted properties would be enhanced as property values in the broader area increased as a result of the regulatory action.¹²² In the case of development fees, property developers receive assurance that the infrastructure supporting the development of the property will occur in a careful, orderly, and timely manner.¹²³ These assurances translate in to increased salability and value.

The property owner also receives indirect benefits. Many municipalities assess fees that support the public welfare, such as for the construction of community serving facilities like libraries and community centers.¹²⁴ Others assess fees to mitigate regional impacts, such as environmental degradation and diminished affordable housing.¹²⁵ The benefits from these monetary exactions will accrue to the general public, as well as the assessed developer. In light

¹²⁰ See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 134-35 (1978) (arguing that sufficient reciprocity is established when the challenged regulation benefits all citizens and structures, both economically and by improving quality of life in the city as a whole).

¹²¹ *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

¹²² *Id.* at 341.

¹²³ See *Rosenberg*, *supra* note 3, at 214-15 (stating the land development process is efficient when it bears the costs the costs of its externalities rather than forcing them onto the public at large and finding that this results in an economic benefit to the developer).

¹²⁴ See *Ledman*, *supra* note 40, at 837.

¹²⁵ *Id.*

of the direct and indirect benefits that would consistently accrue to the property owner, a finding that an assessment of a monetary exaction is sufficiently onerous to warrant a finding that a taking has occurred is unlikely. Thus, an application of the reciprocity of advantage test also demonstrates that monetary exactions would consistently fall outside the scope of takings jurisprudence.

B. Federalism and the Takings Clause

The deep-rooted principles of federalism also support the exclusion of monetary exactions from a Fifth Amendment review. The regulation of property is a right widely believed to be within the purview of states under their police power authority.¹²⁶ This authority is widely delegated to city and county governments in recognition of the integral role that they must play in making local land use decisions.

The suggestion that the federal government can or should prescribe an approach to something as unique as local land use decisions is obtuse at best. Land use and development needs in the communities of New York City are undoubtedly different than those in Omaha, Nebraska. This is the product of differences in economic generators, population density and rates of growth, and citizen preferences. Unique topography and climate patterns also strongly influence local land use decisions. Local governments are best suited to respond to local needs and preferences due to their familiarity with the factors influencing them. As a result, it would be inefficient and irresponsible for the federal government to undertake planning efforts at the local level. And, monetary exactions, as a fundamental aspect of land use and development, should be in the exclusive control of state and local governments.

¹²⁶ Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 MINN. L. REV. 826, 833-34 (2006).

Federal courts have long recognized that the role of local governments in land use regulation is paramount. For well over a century, the Supreme Court has paid deference to states' roles in property regulation, as illustrated in long held doctrines such as the regulation of "noxious" uses¹²⁷ and recent controversial decisions, such as the high-profile eminent domain case, *Kelo v. City of New London*.¹²⁸

A review of takings jurisprudence also reveals that state lawmakers have enjoyed great latitude in defining, interpreting, and adjusting the boundaries of property law—all in response to changing conditions, social needs, and evolving understandings of the appropriate role of property as a social institution.¹²⁹ Nothing in the text, history, or pre-*Penn Central* doctrine of the Fifth Amendment Takings Clause requires that state lawmakers be deprived of that power.¹³⁰

C. Implications of Applying Nollan and Dolan to Monetary Exactions

As discussed above, the Supreme Court has taken steps to limit the reach of the *Nollan/Dolan* test. The Court may have recognized that, while the value of applying the takings analysis in the context of land dedications is rational and effective, it yields a number of detrimental consequences as applied to monetary exactions. These injuries can be minimized by removing monetary exactions from heightened scrutiny. Each of these consequences should be heavily weighed in any analysis of the doctrinal treatment of development impact fees.

As an example, when applied to monetary exactions, the *Nollan/Dolan* test can substantially increase the level of administrative oversight required to recover external costs

¹²⁷ *Mugler v. Kansas*, 123 U.S. 623 (1887) (holding that a regulation designed to protect the general public from harm does not constitute a taking and reaffirming the absolute power of states to enact measures which they deem necessary and appropriate to protect the public from injurious uses of private property).

¹²⁸ 545 U.S. 469, 482 (2005) ("Our earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" that we owe to state legislatures and state courts in discerning local public needs.") (finding that the city of New London, Connecticut could take private property for a "public purpose").

¹²⁹ See Karkkainen, *supra* note 126, at 826.

¹³⁰ *Id.*

associated with development. The heightened bureaucracy adds unnecessary expense to the process of planning and providing necessary infrastructure for communities.¹³¹ One significant way that costs increase is through the burden shifting mandated by *Dolan*. In that case, the Supreme Court shifted the burden of proving the required "rough proportionality" relationship "from the challenging landowner to the defending municipality."¹³² This shift imposes costly procedural demands on municipal governments. To meet the burden, municipalities must make "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."¹³³ This aspect of *Dolan* requires new governmental procedures designed to more accurately measure individual development impacts and to assign more proportional landowner burdens. Generally, cities will expend hours of technical staff time or contract for costly consultant reports in order to make this determination. These factors, in turn, add significant administrative cost to delivering infrastructure.¹³⁴

Another policy consideration is the potential that the development will fail to mitigate its impacts on the surrounding community, otherwise known as externalities. This can occur if an exaction fails to meet the heightened standards of the *Nollan/Dolan* test, resulting in the fee being void and classified as an unconstitutional taking. As a result, externalities imposed by the project either remain unmitigated or become a financial burden to the city. These externalities would differ depending on the type and construction of the fee assessed. However, it could likely include overcrowding of schools and increased traffic congestion, as a result of the introduction of additional children and vehicles to a community. Ultimately, neighborhood residents pay the highest price as a result of a reduction in overall quality of life and the market

¹³¹ See Rosenberg, *supra* note 3, at 208.

¹³² *Id.* at 241.

¹³³ *Id.*

¹³⁴ *Id.*

will likely respond with stagnation or declining property values. If this occurs, there will be long-term consequences in the market.

Fear of litigation has led some municipal governments to underestimate the true impacts of development in order to minimize the risk of litigation.¹³⁵ Long term, this trend will either place greater burdens on already overburdened municipal budgets or, worse, communities will forgo important infrastructure and facilities development. Again, communities and property values suffer the greatest damage.

Alternatively, some cities may refuse to grant development permits altogether to avoid incurring any impacts from growth.¹³⁶ By weakening their ability to condition development permits, the Court effectively requires municipalities "[t]o deny development permits altogether to await completion of necessary public facilities rather than . . . better accommodate commercial development projects by having each contribute a share to those planned facilities."¹³⁷ The municipality's response to stop development could significantly hinder the ability of the market to perform. Ultimately, this could lead to a stagnant economy and degradation in the future quality of life in the community.

In contrast to the scenarios above, when cities can impose monetary exactions to recoup the true costs of mitigating project externalities, such as increased traffic and enrollment in schools, they are able to minimize the impacts of development on surrounding communities. They can avoid potential impacts by fully mitigating them concurrent with the development of the property. As a result, the public at large does not pay through a reduced quality of life and a

¹³⁵ See Ball, *supra* note 4, at 1516; See also Kersten, *supra* note 6, at 293.

¹³⁶ See Ball, *supra* note 4, at 1516.

¹³⁷ See Kersten, *supra* note 6, at 283.

retardation of the market.¹³⁸ The result is more harmonious and efficient growth and better planned communities.¹³⁹

CONCLUSION

"It is a far, far better thing that I do..."¹⁴⁰

At the earliest opportunity, the United States Supreme Court should provide much needed clarification regarding its intent with regard to the applicability of the Takings Clause to monetary exactions. This Note suggests that the most logical reading of the related principles and laws should lead to the removal of monetary exactions from the purview of the Takings Clause.

Some may fear that removing exactions from the purview of heightened takings review may lead states and cities to abuse their regulatory authority. However, developers and property owners would retain their ability to constitutionally challenge defective or ill-advised regulations on Equal Protection and Due Process grounds. Furthermore, state courts have long regulated challenges to local land use decisions. As a result, wronged parties would maintain numerous alternatives for recourse.

A clarification to this body of law would benefit a wide spectrum of stakeholders. Clarification would assist cities by providing certainty when they plan for the health, safety, and welfare of our nation's cities. Property developers and landowners would benefit through increased certainty and predictability in the development process. And, most importantly, a clarification could also serve to arrest further degradation to the quality of life in neighborhoods nationally. Communities, such as the suburb that Jim and his family live in, would benefit from

¹³⁸ See Rosenberg, *supra* note 3, at 214-15.

¹³⁹ See Kersten, *supra* note 6, at 288.

¹⁴⁰ CHARLES DICKENS, A TALE OF TWO CITIES 390 (Richard Maxwell ed., Penguin Books 2000) (1819).

new and modern amenities as development occurs, and, even Jaime's family can benefit during future waves of urban reinvestment and redevelopment. Furthermore, future generations could avoid the disappointment and frustration experienced by Jaime and his family due to potholes, unavailable library books, or insufficient ball fields. It is imperative that we avoid perpetuating the "Tale of Two Cities" in our nation's cities.