REAL ESTATE DEVELOPMENT EXACTIONS, LINKAGE, AND THE NOLLAN DECISION; SOME BACKGROUND, OBSERVATIONS, AND POLICY SUGGESTIONS

BY

Michael P. Klein

B.A. State University of New York at Buffalo (1979)
M.A. State University of New York at Buffalo (1984)
J.D. State University of New York at Buffalo (1985)

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Signature of author: ____________________________
Department of Urban Studies and Planning, 1990

Certified by: ________________________________
Professor Gary Hack: Thesis Supervisor

Accepted by: ________________________________
Professor Donald A. Schon: Head of M.C.P. Committee

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Abstract

This thesis examines the background and development of real estate 
development exactions, and what recent changes in Supreme Court 
doctrine may mean to the practice of exactions. It begins with an historical 
overview of the different types of exactions, and the state law that 
governed them. It then looks at the limited Federal Constitutional law that 
the Supreme Court had formulated up to 1987. In that year, two important 
cases were handed down, which are discussed in the thesis with an 
explication of what the precedents mean for exactions, and linkage 
exactions in particular. In doing this, the tests and standards, insofar as 
they are known and discernable from the opinions, are set out. Further, 
the liabilities to government under these precedents is discussed.

Having established an analytical framework, the thesis sets out two 
sample sets of exactions and applies the analysis to the most important of 
those exactions. In so doing, the tests and standards developed previously 
in the thesis are applied to these exactions, to see how they might be 
affected by these recent constitutional developments. The thesis then 
concludes with a recap of the major points and some suggestions for how 
government might alter its exaction policy to avoid the liability imposed 
under the recent precedents if exactions not meeting the new standards are 
required as a part of the development approvals process.

Thesis Supervisor: Dr. Gary Hack

Title: Professor of City Planning
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INTRODUCTION

Overview

Linkage exaction fees are the newest form of development impact exaction fees. They are a relatively recent idea that follow logically upon a body of exaction thought and policy extending back to the Depression. But they are premised upon some important new assumptions about proper apportionment of responsibility for the consequences of new development and growth in a community. ¹

Linkage raises both public policy and legal issues. For related reasons, the proper boundaries of linkage, and all exactions, is a "hot" question in both planning/governmental circles, and in the law. This relatedness is a function both of the fact that governments have been formulating new types of, and rationales for, exactions lately, and of the new conservative leaning of the Supreme Court which is more inclined than previously to subject wide ranging exactions to its own constitutional scrutiny.

In this thesis I seek three things: 1. to examine the current constitutional law defining what the proper connections should/must be between the consequences of a development, and the exactions that are demanded as a part of regulatory approval; 2. to examine the liability to government if exactions are found to exceed its constitutional authority as discussed in the first section; 3. to look specifically at the linkage portions of two sets of exactions, and apply the rationale developed in the first section to see if the exactions meet the apparent and potential legal minimal requirements to insulate government from liability.

¹For a discussion of this, see my section on the background of land use exactions
The thesis will have several parts. First, a brief overview of the evolution of real estate exactions. Second, I will outline and discuss the severe liabilities governments are exposed to under the holding in First English Evangelical Lutheran Church v. County of Los Angeles.\textsuperscript{2} Third, I will examine the constitutional framework that has emerged since Nollan v. the California Coastal Commission.\textsuperscript{3} As a part of this, I will outline the tests that are contained in Nollan governing the acceptable "nexus" that must exist for an exaction to be acceptable, as well as point the way towards some other areas of potential concern raised by language in the opinion, particularly as First English's rationale interconnects with the holding in Nollan.\textsuperscript{.} Fourth, I will apply the nexus rationale to the linkage portions of two "public benefits packages" agreed to by developers and government in connection with two mixed use projects in Boston. In connection with this, I will look at the legal rationales advanced to justify the policy of linkage, and, using the framework developed in the previous section, I will examine whether they are defensible under the standards propounded in Nollan. Finally, I will conclude with some observations about exactions after Nollan.

Background

Exactions are a way to dissemble the complex layers of government finance and responsibility for the costs imposed in the regional economy when a new factor is introduced that has an economic impact. Because exactions are essentially a form of taxation, the forms they take reveal a great deal about the ideological bias of the implementing government (as do all forms of taxation policy.) This is not just narrowly a function of the redistributive aspects of taxation. It also says much about both the values

\textsuperscript{2}First English Evangelical Lutheran Church v. County of Los Angeles. 107 S. Ct. 2378 (1987)

\textsuperscript{3}Nollan v. the California Coastal Commission. 107 S. Ct. 3141 (1987)
and the vision of social relationships held by the government setting the policy.

Land use regulation itself has many of the same attributes of revealing government attitudes that I attribute to taxation policy. Controlling land use is itself a distribution/redistribution of wealth. Exactions are therefore a related phenomenon, and can often function as a way for the government to capture for itself, or the residents of the city, some of the wealth created through using the land in a particular way. This is the case for those exactions which go beyond requiring that the development merely mitigate its own impacts.

Over the years since the first exaction requirements were formulated, an entire set of development approvals exactions have sprung up in communities across the nation. They have tended steadily to shift the costs associated with the development to the developer and away from the community. In doing this, the intellectual structures justifying the exactions have become ever more divorced from the costs and impacts that are directly, proximately, a result of the project.

Planners and government officials sometimes see the regulatory approval stage in a development project as an appropriate moment to try to procure "public benefits" from the developer, since the government has considerable power and influence that fades quickly once the project has been approved (this is in part a policy of using the approvals process as an opportunity to redistribute wealth.) These take different forms, ranging over requirements that the project provide its own infrastructure (preventing the provision of the infrastructure from becoming a public charge), and mitigation of physical impacts in the area around the project that result from increased use, to linkage programs that imply a responsibility by the developer/owner for the provision of otherwise free public goods that will be made scarcer by the increased demand attributed to the new users inhabiting the project. There is considerable disagreement from place to place over what form exactions should take.
As local budgets have tightened ever further, sometimes as the result of tax caps imposed by an electorate tired of paying for the policies and programs their governments have created, and as the rationales behind the new form of linkage exactions have become known, linkage systems and other demands for amenities have begun to spread across the country. This has raised debate in planning circles as to the proper methods of formulating, measuring, and implementing linkage, and exactions in general.

Legal Framework

Meanwhile, there is considerable ferment in the legalities of exactions as well. Historically, the Supreme Court has given governments broad authority under the police power to pursue land use regulation and exaction policy. This left the task of defining the boundaries of how far government could go in demanding exactions largely to the states, which have differed in the degree of connection they require between the project and the exaction.

The limits that are imposed upon the ability of government to use the development approval process as an opportunity to redistribute wealth has historically varied from state to state, because they are established by state court precedent. The U.S. Supreme Court allowed states wide latitude in this area, under the police power implied in the Constitution. As a result, practice ranged over a fairly broad area depending upon the views of the particular state's high court.

Because the California Supreme Court had allowed government very broad latitude in imposing exactions, that state's government has been very active in developing exaction schemes, leading one commentator to observe:
The decisions with respect to land development exactions have proceeded step by step. No individual decision has represented a remarkable extension of prior law. But few reviewing courts have looked further back than the most recent precedent. Rarely, if ever, has a court stopped to reconsider fundamental constitutional and equitable issues presented by the latest innovations in exactions. If the leap from the most recent precedent is not too great, the courts have been willing to make it. Thus, the law has developed, albeit in small increments, all the way from mandatory construction of off-site physical improvements to compulsory linkage payments. Not even the boldest partisan of the Ayres decision\(^4\)\(^5\) could have foreseen such a progression.\(^6\)

The wide latitude necessary for the gradual expansion of acceptable exaction schemes in some places was allowed under the largely hands-off stance adopted by the Court, which came to an end in 1987 in the case \textit{Nollan v. The California Coastal Commission}.\(^7\) Nollan apparently has signalled the beginning of a federal standard defining the degree of connection, or to use its own term "nexus", between the project for which approval is sought and the exaction that is demanded. The scope of this new standard is unclear, and there is much reason to believe that it may be limited to those exactions involving physical occupations of the property, or some portion thereof, by the government. Traditionally, such occupations have been subjected to a higher standard of scrutiny. As Justice Scalia says in his opinion in \textit{Nollan} while discussing his standard

\(^4\)34 Cal. 2d 31, 207 P.2d 1 (1949).
\(^5\)Ayres was an early case in which the California Supreme Court upheld a requirement that a subdivision developer dedicate an additional right of way along the public street bordering the subdivision. The author is implying that this was the beginning of a "slippery slope" that has lead to today's grasping forms of exactions. (M. P. K.)
\(^7\)Nollan, supra.
that abridgement of property rights requires a "substantial advancing" of a legitimate state interest:

We are inclined to be particularly careful about the adjective [substantial] where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power.8

Nonetheless, the Court did not say that the application of the new nexus standard was limited to such physical occupations, leaving observers to wonder about the implications of applying such a standard to the various forms of exactions in use.

The Court's shift in approach has caused uncertainty as to the propriety of many existing exaction systems, at just the moment when it seems governments are poised greatly to expand the reach of such systems. The concerns for government and exaction payers are, or should be, greatly exacerbated by the Court's decision in First English Evangelical Lutheran Church v. County of Los Angeles, 9 which imposes liability upon governments for regulatory takings from the day of the enactment of the regulation rather than from the time of the determination that the regulation amounts to a taking, as was previously the case.

The logic used by the Court in First English indicates that the definition of a regulatory taking requiring compensation includes exactions that are found to lack adequate nexus as defined in the Nollan decision. This means that government will be liable for the value of such exactions subsequently found to be constitutionally unjustifiable beginning from the time they were imposed, a potentially ruinous liability. Thus, the stakes

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8Nollan, supra at 3150
9First English, supra.
for government in determining and complying with the requirements for "nexus" in their exactions are high indeed.
A BRIEF REVIEW OF EXACTIONS AND THE STATE LAW GOVERNING THEM

Once upon a time—perhaps a half-century ago—there was a fairyland for developers in the United States, where the division of labor between local government and developers were clear-cut: Government was responsible for supplying all the necessary public services (minimal at that time) while developers could subdivide and sell land uninhibited, with only minimal registration requirements.\(^{10}\)

In the beginning there were only paper subdivisions. In the nineteenth century and well into the third decade of this century, land could be subdivided without constructing the public improvements that would be needed to serve the subdivided land. The subdivider needed only to prepare an accurate plat of the property to be subdivided, usually with the assistance of a surveyor, and then record it in the appropriate county office. The subdivider did not assume responsibility for constructing any of the subdivision improvements. That task was left to the municipality or to the purchasers of lots in the subdivision. Streets were laid out but, in many instances, title to the street did not pass to the municipality unless it improved the street or actual use of the street had already commenced.\(^{11}\)

In this time, the role of land use controls and government planning seemed clear, and quite limited. This was a period of city and nation building. The regulations were defining the character of places that largely had not existed before, or were gladly in the process of becoming


\(^{11}\)Smith, supra
something newer and better. It was an age of progress, and willingness to invest in the future. The issue of who really owned development rights, and the equities in distributing the costs caused by regulation, was barely even thought of.

The Depression ended this world, by causing both a surfeit of unsold lots and many defaults on the bonds backed by special assessments on adjacent lots that cities had sold to finance the improvements they had installed. After this experience, it became common for cities to require developers to install the on-site infrastructure to support the subdivision plots they installed. Although some developers protested the requirement that they dedicate land towards streets and install improvements, the state courts generally upheld the government's right so to require the dedication.\textsuperscript{12} This type of exaction grew to include the requirement that owners dedicate land to certain purposes, such as park land and land for schools.

Over time, cities, as a part of the development approval process, began to require developers to agree to build off site amenities. Typically, the early off-site improvement requirements were for the provision of improvements at the "edge of the subdivision, crossing it, or extending our from it. The other type of regulation, usually issued with respect to storm drains or water and sewer mains, requires that lines in the subdivision or those extending out from it contain sufficient excess capacity to serve other developments."\textsuperscript{13}

The next stage on the evolutionary path occurred with the invention of in-lieu fees, which provided for developers of parcels too small to justify their own dedicated parks and school land to pay a fee toward the provision of these by the city. From that point, it was a small step to the development of exactions, particularly Impact Fees, which are intended to

\textsuperscript{12} Much of this discussion is a synopsis of Smith, supra.
\textsuperscript{13} Smith, at page 8
mitigate the impacts of development on the infrastructure of the community by imposing a fee used to help pay for new facilities or to reimburse the community for a proportionate piece of the infrastructure installed in anticipation of future growth. The most recent form of exaction that has been implemented is the linkage fee requirement. Linkage is the application of impact mitigation theory to non-public pieces of the regional economy/infrastructure, notably housing.

The rationale for both Impact Exactions and Linkage Exactions can be partly understood in the context of windfall recapture theory. This idea recognizes that landowners benefit from increases in the value of their property that result from economic occurrences unrelated to anything the owner did, or from inflation. It is thus distinct from on-site improvements that merely require that the development's own infrastructural needs do not represent a cost to the community's treasury. The rationale is described by Diamond in describing the San Francisco Housing Linkage Program (OHPP):

The goal of an exaction is the internalization of external costs imposed on the community by developers. When the local government uses municipal revenues to pay for the public costs generated by the new development, the developer reaps a windfall. In theory, to recapture some of this benefit to the developer, the community measures the anticipated tax revenues of the development against the cost of the public services it expects to supply to the project. If revenues are less than costs, then the development is not considered to pay its own way and the locality exacts a payment, in money or in kind, from the developer. Subdivision developers, for example, commonly are required to pay for the public

infrastructure that services their development. The definition of public costs has recently expanded to the point where cities may require developers to dedicate sites or pay in-lieu fees for schools and parks.

OHPP expands the scope of public costs to include not only cost of government, paid for by the community out of municipal revenues, but also the costs absorbed by the community at large in the form of increased housing costs. By implementing OHPP to alleviate the pressure that the new office projects place on the housing market, the city makes the judgement that the benefits of office projects are not greater than the costs imposed on the city unless the office developer internalizes the housing costs of his project. The city is apparently reasoning that office development creates an externality, stemming from the fact that new offices attract residents to the city. This drives up demand for housing and, consequently, raises the price of housing; the level of office activity thus has a financial impact on the housing market. OHPP is not designed as much to avoid this impact as to shift the burden it creates to the office sector. The program is redistributive, with housing requirements imposed on developers for reasons of equity rather than efficiency.\textsuperscript{15}

To the extent that exactions are understood as a tax, it is also possible to categorize exactions as a special tax on the increased value created in a property by government investment in the community, as well as private investment by adjacent landowners.

\textsuperscript{15}Diamond, supra, \textsection 12-14.
Discussion of state law governing exactions

Most of the legal framework within which exactions and land use regulation generally operate is state statutory law. Typically, the power to impose zoning or other land use schemes is reserved to the state. The state, in turn, delegates its authority to local government in enabling legislation that delimits the boundaries within which the locality must remain in the exercise of this authority. It is the rare case that raises constitutional issues, because most states are sufficiently conservative in delegating power to local government to prevent the case turning on broad constitutional issues rather than the scope of action permitted under the enabling legislation.

Because the Supreme Court has historically allowed states wide authority to regulate and restrict local government's authority to impose exactions, the acceptability of exactions has varied from state to state, and rested on where each state's courts draw the line on government's authority to regulate and exact payments.

The constitutionality of state laws authorizing local governments to require land dedication as a condition of subdivision approval have been uniformly upheld against challenges that they deprive the property owner of due process. In general, the rationale for these decisions is that the state laws are reasonably related to the achievement of legitimate governmental objectives founded in the public welfare and are therefore within the police power of the state.  

16 Much of this discussion derives from Smith, supra.

The principal constitutional dispute has revolved around the question whether there is a reasonable relationship between the exaction requirement and achievement of a proper public purpose. Specifically, the battle has been conducted over whether there must be a direct and demonstrable relationship between the exaction and the needs of the subdivision development, or whether a looser standard would suffice. Most jurisdictions have opted for the looser standard that there be a rational or reasonable relationship between the exaction and needs created by the development.\(^{18}\)

Off-site requirements have met with mixed results when challenged in court. The center of the inquiry has always been to what degree the government must show that the need created by the development relates and is proportional to the exaction. Thus, different states have diverged primarily in deciding what will satisfy this test.

The loosest of the pre-\textit{Nollan} standards was the "reasonable/rationale relationship" test, which requires that the government show merely a reasonable connection between the public purpose being served, and the exaction being levied. This test provides only that if the government could reasonably/rationally have believed that the exaction would have furthered the public purpose being advanced, it is sufficient to justify the exaction. In a fairly strict version of this test, the Minnesota Supreme Court in \textit{Collis v. City of Bloomington} \(^{19}\)

"explained the rationale for its approval of that state's version of the reasonable relationship test:

\begin{quote}
While in general subdivision regulations are a valid exercise of the police power, made necessary by the problems subdivisions create-i.e., greater needs for municipal services and facilities -the possibility of arbitrariness and unfairness in their application is
\end{quote}

\(^{18}\text{Smith, supra, at page 11.}\)

\(^{19}\text{Id. This is footnote 41 in the original text: 310 Minn. 5, 246 N.W.2d 19 (1976).}\)
nonetheless substantial: A municipality could use dedication regulations to exact land or fees from a subdivider far out of proportion to the needs created by the subdivision in order to avoid imposing the burden of paying for additional services on all citizens via taxation. To tolerate this situation would be to allow an otherwise acceptable exercise of the police power to become grand theft. But the enabling statute here prevents this from occurring by authorizing dedication of only a 'reasonable portion' of land for the purposes stated. We therefore uphold the statute as constitutional. A 'reasonable portion' is construed to mean that portion of land which the evidence reasonably establishes the municipality will need to acquire for the purposes stated as a result of approval of the subdivision. This is, of necessity, a facts-and-circumstances test, but it is the only kind of test that will consider the myriad of factors which may bear on a municipality's needs for certain kinds of facilities and the relationship of a particular subdivision to those needs.\textsuperscript{20}

The California Supreme Court's *Walnut Creek* decision\textsuperscript{21} provides the leading explanation of the rationale behind the reasonable relationship test. The Court said:

We see no persuasive reason in the face of these urgent needs caused by present and anticipated future population growth on the one hand and the disappearance of open land on the other to hold that a statute requiring the dedication of land by a subdivider may be justified only upon the ground that the particular subdivider upon whom an exaction has been imposed will, solely by the development of his subdivision, increase the need for recreational facilities

\textsuperscript{20}Id. This is footnote 42 in the original text: Id at 17, 246 N.W.2d at 26
\textsuperscript{21}Id. This is footnote 43 of original text: 4 Cal. 3d 633, 484 P.2d 606, 94 Cal Rptr. 630, appeal dismissed, 404 U.S. 878 (1971). (additional material omitted)
to such an extent that additional land for such facilities will be required.22

Therefore, the court held that "the amount and location of land or fees shall bear a reasonable relationship to the use of the facilities by the future inhabitants of the subdivision."23

The reasonableness of the relationship required by the Walnut Creek decision is very generously weighted in favor of the municipality by the California courts. In Grupe v. California Coastal Commission,24 a California court upheld a condition imposed in a new development permit requiring the dedication of two-thirds of a parcel for an easement that would provide access to a beach on the property. The lot owner had requested a building permit for a single-family home on a 15,200 square foot beachfront lot. The permit was conditioned on confinement of construction to 5,000 square feet and dedication of between 8,000 and 10,000 square feet as a lateral easement (that is, parallel to the shoreline) for public access and passive recreational use. Already developed properties surrounding the land at issue were not burdened with similar easements. Therefore, the land would not be accessible from anywhere except the shoreline below the high tide mark.25 Moreover, the easement did not provide access to the beach from a public road because it ran along the coast. The property owner claimed that the dedication was not reasonably related to needs that the construction of one residence created. Nevertheless, the court upheld the mandatory deduction, reasoning that the condition requiring beach access need not benefit the proposed development. Instead, only an "indirect relationship" between the exaction and a need attributable to development is required. It stated:

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22Id. This is footnote 44 of the original text: 4 Cal. 3d at 639-40, 484 P.2d at 611, 94 Cal. Rptr. at 635.
23Id. This is footnote 45 of the original text: Id. at 640, 484 P.2d at 612, 94 Cal.Rptr. at 636.
24Id. This is footnote 46 of the original text: 166 Cal. App 3d 148, 212 Cal Rptr. 578 (1985). (additional material omitted)
25Id. This is footnote 47 of the original text: 166 Cal. App. 3d at 156, 212 Cal. Rptr. at 581.
Respondent's beach front home is one more brick in the wall separating the People of California from the state's tidelands. Although respondent's home alone has not created the need for access to the tidelands fronting his property, it is one small project among a myriad of others which together do severely limit public access to the tidelands and beaches of this state, and therefore collectively create a need for public access. Thus, the condition exacted to facilitate access is related to a need to which respondent's project contributes, even though, standing alone, it has not created the need for access.26

The Grupe decision adopted a very generous definition of the reasonable relationship required between an exaction and a development-generated need. The decision effectively gives municipalities carie blanche to impose exactions. The reason is that the construction of the residence proposed in Grupe could not, except as a matter of abstract theory, have actually created a need for an easement that granted beach access when the easement did not even provide direct access to the beach. At this level, exactions become judicially sanctioned governmental extortion, limited only by the taking rule that regulations may not deprive property of substantially all economic use.27

This broad standard was the one operating in California before Nollan..

A much more restrictive approach was taken by the Illinois courts, which adopting a rule that the exaction must be "specifically and uniquely attributable" to the consequences of the development.

If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is

26Id. This is footnote 48 of the original text: Id. at 167, 212 Cal. Rptr. at 589-90 (citations and footnote omitted)
specifically and uniquely attributable to his activity, then the [dedication] requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power.\textsuperscript{28}

Some states adopted the "rational nexus" approach. This test requires that there be a rational connection between the exaction and the need created by the development, and puts the burden of proving this connection on the state. It is probable that is the closest of the previous state standards to that which the Supreme Court intends to adopt in \textit{Nollan} when it propounds the "nexus" requirement for exactions.

One approach that strikes a middle ground was adopted by the New Hampshire Supreme Court, which "has held that a developer can be required to improve off-site roads providing access to the development, but only to the extent of the developer's fair share of the costs.\textsuperscript{29} If those roads would serve needs beyond those generated by the subdivision, the municipality must share the cost."\textsuperscript{30}

It can be seen that there was diversity in approach and opinion in this area in state law before the Supreme Court chose to involve itself in the debate on the limits of exactions. By setting federal constitutional limits on the reach of governments setting exactions, the Court has intruded into an area that it has historically avoided except in a limited number of cases. The hesitance the Court has displayed historically reflects the belief that state sovereignty should not be impinged upon unless there is an important purpose to be served by imposing a federal standard.

\textsuperscript{30}117 N.H. at 822, 379 A.2d at 203.
With the increasing centrality of federal authority in everyday life, and the assumption that the courts, especially the Supreme Court, will act to safeguard rights against government abuse, the Court has generally become more willing to involve itself in the area of social policy. Thus, it is not so large a departure from other manifestations of judicial activism for the Court to develop more stringent guidelines governing exactions. Unfortunately, so far the Court's doctrine in the area has been no less confused and uncertain that that of the several states. It is this doctrine that is the subject of the next section.
A OUTLINE OF THE CONSTITUTIONAL DOCTRINE GOVERNING EXACTIONS

Historical Structure of the Inquiry

The constitutional law governing exactions is premised upon judicial construction of the Fifth Amendment "takings clause" and the Fourteenth Amendment due process requirements. The Fifth Amendment requires that "private property shall not be taken for public use, without just compensation." The Fourteenth Amendment, in turn, requires that the state, in exercising its police powers, must provide substantive due process.

Each of these two clauses, in turn, has its own set of tests and standards which define the requirements they impose upon the actors in a given situation. The Fourteenth Amendment due process requirement was stated by the Supreme Court in Lawton v. Steele.31

To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.32

The Fourteenth Amendment substantive due process requirements have generally been held to have a lower threshold of justification that the government must advance in justification for its actions than do the Fifth Amendment requirements. But the Court has recently indicated that the Fourteenth Amendment might be invoked in developing a new requirement that an exaction be proportional to the impact justifying an exaction, as I will discuss later. Nonetheless, historically the most difficult issues in

31 152 U.S. 133 (1894)
32 Id. at 137
land use regulation boundaries have tended to arise in the realm beyond due process, when the question being asked is whether some regulations, even though they meet the substantive due process requirement, nonetheless amount to a Fifth Amendment taking requiring compensation. The crux of this issue lies in the balancing of the constitutional exercise of the police power against the requirement for compensation under the takings clause.

The police power is generally defined as the power of a sovereign to prevent persons under its jurisdiction from conducting themselves or using their property to the detriment of the general welfare.\(^{33}\) A state may, pursuant to its police power, regulate the use to which private property is put in order to promote the health, safety, and welfare of the public.\(^{34}\) Such regulatory measures restrict the use of property that remains in the physical possession of the owner. The state does not appropriate or make any use of the property but merely prevents the owner from using it in a way that interferes with the rights of the public.\(^{35}\)\(^{36}\)

The earliest cases testing the constitutional limits that courts would impose on government exercise of the police power went heavily against the land owner, permitting the state to severely limit the uses to which owners could put their properties so long as it could demonstrate a public purpose being served:

\[\text{In \textit{Mugler v. Kansas},}^{37}\text{ the Court upheld state legislation which had prohibited the manufacture of alcoholic beverages sold within the state, despite the fact that the legislation}\]


\(^{35}\)See Mahon, 260 U.S. at 417 (Brandeis, J. dissenting).


\(^{37}\)123 U.S. 623 (1887)
rendered Mugler's brewery virtually useless. Mugler emphasized that where the legislature had determined an act to be necessary for the public's health, safety, and welfare, the judiciary need not scrutinize the actions of the legislature, regardless of the extent of loss suffered by the property owner. The Mugler Court, reviewing the legislation under the due process clause of the fourteenth amendment, found that it need only decide whether the act at issue was fairly adapted to the end of protecting the community. A prohibition on the use of property, enacted in the interest of the community as a whole, the Court held, cannot be deemed a taking or appropriation of property.

The Court's deference to legislation on behalf of the public's health, safety, and welfare continued well into this century. In Hadacheck v. Sebastian, the Court reviewed an ordinance passed by the City of Los Angeles prohibiting the manufacture of bricks within the city limits. The Court upheld the ordinance, despite the fact that it greatly diminished the value of Hadacheck's land, which he used as a brickyard. With the Hadacheck decision, the Court endorsed the belief that, although a regulation might diminish the value of property as much as outright appropriation, compensation was not due where the diminution was the

38 Id. at 669
39 Id.
40 Id. at 668
41 Id. at 668. Justice Harlan, who wrote the Mugler opinion, supported this holding in two ways. First, the regulation was not in any sense a "taking" because it involved no appropriation of property for the public benefit, but merely a limitation upon use by the owner for certain purposes that endanger the community. Second, where the landowner is using property in a way which causes harm to the community, the government may enjoin such use without having to pay compensation, no matter how great the economic loss involved. Id. See Sax, Takings and the Police Power, 74 Yale L.J. 36, 38-39 (1964).
42239 U.S. 394 (1915)
43 Id. at 404
44 Id. at 404
45 "Outright appropriation by the government constitutes an act of eminent domain for which compensation must be paid; in contrast, the mere regulation of one's use of property does not necessarily constitute a taking..."
result of a regulation enacted within the scope of the legislature's police power.\textsuperscript{46}

It was not until 1922, in \textit{Pennsylvania Coal v. Mahon},\textsuperscript{47} that the Supreme Court, in an opinion by Justice Holmes, established the principle of requiring compensation under the Fifth Amendment takings clause when the exercise of the police power "went too far." The decision established the basis for "regulatory takings", which occur when the state in fact is found to go too far, depriving the owner of all economic use of his/her property. Thus began the jurisprudence of regulatory takings, of which Justice Stevens in 1987 said:

\begin{quote}
Intelligent, well-informed public officials may in good faith disagree about the validity of specific types of land use regulation. Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence.\textsuperscript{48}
\end{quote}

The Court's modern Takings doctrine

Prior to \textit{First English} and \textit{Nollan}, the most important recent case in the area of takings doctrine was \textit{Penn Central Transportation Co. v. New York City} \textsuperscript{49} In \textit{Penn Central} the Court established three areas of inquiry when considering a claim that a regulation amounts to a taking.

\textsuperscript{46}Hadacheck, 239 U.S. at 410. The Court stated that state's police power 'may, indeed, seem harsh in its exercise...but the imperative necessity for its existence precludes any limitation upon it when not exercised arbitrarily.' Id.
\textsuperscript{47}260 U.S. 393 (1922).
\textsuperscript{48}Nollan v. California Coastal Commission, 107 S. Ct. 3141, 3163 (1987) (Stevens, J. dissenting)
\textsuperscript{49}438 U.S. 104 (1978)
These tests were an attempt to replace the ad hoc case by case consideration of *Mahon* with a definition of what "too far" would be.50

In 1980 the Court decided *Agins v. City of Tiburon*,51 and established a different set of questions to be asked when considering whether a regulation amounts to a taking. The Fifth Amendment takings clause, as it applies to regulatory takings, was held to impose two threshold standards for defining a regulatory taking. To be justified under the police power, the regulation must: 1. Substantially advance on important public purpose; and 2. not deprive the owner of any economic use of his/her property.52 If an exaction or regulation fails either test, it is a taking.

It is unclear how the two sets of standards, from *Penn Central* and *Agins*, interact with each other, although a likely explanation is that the *Agins* tests are a threshold examination over which the analysis must pass before proceeding to the *Penn Central* analysis. Thus, both the *First English* and *Nollan* decisions, discussed in the following sections, effect the overall analysis at a level prior to the tests propounded in *Penn Central*.

This admittedly confused and confusing set of inadequately interrelated inquiries was the state of takings doctrine at the time that the court handed down both *First English* and *Nollan* in 1987. These two cases have formed the center of debate in takings doctrine ever since, and have profound implications that are dependent upon the direction that the Court takes in the future in refining and applying the rationales begun in these cases. In the next sections, I will examine those two cases.

50 Much of my discussion of Penn Central is a synopsis of: Peterson, Craig A. "Land Use Regulatory 'Takings' Revisited: The New Supreme Court Approaches" *The Hastings Law Journal* Vol 39, 335.
51 *Agins*, supra
52 Id.
First English Evangelical Lutheran Church v. Los Angeles County

This case laid a foundation for a new line of doctrine, raising liability concerns for government that have yet to be fully appreciated. First English stands for government liability in those regulatory and exaction instances where it is found that the regulation/exaction went "too far" and thereby deprived the owner of all "reasonable economic use" of his/her property.

The Court in First English dealt with governmental liability to compensate land owners for the costs caused by certain regulatory acts that are found to be "takings", whether "temporary" or otherwise, and held that government must compensate the owner from the day the regulation was implemented, regardless of the government's belief that the regulation was a proper exercise of its police power and not a taking.

Although it is clear that in defining the timing of when liability for regulatory takings begins this case represents an important precedent, it is yet to be seen whether First English really represents a departure from long standing precedent in the area of defining what amounts to a taking. Nonetheless, it is a case of tremendous concern to government, because the potential liability is huge. That is why the "atmospherics" surrounding this case are so curious, and will remain so until the Court more clearly defines where it intends to go in this area of the law.

Synopsis

The Defendant was Los Angeles County, which had prevented the Plaintiff land owner from developing its property after it determined that the property was hazardous to occupy because it was on a flood plain. The Plaintiff had run a school and other activities in facilities on the site, until they were destroyed in a flood, caused partly by the denuding of a
surrounding forest during a forest fire. Thereafter, the county government
had enacted a regulation "temporarily" prohibiting new construction on the
site, as a means of protecting the public welfare. The county took no action
to begin to alleviate the underlying conditions that caused the area to be
prone to flooding, not to install any flood control system. The regulation
had no declared expiration date, and was on this basis eventually held to be
of "indefinite" duration. Thus, the Plaintiff claimed, the regulation
effectively precluded any economic use of the property, which is the usual
threshold standard defining a "taking" for which the government must
compensate the owner. However, because the taking had been
characterized as "Temporary" despite its lack of a defined expiration date,
under California law the government had avoided the responsibility of
paying compensation to the owner.

Although the Supreme Court, in its decision, does not say that such
a regulation under these circumstances amounts to a "taking", the peculiar
posture of the case allowed the court to use it as a vehicle to make a point
regarding the timing of when government's responsibility for
compensation begins in the event that an action is subsequently held to be a
taking. The main point the court makes is to reject the view espoused by
the California Supreme court in *Agins v. Tiburon*53. In that case the
California court held that government's liability for damages caused by a
taking begin to accrue only at the point that the act is found actually to be a
taking. Thus, if the government effected a regulation believing it to fall
short of the deprivation of use that would constitute a "taking", and it was
subsequently found by a tribunal to in fact be a "taking", the government
could vacate its action, or otherwise act to change its posture, while
remaining free of liability in damages for the deprivation that occurred up
to the point that the finding was made.

53 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), aff'd on other grounds, 447
U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).
Discussion

The Court said in *First English* that the liability for compensating owners in instances of regulatory takings was "self executory", arising automatically upon the execution of the act found to be a taking. Thus, even if there is not a determination that the regulation in question was a taking for some time after its enactment, the government must pay compensation from the date that the deprivation was first instituted. This holding is not, by itself, very surprising, because it says merely that when something has been taken, it must be paid for. What sets it apart is the fact that the Court is now applying this to the timing of liability for regulatory takings by land use regulation, wherein historically government has been given very broad latitude.

The concern for government is basically as follows: The standard for finding a regulatory taking is either: 1. a lack of a substantial advancement of a legitimate public purpose under the police power; or 2. Deprivation of all reasonable economic use. *First English* signals an important departure by the Court from its past doctrine, because onerous but not physically invasive (as in the lateral easement in *Nollan*) government restriction on use was found to constitute a taking under the second of these tests, requiring compensation. The Court thereby departs from its prior doctrine holding that, since a timed restriction on use is only a minor infringement of ownership rights in property, which are seen as having infinite duration, compensation is not required. After *First English*, regulations alone may be takings that require compensation, despite their being characterized as temporary, at least if they are of indefinite duration.

Suppose we have before use a severely restrictive state or local land use regulation. The regulation on its face seems to deny to an owner, for so long as it is in force, all "economically viable" use of affected land. As enacted, moreover, the restriction is of potentially infinite duration. The enactment contains no termination date and so
will last forever unless the enacting government takes some further action to terminate it. Thus, its duration is...indefinite\textsuperscript{54}.

The key is that the enacters (sic) of the offending regulation enacted it not as temporary, but as indefinite. As enacted, the regulation would (by hypothesis) totally—that is to say, permanently or indefinitely—deny the church all use of its land, without offering any compensation\textsuperscript{55}.

\textit{What First English} may stand for is the beginning of a judicial willingness to consider the economic consequences of regulation. Because the Court implicitly is recognizing that there is a time value to land ownership, it is a beginning of a new view of real property, one more sensitive to economics. Both the time value inherent in a temporary (indefinite) regulatory prohibition on development, and the takings nature of non-invasive restrictions on use, are issues in the \textit{First English} situation. Further, when combined with the newly restrictive \textit{Nollan} definitions of the nexus necessary to justify an exaction, there is the possibility of governmental liability for takings accomplished by unjustified exactions. This has great implications for negotiated packages of amenities, particularly in light of \textit{Nollan}'s footnote 4 material discussed in the next section, which recognizes that government has a conflict of interest when it both establishes the acceptable levels of development under the zoning code, and also has the power to trade away the limits of the regulations in exchange for increased payments by the developer. Could this mean that a city that deprives an owner of an economically viable as of right development, requiring him/her to buy increased densities with exactions that cannot be justified under the \textit{Nollan} nexus test, can be held to have accomplished a regulatory taking for which it will be liable? This seems a likely result if the Court's approach is developed along these lines.

\textsuperscript{55}Id, at page 1619
Because *First English* clearly stands for the idea that government will have to pay damages from the day that it regulates in a way subsequently found to be a taking, governments are well advised to consider carefully the basis for their land use regulation, with an eye towards protecting the economic viability of the land being effected. In the next section examining *Nollan*, it will be seen that the concerns for government after that case are different but related. Governments after that case must be clear to define their regulatory goals and purposes and keep their regulations within logical proximity of those goals, because if the courts begin to look behind broad assertions of regulatory rights under the police power to the substance of regulatory rationales, the government involved will have to show the defensible basis for their regulatory scheme.
Nollan v. The California Coastal Commission

Facts

The Nollans leased a piece of California beachfront property on which was a dilapidated beach shack type structure. The Nollan's property is one of a number lying between two public beaches, one about 1300 feet North, and the other about 1800 feet South of their property line\textsuperscript{56}. A seawall separated the beach part of the property from the rest. At low tide anyone, including the general public, could walk along the beach in the areas between the high and low water marks, which area is public property. But at high tide the water reached the seawall, thereby cutting off pedestrian access between the two public beaches.

After years of renting, the Nollans decided to exercise a purchase option they had on the property, which required them to replace the shack with another structure. They applied for a permit from the California Coastal Commission to build a new, larger, house on the site, which application was required by state law. Similar permits were routinely granted, and in fact had recently been given for construction on adjacent lots.

The commission reviewed the application, and agreed to grant it only if the Plaintiff granted a public access easement across his property in favor of those who might seek to walk laterally across the property between the two nearby public beaches. This requirement was imposed in connection with approval of similar permits for construction on other lots lying between the beaches. The Nollans refused to accede to the demand, and proceeded to challenge the Commission's right to impose such a

\textsuperscript{56}"Take My Beach, Please": Nollan V. California Coastal Commission and a Rational Nexus analysis of Development Exactions. (Hereinafter referred to as: Note) Boston University Law Review, Vol. 69, Page 823. page 825
requirement, claiming that it amounted to a taking under the Fifth Amendment.

The Commission tried to justify its requirement by saying that its public purpose was, broadly, to mitigate the adverse impact the Nollan's development would have on the public's visual access to the beaches. The Commission reasoned that the Nollan's new, larger, house, combined with adjacent new houses, would result in a visual and psychological barrier between the road and the sea, which would discourage the public from using the tidal area to which they have legal access and encourage them to use the nearby public beaches, increasing demand upon the beaches. Further, the Commission argued, the new houses would themselves produce new demand and encourage further development which will impact upon the public beaches and present further psychological barriers to the public pieces of the shore. Therefore, lateral access is needed between the public beaches to optimize the efficiency of their use which was necessary to mitigate the effects of development.

The trial court found against the Commission, saying it had failed adequately to demonstrate a "direct or cumulative burden on public access to the sea"57, as was required by the California Coastal Act governing the Coastal Commission. This public access was defined as the ability physically to access the beach, at least pieces of which are public property. Preventing the hindrance of this access was legitimately within the authority of the Coastal Commission, and it could prevent or demand the alteration of development that did so hinder public access. Because it had failed to demonstrate this burden, reasoned the court, there was not sufficient logical connection between the legitimate public purpose being advanced under the police power, and the exaction.

The California Supreme Court reversed the lower court, holding the
the exaction was within the boundaries of a "reasonable relationship"
between the public purpose and the exaction which was operating in
California. This requires only the the state, when furthering a legitimate
public interest that it can advance by regulation under the police power,
must show a reasonable relationship between the impact of the
development project and the exaction demanded. This was the loosest of
the standards of causality that operated in various states. It did not require
that the exaction be uniquely attributable to the development, nor that that
state demonstrate that the owner was being burdened only to the extent that
his/her development is creating a new need. The standard is only that the
state show a reasonable logical connection between the exaction and a
legitimate public purpose, which standard is largely a measure of whether
what the state has in mind when it implements a regulatory exactions
scheme can be shown to have some reasonable logical connection.

The case was litigated for years in the California courts. The
Nollans, in the interim, build their new house despite their lack of a permit
from the Coastal Commission. Upon loosing in the California Supreme
Court, the Nollans appealed to the Supreme Court. Upon consideration
the Supreme Court reversed the California Court.

Structure of the Court's Analysis

_Nollan's_ holding concerns the Fifth Amendment requirement stated
in _Akins_ that a regulation, and therefore an exaction premised upon the
regulation's being a proper exercise of the police power, under _Akins'_
"substantially advance a legitimate state interest" test. The central issue in
the inquiry was whether the requirement for the easement for public access
laterally across the Nollan's beach was a valid under the prevailing doctrine
concerning necessary connections between development impacts, exactions
and the public purposes being served.
The Court first engages in an examination of whether the demand for the lateral easement would, by itself, have amounted to a taking requiring compensation under the takings clause:

Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would be a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather, (as Justice BRENNAN contends) "a mere restriction on its use," (citation omitted) is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principle uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them.58

Having established that:

[R]equiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land use permit alters the outcome.59

The court then states its doctrine defining the limits beyond which regulation under the police power becomes a taking under the fifth amendment:

We have long recognized that land use regulation does not effect a taking if it "substantially advance(s) legitimate state interests" and does not "den[y] an owner economically viable use of his land," Agins v. Tiburon, 447 U.S. 255,

58Nollan, at 3145
59Nollan, at 3146
260, 100 S.Ct. 2138, 2141, 65 L.Ed. 2d 106 (1980). See also
Penn Central Transportation Co. v. New York City, 438
...

Addressing the first level of the Fifth Amendment test that an
exaction must substantially advance a legitimate public purpose the Court
recognizes the broad range of public purposes that can be advanced to
justify regulation upon which exactions are premised:

Our cases have not elaborated on the standards for
determining what constitutes a "legitimate state interest" or
what type of connection between the regulation and the state
interest satisfies the requirement that former "substantially
advance" the latter. They have made clear, however, that a
broad range of governmental purposes and regulations
satisfies these requirements. See Agins v. Tiburon ... 447
U.S. at 260-262, 100 S.Ct., at 2141-2142 scenic zoning);
Penn Central Transportation Co. v. New York City supra

60"Contrary to Justice BRENNAN'S claim, post, at 3150, our opinions do not
establish that these standards are the same as those applied to due process or equal
protection claims. To the contrary, our verbal formulations in the takings field have
generally been quite different. We have required that the regulation "substantially
advance" the "legitimate state interest" sought to be achieved, Agins v. Tiburon, 447
U.S.255, 269, 100 S. Ct. 2138, 2141, 65 L.Ed.2d 106 (1980), not that "the State
'could rationally have decided' the measure adopted might achieve that State's
objective." Post, at------ , (sic) quoting Minnesota v. Clover Leaf Creamery Co., 449
relies principally on an equal protection case, Minnesota v. Clover Leaf Creamery Co.,
supra, and two substantive due process cases, Williamson v. Lee Optical of Oklahoma,
Inc., 348 U.S. 483, 487-488, 75 S.Ct. 461, 464-465, 99 L.Ed. 563 (1955) and Day-
Brite lighting, Inc. v. Missouri, 342 U.S. 421, 423, 72 S. Ct. 405, 407, 96 L.Ed. 469
(1952), in support of the standards he would adopt. But there is no reason to believe
(and the language of our cases gives some reason to disbelieve) that so long as the
regulation of property is at issue the standards for takings challenges, due process
challenges, and equal protection challenges are identical; any more than there is any
reason to believe that so long as the regulation of speech is a tissue the standards for
due process challenges, and First Amendment challenges are identical. Goldblatt v.
Hempstead369 U.S. 590, 82 S. Ct. 987, 8 L.Ed.2d 130 (1962), does appear to
assume that the inquiries are the same, but that assumption is inconsistent with the
formulations of our later cases."

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(landmark preservation); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L.Ed. 303 (1926) (residential zoning) (additional citations omitted)\(^{61}\)

As to whether the public purpose being advanced in this case was legitimate, the Commission, of course claimed that it was:

The Commission argues that among the these permissible purposes (under the Commission's statutory authority) are protecting the public's ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach created by a developed Shorefront, and preventing congestion on the public beaches.

The Court accepts the Commission's premise, in an equivocal way:

We assume, without deciding that this is so - in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede these purposes, unless the denial would interfere so drastically with the Nollan's use of their property as to constitute a taking. See *Penn Central Transportation Co. v. New York City.*\(^{62}\)

The Court then recognizes the premise upon which exactions are based - that a right to regulate implies a right to impose exactions in furtherance of the same public purposes:

The commission argues that a permit condition that serves the same legitimate police power purpose as a refusal to issue the permit should not be found to be a taking if the

\(^{61}\)Nollan, supra, at page 3147.

\(^{62}\)438 U.S. 104, 127, 98 S.Ct. 2646, 2660, 57 L.Ed.2d 631 (1978) ("a use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose").
refusal to issue the permit would not constitute a taking. We agree.

The Court then examines the basis of the Commission's right to regulate to further the public purpose:

Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house - for example, a height limitation, a width restriction, or a ban on fences - so long as the commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case) the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplished the same purpose is not.

The Court then examines the necessary connection that must exist between the purpose and the exaction:

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the
prohibition. When that essential *nexus* (emphasis is mine) is eliminated, the situation becomes the same as if California law forbade shouting in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster. Similarly here, the lack of *nexus* between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."

*J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981); see Brief for United States as Amicus Curiae 22, and n. 20. See also *Loretto v. Telepromter Manhattan CATV Corp.*, 458 U.S., at 439, n. 17, 102 S.Ct., at 3178, n. 17.63(64)

At this point however, the Court's rationale departs from that of the commission's, as well as from previous doctrine in this area of takings law

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63 This is footnote 5 of the opinion. "One would expect that a regime in which this kind of 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 nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not justify the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice."

64 Nollan, supra, at 3148
insofar as that doctrine had largely allowed states to adopt their own standards of how close the relationship between the purpose and the exaction needs to be:

The Commission claims that ... we may sustain the condition at issue here by finding that it is reasonably related to the public need or burden that the Nollan's new house creates or to which it contributes. We can accept, for purposes of discussion, the commission's proposed test as to how close a "fit" between the condition and the burden is required, because we find that this case does not meet even the most tailored standards. The Commission's principal contention to the contrary essentially turns on a play on the word "access." The Nollans' new house, the Commission found, will interfere with "visual access" to the beach. That in turn (along with other shorefront development) will interfere with the desire of people who drive past Nollan's house to use the beach, thus creating a "psychological barrier" to "access." The Nollan's new house will also, by a process not altogether clear from the Commission's opinion but presumably potent enough to more than offset the effects of the psychological barrier, increase the use of the public beaches, thus creating the need for more "access." These burdens on "access" would be alleviated by a requirement that the Nollans provide "lateral access" to the beach.

Rewriting the argument to eliminate the play on words makes quite clear that there is nothing to it. It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollan's property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollan's new house. We therefore find that the commission's imposition of the permit condition cannot be treated as an exercise of its land use power for any of these purposes. (footnote omitted).65

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65Nollan, supra, at 3148-49
The court then remarks:

Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts. (citations omitted)\(^6\)

The Court thus dismissed the Commission's contention that an adequate causal connection existed between the projected impact and the demanded exaction for it to be justified. What is left unanswered is what degree of connection is adequate to support an exaction. That is the question posed by the invention of the nexus standard.

\(^{6}\)Nollan, supra, at 3149. This statement by the Court has lead some commentators to assert that all the Court did in Nollan was adopt the "rational nexus" test that is used as the standard in many states. While this may be so, the Court did not explicitly say it was adopting that standard.
What is "Nexus"?

What does Justice Scalia, in *Nollan*, mean to define as the required "nexus" between the declared public purpose and the exaction? The phrase by itself is incapable of defining its inclusionary boundaries, leaving observers to speculate on what they might be. Justice Brennan, in his *Nollan* dissent, asserts that even if the Court is going to require a connection beyond that of the "rational relationship" standard, so that a "precise match" exists:

"[B]etween the condition imposed and the specific type of burden on access created by the appellants, the State's action easily satisfies this requirement. First, the lateral access condition serves to dissipate the impression that the beach that lies behind the wall of homes along the shore is for private use only. It requires no exceptional imaginative powers to find plausible the Commission's point that the average person passing along the road in front of a phalanx of imposing permanent residences, including the appellant's new home, is likely to conclude that this particular portion of the shore is not open to the public. If, however, that person can see that numerous people are passing and repassing along the dry sand, this conveys the message that the beach is in fact open for use by the public. Furthermore, those persons who go down to the public beach a quarter-mile away will be able to look down the coast-line and see that persons have continuous access to the tidelands, and will observe signs that proclaim the public's right of access over the dry sand. The burden produced by the diminution in visual access—the impression that the beach is not open to the public—is thus directly alleviated by the provision for public access over the dry sand.67

Justice Brennan then concludes: "The Court therefore has an unrealistically limited conception of what measures could reasonably be

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67 Nollan, supra, at 3154 ((Brennan, J. dissenting)
chosen to mitigate the burden produced by a diminution of visual access." 68 This is an important observation for understanding the possible applications of the nexus standard to exactions, because it highlights the Court's apparent intent narrowly to view how the exaction effects, and interacts with, the individual development from which the exaction is being demanded.

It is obviously impossible to know how the Court will or won't elaborate and develop this idea of nexus, but it is apparent that it intends to require that an exaction done in the name of a particular public policy purpose be individually in direct causative proximity to that purpose. This might usefully be analogized to the tort requirement of proximate cause, defined by Black's Law Dictionary (revised fourth edition) as: "That which, in a natural and unbroken sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." Within the limits of this analogy, it is possible to say that the Court's holding was that the Commission's purposes of maintaining the visual access to the beach did not stand in a sufficiently proximate relationship to the exaction of a lateral easement across the beachfront property in question.

But what of the other aspect of the impact the Commission claimed resulted from the new development? As Justice Brennan points out in his dissent, the majority's opinion does not effectively deal with the issue of the new demand created by new development, whether of this house individually, or of the cumulative effect of similar houses along the shore:

The second flaw in the court's analysis of the fit between burden and exaction is more fundamental. The Court assumes that the only burden with which the Coastal Commission was concerned was blockage of visual access to

68 Id. at 3154-3155
the beach. This is incorrect. The Commission specifically stated in its report in support of the permit condition that "[t]he Commission finds that the applicant's proposed development would present an increase in view blockage, an increase in private use of the shorefront, and that this impact would burden the public's ability to traverse to and along the shorefront." App. 65-66 (emphasis added [in opinion]) It declared that the possibility that "the public may get the impression that the beachfront is no longer available for public use" would be "due to the encroaching nature of private use immediately adjacent to the public use, as well as the visual block of increased residential build-out impacting the visual quality of the beachfront." Id., at 59 (emphasis added [in opinion]).

Understanding the implications of Justice Brennan's point is crucial to an understanding of the applicability of the standard in *Nollan* to other exactions. The ambiguity of the limited comment on this point appearing in the main opinion only adds to the difficulty of speculating on the Court's actual views as they apply to exactions that do not involve a physical intrusion. Addressing himself to the Commission's contention the exaction is rationally related to the need to compensate for additional demand that the new development will place on the public beaches, Scalia says:

[The Commission contends] The Nollan's new house will also, by a process not altogether clear from the Commission's opinion but presumably potent enough to more than offset the

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69 This is footnote 4 of Justice Brennan's dissent in *Nollan*: "This may be because the State in its briefs and at argument contended merely that the permit condition would serve to preserve overall public access, by offsetting the diminution in access resulting from the project, such as, inter alia, blocking the public's view of the beach. The State's position no doubt reflected the reasonable assumption that the court would evaluate the rationality of its exercise of the police power in accordance with the traditional standard of review, and that the Court would not attempt to substitute its judgement about the best way to preserve overall public access to the ocean at the Faria Family Beach Tract." at page 3155. Note: The Nollan's property was part of the tract to which Justice Brennan makes reference.

70 *Nollan*, supra (Brennan, J. dissenting) at page 3155
effects of the psychological barrier, increase the use of the public beaches, thus creating the need for more "access." These burdens on "access" would be alleviated by a requirement that the Nollans provide "lateral access" to the beach.

Rewriting the argument to eliminate the play on words makes quite clear that there is nothing to it. It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollan's property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollan's new house. We therefore find that the commission's imposition of the permit condition cannot be treated as an exercise of its land use power for any of these purposes. (footnote omitted.) 71

Justice Scalia here seems willfully to avoid addressing himself to the issue of whether an exaction can be used to mitigate the increased demand caused by development. By focusing on "access" and making the logical leap to "people already on the public beaches", he avoids addressing the crux of the Commission's contention, which is to premise its exaction on the logical causal chain that increased demand serves as a justifiable basis for demanding an easement that would help to mitigate the impact. This refusal by Scalia has left observers to wonder about the application of this case to exactions that rely upon a chain of causality between the development and the exaction. It seems that he is only interested in finding whether there is a connection between a particular instance of exaction and the impacts claimed to result from development. He does not seem willing to allow exaction systems that pursue broad public purposes.

Since fitting each individual exaction into a fabric of a larger whole is the only way to accomplish certain policy ends if they are pursued

71Nollan, supra, at 3149
through exaction systems, such as California's attempt to provide lateral access across a series of private beaches laying between two public beaches, nexus appears to signal the end of government's ability to subject a class of users to an exaction in pursuit of a broad policy end unless it can be shown that the exaction on the individual property is in direct relationship to the project's negative impact on a public purpose. The issue that this raises is one of proof. How can a government credibly show that a project will have a particular impact? While the degree of freedom that the Court will allow remains uncertain, it is prudent to assume that the standard of proof will be stricter than has heretofore been the case, meaning that generalized assertions that certain types of projects/uses will have certain types of impacts will not suffice. A more thorough and detailed understanding of the impacts of a project on the economy is needed.

_Nollan_ , Nexus, and the proportionality of exactions

The _Nollan_ decision has a further possible implication of enormous importance to governments setting exaction policy. This is the apparent beginnings of a requirement that the burdens of achieving a public benefit be proportionally distributed, and not unduly placed on one landowner:

Scalia's arguendo assumption of police power authority, however, contains a most important limitation, one that he scarcely explores ...namely, that the nexus requirement to be applied in these cases measures not just the closeness of fit between regulatory means and ends but also whether the burden of the regulation is properly placed on this (italics original) landowner.

In what may be destined to become another famous footnote four, Scalia writes:

If the Nollans were being singled out to beat the burden of California's attempt to
remedy [the various regulatory] problems, although they had not contributed to it [sic] more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.72

Because the Nollans did not challenge the easement condition on this basis, the court does not address it directly. Nevertheless, the footnote's significance lies in the fact that it again echoes and affirms the need to draw a distinction between the use of the police power to prevent harms as opposed to its use to extract benefits, a distinction central to nuisance exception to the just compensation requirement acknowledged by all members of the Court.73

It appears that this test represents yet another potential layer of inquiry that the court may engage in in connection with scrutinizing exactions. It appears to amount to a requirement, as a part of nexus, that the exaction be demonstrably proportional to the effects of the individual project. This, it may be suggested, represents either a revival of the Court's willingness to redefine and expand the very narrow "unduly burdensome" piece of the Lawton v. Steele Fourteenth Amendment three part test, or it may be part of the Fifth Amendment requirements, as a subset of the nexus requirement. It is far more likely to be the latter, as such a requirement is consistent with the takings doctrine under the Fifth Amendment and state constitutional law that has been adopted in many states. Indeed, it is a common requirement under the takings doctrine.

72Nollan, supra, at 3147 n.4 (citations omitted)
developed in the states. Thus, it appears that the Court may simply be adopting that more conservative standard as the federal constitutional norm.

What is the nature of the proportion required? In other words, how closely does the project have to be shown to relate to the amount (degree) of impact in order to satisfy this proportionality requirement? Once again, I do not know, but the Court supplies a hint that the supposition of an impact upon demand for public beaches caused by the use in Nollan would not be a basis, even if it could be shown that the same type of development, on average, would have an impact that could be mitigated by exacting of a benefit premised on the expected impact of that type of development. In his dissent, Justice Brennan addresses himself to this point. In making the point that the Commission was merely exercising its discretion to balance access between the public and the private owners, which the commission felt was fairly achieved by granting the permit conditional upon receiving the easement, he observes:

    The Court finds fault with this measure because it regards the condition as insufficiently tailored to address the precise type of reduction in access produced by the new development. The Nollan's development blocks visual access, the Court tells us, while the Commission seeks to preserve lateral access along the coastline. Thus, it concludes, the state acted irrationally. Such a narrow conception of rationality, however, has long been discredited as a judicial arrogation of legislative authority. "To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our government." Sproles v. Binford, 286 U.S. 374, 388, 52 S.Ct. 581, 585, 76 L.Ed. 1167 (1932).74

74Nollan, supra (Brennan, J. dissenting) at page 3152-53.
It thus seems clear that Nollan's standards, if they become the norm, mean a vastly more perilous and intellectually complicated structure in the world of exactions, with a substantial liability "kicker" out there in the First English doctrine for those governments that misjudge the limits of their discretion.

**Nollan** and Extortion

It is important to note here, without going into an extensive analysis, that the holding in *Nollan* has sometimes been characterized merely as the prevention of opportunistic extortion of benefits by the government when it finds itself in a situation where it has extensive bargaining leverage and it has an agenda that it wants addressed. In this view, *Nollan* stands for a narrow rule in the area of abuse of authority. Namely, that where government uses the development approval process as an opportunity to force owners to contribute towards public goals that are not directly related to their projects the limits of constitutional discretion given to government has been exceeded.

The critical element in *Nollan* was not that the Coastal Commission lacked exquisite precision in justifying its regulation. It was a much more primitive failing than that. Justice Scalia said the condition imposed by the Commission "utterly fails to further the end advanced as the justification..." and that whatever may be the outer limits, "this is not one of them."

The Court knew that the Coastal Commission had an ongoing program of acquiring public coastal access, and that it wanted a right of way across the Nollan property whether or not there was an improvement of the Nollan's home. The Court might well have concluded that permit applications sought by coastal landowners like the Nollans simply offered the Commission a pretext to get a public right of passage without paying for it; and that claims of a causal relationship between the construction project and public access to the coast were after-the-fact justifications put forward by the Commission for the purpose of defending itself in litigation.
once its 'expropriation/acquisition' program had been challenged.

This is, I suggest, how the majority saw the case. Justice Scalia used very harsh words. The permit condition, he said, was "an out-and-out plan of extortion." He called the Commission's argument a mere "play on words," and said "there is nothing to it." Scalia added that "it is quite impossible to understand" how there could be a relationship between loss of view of the ocean from the Nollans' construction and provision of a public walkway, the link upon which the Commission largely rested its case. Though the Commission said it was trying to make up for loss of visual access, it did not try to get the Nollans to maintain visual amenities, though, the Court noted, it might directly have imposed conditions to protect preexisting views.

The facts in the record, and the very strong condemnatory language in Justice Scalia's opinion, suggest that Nollan is basically an abuse of authority case, rather than a new departure in property law.  

The view expressed above represents the narrowest interpretation that can be given to the holding in Nollan. Nonetheless, it has important implications for exactions and linkage in particular. For even if the case stands for nothing other than the prevention of extortion, it is fair to speculate that some linkage programs might be found to fall into the type of exaction that the Court would characterize as extortion. Where governments have taken advantage of strong real estate development markets to demand linkage exactions for purposes that historically have been beyond the purview of the government's concern, such as the rent levels of private housing, it is possible to wonder whether the Court could not find parallels to the extortionary exactions they reject in Nollan.

There are, of course, very important limits to the ability neatly to analogize opportunistic development exactions such as linkage, that are

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clearly related to the declared public purposes of the government, to the narrow rule in *Nollan*. After all, the gap between the exaction and the purpose is not necessarily present in the case of the development exactions. Nonetheless, some basis exists to believe that even this narrow reading of *Nollan* is not so limited. Justice Scalia does say after all in connection with Justice Brennan's observation that the Commission's findings of a connection between the exaction and the impact that:

> Even if the Commission had made the finding that Justice BRENNAN proposes, however, it is not certain that it would suffice. We do not share Justice BRENNAN's confidence that the Commission "should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access,"...that will void the effect of today's decision. We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a *substantial* advanc[ing]* (italics and brackets original) of a legitimate state interest.\(^7\)

Given this statement by the Court, it does not seem unreasonable to suppose that the Court might look at the larger setting of the exaction in the context of whether the government has demonstrated that the purpose is in fact in furtherance of a purpose which the government has demonstrated a consistent commitment to, as well as whether the exaction does anything to further that interest. Further, if the government's policy of imposing the exaction varies over time, so that the public purpose seems to vary with the state of the real estate market, could not the Court find a lack of consistency that lends support to the facial appearance of extortion? This is all speculation, of course, but these concerns should not be ignored by government.

\(^7\)Nollan, supra, at 3150
The exactions set out in this section are those negotiated and agreed to between the developers and the city of Boston for the two projects. Boston requires that every commercial project over 100,000 square feet of space that requires governmental approval, such as a Special Permit, Variance, zoning change, or similar alteration in the as of right development permitted, to pay both housing and job linkage fees, as well as other exactions. Further, under the city's inclusionary zoning provisions, developers are asked to provide 10% of new residential units, or their equivalent in cash, as affordable housing.

The rationales for the exactions in these packages fall into several categories. Some seek only to mitigate the direct consequences of the development. Some seek to use the approvals process as an opportunity to have the developer provide services to the community that neither the government nor private users had provided before. Of these, some limit the exaction to providing the new services proportionate to the demand the project will produce, while others go further and frankly require the developer to provide a level of the service beyond any demand that the project could produce. Finally, some of the exactions are understandable only as "gifts" that the developer is asked to pay to foster goodwill. While these gifts may amount to de facto requirements, because of the realities of the power balance when negotiating a project with a city experiencing a strong real estate market, no currently credible rationale could be advanced to justify them.

Of the many different exactions, it is linkage that is at the heart of this thesis. The linkage exactions, for jobs and housing, raise essentially all of the issues to be found in the area of exactions after Nollan. It is in this area that I will develop my basic rationale and then apply it to the other exactions.
The Prudential Project developers are obligated to make a large variety of public benefits payments. These include:

1. Development Impact Project Contributions. Housing linkage payments amounting to $7,275,000 over the five phases of the project.

2. Jobs development Contribution Grant. Payments of $1,455,000 over the five phases of the project.

3. Affordable Housing contributions. The developers agree to provide 285 on-site affordable housing units. Additionally, they will make a grant to the Neighborhood Housing Trust of $1,116,000, in lieu of an additional 57 units of affordable housing on-site.

4. Child Care Facilities. Developers shall provide 14,800 square feet of child care facilities on site.

5. Community Benefits. Developer shall provide $1,384,000 for community benefit programs and initiatives.

6. Streetscape and Open Space Improvements. Developers agree to construct new sidewalks and to install street trees and furniture on the north side of Huntington Avenue, south side of Boylston Street, east side of Belvidere Street, and west side of Exeter Street. They will also improve East Ring Road for both pedestrians and drivers.

7. Infrastructure Improvements. Developer will install a new 24 inch sanitary sewer along Huntington Avenue, permitting the abandonment of the current sewer system. An on-site conservation program will also be pursued.
8. Transportation. Developers agree to contribute to transportation improvements, including roadway and mass transit facilities, as follows:

9. $424,000 for improvements to Huntington Avenue, The intersection of Dalton and Belvidere Streets, and Massachusetts Avenue.

10. $526,000 to pay for traffic control officers at intersections in the vicinity of the project.

11. $50,000 for a comprehensive South End transportation study

12. Reconstruction of the Prudential Green Line station on the North side of Huntington Avenue, providing an indoor route from the Prudential Center to the station, as well as new external entry ways.

13. Resident Construction Employment Plan. Developer agrees to make best efforts to ensure that the employees on the construction project will meet the following Residents Construction Employment Standards:
   - 50% Boston Residents
   - 25% minorities
   - 10% women

14. Employment Opportunity Plan. Developer agrees to make best efforts to provide 50% of certain types of employment at the project to minority members.

15. Ground Water Monitoring. Developer agrees to monitor the ground water around the site, and make the results available to the public upon request.

16. Residential Parking. Developer shall make available on-site parking spaces to all existing residential tenants on the site as of January 1, 1990.
These shall be rented at competitive rates, and shall not be valet or tandem parking spots. Security shall also be provided.

17. Certain guarantees regarding the provision of a north-south pedestrian passageway in the event that all phases are not completed, thereby eliminating the pedestrian throughway that would be provided as part of those phases.

II. Commonwealth Center Public Benefits package

The developers of Commonwealth Center are required to provide $25,000,000 in total benefits, over a wide variety of programs which are divided into several categories

1. Affordable Housing, as required under Boston Zoning Code Articles 26 and 26A. Under these articles, developers must provide either:
   a. Housing Impact Linkage payments, required in proportion to the amount of commercial space developed, or
   b. New housing on site, required in proportion to the amount of housing developed on the site, or a contribution to off-site housing in an amount equal to the value of their obligation if they had chosen the on-site option.

   The total payment being made is $8,000,000. This will be paid in a lump sum at the start of housing construction. The housing will be for Chinatown residents

   a. The developers have agreed, voluntarily, to comply with the Jobs residency Policy, which requires them to use their best efforts to meet the goal of having the composition of the construction workers for the project be 50% Boston residents, 25% minority, and 10% women.
b. The developers will pursue the Boston for Boston initiative, which asks that best efforts be made to provide 50% of jobs created to Boston residents by hiring 50% of operation, management, maintenance, and security jobs at the project.

c. $1.6 million will be paid to the job linkage fund. This will be used for:

i. English as a second language training programs for Chinatown residents. The developers will fund 100 positions over a five year period at a cost of $1,000 per position. Over 5 years, this will amount to $500,000.

ii. Child care training Program to provide staff for the many child care facilities being demanded by the Midtown Cultural District Zoning provisions. Training will be done in the child care facilities being provided by the Commonwealth Center developers on the site. The trainees will be interviewed for jobs at the facility, with strong encouragement to the employer that they be hired. The cost will be $4,000 per student, and the program will have 40 students per year for 2 years. Should it prove a success, the developers will continue the program for additional time.

iii. The remaining balance of the linkage funds, some $780,000, will be contributed to the Jobs Trust for programs they select.

3. Child Care

The developers will provide child care facilities needed for the many working mothers entering the work force in record numbers. 12,000 square feet of space will be provided for the children of area employees and residents. This space will be distributed as follows:

a. 8,000 square feet below the Evans House (a piece of the project) on Tremont Street. additionally, 3,000 square feet of outdoor play area will be made available at grade level.
b. 4,000 square feet in a second child care center in Chinatown, perhaps in the same location as the affordable housing being constructed in Chinatown.

Estimated construction costs of the two centers is $2.5 million dollars. Further, the developer will not charge the centers any rent.

4. Neighborhood Business Opportunities

This initiative takes form in two programs. One is to help existing businesses in the Chinatown area. The other is to help entrepreneurs begin new ventures in the area.

a. Completion of a retail marketing study for Chinatown businesses that will detail the nature of current businesses, the size of the market, identify business opportunities, and estimate potential demand for new businesses. The study is predicted to cost $10,000.

b. Upon completion of the study, the results will be evaluated to identify the opportunities with the findings distributed to Asian businesses and residents.

c. Commonwealth Center's leasing agents will review the study, and will present leasing briefings to businesses interested in moving or expanding their operations.

5. Entrepreneurial Support Programs

The developers shall each year sponsor seven one week long Small Business Workshops aimed at Asian businesses. These shall be:

a. Finance, Tax, and Legal
b. Development of Goods and Services
c. Selecting Office and retail Space
d. The Business Plan
e. Advertising and Marketing
f. Staffing
g. Controlling the Business

6. Cultural Facilities

The Project will contain two theaters for dance and drama, which will occupy the the Paramount theater, now in disrepair, by dividing the theater's space into two separate theater spaces. Rehearsal and related space will also be provided. The marquee will be restored. The project will also provide 100,000 square feet of cultural related space for retail, restaurants, galleries, and entertainment space and parking, which will be made available to patrons at evening discount rates.


The developers will commission several pieces of public art once a study identifies the best locations and types for the project.

8. Historic Preservation

The project, in addition to renovating the Paramount Theater, will preserve the Evans House, a historic building on Tremont Street.

9. Open Space

The developers will contribute to a fund to maintain and improve the Common, and will sponsor an "Annual Common Clean-Up Day ."

10. Transportation

Commonwealth Center will improve the access to the Chinatown Orange Line stop. Van pools and ride sharing will be encouraged. All service,
parking, and deliveries to the project will be off street. The project will work with the MBTA to explore extending the Green Line to South Station. Pedestrian walk ways from Tremont Street through to Washington Street will be created.

Studies will be done to see how to minimize the traffic impacts of the project.

11. Streetscapes

$1.5 million will be invested in the landscaping and public spaces of the center.
NEXUS AND THE REASONABLE RELATIONSHIP TEST

Understanding what the extent of the change rendered by the nexus requirement is depends upon speculating as to what the boundaries of the new test are. As I discuss elsewhere, if the new standard requires merely that there be a rational connection, a connection found lacking in Nollan itself, without proportionality, and without an inquiry into the motivations and behavior of the government imposing the exaction, then it is a narrow rule, and linkage can meet it because there is such a connection between the exaction and the public purpose. In this sense, the reasonable relationship standard proposed by Kayden in the next section of this thesis would be effectively similar to nexus, because the narrow connection is present. If however, there must be demonstrated some actual affect by the development upon the public that the exaction seeks to compensate for, and/or if the exaction must be proportional and/or in keeping with consistent government practice, then the nexus test is stricter, and possibly linkage cannot meet it.

To understand the application of Nollan to the practice of linkage as well as other exactions, it is perhaps essential to understand the original rationale behind the development of linkage programs. By establishing the looseness of the connections between the project and the impact at the heart of the original conception, it is possible to see why the apparently much stricter test in Nollan poses a threat to the practice of linkage as it has been implemented.
A RATIONALE FOR LINKAGE UNDER
THE REASONABLE RELATIONSHIP TEST

Kayden and Pollard\textsuperscript{77} examined the housing linkage program operating in Boston, measured the impacts of office development on residential rent rates in the city, and came to the conclusions that Linkage is defensible under the reasonable/rational relationship test operating before \textit{Nollan}. In examining the issue of the legitimacy of Linkage payment requirements, Kayden poses the question "Can linkage be justified under the traditional reasonable relationship test?" \textsuperscript{78} This test they describe as having two parts: 1. does the development create a need that it should be asked to address? 2. is the obligation imposed on the development proportional to the need created?

Working within what was, before \textit{Nollan}, a standard rationale, they believe that since any impact that can be shown to be the result of a development is subject to a mitigating exaction, the crux of justifying linkage lies in showing that development has the impacts that the linkage seeks to mitigate. The authors then make the case for allowing the city to collect feed based upon the impacts that can be verified. They analogize the case for linkage to that of subdivision exactions:

In subdivision exaction cases, courts routinely assume that the community will experience harm if the need for the exacted amenity remains unmet. For example, they assume new subdivisions will harm existing park users by increasing park congestion. This same reasoning applies to office development and its housing impact. Higher housing prices resulting from the additional demand of new resident employees necessarily mean that existing residents will be harmed by spending more for the same amount of housing.

\textsuperscript{78}Id. at 127
Thus, in both cases it is reasonable to force the subdivision or office development to bear the burden of avoiding adverse effects on other members of the community.79

To show the impact, the authors did a survey of Boston office employees resident in the city to determine what proportion of them had been induced to move into Boston by the office jobs they are holding. All those responding in a certain way to a set of questions were counted as having moved to the city due to the downtown job. By working through the math, the authors claim to be able to show what the impacts of office jobs are on the demand for housing in Boston. Further, the authors claim that since office jobs have a high spin-off effect, creating many other supporting jobs, the net impact is actually even higher.

The worker influx is posited as having an effect on the housing market. Although it is theoretically possible that increased demand will lead easily to increased supply, the authors point out that "By using part of the fixed quantity of land in the city, office development decreases land available for residential purposes, thereby increasing land prices. As a significant component of residential development costs, higher land prices will tend to offset additional income potentially derived from the higher housing prices resulting from the additional demand of new-resident employees."80

While then examining the issue of whether the payment Boston requires is proportional to the impacts that result, the authors posit that since the prices in the housing market are a function of scarcity, "...it is reasonable to compare the financial burden of linkage imposed on office developments to changes in housing prices. If the linkage obligation is proportionate to the housing price impact, then needs can be said to have been addressed and...[this] part of the reasonable relationship test met."81

79 Id. at 135
80 Id. at 134
81 Id. at 136
The authors then show how the current linkage exaction required in Boston is only a fraction of the actual impact that can be shown to have occurred by the methods already discussed. Thus, they say, it is well within justifiable limits.

In an examination of the pros and cons of the issues that partially presages the holding in Nollan, the authors note the view that "linkage is no more than a cynically veiled effort to tax one segment of society for redistribution to another while the "getting is good." 82 But they go on to make the point that little effort has been made to examine Linkage under the reasonable relationship test described above. They then address the equity of placing the burden of housing impact mitigation caused by office employment upon the developers of the office space, rather than the employers or even the public who demand the services the office employees provide. They point out that the builders are not necessarily the parties who ultimately bear the burden of the linkage payment, since the costs are passed on to tenants, who pass it on to customers.

Further, since the necessity of linkage payments will have an effect on the desirability of the location, the cost may be even further spread to the landowner, and ultimately may be borne in part by the city itself in foregone tax revenues due to the decreased value of the property. This is a result of the fact that the costs imposed by linkage function as negative externalities for the land in the city, and points out that the policy may be characterized as a circular attempt to distribute costs. Apparently frustrated, they point out that "Resolution of this debate, even if possible, should be unnecessary if a court applies the reasonable relationship test to linkage obligations. It should be enough that there are reasonable arguments that support allocating responsibility to the developer, or, in the alternative, evidence showing that the linkage obligation is passed on to the responsible party." 83

82 Id., at 129
83 Id., at 132
The thesis advanced by Kayden and Pollard serves well to illuminate the thinking behind the original linkage proposals. But these are no longer adequate after *Nollan*, as I will show in the next section.
WHAT IS AN ACCEPTABLE RATIONALE AFTER NOLLAN
FOR HOUSING AND JOBS LINKAGE REQUIREMENTS,
AND THE OTHER EXACTIONS IN THE SAMPLE SETS?

For purposes of this analysis, it must largely be assumed that the Court will accept the purposes furthered by these exactions as legitimate state interests that can be furthered through the regulatory process, and for which the government might deny an owner approval of his/her project. Without such authority, the government cannot impose a development exaction. Thus, both the effects in the housing and jobs market, and the provision of child care must be represented as public purposes that justify the exactions. So long as the Court is willing not to inquire beyond the declaration of a public interest, these justifications will suffice to justify exactions that further the same ends. While it is not at all clear that all of these exactions could be justified in a Court determined strictly to scrutinize public purposes and the state's power to advance them, those inquiries would be such a departure from the norm in this area that attempting to predict them are largely beyond the scope of this thesis, which focuses on the affect of the nexus requirement on exactions.

The nexus requirement means several things to exactions justification, some subtle and some simple. The first and most apparent new requirement is that the regulation upon which the exaction is premised exist in a logical relationship to the exaction being imposed. The loose reasonable relationship test, which Kayden relies upon, really merely asks whether the government could reasonably/rationally believed that the exaction is related to the public purpose. If nexus does stand for a stricter test, this loose justification is no longer sufficient, the government must now demonstrate that the exaction is related to the effect the project is said to have.

But what is the burden of proof required? This might just as well be expressed as: how deeply is the Court prepared to delve in examining the
connection between the public purpose and the exaction? This inquiry may be said to have three interrelated levels. The first of these is the simple logical connection that the Court found lacking in Nollan. The second is the issue of proportionality, which could be expressed as a corollary of the connection if the proportionality were implied in the connection. The third deals with the issue of whether, despite connection and/or proportionality, it is fair to place the burden on a particular property.

The first of these inquiries is largely an examination of the limits the Court intends to impose on how far along a causal chain a government can go when calculating the impacts that are to be mitigated by exactions. The Court has now made it clear that there is very little flexibility in applying a public purpose to a particular instance of regulatory authority. The simplest test will not be hard to pass, all government has to do is be quite specific about the public purpose it is advancing. But how can it demonstrate that the project has an impact of the type being mitigated by the exaction? This can be expressed as: how can the government show causality between a particular development and the projected effects? The thinking in Nollan shows that this must be demonstrated directly, or as I said before, there must be a proximate relationship between the exaction and the affects serving as justification.

Assume for a moment that the situation in Nollan was as follows: there is a level of "access" to the beach that exists prior to development. The physical placement of the house was going to diminish that access, and the court held that the Commission could, presumably, have completely prohibited the development to prevent the diminishment of the access that is the public purpose under the police power that the commission was advancing. Further, held the Court, the commission could have required an easement on the property for public viewing as a mitigatory measure.

But the Commission did not so restrict the development. Rather, it took the seemingly less severe step of allowing the development, with the
requirement that the owners allow a lateral easement. The premise for this was not only to mitigate the impact on access, by providing increased lateral area on which the public could view the ocean, but also to mitigate the increased demands on the public beaches that new development would cause.

The Court did not go along with the set of justifications. The Court essentially established a limit saying that the government's demand for the lateral easement to provide increased public area on which to view the ocean could not be connected through a nexus relationship to the impact of the development. The Court thus denied the government the flexibility of trading less visual access from the road for both more access, both visual and physical, laterally along the shore between the two nearby beaches.

It is therefore clear that governmental flexibility is now quite limited. General public purposes cannot suffice to justify exactions that are not themselves related to the legitimate public interest/purpose that gives the government the standing to prohibit development in the first instance.

The second of the inquiries, that of proportionality, is probably the one with the most potential importance. To the extent that the Court moves to require a proportionality between the impact and the exaction, it further burdens the government with a difficult degree of proof. Once again, the freedom of action left to government under this requirement will be determined by the degree of generalized proof and abstraction that the Court will accept as the basis for finding an impact exists, and that the exaction is properly matched to that impact. Further, First English still provides a basis for liability for those governments that don't "get it right."

The issue of proportionality is especially tied into the inquiry surrounding accurate estimates of impacts. To the extent that nexus requires both direct rational connections and a proportionate imposition of mitigation, it is difficult for linkage to meet, because linkage relies upon positing particularly generalized impacts in the private economy, which is a
dynamic and ever changing set of interrelationships. The justification relies upon a general model of the economy and the effects of variations in prices for particular goods caused by altering the mix of demand, as a basis for imposing fees that generalize about the effects of more office space in creating more demand in the economy for certain goods.

It would be virtually impossible to say with exquisite certainty what the specific actual effects of any particular project would be on, say, housing or the jobs market. After all, no one knows where each worker will live, or exactly what skills each employer will demand relative to their availability in the economy. It is a virtual certainty that new office space will be filled with both existing and new residents, in an ever-changing mix, as well as newly trained and previously experienced workers.

Because all regulations/exactions that go beyond on-site servicing of a development have to rely in part upon an hypothesis to claim that an impact exists, the relevant core of the inquiry is the degree of proof that will be required, once the basic logical connection between the purpose and the type of impact is established. Even traffic impacts cannot be proven on a car by car basis, so some degree of abstraction must be permitted, or the courts will have to throw out an entire set of currently non-controversial impact mitigation fees, such as traffic impact fees. Where this line will be drawn is unclear. What is clear is that utilizing a strict version of the model in Nollan, such hypothesized general impacts might not satisfy the requirement of demonstrating a relationship between the individual project and the impact.

Possibly, the Court will attempt a double standard that distinguishes the degree of proof required to mitigate a harm from that justifying the extraction of a public benefit. This system might fairly be based upon an examination of whether the legitimate public purpose being furthered is one that the government routinely supports through its spending, and whether the existing programs are funded through broad based taxes, so that everyone in the community has made a contribution towards them. This
system would help to distinguish situations where the government is pursuing new goals through the device of exactions from those where the exaction really does go to mitigate the cost imposed upon the community in the form of diluting the previous government investment for the provision of certain public goods. While such a distinction is an attractive theoretical device, the downside is the likelihood that the distinctions will inconsistent and illogical in practice, and deprive government of flexibility at a time when their budgets are particularly strained.

The third requirement is even more difficult to predict, because it is really querying whether the Court will look at an exaction in relation to what others in the community are being asked to pay in support of the same purpose, and judge whether it is proper to impose an exaction in a particular case. This is, perhaps, related to the extortion that Justice Scalia refers to in *Nollan*, because it asks whether the government can use the approvals process as a means of getting some owners to pay for achieving public goals that are properly paid out of public funds. I wonder if this is not especially the case where the exaction supports mitigation of effects in the economy that are not direct charges on the treasury, and which goods are not generally paid for by the public at large.

Therefore, exaction systems after *Nollan* must require: 1. a strict fit in the match between the purpose and the exaction; 2. proportion to the new demand they generate; 3. preferably, that the exaction is serving an interest that is generally pursued by the government and supported by other users, not just some users, and especially not just an unlucky few upon whom the exaction is/was imposed at a "hot" moment in the real estate cycle.
What does this analysis mean for Linkage?

Assuming that the public purposes in linkage will be honored, the core of the issue is that of proportion and equality of distribution of responsibility for the costs of the public goals being furthered. It is doubtful indeed that sufficiently accurate models for the regional economy exist for the government to feel altogether comfortable claiming that a certain impact results from a particular project. It is in part the fear of not being able to prove the full extent of the impact that has kept the cost linkage exactions below that which could be claimed if the statistics used were fully reliable (see the previous section for a discussion of this.) Thus, an essential piece of any structure attempting to support linkage must be a far more credible analysis of the real effects. If this cannot be credibly shown, linkage is probably doomed in court.

Further, once the real effects are shown, the proportionality requirement may require that the imposition of mitigatory linkage requirements be more sensitive to the actual uses to which the project is put. It is perhaps not unfair to observe that linkage premised upon a crude measurement of the square footage of the project does little to tailor the exaction to the actualities of the project.

Finally, linkage exactions to further public purposes which the government is not actively regulating, and for which little public monies collected on a broad basis are spent, is certainly subject to close examination along the extortion lines discussed above. It is certainly possible that these are the types of opportunistic exactions that the Court intended to prohibit in Nollan when it observed that whatever the boundaries of propriety were, certain types of exactions went beyond them.
Child Care

Child care raises issues that are similar to those of linkage. The policy is not implemented in the same way, because it is not run by fees paid to fund programs to mitigate the effects of development. Thus, it is partly similar in its theoretical underpinnings to land dedication because it requires on-site provision of certain services that will be consumed by the users of the site. But the analogy has its limits, for, while it is fair to assert that the workers in a new project will create new demand for child care, most users are not required to provide it. Further, much of the space/capacity the provision of which is demanded by the government is opened to the public, or at least to other users in the area, so that the development is essentially being required to provide a service to the community that the community as a whole chooses not to pay for.

While it is clear that the basic intellectual nexus exists between ensuring child care availability and the requirement that the developer provide facilities, it is quite clear that there is no proper proportionality between what is demanded of the project and the new demand for a particular service, or public good, that the project created. Since this is a public interest towards which other users do not have to pay, it is fair to question whether it is being imposed upon this project in an inequitable way, since the owner is paying a fee that others do not have to pay. To the extent that the Court may look behind the exaction at the equities of the distribution, this could cause the exaction to be found improper.

Neighborhood Business Development (Commonwealth Center only)

These benefits could not be justified on any existing impact mitigation grounds unless it could be shown that the project is displacing jobs and opportunities in the neighborhood that need to be replaced, which is presumably just the opposite of the case. While this exaction may exist in direct logical relationship to a public purpose, if there is a declared
public purpose of furthering community development and nourishing ethnic businessmen, it is certainly possible that this is the type of exaction that will provoke a judicial examination of whether the public purpose is a legitimate one to impose upon this development.

Further, to the degree that the city may not be able to demonstrate adequate proportion between the project and the exaction, nexus could effect the city's ability to impose this type of exaction. How, after all, could the city even begin to show that the exaction exists in any relationship to the impacts of the project? The attempt would likely strain credulity far beyond the rationale relied upon by the commission in Nollan. This is therefore, presumably, an attempt to extract a benefit from the project unrelated to any negative impact that it will have.

Finally, this is certainly an exaction that could not withstand scrutiny requiring that the exaction be to further public purposes that are generally supported by the city and all users/taxpayers. This seems like an even more opportunistic exaction that does the theater provision discussed below, which at least has meaning on a city-wide basis. If any of these sample exactions is likely to amount to extortion, this is it.

Cultural Facilities (Commonwealth Center only)

Similar to the neighborhood economic development programs outlined above, the requirement that the developer provide two theaters with related facilities cannot be justified as an impact exaction unless the city can show that the project will create new demand or eliminate old capacity that the exaction will replace. Since this is, at least presumably, not the case in this instance, these exactions clearly are not mitigatory in nature.
This exaction is the result of the city pursuing broad public policy goals, seeking to rejuvenate and shape its historic but moribund theater district. It serves well as an example of where the Court could attempt to establish a boundary between protecting the city from public harms vis a vis extracting public benefits.

The first issue is first whether it is acceptable to impose the costs of restoring the district upon developers building within the defined boundaries of the district. It is the statutory requirement imposing this burden upon developers in the area that serves as the basis for the exaction, and there is not a general requirement that development projects pay into a fund to provide theater space across the city. This inquiry really goes beyond the bounds of this thesis' concern with the narrow issue of the nexus requirement, although not beyond that of proportionality.

Because there is no pretense that the new projects are in any way adversely affecting a public interest in preserving or restoring theaters, there can be no justification premised on the underlying state authority to prohibit the development completely to protect the underlying legitimate state interest in ensuring the provision of theaters. The central issues are thus the limits of government authority to use land use regulation to effect certain public purposes, which might be framed as a judicial inquiry into the legitimacy of certain public purposes, or at least into the means used to achieve them.

The theater exaction certainly completely fails the proportionality test, because there is and can be no pretense that the project will create demand for this much new theater space. Further, it is perfectly clear that the developer is being asked to supply a public amenity from which other users will benefit, and for which they will not be asked to help pay. The exaction, therefore, certainly fails any examination of whether it is fairly imposed upon this owner vis a vis other owners.
Traffic, Transit, and Infrastructure

The exactions demanded for the improvement of infrastructure around and concerning these projects are more clearly mitigatory in nature, so the narrow nexus requirement of a connection between the public purpose and the exaction is met as certainly in these exactions as it ever can be. To the extent that the exactions are mitigations, they are still subject to the requirement that they be in proportion to the impact, as well as that it is fair to impose the exaction upon a particular owner.

Although there is now a long history of traffic exactions, and they are well accepted, it is possible that some of them could be subject to scrutiny under the nexus requirement, especially the proportionality piece. To the extent that a project contributes more to traffic mitigation of a certain type than it can be shown to produce in its own impact, it may exceed the limits of a narrow nexus reading. Thus, in the sample packages, the Prudential Project is paying for the rebuilding of a subway station, which almost certainly exceeds the impact that the project will have upon that one station. Presumably, the rationale was that the project would pay for the station partially in mitigation for the effects felt elsewhere in the transit system as well. But it is unclear that this type of trade off would be acceptable under a strict interpretation of Nollan.
CONCLUSIONS

Although local government is today in a particularly painful place, caught between increasing demand for services and decreasing willingness to pay for them, it now seems clear that the Supreme Court intends to establish some limit to government's discretion in an area that appeared a partial solution to the cash crunch: real estate development exactions. The effect will be most pronounced in those states that previously had the most liberal standards governing the justifications that must be advanced for exactions. It is, therefore, apparent that all exaction systems, as well as the land use regulatory systems underlying them, should now be subjected to careful review.

The history of exactions traces the evolution of constitutionally permissible government action from very broad authority to protect the public welfare and safety under the police power, to narrowing power to use land use regulation as an opportunity to raise revenues. Along the way, the underlying concepts, and the rational structures into which they fit, have changed greatly.

To the now substantial degree that commercial space is recognized as capturing much of an economy's wealth, the regulation of such land is directly affects the value it has by determining how much of the wealth will be captured in a particular parcel. Some governments, in recognition of these economic realities, have chosen to use the development approvals process as an appropriate moment to recapture some of the wealth created by the development for the community in furtherance of broad public purposes. The rationale is basically an extension of the original one justifying regulation, namely that such exactions are used to further broad public purposes that the government believes are related in some way and to some degree to the development project.

Some of these exactions are mitigatory in nature, intended to compensate for a harm said to result from the project. These harms are
sometimes closely related, and sometimes loosely related to the exaction. Some other of the exactions do not pretend to be mitigatory in nature. They, rather, seek to exact public benefits from a project unrelated to any impacts caused by the project.

_Nollan_ is apparently about the degree of connectedness required by the Court between the purpose, the impact, the project, and the exaction. _Nollan's_ implications for the prudent government require that exactions be premised only on those public purposes that were clearly defined before the approval was sought, and only for those projected effects of the project that exist in a proximate relationship to the exactions. No elaborate, or even semi-elaborate, chain of causality is clearly acceptable after _Nollan_. Further, the exaction should be only in proportion to the impact projected. Determining proportionality is dependent upon assessing the real impact of the development, which may require a degree of understanding of the relationships in an economy that does not presently exist. This analysis is both crucial and difficult, but it may be essential to provide a defensible basis upon which to premise an exaction.

To be still more cautious, governments should consider not imposing exactions that are premised upon providing services/amenities to the community that other members/users are not required to pay towards, even if the exaction is limited to the projected demand produced by the new project. This precaution might be necessary to prevent a de facto Court examination of the motivations behind the exaction, which is basically what occurred in _Nollan_. The determination in that case was that the government's authority was abused because it sought to use the exaction process as an opportunity to gain a public benefit for which the government should rightfully pay. It therefore amounted to an inquiry behind the structure of the Commission's facial justification. While the Court justified its denial of the Commission's right upon the lack of conceptual nexus, it may not be unduly conservative to see the holding as a willingness to consider the equity of imposing the costs of providing a public benefit upon a particular party. If this is a fair reading, then
imposing an exaction for a public benefit upon some users/owners but not all, may very well amount to the same type of abuse of authority that the Court rejected in Nollan.

*First English*, meanwhile, opens up possibilities for staggering liability by requiring compensation for the taking from the time the offending regulation/exaction was implemented. Although most commentators have come to regard these cases as relatively narrow, the enormity of what *First English/Nollan* in tandem could mean demands caution.

Exactions serve important and defensible public purposes. They are almost certainly here to stay. What these two cases do, however, is indicate that there are limits that the Court intends to impose on the use of exactions. These limits do not really seem severe if viewed through the belief that government should distribute the burdens imposed by exactions fairly, and in relation to the actual costs that can be shown to result from the project. Exactions as a taxation/wealth redistribution system, however, seems to be in a state of constitutional limbo until the Court further defines its doctrine growing out of these cases.

In the interim, local governments that use exaction systems as an important means of implementing social policy must, at least, work far harder at developing sophisticated analysis of affects in the economy caused by development. If that can be done sufficiently well to demonstrate statistically defensible affects, government will likely be far closer to a safe and defensible system of exactions than it is now.
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