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Dolan and Municipal Risk Assessment

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ARTICLES

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Dolan and Municipal Risk Assessment

Dolan v. City of Tigard,[1] the latest significant decision by the United States Supreme Court on the relation of the Fifth Amendment Takings Clause[2] to government regulation of property by conditions imposed on land development, crafted a new two-part test that will now be used to determine if a government has exceeded its constitutional bounds. In order for government-imposed conditions to be constitutional under the Takings Clause, there must first be an "essential nexus" existing between the permit condition required by the government and the legitimate government interest behind imposing the condition.[3] Second, if this nexus exists, then there must be a "rough proportionality" between the degree of the exaction demanded by the government's permit condition and the projected impact of the land owner's proposed development.[4] Applying this test to the facts of *Dolan*, the Court held that the conditions that the local government had imposed on the developer did not satisfy the second of these requirements of the Takings Clause.

The decision in *Dolan* has been analyzed exhaustively by legal scholars and courts in the short period since its release. Most

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

2 U.S. Const. amend. V. (This clause reads: "nor shall private property be taken for public use, without just compensation.").

3 *Dolan*, 512 U.S. at 386. The "essential nexus" test was first formulated in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

4 *Dolan*, 512 U.S. at 388-89.

generally agree that as a result of the decision, local governments have been hurt somewhat because they now shoulder a greater burden of showing that their imposed land use conditions are justified; or otherwise, they face a greater risk of litigation.[5] Justice Stevens, in his dissent to *Dolan*, stated his belief that "property owners have surely found a new friend" as a result of the decision.[6] However, even though *Dolan* presents a greater obstacle to local governments, others will not concede that *Dolan* is a complete victory for property owners.[7] Despite *Dolan*, there may yet be methods that local governments can use to exact the conditions that they need from land developers before granting permits to undergo development without violating the Takings Clause.

The general goal of this Article is to provide some guidance to local governments on how to respond to the *Dolan* requirements and minimize the risk that their land development requirements will be invalidated under a Takings Clause challenge by land developers. After a basic summary of the facts, significant holdings, and implications of *Dolan*, the Article meets this goal in two ways. First, it examines two key issues that remain unresolved even after the *Dolan* decision: a) whether the scope of the *Dolan* requirements of "essential nexus" and "rough proportionality" applies only to land development exactions, or whether the holding can also be applied to other conditions, such as the imposition of fees; and b) whether the *Dolan* requirements apply only to *ad hoc* adjudicative decisions that affect only a small number of land owners, or whether they must also apply to legislative enactments aimed at a wide array of property interests. Even though these issues have yet to be resolved by the U.S. Supreme Court, they have been frequently discussed in lower court cases and by many legal scholars. This Article will predict how these issues will eventually be decided, in order to assist local governments in responding accordingly. Second, this Article provides some suggestions to local governments on how to respond to, and cope with, the *Dolan* requirements, including the use of comprehensive plans, administrative processes, and fi-

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[5] Brian B. Williams, Dolan v. City of Tigard, *A New Era of Takings Clause Analysis*, 74 Or. L. Rev. 1105, 1126 (1995).

[6] *Dolan*, 512 U.S. at 405 (Stevens, J., dissenting).

[7] Keith Kraus, Dolan v. City of Tigard: *Property Owners Win the Battle But May Still Lose the War*, 48 Wash. U. J. Urb. & Contemp. L. 275, 296 (1995).

nancing measures. In sum, although undoubtedly "property owners are better off now than they were before *Dolan*,"[8] even after this important decision, local governments may still "impose exactions to offset the impact of development" so long as the exactions "relate to and flow from the development itself."[9] This Article will help local governments take steps to insulate themselves from future potential *Dolan* challenges to its land use regulations.

I
Dolan: Facts, Holdings, and Implications

Dolan v. City of Tigard[10] arose out of a property owner's application to the City of Tigard (the City) to redevelop her site. Florence Dolan (Dolan) owned a plumbing and electric supply store, and proposed to double the size of her store to 17,600 square feet and pave a thirty-nine space parking lot on her 1.67-acre parcel of property.[11] Because a creek bordered her parcel, a significant portion of it was within the creek's 100-year floodplain, thus making that portion "virtually unusable for commercial development."[12] Upon its review and approval of Dolan's application, the City's Planning Commission and Council imposed two particular conditions (among others) on her proposed development project: (1) dedication of that portion of her property lying within the 100-year floodplain for improvement of a storm drainage system along the creek, and (2) dedication of an additional fifteen-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway.[13] In making these land development conditions, the City noted that Dolan's expansion of her store could lead to increased traffic congestion on nearby streets. Thus, the City determined it reasonable to require Dolan to create a "convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation" to offset this traffic demand.[14] Furthermore, the City found that, because Dolan's ex-

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[8] *Id.* at 295.
[9] Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. Ill. U. L. Rev. 513, 515 (1995).
[10] *Dolan*, 512 U.S. 374.
[11] *Id.* at 379.
[12] *Id.*
[13] *Id.* at 380.
[14] *Id.* at 381-82 (citing City of Tigard Planning Comm'n Final Order No. 91-04 PC, App. to Pet. for Cert. G24).

pansion project would result in the addition of significant impervious surfaces on her property, there would be an "'anticipated increased storm water flow from the subject property'" to the creek.[15] Therefore, the City concluded that the "'requirement of dedication of the floodplain area on the site [was] related to'" Dolan's redevelopment plans.[16]

Ms. Dolan appealed the City's decision to Oregon's Land Use Board of Appeals (LUBA)[17] with no success. Her complaint was that the City's dedication requirements were not related to her proposed development and therefore constituted an uncompensated taking of her property under the Fifth Amendment.[18] However, LUBA concluded that both City dedication requirements were related to the impacts of the proposed development.[19] Both the Oregon Court of Appeals and the Oregon Supreme Court affirmed this decision.[20]

In the arguments before the U.S. Supreme Court, Dolan acknowledged the City's authority "to exact some forms of dedication as a condition for the grant of a building permit," but objected to how the City justified those exactions.[21] In evaluating her claim, the Court applied the two-part test that was briefly discussed above. First, it determined whether or not there was an "essential nexus" between the permit condition exacted by the City and the legitimate state interest involved behind that condition.[22] Assuming the nexus existed, the Court then decided whether there was a "rough proportionality" between the degree of exactions demanded by the City and the projected impact of Dolan's proposed development.[23]

In *Dolan*, the Court found that the first prong of the test had been met for both development requirements. It ruled that the prevention of flooding along the creek and the reduction of traffic congestion near Dolan's store qualified as legitimate govern-

[15] *Id.* at 382 (quoting City of Tigard Planning Comm'n Final Order at G37).
[16] *Id.*
[17] LUBA is a state agency established to supplant trial courts in most cases involving local or state "land use decisions" as defined by OR. REV. STAT. § 197.015(10) (1995). LUBA's jurisdiction is set forth at OR. REV. STAT. §§ 197.805-.855.
[18] *Dolan*, 512 U.S. at 382.
[19] *Id.* (citing Dolan v. Tigard, Or. LUBA 91-161 (Jan. 7, 1992), *reprinted at* App. to Pet. for Cert. D-15, n.9).
[20] *Dolan*, 512 U.S. at 383.
[21] *Id.* at 386.
[22] *Id.*
[23] *Id.* at 391.

ment interests. The Court then concluded that there was a nexus between the City's attempt to prevent flooding and its limitation on development within the creek's floodplain, and that there was a nexus between the City's attempt to reduce traffic congestion and its requirement of providing the pedestrian/bicycle pathway.[24]

Turning to the second prong, the Court found that neither land development requirement provided for the necessary relationship ("rough proportionality") between the impact of the proposed development and the requirements. While the Court acknowledged that "keeping the floodplain open and free from development would likely confine the pressures on [the creek] created by [Dolan's] development,"[25] it held that the City went too far. It stated that the City "not only wanted [Dolan] not to build in the floodplain, but it also wanted [Dolan's] property along [the creek] for its Greenway system."[26] What the City did wrong was that it:

> never said why a public greenway, as opposed to a private one, was required in the interest of flood control. . . . It is difficult to see why recreational visitors trampling along [Dolan's] floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along [the creek], and the city has not attempted to make any individualized determination to support this part of its request.[27]

Thus, the City did not show the required reasonable relationship[28] between the floodplain easement and Dolan's proposed development.[29]

With respect to the pedestrian/bicycle requirement, the Court acknowledged that the City was probably correct that Dolan's proposed development would result in increased traffic in the area and that dedications for streets and sidewalks were "generally reasonable exactions to avoid excessive congestion from a proposed property use."[30] However, it held that "the city [had]

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[24] *Id.* at 387-88.

[25] *Id.* at 393.

[26] *Id.*

[27] *Id.*

[28] The Supreme Court noted that "reasonable relationship" and "rough proportionality" are somewhat equivalent; however, the use of the former term in cases in which any degree of relationship was sufficient was the reason for the formulation of the term "rough proportionality." *Id.* at 375.

[29] *Id.* at 395.

[30] *Id.*

not met its burden of demonstrating that the additional [traffic] generated by [Dolan's] development reasonably relate[d] to the city's requirement for a dedication of the pedestrian/bicycle pathway easement."[31] Again, the City had failed to meet the second prong of the Court's test. As a result, the Court reversed the opinion of the Oregon Supreme Court.

The Court's opinion was significant in several respects for future cases involving a local government's imposition of land development conditions. The most important aspect is the creation of the "rough proportionality" test, as discussed above. In trying to further define the meaning of "rough proportionality," the Court stated that "[n]o precise mathematical calculation is required, but the city [or local government] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[32] This statement also includes two more significant elements of the *Dolan* decision. First, the Court put the burden on the *government* to "prove a 'rough proportionality' between its dedication requirements and the impacts of the proposed development."[33] It justified this requirement because "the city made an adjudicative decision to condition [Dolan's] application for a building permit on an individual parcel. In this situation, the burden properly rests on the city."[34] Second, the Court forced the government to establish the constitutionality of its conditions by requiring an "'individualized determination' that the condition in question satisfies the proportionality requirement."[35] In other words, under *Dolan*, "common assumptions

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[31] *Id.*

[32] *Id.* at 391.

[33] Kraus, *supra* note 7, at 291.

[34] *Dolan*, 512 U.S. at 391 n.8. The dissent disagreed, stating that this went against past precedent of giving state statutes a presumption of validity and placing "[t]he burden of demonstrating that [the land use] conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action's constitutionality." *Id.* at 411 (Stevens, J., dissenting).

[35] *Id.* at 398 (Stevens, J., dissenting). In Art Piculell Group v. Clackamas County, 922 P.2d 1227, 1331 (Or. Ct. App. 1996), the Oregon Court of Appeals demonstrated one of the major changes wrought by *Dolan*, i.e., the manner in which findings justifying conditions would be reviewed:

> The question in such cases is whether the local decisionmaker has carried its burden of demonstrating rough proportionality. Although there are substantial factual aspects involved in it, that question is ultimately one of law. . . . Accordingly, when faced with an assignment that LUBA erred by

about development impacts and relations between those impacts and required exactions would appear to be on dangerous ground."[36] Furthermore, the decision "suggests that most impacts and relationships must be quantified."[37]

The *Dolan* decision now makes it more difficult for a local government to impose land development requirements on a property owner. Certainly, the decision gives land owners a better chance at successfully challenging permit conditions, as well as subjecting local governments to civil rights suits.[38] *Dolan* is also difficult for local governments because it arguably does not provide them with enough guidance on how to apply the "rough proportionality" test. James Freis and Stefan Reyniak state, "The *Dolan* majority has made it clear that it desires a heightened scrutiny for this type of regulatory Taking but has failed in its attempt to define these levels of scrutiny."[39] They add, "The Court has 'stumbled badly' by failing to present a guiding principle for application of *Dolan* and has thus injected more uncertainty into this area of the law."[40] As a result, "lower courts lack

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> holding that a local government's findings do or do not establish rough proportionality, our analysis must eventually focus on the local [government's] findings themselves. That is not to say that an evaluation of LUBA's reasoning cannot be of assistance to us in answering the question. However, as with all legal questions that are presented to us in reviewing decisions by LUBA under ORS 197.850, the answer is for us to give, without applying any deferential review standard.

36 Cordes, *supra* note 9, at 549.

37 Cordes, *supra* note 9, at 549.

38 Under 42 U.S.C. § 1983 (1994),

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

39 James H. Freis and Stefan V. Reyniak, *Putting Takings Back into the Fifth Amendment: Land Use Planning after* Dolan v. City of Tigard, 21 COLUM. J. ENVTL. L. 103, 129 (1996).

40 *Id.* at 134. That uncertainty was illustrated recently in Clark v. City of Albany, 904 P.2d 185, 187 (Or. Ct. App. 1995), *rev. denied*, 912 P.2d 375 (Or. 1996):

> As will become clear in some of the specific contexts that we will discuss, there is a general difficulty in analyzing the conditions here in the light of *Dolan*. That case requires that, under the Takings Clause of the Fifth Amendment, a governmental body must demonstrate a "rough proportionality" between certain conditions that it "exacts," and the "impacts" of the development that it approves subject to the conditions. However, in *Dolan* itself, the requirement was established and applied in a framework where

> the conditions and the proposed development had both assumed something akin to final definition. Here, conversely, what the city has granted amounts to a preliminary approval, and several of the disputed conditions are subject to future contingencies or are, by their terms, prerequisites to future phases of the application process rather than the one involved in the present proceeding. The comparison of an exaction and an impact is not easily made—and may not even be possible in some instances—when either or both have yet to assume final form and when the eventual final nature of one depends to some extent on the final form of the other. In addition to that procedural problem, the application of *Dolan* is further complicated here by the fact of the parties' arguments and LUBA's analysis reflect different views about what kinds of conditions are "exactions" that are subject to the test defined in *Dolan*.

In analyzing certain conditions which were contingent on future events, the Court of Appeals found the city had not justified the conditions by adequate findings and affirmed LUBA's remand on those points. *Clark*, 904 P.2d at 190. However, the court affirmed LUBA on a condition that required designating a certain area as "traffic free" because there was no appropriation of the property, and the condition was essentially a "traffic regulation," as opposed to a regulatory taking. In other cases, showing that current city requirements are met, but where those requirements could differ with contingent future events, was also found not to be a taking. However, a further condition which required that a city standard be met before the next appealable stage of the development without such contingency was remanded for LUBA consideration in light of *Dolan*. Finally, a "supplemental note" on the approval warning the reader that there may be future development issues which must be resolved was remanded to LUBA for deletion because it was used "as a vehicle for announcing speculative facts and predictions about future events that have no direct connection to the issues or the decision in the case." *Clark*, 904 P.2d at 301-04.

The same problem of the speculative and contingent future uses and conditions arose in St. ex rel. Department of Transportation v. Altimus, 905 P.2d 258 (Or. Ct. App. 1995), (remanded by the U.S. Supreme Court in light of *Dolan*, 115 S. Ct. 44 (1994). *Altimus* involved a compensable taking by a state highway agency of two acres of undeveloped and agriculturally zoned property at the urban fringe. The agency said the value of the property would be less than its future light industrial use because it had to be annexed by the adjacent city and rezoned, which would likely require a dedication of up to one of the two acres. After noting the difficulty of predicting future contingent events, the court turned to whether the trial court correctly admitted expert evidence on those events:

> *Dolan* was decided in a context where the conditions imposed and the developmental impacts approved by the governmental body were "real," final and defined. We do not think that *Dolan* requires the exclusion of all evidence of hypothetical conditions in circumstances such as this, where it is relevant and responsive to evidence of potential developmental impacts and where the degree of proportionality is necessarily as "speculative" as is the potential nature and existence of the hypothetical impacts and exactions themselves. To that extent, *Dolan* leaves the answers in our earlier opinions unchanged: evidence of hypothetical conditions and uses and the potential nature of both is not inadmissible *per se* on relevance on constitutional grounds.
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> For similar reasons, defendant's reliance on Schultz v. City of Grants Pass, 131 Or. App. 220 (1994) is misplaced. Unlike the situation there, no conditions *have* been attached here to a potential use instead of a real one;

clear guidance when applying the Court's test" and are arguably left with more discretion with which to use these tests to strike down a local government's land use conditions.[41]

The *Dolan* Court also left certain other issues unresolved for local governments in the future when they try to impose land development conditions on property owners. Two of the most important issues are discussed in the next section. First, what exactly is the scope of the *Dolan* decision? Does it apply strictly to requirements of land dedications similar to the facts in the *Dolan* case itself, or is the scope much broader? Second, does the *Dolan* decision only apply to *ad hoc* adjudicative decisions, or does it also apply to legislative decisions as well?

II

Evaluating the Scope of *Dolan*

One of the issues that has been debated in the literature since the *Dolan* decision is whether its scope is limited to physical land development exactions (or improvements to property owned by the applicant or public property adjacent to that owned by the applicant[42]), or whether the decision is also applicable to impact

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> rather, the issue is whether and what conditions *would* have been imposed if defendants had chosen to pursue their hypothesis of a higher and better use to the point that it became a real one.

Id. at 262 (emphasis in original). The court remanded the case to the trial court for analysis in the light of *Dolan*.

[41] Freis and Reyniak, *supra* note 39, at 129.

[42] In *Clark*, 904 P.2d at 189, the Oregon Court of Appeals decided that *Dolan* applied to such improvements, stating:

> There are suggestions in the city's argument that the *Dolan* test should not apply to conditions, like these, that do not require a dedication or transfer of a property interest to the public or the body from which the developmental approval is sought. We implicitly concluded otherwise in *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360 (Or. Ct. App. 1994), where we applied the *Dolan* test to development conditions. . . .
>
> We recognize, and will hold in other connections in this opinion, that not all conditions of approval come within the ambit of the *Dolan* test. However, the fact that *Dolan* itself involved conditions that required a dedication of property interests does not mean that it applies *only* to conditions of that kind. This case is not the appropriate one for universal line-drawing because, in our view, there is no relevant and meaningful distinction between conditions that require conveyances and conditions . . . here. For purposes of takings analysis, we see little difference between a requirement that a developer convey title to the part of the property that is to serve a public purpose, and a requirement that the developer himself make public improvements on the affected and nearby property and make it available for the same purpose. The fact that the developer retains title in, or never

fees and other conditions. Oregon has resolved the one issue of whether the *Dolan* test extends to all potential development which might be facilitated by the instant proposal, or whether the inquiry is limited only to that development which is before the decision maker. Oregon decided that it applies only to the immediate development proposal presented by the instant application.[43]

The implications of whether or not *Dolan* is limited to land exactions are enormous. If the *Dolan* requirements of "essential nexus" and "rough proportionality" can be extended to impact fees, then to avoid violating the Takings Clause, local governments will have to be very careful in imposing any kind of development conditions on land developers. Although the Supreme Court has yet to make a definitive ruling on this issue, in light of its remand of *Ehrlich v. City of Culver City* in 1994,[44] the Court has sent a strong signal that it may have intended its *Dolan* holding to encompass more than just land development exactions.

Some commentators have argued that the *Dolan* holding should only apply to the specific facts of the *Dolan* case; that is, its holding "should not be construed to apply to every property regulation, much less every type of economic regulation, [that] the government enacts."[45] Craig Habicht interprets the Supreme Court majority opinion to suggest a limited scope of the holding. First, Habicht notes that the majority stated that the land use regulations in *Dolan* dealt with the City of Tigard's "adjudicative decision to condition [Dolan's] application for a building permit on an individual parcel," instead of "essentially legislative determinations classifying entire areas of the city."[46] This "classification of the dedication requirements as an adjudicative decision, rather than as a legislative enactment, allowed [the majority] to shift the burden to the government and to review the city's findings with heightened scrutiny, without overruling the well-established presumption of constitutionality and rational basis analysis

acquires title to, the property that he is required to improve and make available to the public, does not make the requirement any less of a burden on his use and interest than corresponding requirements that happen also to entail memorialization in the deed records.

43 *See* Schultz v. City of Grants Pass, 884 P.2d 569 (Or. Ct. App. 1994).

44 Ehrlich v. City of Culver City, 114 S. Ct. 2731 (1994) (remanding case to California Court of Appeals).

45 Craig R. Habicht, Dolan v. City of Tigard: *Taking a Closer Look at Regulatory Takings*, 45 CATH. U. L. REV. 221, 264 (1995).

46 *Dolan*, 512 U.S. at 385.

the Court generally employs when reviewing economic regulations."[47]

Second, Habicht noted the majority's inquiry into "the character of the government action [in *Dolan*] and whether such action authorized a physical invasion of the owner's land."[48] Because the City of Tigard imposed conditions on Dolan that included a requirement "that she deed portions of the property to the city,"[49] this constituted a physical invasion of land by the government that in most cases is deemed to be a *per se* taking. After the Court determined that the government's action constituted a taking, it shifted the burden to the government to show that its imposed requirements were necessary to offset the effects of the landowner's development.[50] Using these textual hints, Habicht concludes that the *Dolan* holding is limited to instances where local governments authorize a physical invasion of land.[51]

Other authors agree with limiting the scope of *Dolan*. Sam Starritt and John McClanahan state that in writing the majority opinion, Chief Justice Rehnquist "hung his hat on the fact that the Dolans would have lost their right to exclude from real property."[52] However, because a money exaction "does not involve the loss of real property, nor does it entail losing one's right to exclude from real property," they argue that the *Dolan* holding should not be applicable to impact fees.[53]

On the other hand, a number of other commentators believe that the *Dolan* holding should also apply to money exactions, especially after the Supreme Court decided to remand the *Ehrlich v. City of Culver City* decision back to a California appeals

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[47] Habicht, *supra* note 45, at 264-65. The distinction between legislative enactments and adjudicative decisions is discussed in more detail below. *See infra* text accompanying notes 71-89.

[48] Habicht, *supra* note 45, at 266.

[49] *Dolan*, 512 U.S. at 385.

[50] Habicht, *supra* note 45, at 268.

[51] Habicht, however, does acknowledge the possibility that "Dolan's burden shifting and heightened scrutiny could, conceivably, be extended to those government actions that, while not being a physical invasion *per se*, have the similar effect of depriving the owner of a basic property right." Habicht, *supra* note 45, at 269.

[52] Sam D. Starritt and John H. McClanahan, *Land-Use Planning and Takings: the Viability of Conditional Exactions to Conserve Open Space in the Rocky Mountain West after* Dolan v. City of Tigard, 114 S. Ct. 2309 (1994), 30 LAND & WATER L. REV. 415, 461 (1995).

[53] *Id*. at 461.

court for "reconsideration in light of *Dolan v. City of Tigard*."[54] Because *Ehrlich* did not involve a physical dedication but instead only involved the imposition of a fee, Cordes states that this remand "suggests that [the Court] did not necessarily intend for its [*Dolan*] analysis to be limited to only physical dedications."[55] Although Starritt and McClanahan state that "it is premature to conclude that [the Court's remand] automatically signifies the Court's desire that Dolan apply to money exactions,"[56] the more telling indication of just what the Supreme Court meant by its remand may have come from the California Supreme Court's decision after the case was remanded.

Following the remand, the California Court of Appeal reached the same conclusions as before. Additionally, it found that "the

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[54] *Ehrlich*, 114 S. Ct. at 2731. (It is noteworthy that the decision to remand *Ehrlich* was made three days after the *Dolan* decision was handed down.). Ehrlich acquired a vacant 2.4-acre lot in Culver City and obtained city approval to develop the site as a private tennis club and recreational facility. Ehrlich v. City of Culver City, 911 P.2d 429, 434 (Cal. 1996). This club was operated from 1975 to 1988; it was closed by Ehrlich following a period of continuing financial losses. A month later, he applied to the city to request a zoning change which would have allowed him to construct a 30-unit condominium complex. *Id*. at 434. In April 1989, the city decided to deny Ehrlich's application based on concerns over the loss of recreational land use needed by the community. *Id*. at 435.

After the rejection of his application, Ehrlich entered into negotiations with city officials to restructure the project. His claim was that he was informed the project would not be approved unless he agreed to build new recreational facilities for the city. He raised the possibility of building four new tennis courts for the city in exchange for the city's reconsideration of its denial. *Id*. at 434-35. After Ehrlich filed a petition for writ of mandate and complaint for damages, the city council approved Ehrlich's application conditioned on the payment of certain monetary exactions. This included a payment requirement of $280,000 to replace a portion of the lost recreational facilities caused by Ehrlich's condominium development, and a payment requirement of $33,200 to meet a city ordinance requiring "art in public places." *Id*. at 435.

Ehrlich eventually filed a complaint, claiming that the imposition of these fees violated the Takings Clause of the United States and the California Constitution. The trial court ruled that the $280,000 recreation fee was invalid, because there was "no reasonable relation . . . between the plaintiff's project and the need for public tennis courts in the City." *Id*. However, the trial court also ruled that the $33,200 art fee was not an unconstitutional taking. *Id*. The California Court of Appeal (on a rehearing) reversed the trial court in part, because it found that there was a "substantial nexus" between the proposed condominium project and the $280,000 recreation fee. Therefore, the recreation fee was not an unconstitutional taking. The appellate court also upheld the art fee. *Id*. at 436. Ehrlich then sought certiorari from the United States Supreme Court, which granted his petition, vacated the Court of Appeal's judgment, and remanded the case for further reconsideration in light of *Dolan*. *Id*.

[55] Cordes, *supra* note 9, at 542.

[56] Starritt and McClanahan, *supra* note 52, at 460.

$280,000 fee was 'roughly proportional' in nature and extent to the needs generated by the project, and therefore passed muster under *Dolan*."[57] On review, the California Supreme Court concluded that Dolan applied to the monetary exaction imposed by the City and stated:

> [W]hen a local government imposes special, discretionary permit conditions on development by individual property owners—as in the case of the recreational fee at issue in this case . . . *Dolan* require[s] that such conditions, *whether they consist of possessory dedications or monetary exactions*, be scrutinized under the heightened standard [of scrutiny].[58]

Applying *Dolan*'s heightened scrutiny requirements to the facts of the *Ehrlich* case, the California Supreme Court remanded the case to the City of Culver City. Although the court upheld the art fee (holding that this kind of aesthetic control was well within the local government's authority to impose),[59] it vacated the imposition of the $280,000 recreation fee. It held that the city had not adequately shown that Ehrlich's development justified the recreational fee. The California Supreme Court required the city "to reconsider its valuation of the fee" by determining "whether and to what extent approval of [Ehrlich's] requested land use changes justify the imposition of a recreation fee as a means of compensating it for the additional costs of attracting the development of comparable private recreational facilities for its residents."[60] Applying language from *Dolan*, the court required the city to make specific findings supported by substantial evidence; "that is, the city 'must make some effort to quantify its findings' supporting any fee, beyond 'conclusory statements', although [n]o precise mathematical calculation is required.'"[61] The California Supreme Court noted, however, that its remand did not mean that the city was not entitled to any fee, but only that the "amount of such a fee [had to be] tied more closely to the actual impact of the land use change the city granted [to Ehrlich]."[62]

Thus, although the U.S. Supreme Court has yet to state definitively that the *Dolan* holding applies to more than land dedica-

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[57] *Ehrlich*, 911 P.2d at 436.
[58] *Id.* at 447 (emphasis added).
[59] *Id.* at 450.
[60] *Id.* at 449-50.
[61] *Id.* at 450.
[62] *Id.* at 449.

tion requirements,[63] its remand of the *Ehrlich* case may have been a strong signal of its wishes. Apparently, the California Supreme Court interpreted the remand as an indication that *Dolan*'s requirements should be extended to impact fees.

There are also other strong arguments for why the *Dolan* holding ought to be applied to more than just physical land dedications. First, Mark Cordes points out that the primary concern behind the *Dolan* test is that local governments will try to seek exactions unrelated to the impact of a land owner's development. He says this concern "applies equally to impact fees as well as to physical exactions."[64] It would make little sense to prevent local governments from imposing unfair land development dedications on land owners, but then allow the governments to use a different scheme—impact fees—to achieve the same unfair result.[65] Second, Cordes notes that many state court decisions have essentially applied the same standard under the Takings Clause to both physical dedications and impact fees. He states that "courts have generally applied a similar analysis to both types of exactions and usually expressed comparable concerns in assessing their legitimacy."[66] Two cases in particular, *Jordan v. Menomonee Falls*[67] and *Call v. West Jordan*,[68] which were cited with approval in *Dolan* for their application of the "rough proportionality" test, involved the imposition of fees on land developers.[69] Third, Cordes notes the similarity between impact fees and land use dedications. They both are "typically made pursuant to an adjudicatory approval process and are affirmative obligations designed to offset the burdens caused by development."[70]

All of these reasons, but in particular the remand of *Ehrlich* and the California Supreme Court's subsequent treatment of the

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[63] *Dolan* basically only involved the Supreme Court reviewing a land use design. Furthermore, many of the cases cited by the Court dealt only with subdivision development.

[64] Cordes, *supra* note 9, at 542.

[65] Cordes, *supra* note 9, at 542.

[66] Cordes, *supra* note 9, at 542.

[67] Jordan v. Menomonee Falls, 137 N.W.2d 442 (Wis. 1965).

[68] Call v. West Jordan, 606 P.2d 217 (Utah 1979).

[69] *Jordan*, 137 N.W.2d 442, involved a village's requirement that a subdivision developer pay $200 per lot so that the village could acquire recreational and school lands to support the subdivision's residents. *Call*, 606 P.2d 217, involved a city ordinance that required subdividers to either dedicate seven percent of the land to the city, or pay the equivalent of that value in cash, to be used for flood control and/or parks and recreation facilities.

[70] Cordes, *supra* note 9, at 543.

case, seem to suggest that the *Dolan* holding would apply to more than just physical land exaction requirements. The dissent protested, saying that "property owners have surely found a new friend" in the *Dolan* decision.[71] However, not all is lost for local governments who are trying to impose requirements on land developers. Even with an expanded scope of the *Dolan* holding, there are still requirements that local governments can impose on land developers without violating *Dolan* and the Takings Clause. Sections III and IV of this Article are intended to provide some guidance to local governments on methods that can still be used to minimize the risk of having land development conditions invalidated in court.

The other major unresolved issue after the *Dolan* decision is whether the "essential nexus" and "rough proportionality" tests apply to *ad hoc* adjudicative decisions only, or whether they also apply to legislative decisions as well? The U.S. Supreme Court seemed to make a distinction between adjudicative and legislative decisions in *Dolan*. It stated that the land use regulations in *Pennsylvania Coal v. Mahon*[72] and *Agins v. Tiburon*[73]—which were both upheld—were different from the *Dolan* facts in two ways. First, the regulations in *Pennsylvania Coal* and *Agins* involved "essentially *legislative* determinations classifying entire areas of the city, whereas [in *Dolan*] the City made an *adjudicative* decision to condition [Dolan's] application for a building permit on an individual parcel."[74] Second, the conditions imposed by the City were "not simply a limitation on the use [Dolan] might make of her own parcel, but a requirement that she deed portions of the property to the city."[75] This language appears to indicate that legislative land use regulations are not subject to the *Dolan* requirements, whereas adjudicative land use decisions to condition a permit approval on certain physical dedications of land to the government (similar to the requirements imposed by the City of Tigard) will be subject to *Dolan*.[76]

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71 *Dolan*, 512 U.S. at 405 (Stevens, J., dissenting).

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

73 Agins v. Tiburon, 447 U.S. 255 (1980).

74 *Dolan*, 512 U.S. at 384 (emphasis added).

75 *Id*.

76 Many legal analysts have agreed with this interpretation of the *Dolan* language. *See, e.g.*, Freis and Reyniak, *supra* note 39, at 130 (stating that *Dolan* is limited "to specific fact patterns in which a land use regulation results in an adjudicative decision to condition a single permit approval on a physical dedication of land to the state"); Cordes, *supra* note 9, at 538 ("[n]ew *Dolan* test does not apply to the major-

According to Cordes, under this "legislative-adjudicative" distinction, zoning restrictions that only limit a property owner's use of her land would not be subject to *Dolan*, so long as the restrictions did not involve requiring the owner to physically dedicate some of her land to the government.[77] Furthermore, development approvals such as building permits, subdivision approval requirements and site approval requirements - that do require land dedication - would be subject to *Dolan* because they are essentially adjudicative actions. These types of actions "involve a condition imposed on a particular parcel of land as opposed to a more general classification."[78]

A series of cases in lower courts have used the "legislative-adjudicative" distinction to decide whether *Dolan* applied to the facts of their particular cases. In *Home Builders Association of Central Arizona v. City of Scottsdale*, a court decided that the *Dolan* test did not apply, because the city government's ordinance in question was a "legislative" determination affecting the entire city, rather than an "adjudicative" determination.[79] In *San Mateo County Coastal Landowners' Association v. County of San Mateo*, because the county agricultural and space easement requirements in question were "part of a legislatively adopted zoning scheme intended to preserve agricultural and open space land," *Dolan* did not apply.[80] The court stated that "*Dolan* makes it clear that it does not reach the type of legislative determination classifying entire areas of a county, such as we are here

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ity of land use restrictions that involve restrictions on land pursuant to a broad legislative restriction. . . . On the other hand, the *Dolan* standard would clearly apply to adjudicative decisions that involved a physical dedication of land."); Habicht, *supra* note 45, at 268 (stating that *Dolan* is limited to "where the character of the government action is an adjudicative, as opposed to a legislative, determination and where such action authorized a physical invasion of land"). In a footnote, the Court also stated that when "evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights." *Dolan*, 512 U.S. at 391 n.8. However, when a government makes an adjudicative decision to condition petitioner's application for a building permit on an individual parcel, "the burden properly rests on the city." *Id*.

[77] Cordes, *supra* note 9, at 538.

[78] Cordes, *supra* note 9, at 539.

[79] Home Builders Ass'n of Cent. Arizona v. City of Scottsdale, 902 P.2d 1347, 1352 (Ariz. Ct. App. 1995).

[80] San Mateo County Coastal Landowners' Ass'n v. County of San Mateo, 38 Cal. App. 4th 523, 548 (1995).

concerned with. Rather, its reach is limited to adjudicative decisions conditioning permit applications on particular parcels."[81]

However, since the *Dolan* decision, at least two Supreme Court justices have expressed their concern over the validity of the "legislative-adjudicative" distinction. In a dissent to the Court's denial of certiorari in *Parking Association of Georgia v. City of Atlanta, Georgia*, Justice Thomas stated that "[t]he lower courts are in conflict over whether [*Dolan*'s] test for property regulation should be applied in cases where the alleged taking occurs through an act of the legislature."[82] While some courts have "relied upon the 'legislative character' of state action to conclude that [the *Dolan* test] was inapposite . . . [o]ther courts . . . have applied [*Dolan*] to cases involving alleged legislative regulatory takings."[83] Justice Thomas then stated:

> It is hardly surprising that some courts have applied [*Dolan*'s] rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.[84]

This statement, while not indicative of the opinion of the current Supreme Court majority, indicates "that the legislative/adjudicative distinction may not continue indefinitely as a curb on *Dolan*'s reach into the realm of state and local powers."[85]

Even if the "legislative-adjudicative" distinction exists today, local governments must still be careful about using the distinc-

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[81] *Id.*

[82] Parking Ass'n of Georgia, Inc. v. City of Atlanta, Georgia, 115 S. Ct. 2268 (1995) (Thomas, J., dissenting). *Parking Association* involved an ordinance passed by the city of Atlanta to require landscaping for certain existing surface parking lots. Upon the petitioners' motion for injunctive and declaratory relief on the grounds that these landscaping requirements constituted a Fifth Amendment taking, the state trial court ruled in favor of the city. The Supreme Court of Georgia affirmed this decision. It held that the *Dolan* test was not applicable to this case because the city of Atlanta had made a legislative determination with regard to many landowners. *Id.*

[83] *Id.*

[84] *Id.* at 2269.

[85] Matthew J. Cholewa and Helen L. Edmonds, *Federalism and Land Use After Dolan: Has the Supreme Court Taken Takings from the States?*, 28 URBAN LAW. 401, 435 (1996).

tion in trying to validate the conditions that it imposes against property owners. In *Schultz v. City of Grants Pass*, two property owners requested a permit to partition their parcel of land into two lots.[86] The city government approved the application, subject to a condition that the owners dedicate several strips of land along their parcel.[87] When the property owners requested review of the condition by the Oregon Court of Appeals on grounds that the condition was an unconstitutional taking, one of the city's counter-arguments was that because the conditions were mandated by city ordinances, they were "the 'functional equivalent' of legislative decisions and, therefore, are not subject to the requirements of *Dolan*."[88] In response, the court called the city's argument "a misunderstanding of *Dolan* and a mischaracterization of its own actions."[89] The court added that the adjudicative-legislative distinction (in which legislative actions are presumed to be valid) "attaches only when a petitioner challenges the validity of a zoning ordinance or similar legislative or quasi-legislative enactment that is applied generally to all similarly situated properties."[90] What was important in *Schultz* to the court was not the city's use of the "adjudicative" or "legislative" label; instead, because the city required the land owners to physically deed portions of their property, the *Dolan* requirements were applicable.

Therefore, what the *Schultz* case teaches is that local governments cannot simply use the "adjudicative-legislative" distinction to justify their imposition of land use conditions, especially if those conditions involve physically dedicating land to the government. Courts are generally more sensitive to actual transfers of property than they are to restrictions on the use of property.[91] However, the evidence shows that if these governments avoid imposing requirements that involve the property owners' physical dedication of property, and if the requirements are "legislative" in character, the *Dolan* requirements probably will not apply. Assuming this is true, the local government must assure that the land development requirements it makes are the result

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[86] *Schultz*, 884 P.2d 569.
[87] *Id*. at 570.
[88] *Id*. at 572.
[89] *Id*.
[90] *Id*.
[91] Kim I. Stollar, *How Much is Enough? Assessing the Impact of* Dolan v. City of Tigard, 46 CASE W. RES. L. REV. 193, 230 (1995).

of a legislative enactment that affects a wide array of property interests, instead of the result of an *ad hoc* adjudicative decision which burdens only a single individual.

Three types of legislatively enacted mechanisms that have a good chance of withstanding a challenge under *Dolan* are impact (development) fees, development agreements, and the establishment of community facilities districts. Ordinances that calculate development fees that are based on mathematical formulas are most likely to pass a *Dolan* challenge because they specifically remove "discretion from the hands of local planning officials" and may therefore be "the surest means of demonstrating rough proportionality."[92] In an Arizona case involving the City of Scottsdale's water resource development fee, the court pointed out that the city ordinance:

> specifies the amount of the fee to be charged for each type of development. Unlike Tigard's ordinance, Scottsdale's allows its staff no discretion in setting the fees which are based upon a standardized schedule. The fees are tailored to the type of development involved and are uniform within each class of development. Because the fees are standardized and uniform, and because the ordinance permits no discretion in its application, a prospective developer may know precisely the fee that will be charged. The Scottsdale ordinance, therefore, does not permit a *Dolan*-like ad hoc, adjudicative determination.[93]

This seems to indicate that by limiting the amount of discretion delegated to the local government in making these land development requirements, the risk of an invalidation of the requirements can be minimized or prevented. Although mathematical formulas may create a presumption of a valid land development requirement under *Dolan*, there are other ways to limit a local government's discretion. For instance, Freis and Reyniak suggest that state statutes can require that all findings at the local level regarding development permit approval be supported by specific determinations and not mere axiomatic conclusory statements.[94] Even "unsophisticated measures" of the relationship between the permit requirements and the impacts of the development might be permissible to meet *Dolan*'s "rough proportionality"

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92 Freis and Reyniak, *supra* note 39, at 171.

93 *Home Builders Ass'n of Cent. Arizona*, 902 P.2d at 1352.

94 Freis and Reyniak, *supra* note 39, at 170.

requirement, "as long as an effort is made to apply the rough calculation to the specific facts of the development."[95]

For imposing what she terms "linkage fees"—which are used to pass some of the social costs associated with development to developers by requiring them to help finance social infrastructure projects such as affordable housing, day-care services, or recreational land[96]—Rachel Janutis suggests a three-step process for local governments to meet the *Dolan* rough proportionality standard and therefore protect themselves from *Dolan* challenges. First, the local government should identify a quantifiable social problem within the community. Second, the local government should undertake a study to determine if there are any types of development in the community that contribute to that social problem. Third, the local government should then provide for an individual fee assessment for each proposed development, based on the findings made in the first two steps. In applying this framework, Janutis presents a hypothetical in which the local government receives an application for a development permit. First, the local government may decide there is a need for affordable housing within the community. Second, it should try to determine the number of workers that might be attracted to the community by the proposed development, and how many of those workers will need affordable housing. The government could then estimate the cost of providing housing for these workers. Finally, using these estimates, the local government can impose a fee on the developer that would be a percentage of the cost of providing the housing, as long as the government makes a finding that the fee will offset the need for the housing.[97] According to Janutis, this process will enable the local government to meet the *Dolan* standards and therefore will not be a violation of the Takings Clause.

Michael Dowling and Joseph Fadrowsky present other legislative approaches that they believe will not violate the Takings Clause. One approach is a development agreement between the local government and the developer.[98] These agreements are

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[95] Cordes, *supra* note 9, at 552.

[96] Rachel Janutis, *Nollan and Dolan: "Taking" a Link out of the Development Chain*, 1994 U. ILL. L. REV. 981, 986 (1994).

[97] *Id*. at 1006.

[98] Michael B. Dowling and A. Joseph Fadrowsky III, Dolan v. City of Tigard: *Individual Property Rights v. Land Management Systems*, 17 U. HAW. L. REV. 193, 260 (1995).

often governed by statute. In Hawaii, enabling legislation has been passed that allows counties to pass their own development agreement ordinances. Some of the benefits of using these agreements are that the agreements are bilateral and voluntary, with a sound basis in contract law for enforcement.[99] Furthermore, with the agreement, the local government may no longer need to make the site-specific determinations of "rough proportionality" between the land development requirement and the impact of the development that *Dolan* requires.[100]

However, statutes dealing with making development agreements, if not properly structured, may not adequately meet the *Dolan* "rough proportionality" standard. For example, Joseph Lee argues that the state of Washington's statutes regarding development agreements fall into this category.[101] Lee argues that Washington Revenue Code § 82.02.020 does not mandate that fees cannot exceed a proportionate share of the costs of the land developments.[102] Thus, the requirements of the statute "do not meet the customized, site-specific fee determination envisioned by the *Dolan* Court."[103]

The other legislative approach suggested by Dowling and Fadrowsky is the use of "community facilities districts." Using the Hawaii example again, the use of these districts (by statute) allows for the issuance of tax exempt bonds to finance public facilities that require major capital expenditures. Through this

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[99] *Id.*

[100] *Id.* at 259-60.

[101] Joseph D. Lee, *Sudden Impact: The Effect of* Dolan v. City of Tigard *on Impact Fees in Washington*, 71 WASH. L. REV. 205, 229 (1996).

[102] The relevant language of the statute includes:

> [The statute] does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment in lieu of a dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat. . . . Any such voluntary agreement is subject to the following provisions:
>
> (1) The payment shall be held in a reserve account and may only be expended to fund a capital improvement agreed upon by the parties to mitigate the identified, direct impact;
>
> (2) The payment shall be expended within five years of collection; and
>
> (3) Any payment not so expended shall be refunded with interest at the rate applied to judgments to the property owners of record at the time of the refund; however, if the payment is not expended within five years due to delay attributable to the developer, the payment shall be refunded without interest.

WASH. REV. CODE § 82.02.020 (1996).

[103] Lee, *supra* note 101, at 229.

mechanism, a developer gains an advantage because she can finance major elements of infrastructure at bond interest rates that are much lower than the rates that she could otherwise obtain by conventional methods.[104] However, the use of these districts (sometimes called "special financing districts") may at some point in the future also be subject to *Dolan*'s "rough proportionality" standard.[105]

The bottom line is that land development exactions that are most at risk from a Takings Clause challenge are those that are made by the local government after it has already decided that it wants a piece of land or a fee, and then uses the development approval process as a means to get what it wants. As Cordes notes: "[w]here a development process is merely an excuse to obtain land already designated for public use, there is often little relationship to development impacts, and therefore, the process is invalid."[106] On the other hand, the kinds of land development conditions that are least at risk under *Dolan* are

> those that are imposed in an honest effort to offset the impacts of development. . . . Such exactions will be valid if the local government can establish that the proposed development creates the need for the exactions, the degree of required exaction is proportionate to the need attributable to the development in question, and the local government can quantify the above.[107]

This section has shown that the requirements of *Dolan* can probably be applied to both land development exactions as well as impact fees. The decision also appears, at this time, to apply only to development requirements that are adjudicative in nature, or to requirements that require a property owner to physically dedicate some of his or her land. Now that the scope of the decision has been examined, the remainder of this article will outline suggested methods for local governments to cope with the *Dolan* decision.

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[104] Dowling and Fadrowsky, *supra* note 98, at 261-62.

[105] Stollar, *supra* note 91, at 230 n.239.

[106] Cordes, *supra* note 9, at 550.

[107] Cordes, *supra* note 9, at 551.

III

REVISING LOCAL PROCESSES TO RESPOND TO *DOLAN*

Regardless of the ultimate scope of *Dolan*, local governments must respond to the very real exposure to monetary awards and attorney fees for allegedly unconstitutional actions when imposing land development conditions.[108] In Oregon, the difficulty is compounded by the requirements for processing applications for land use permits and for limited land use decisions, which require that decisions be made in a comparatively short time. Most applications must be processed within 120 days of the application being declared or deemed complete.[109] Additionally, certain other applications for expedited land divisions[110] provide for comparatively short time periods for government action.[111] Because these time limitations may be waived by the applicant, the power to waive (or not) is a powerful tool for the development community in dealing with local governments.

If, as suggested above, *Dolan* evinces a dislike of *ad hoc* decision-making which may result in deprivation of constitutional rights, there is reason for local governments to review their land development plans and processes to avoid litigation, damages, and attorney fee exposure. Prudence advises that each step in these processes be examined as part of an overall strategy to reduce risk of unconstitutionality. The following recommendations may play a part in that overall strategy of risk reduction.

A. *Comprehensive Planning*

Oregon requires comprehensive planning and establishes a hierarchy of those plans over development regulations and land

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[108] *See, e.g.*, 42 U.S.C. § 1983 (1994); Robinson v. City of Seattle, 830 P.2d 318 (Wash. 1992) (Property rights, in addition to personal liberties, are within the protection of 42 U.S.C. § 1983.); Sintra v. City of Seattle, 829 P.2d 765 (Wash. 1992) (Land use disputes, including takings claims, are an appropriate subject of § 1983 claims.).

[109] OR. REV. STAT. § 215.428(1) to (3) requires such action with regard to counties, while OR. REV. STAT. § 227.178(1) to (3) requires the same for cities in Oregon.

[110] The term "expedited land division" relates to certain residential development proposals and is provided for by OR. REV. STAT. §§ 197.360-.380.

[111] OR. REV. STAT. § 197.370 provides for an initial decision within 63 days of filing and a maximum period for a decision at 120 days.

use actions.[112] The formulation of comprehensive plans therefore plays a major role in bolstering development conditions. While plans are supposed to be the result of adequate facts and policy choices,[113] frequently such plans are the result of decisions lacking any basis at all. To the extent that the thesis that *Dolan* applies to adjudicative, rather than legislative, actions of local governments is valid, then a plan which provides a factually based policy choice (particularly as to needed infrastructure and allocation formulas) will receive greater weight in the judicial calculus.

Strengthening the comprehensive plan may be done in several ways. First, the adequacy of the factual basis for the plan can be strengthened. Second, the policy choices may be more clearly articulated. Third, the use of capital improvement plans which specifically set forth water, sewer, transportation, drainage, and public services and facilities needs for development over a 20-year period—the generally accepted planning horizon in Oregon—provides a strong basis for allocation of the costs of those facilities among those benefited and the general public. It is unlikely that courts will have the inclination or expertise to delve into allocation formulae so as to micro-manage the development process.[114]

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[112] *See* Fasano v. Board of County Comm'rs of Washington County, 507 P.2d 23 (Or. 1973); Baker v. City of Milwaukie, 533 P.2d 772 (Or. 1975); OR. REV. STAT. § 197.175.

[113] Statewide Planning Goal 2 of the Oregon Land Conservation and Development Commission provides:

> To establish a land use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions and actions.
>
> . . . .
>
> All land use plans shall include identification of issues and problems, inventories and other factual information for each applicable statewide planning goal, evaluation of alternative courses of action and ultimate policy choices, taking into consideration social, economic, energy and environmental needs. The required information shall be contained in the plan document or in supporting documents. The plans, supporting documents and implementation ordinances shall be filed in a public office or other place easily accessible to the public. The plans shall be the basis for specific implementation measures. These measures shall be consistent with and adequate to carry out the plans. Each plan and related implementation measure shall be coordinated with the plans of affected governmental units.

OR. ADMIN. R. 660-15-000(2) (1995); *see also* LAND CONSERVATION AND DEVELOPMENT COMMISSION, OREGON STATEWIDE PLANNING GOALS (1996 ed.).

[114] *See, e.g.*, Western Amusement v. City of Springfield, 545 P.2d 592 (Or. 1976).

B. Precise or Specific Plans

An extension of the notion that more intensive planning on the macro, or policy, level is an effective antidote to the prospect of unconstitutionality after *Dolan* is more intensive planning on the micro, i.e., small area, level. Thus, when an undeveloped area becomes available for development, the local government may find it more appropriate to undertake planning for public services and facilities for the particular area under consideration and allocate costs as part of that planning process. As with improved comprehensive planning generally, planning for land-extensive areas is likely to be given judicial deference for reasons of planning expertise, as well as because such planning is more likely to be called a legislative act, in which courts are less likely to interfere.[115]

C. Concurrency

One notion accepted in some other states, but not in Oregon at this time, is that of "concurrency," by which development may not occur unless and until an adequate level of public facilities and services are present or will be made available concurrent with development. In particular, Florida has championed the concept of concurrency in its statewide planning program.[116] Oregon has been reluctant to undertake this concept, perhaps because it requires more intense and precise planning for public facilities and services and because the concept requires denial of development in areas which are urban in nature.

The planning and political culture in Oregon reacts strongly to those planning actions which result in a moratorium on develop-

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[115] *See* Comment, *Zoning Amendments: The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972); *Fasano*, 507 P.2d 23; Fifth Ave. Corp. v. Washington County, 581 P.2d 50 (Or. 1978); *see also* Williams, *supra* note 5, which also suggests the refinement of broad brush comprehensive plans in more precise, localized plans. Oregon law favors such "refinement plans" under OR. REV. STAT. § 197.200, which allows treatment of development under such plans through the expedited land division process.

[116] *See* FLA. STAT. ANN. § 163.3177(10)(h) (West 1990 & Supp. 1996) ("It is the intent of the Legislature that public facilities and services needed to support development shall be available concurrent with the impacts of such development in accordance with § 163.3180."); Thomas G. Pelham, *Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth*, 19 FLA. ST. U. L. REV. 973 (1992); David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U. L. REV. 223 (1993); David L. Powell, *Recent Changes in Concurrency*, 68-NOV FLA. B.J. (1994).

ment, which Oregon statutory law has limited severely.[117] While a moratorium does not include "denial or delay of permits or authorizations because they are inconsistent with applicable statutes, rules, zoning or other laws or ordinances, or a public facilities strategy that meets the provisions of ORS 197.768,"[118] the wording of the statutory provisions governing moratoria limit the use of this tool immensely.[119] Nevertheless, the combination of appropriately worded plan policies, carried out by zoning, capital improvement or other ordinances, or a "public facilities strategy,"[120] may enable local governments to link developments to

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[117] *See* Or. Rev. Stat. §§ 197.505-.540.

[118] Or. Rev. Stat. § 197.505(1).

[119] In Homebuilders Association v. Wilsonville, 30 Or. LUBA 246 (LUBA No. 94-166 (December 21, 1995)), a limitation on certain development within a given distance of a congested freeway intersection was struck down by LUBA as a moratorium under a definition in Or. Rev. Stat. § 197.505(1) (1993) which was much more liberal than the current version. The definition of "moratorium" is statutorily described as follows: "*engaging in a pattern or practice of delaying or stopping issuance of permits, authorizations or approvals necessary for the subdivision and partitioning of, or construction on, any land*." Or. Rev. Stat. § 197.505(1) (1995) (emphasis added). Moratorium does not include actions engaged in or practices in accordance with a comprehensive plan or implementing ordinances acknowledged by the Land Conservation and Development Commission under Or. Rev. Stat. § 197.251, nor does it include the denial or delay of permits or authorizations because they are inconsistent with applicable zoning or other laws or ordinances. Or. Rev. Stat. § 197.505(1) (1995) (The current language does not specifically include acknowledged comprehensive plans. That change has not yet been tested.).

[120] Or. Rev. Stat. § 197.768 provides:

> (1) A local government may adopt a public facilities strategy as described in subsection (2) of this section. A public facilities strategy may be implemented if it:
>
> (a)(A) Is acknowledged under ORS § 197.251; or
>
> (B) Is approved by the Land Conservation and Development Commission under ORS § 197.628 to § 197.646; and
>
> (b) Meets the requirements of subsection (2) of this section.
>
> (2) A public facilities strategy adopted under subsection (1) of this section shall:
>
> (a) Include a statement of purpose that limits the public facilities strategy to situations in which clear and objective standards demonstrate that:
>
> (A) There is a rapid increase in land development in a specific geographical area; and
>
> (B) The total land development would exceed the planned or existing capacity of public facilities;
>
> (b) Include a detailed description of actions and practices a local government may engage in to control the time and sequence of development approvals in response to the identified deficiencies in public facilities; and
>
> (c) Set forth the procedures, notice and findings that allow the local government to proceed under this section.

These provisions accompanied the 1995 redefinition of "moratorium" noted above and have not been tested.

improvements and thus limit most challenges to the appropriateness of the allocation formula.

D. *Using Process as a Constitutional Filter*

In addition to planning and plan implementation measures, another way in which local governments can reduce exposure to damages, attorney fees, and unconstitutionality is to provide a process by which that level of government can evaluate and deal with potential constitutional challenges before litigation occurs. While the Oregon land use process often uses local proceedings to narrow issues on appeal,[121] the particular allocation of the burden in *Dolan* presents a problem for local governments. *Dolan* places the evidentiary burden of justifying the exaction on the local government.[122] Therefore, local governments must be more creative in fleshing out challenges to conditions early in the process. There are several ways in which this may be done:

1. *Pre-Application Conferences*

Although not required by state law, many local governments require potential applicants for permits or limited land use decisions to meet and confer with the planning staff before the filing of an application in order to discuss the applicable standards and issues which are likely to be raised in the development process. Those contacts provide an opportunity to determine whether development exactions will be an issue during the development process. Because the 120-day time limit for a local government to process a land use permit has not begun, the local planning staff with a command of the needs of the community, a defensible allocation formula, and an ability to defend exactions at the hearing level will be able to limit future controversy by presenting the local case for the exaction early in the process.

The local government should provide a description of those public services and facilities needed for the project, as indicated

121 Oregon requires that issues to be considered on appeal ordinarily must be raised in proceedings before the local government. OR. REV. STAT. § 197.763(1). Oregon case law also provides that parties may waive issues. *See, e.g.*, Melton v. City of Cottage Grove, 887 P.2d 359 (Or. Ct. App. 1994); Boldt v. Clackamas County, 813 P.2d 1078 (Or. Ct. App. 1991).

122 *Dolan*, 512 U.S. at 391 ("No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

in its plan, a description of services present, and, if there is a "gap" between the two, a description as to how to fill that gap. This will raise the issue of providing for those services and facilities before the application is filed.

2. *The Completeness Check*

The 120-day rule commences the time for decision only from the time the application was complete, or was deemed complete.[123] The time during which the application is being found by the local planning staff to be complete (usually thirty days) presents another opportunity to deal with *Dolan* without the decision time running. Particularly, if the issue were raised in the pre-application process, the staff should be ready with its response to justify the exaction.

Besides providing for the same description of existing and required facilities, the application form should also provide for a description as to how any gaps between the two may be bridged. The local code should provide for denial of the application if required public facilities and services are not provided at the time of decision, and should also provide a menu of opportunities for the developer to provide these facilities and services, as set forth below. While the burden is not on the applicant to justify the exaction, the local government can reduce the risk of a *Dolan* challenge by providing both the expectations of services and facilities and a menu of opportunities to meet those expectations. Particularly by codifying the expectations in a legislative form, local governments reduce the risk of *ad hoc* exactions which drew judicial suspicion in *Dolan*.

3. *The Staff Report*

Another opportunity to reduce risk, although within the 120-day decision period, is the staff report, which provides the context of the case for the decision-maker. Although there is no statutory form for the report, the report frequently sets forth the nature of the application, the applicable plan and regulatory standards, and weighs the application against those standards. Most importantly, the staff report often sets forth conditions of approval, if approval is recommended.

[123] *See* OR. REV. STAT. § 215.428(1) to (3) and OR. REV. STAT. § 227.178(1) to (3).

The staff report provides an opportunity to evaluate a negative recommendation on the grounds that required public facilities and services are not present or, alternatively, to establish the basis for "rough proportionality" under *Dolan*. The first alternative is legally possible, but often politically unpopular,[124] while the second must be justified in a way which both satisfies the local political process and subsequent review. At this point recommendations as to how to provide public facilities and services become important. For example, whether the developer should front the cost for the improvements (or participate in financing those improvements with the appropriate governmental agency), or simply defer provision of the improvements to a certain date, all have effects on the developer and the local service provider.

Once again, if the local government provides a legislative policy which makes development dependent on service provision and also provides a formula allocating responsibility for the costs of providing those facilities and services, reference in the staff report to these considerations greatly enhances the prospects of local success in light of a *Dolan* challenge.

4. The Hearings Process

Assuming a strong service policy and allocation formula, the staff report will have set the stage for evaluating "rough proportionality" in a credible way. However, the hearings process[125] is the crucible at which the critical local decision (which will provide the basis for later review) is made. The applicant may disagree with the staff's interpretation of the policy or allocation formula or may challenge these standards entirely.

If the applicant challenges the service policy, it will likely be on subconstitutional grounds, i.e., that the policy constitutes a moratorium, violates some statutory or rule provision, or is inconsistent with the remainder of the local plan and regulatory scheme.

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[124] As will be the case with most *Dolan* challenges, the land will be located within an urban growth boundary, where development must occur over a 20-year horizon. Although the timing of development is a significant legal issue, developer expectations are frequently oriented toward approval of all applications within the boundary.

[125] Not all land use decisions provide for a hearing. Or. Rev. Stat. § 215.416(11) and § 227.175(10) allow for a decision to be made without a hearing if there is a later opportunity for a hearing and notice is given to the applicant and those within a specified distance of the subject property which allows any such person to "trigger" a *de novo* hearing by paying a fee.

The formulation of this policy may or may not be valid, but those decisions are not based on *Dolan* considerations and are not considered here.

Regarding the allocation formula, the local government should stress that *Dolan* only requires *rough* proportionality. Mathematical precision is not required[126] and, if *Dolan* does not extend to the legislative formulation of the allocations, that legislative determination should survive constitutional scrutiny. Whether or not *Dolan* extends to every instance involving the formula, the formula should have some flexibility of application, so that if there are particular instances of inequitable application, an administrative process is available to smooth out the roughness of proportionality.[127] Similarly, staff, participants, and the decision makers must be mindful of the possibility of a *Dolan* challenge as they fulfill their respective roles. Finally, the decision maker must be mindful that a *Dolan* challenge must require a thoughtful response in the final order, notwithstanding the 120-day rule. The greater the thought given before a final order is entered, the less the danger of a premature *Dolan* challenge under that rule.[128]

Dolan may thus be viewed as a fortuitous occurrence to planning, since it forces planners and local governments to justify, at minimum, property exactions and may force justification of monetary demands in lieu of property or on fees imposed as part of the planning process. The *Dolan* requirements can be met by better planning for the provision for infrastructure and for a more rigorous planning process which compels denial for proposals that do not meet infrastructure needs, yet provides a menu of alternatives for supplying infrastructure and a fair allocation formula for doing so.

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[126] *See supra* note 120.

[127] One of the reasons for the necessity of a Fifth Amendment-based decision in Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003 (1992) was the lack of any form of administrative relief by the time the lawsuit was brought. A later administrative relief procedure was made available, but was too late for application in this case.

[128] Such a challenge runs the risk of not being ripe, as there is no final order requiring the dedication of property or payment of money which may give rise to such a challenge. Williamson County Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

IV

Financing Measures to Meet *Dolan* Requirements

Process alone will not supply a complete answer to the difficulties that the *Dolan* decision created for local government. The development process in Oregon is such that there is an expectation that lands within urban growth boundaries will develop within a twenty-year period.[129] Additionally, the theory behind Oregon's comprehensive planning program is that provision of public services and facilities is coordinated with the development of urban lands. However, that theory often lacks realization, as local governments tend to plan for provision of public services and facilities at the same time they process applications for development.

Even if planning for these services and facilities exists, the actualization of those plans is often stymied by lack of funds. Provision of these services and facilities is also difficult when the property which is the subject of the application is more remote from those services and facilities and there is a "gap" in funding the extension. The purpose of this section is to set forth alternative means of funding those services and facilities in a manner which satisfies *Dolan*.

For the development community, money and certainty are at a premium. Under the suggestions made above, much of the local work is done at the planning and regulatory stages, so that the application of the plan and regulations to the particular case becomes more predictable. This same approach is particularly sound when it comes to financing public improvements. Local governments can acquire land and install all or a portion of improvements, so long as funds allow. For example, the local government may take it upon itself to install sewer or water mains in existing rights of way. The costs of that portion of infrastructure can be recaptured in hookup or other fees, with the developer picking up the costs of the connection of the structure to those mains. Alternatively the local government may install collector roads and require the developer to install local roads.[130] Oregon

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[129] *See* Or. Rev. Stat. § 197.752.

[130] The developer can fairly be called upon to install collector or arterial road improvements for developments fronting those roads, being reimbursed for those improvements beyond that of a local road.

statutory law allows at least two means by which developers may defer costs of infrastructure to another day or to other parties.[131]

Much of the concern of the development community, which supported a hard-line approach in the *Dolan* case,[132] arises out of the uncertainty and open-ended nature of the development process. It is understandable that a hard-pressed local government might equate its need for public facilities and services with the burden on the first developed applicant. That first developer creates a portion of the need for those facilities and services, but certainly not the entire need. Local governments normally do not have the funds to advance capital costs and seek reimbursement from later developers. The result is often a standoff to see who "blinks" first.

A number of financing mechanisms exist under existing law and by analogy from other jurisdictions. These mechanisms include:

A. *The Local Improvement District*

The first, and more widespread instrument, is the local improvement district (LID), by which the local government describes a capital project and holds a hearing on whether the project should proceed and how costs should be allocated. If the project does proceed, the local government provides a further hearing on the costs after construction has been completed. It allows property owners to pay for the cost of the improvement

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[131] See the discussion of local improvement districts and systems development charges below.

[132] *See, e.g.*, Brief for Defenders of Property Rights at 18, Dolan v. City of Tigard, 512 U.S. 374 (1994) (No. 93-518) ("[T]he lack of proportionality between the city's required dedication of property and the problems the taking purported to address, in itself renders the taking patently unconstitutional. . . . Upholding schemes which extort private property from its owners as a price of exercising their constitutional right to use private property in a reasonable manner violates not only the express guarantee of the just compensation clause, but eviscerates the framers' purpose in securing the protection of private property in the Constitution."); Brief for the National Association of Realtors and the Oregon Association of Realtors, *Dolan*, 512 U.S. 374 (No. 93-518) ("The Constitution must be enforced by courts who are not limited to superficial review of self-serving government declarations, but which are zealous guardians of the just principle that everyone pay their fair share and no one is saddled with an inordinate burden."); Brief for Jon A. Chandler, Common Ground: The Urban Land Council of Oregon, *Dolan*, 512 U.S. 374 (No. 93-518) ("If the relaxed level of judicial review employed by the Oregon court is acceptable, then future takings cases will not need to be decided by justices on constitutional principles but by clerks ticking off boxes on a form every time the appropriate phraseology is used.").

immediately, or on a semi-annual basis, with interest, up to thirty years.[133] If the local government has the funds available, its funds receive the benefit of the interest. Otherwise, the local government may sell bonds secured by the project and the benefited properties. Frequently, these individual obligations are paid off when the benefited property changes hands.

A frequently used device for local governments in Oregon is the "waiver of remonstrance" to the formation of a local improvement district. This device is often the result of an exaction in exchange for development approval and is not often challenged.[134] The waiver allows the LID to be formed and to "count" the waivers as affirmative votes.[135] Combined with an aggressive policy on denial of proposals where infrastructure is not provided, the LID is an excellent tool for providing for infrastructure. The local government may choose to delay formation of the district to install improvements where only one project may need them at the time, recalling that the waivers, if a matter of public record, place the present and future property owners on notice of the potential liability of the costs of the improvement. Alternatively, the local government may choose to proceed with the development immediately to provide the facility or service for the first development. It can then charge all benefited property owners of undeveloped property, who may then be moved to develop their property more quickly to pay for the improvements.

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[133] OR. REV. STAT. §§ 223.387-.401.

[134] *But see* Nelson v. Lake Oswego, 869 P.2d 350 (Or. Ct. App. 1994).

[135] OR. REV. STAT. § 223.399 provides for flexibility in imposition of assessments under local improvement districts:

> The governing body of a governmental unit may impose additional procedural requirements. The procedural provisions of OR. REV. STAT. §§ 223.387-.399 shall apply only where the charter or an ordinance of a governmental unit does not specify otherwise and the charter or ordinance provisions comply and are consistent with the requirements of the Oregon Constitution. The charter or ordinance provisions shall apply to local improvements permitted by law. No governmental unit shall authorize a local improvement prohibited by percentage of remonstrance or otherwise under the charter of the governmental unit.

Many local government charters or ordinances have provisions whereby the project must be abandoned if two-thirds of the "benefited" property owners file written remonstrances against formation of the district. In most cases, there is not that degree of opposition, and the local governing body may determine whether to proceed.

B. The Systems Development Charge

A second device, of more recent vintage but still very effective, is the systems development charge (SDC). Under Oregon statutory law, the local government may impose charges on building permits if it devises a plan which shows the improvements to be constructed and the allocation of those costs to individual developments.[136] Thus, if the local government requires a given number of square feet of land for parks for every 100 units and divides a city into park districts, it may then charge each residential unit a charge for its share of the needed costs of providing such a park, based on the estimate made in the plan. The SDC system also provides for credits to those charges, if, for example, a residential development decides to dedicate a park to the city. That dedication would offset the charges levied and may even provide for a partial refund of the SDC fees.

The point of SDC fees in response to *Dolan* is that they are imposed as part of a plan to allocate the costs of public improvements to development as it occurs. Troubling questions still arise from the SDC tool, as have already arisen in other impact fees, particularly over the share which new development must pay, as opposed to present development which has not been subject to such fees. However, those who already enjoy approved development may argue, with some force, that present development provided existing infrastructure without further cost to new development.[137] In any event, one may expect the field of urban economy to become more complex in the future.

C. Economic Improvement Districts

The Economic Improvement District (EID) is a creation of Oregon law.[138] It provides a range of services or facilities to nonresidential property along the lines of providing public improvements through a local improvement district, discussed below. The following services or facilities may be provided by an EID:

a. The planning or management of development or improvement activities;
b. Landscaping or other management of public areas;

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[136] *See* OR. REV. STAT. §§ 223.297-.314.

[137] This argument was accepted by the California Court of Appeals in the context of a Facilities Benefit Assessment in J. W. Jones Cos. v. City of San Diego, 203 Cal. Rptr. 580 (1984). *See infra* text accompanying notes 148-153.

[138] *See* OR. REV. STAT. §§ 223.112-.132.

c. Promotion of commercial activities or public events;
d. Activities in support of business recruitment or development;
e. Improvements in parking systems or parking enforcement; and,
f. Any other economic improvement activity for which an assessment may be made on property specially benefited thereby.[139]

The breadth of these improvements is wide and the procedural requirements fairly easily met. There is a hearing, preceded by personal notice to owners of potentially benefited property, a required description of the improvement and its potential cost, an opportunity for remonstrance, and, if the assessment ordinance is adopted, an assessment (for a period not to exceed five years)[140] against each benefited property for the estimated proportionate share of the costs, and a requirement that no assessments shall be made if the owners of property on which thirty-three percent or more of the total assessments are proposed object.[141]

The last characteristic of the EID worthy of mention is that the improvements may be financed through the LID process[142] and the sale of Bancroft Bonds.[143] This means that the property owner can avoid full and immediate payment of the assessment by an application to pay in installments payable for a period of up to thirty years.[144] While the obligation to pay is secured by the property, a common practice is that the outstanding assessment is paid in full if the property were sold.

The EID, like the LID and SDC discussed above, provides a method of deferring immediate obligations. A developer may find this particularly helpful, in that the ability to pay may be spread out over a thirty-year period, avoiding a capital expenditure and the risk of personal liability for failure to repay. The weakness of the EID, however, is that it is limited to commercial

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[139] OR. REV. STAT. § 223.112(2).

[140] OR. REV. STAT. § 223.117(1)(d). However, under OR. REV. STAT. § 223.118(2)(c) and OR. REV. STAT. § 223.124, the five year period may be extended, subject to the right of remonstrance and exclusion from assessment.

[141] OR. REV. STAT. §§ 223.117-.118. Somewhat uniquely, OR. REV. STAT. § 223.118(1)(a) and (b) allows those who do not file written remonstrances to be deemed to have requested the improvements proposed. However, if a person does file such written objection, the property shall not be assessed for those improvements.

[142] *See* OR. REV. STAT. § 223.127.

[143] OR. REV. STAT. § 223.260(2).

[144] OR. REV. STAT. § 223.215(1)(b).

and industrial lands and cannot be used in connection with residential development.

D. *Development Agreements*

Oregon law provides that applicants may enter into agreements with developers to provide infrastructure.[145] The original purpose of these agreements was to insulate approved developments which have not been completed to provide some financial certainty to the developer. Among other things, the agreements must include the uses permitted, along with their intensity and density, development schedules, and provisions for supply of infrastructure and services.[146]

Creative use of development agreements may extend beyond this original purpose so that a developer and a local government may agree on the supply of infrastructure and services on a multiple-development basis. It is possible for a large vacant area to be the subject of such an agreement and to provide for the advance of capital for infrastructure development and for the reimbursement of those costs. The local government must adopt the agreement by ordinance and the agreement must be consistent with local regulations.[147] The agreement must be recorded within ten days of adoption.[148]

E. *Community Facilities Districts*

California local governments, like those in Oregon following tax limitation measures of 1996,[149] have faced reduced revenues to fund public services and facilities, while the demand for those services and facilities has not abated. In response to California property tax limitations imposed by Proposition XIII,[150] local governments have developed a host of responses, including the Facilities Benefit Assessment (FBA).

The FBA has withstood challenge under both California's Proposition XIII and state LID law in *J.W. Jones Companies v.*

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[145] *See* OR. REV. STAT. §§ 94.504-.528.

[146] OR. REV. STAT. § 94.504(2).

[147] OR. REV. STAT. § 94.508.

[148] OR. REV. STAT. § 94.528. The agreement must describe the property affected and be filed with the deed records of the county in which the subject property is located.

[149] Oregon Ballot Measure 47 (1996).

[150] CAL. CONST. art. 13A (citing law review and journal commentaries).

City of San Diego,[151] which dealt with the use of a large district to provide infrastructure[152] (which had previously been provided by the City's General Fund) to urbanizing areas. The infrastructure in this case was mandated by the City's General (comprehensive) Plan and the specific plan for the North University City area, but exempted property already developed from its scope. The LID process was used in that case,[153] the proceeds were segregated into special funds to construct the public improvements which were the subject of the proceedings, and the payments became a lien which is due on application for a building permit.[154] More importantly, the omission of developed property from the assessments was upheld and did not offend equal protection concepts, despite the incidental benefit accruing to those properties.[155] Finally, the court specifically upheld the idea of mixing twenty-five different public improvements in one assessment, concluding:

> The City concluded a piecemeal approach to dealing with large development projects in planned urbanizing areas would inevitably lead to a haphazard, random growth putting heavy burdens on those seeking early development of their land and lighter loads upon those coming into development at later times. Importantly, that approach would necessarily defeat general plan policies for planned development as spelled out in the North University City community plan. The aggregation of all the improvements in the FBA and the spread of their costs to the undeveloped parcels in the area of the benefit was proper.
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> . . . .
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> In sum, the ordinance is the key to implementing San Diego's controlled growth concept as formalized in the general plan and community plan. The narrow strictures of general law concepts of financing public facilities as imbedded in [California Statutory Law] do not accommodate the dynamics of explosive growth in sunbelt cities. The undeveloped perimeters of urban centers required to be controlled in their growth

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151 J.W. Jones Cos. v. City of San Diego, 203 Cal. Rptr. 580 (1984); *see also* City of San Diego v. Holodnak 203 Cal. Rptr. 797 (Cal. Ct. App. 1984).

152 That infrastructure included water mains, utilities, sewers, drainage systems, streets and sidewalks, parks, transit and transportation, libraries, fire stations, school buildings and police stations. *J. W. Jones*, 203 Cal. Rptr. at 583.

153 *Id.* It should be noted that this process was by analogy, the City asserting its home rule powers to formulate the FBA process, as there was no specific statutory authority for FBAs.

154 *Id.* The FBA assessment was in excess of $26 million, mostly for streets and parks.

155 *Id.* at 588.

> not on a street by street basis looking to adjacent properties to bear improvement costs, but from the perspective of future communities planned to be complete in themselves. The vision of San Diego's future as sketched by in the general plan is attainable only through the comprehensive financing scheme contemplated by the FBA. We view the precedents of yesterday's case law, not as barriers to growth, but as guidelines to accomplish the needs of tomorrow. We hold the ordinance as applied here is a valid exercise of San Diego's power to require undeveloped land to bear the costs of the public facilities necessary for the health and welfare of the future residents of North University City Area.[156]

As helpful as the FBA process sounds, the Oregon Court of Appeals did sound a warning to the use of this or similar "fair share" allocation methods, which developers often equate with unfairness to those who apply for development approval:

> Petitioner's principal target is the term "fair share" in the passage from the LUBA opinion. Petitioner points out that the term is akin to some of the variations of the stated standards for allocating improvement assessments among benefited property owners, but is not the appropriate standard for determining rough proportionality. The concern under *Dolan* is not with the apportionment of costs for a general improvement over the general body of benefited property owners, but with the extent to which particular property may be burdened because of the impacts that are attributable to its development.
>
> Petitioner's understanding of *Dolan* is correct. We do not imply that a development cannot have impacts that could warrant improvement conditions that are system wide in scope. However, . . . the determinative factor must be the relationship between the impacts of the development and the approval conditions, and not the extent of the public's need for the road or other improvements that happen to exist at the time the particular development is approved.[157]

This statement does not preclude the use of FBAs or other methodology to meet local capital construction needs; however, it is a clear warning that the rough proportionality must be shown whenever such an allocation vehicle is used.

Other financing mechanisms will no doubt be tied into the *Dolan* analysis. Impact fees, the costs of "hooking up" into existing infrastructure,[158] are likely to become a battleground as local

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[156] *Id.* at 589. *See also* Knox v. City of Orland, 841 P.2d 144 (Cal. 1992).

[157] *Art Piculell Group*, 922 P.2d at 1235-36 (footnotes omitted).

[158] *See, e.g.*, Hayes v. City of Albany, 490 P.2d 1018 (Or. Ct. App. 1971); Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. Dist. Ct. App. 1976).

governments become more hard pressed financially. And "linkage fees," which require developers to pay the cost of relocation of the urban poor forced to relocate when central city lands are redeveloped for much more valuable uses,[159] may come to Oregon to deal with reallocation of the social costs of private redevelopment.

Conclusion

Until the U.S. Supreme Court breaks its delphic silence, the extent of *Dolan*, if any, beyond real property exactions will be unknown. Some future case will have to address whether *Dolan* deals with fees and whether those fees must be predicated upon an individualized determination, notwithstanding the adoption of a map showing future rights-of-way needed to facilitate more intense development or a general fee schedule. Until that time, the more prudential view is that *Dolan* extends to development-related fees,[160] though the door is not closed to the establishment

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Specifically, in Montgomery Bros. Constr., Inc. v. City of Corvallis, 580 P.2d 190, 193-94 (Or. Ct. App. 1978), the Oregon Court of Appeals referred to its decision in *Hayes* to say:

> [In *Hayes*] we held that the city had the power to levy a sewer connection charge reasonably commensurate with meeting the burden currently imposed or reasonably to be anticipated upon the city's sewerage disposal system. While it is not clear, it appears from the ordinance in question that since the rates of charge are to be revised from time to time to reflect changes in costs of sewer and water line construction incurred since the preceding review, and that the funds collected on account of water connections are segregated in the city's water fund, the amount of the charge is intended to relate to the current construction costs and the burdens currently imposed.

[159] *See* Bonan v. City of Boston, 496 A.2d 640 (Mass. 1986), Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992). San Telmo Assocs. v. City of Seattle, 735 P.2d 673, 674 (Wash. 1987) comes to a different conclusion. Quoting from Hillis Homes, Inc. v. Snohomish County, 650 P.2d 193, 195 (Wash. 1982), Washington finds that a charge "to accomplish desired public benefits which cost money" is a tax, which was prohibited.

San Telmo dealt not with *Dolan*'s rough proportionality requirement, but rather whether the charge was a "tax" under state law and therefore unauthorized. Assuming the charge is authorized, *Dolan* becomes an issue. If the local government is able to demonstrate a rough proportionality between the linkage fee and the costs of relocation, that fee may be upheld. *See* Janutis, *supra* note 96.

[160] The rough proportionality test for local development-related fees in Oregon is likely met if the city or county has adopted fees in accordance with Or. Rev. Stat. § 215.416(1) and Or. Rev. Stat. § 227.175(1) which both provide: "The governing body shall establish fees charged for processing permits at an amount no more than the actual or average cost of providing that service." *See also* Or. Rev. Stat.

of a legislatively adopted fee schedule predicated on the actual or average costs of such development. This view would allow courts to review local substitution of fees for property dedications or grants as a means of subverting *Dolan* and would limit the application of that case to the action in which the federal Supreme Court had interest, *viz ad hoc* conditions not routinely applied, to assure that fairness of application is secured.

This Article has also suggested certain changes to the planning process to minimize the impacts of unconstitutional exactions on local governments. This danger is especially inherent in the Oregon development process, as decisions under that process must be made within 120 days unless the applicant consents to additional time. Because the burden is on the local government to justify conditions through an "individualized determination," local governments must do much in a short time to bear that burden. This end may be accomplished through greater attention to detail, by advanced planning, and by careful attention and response to actual or potential objections to development conditions.

However, a defensive posture, while necessary to the local development process, is not sufficient in the light of *Dolan*. Local governments must become more pro-active by using recognized financial mechanisms to pay for growth and combine those established mechanisms with more novel approaches, such as development agreements and Facilities Benefit Assessments, not now generally used in Oregon.

Dolan presents both a challenge and an opportunity for local governments in Oregon, which face the twin risks of deciding issues of constitutional import too quickly at the risk of precision and consequent loss of the case if challenged. If more time is needed to decide the constitutional issues, the 120-day rule, with its attorney fee provisions, may preclude careful attention. If the case is decided on time, but is constitutionally wrong, the prospect of a civil rights suit, with its own attorney fees provisions, looms large. In many ways, this is a no-win situation for local governments.

The opportunity for local governments is to redirect efforts towards anticipating, and providing for, capital construction needs,

§ 215.422(1)(c) and OR. REV. STAT. § 227.180(1)(c) relating to appeal fees, which also acts to limit the costs of appeals.

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and devising the correct mechanisms to realize their comprehensive plans as the future unfolds.