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14-823 Follow-up

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SUPREME COURT OF THE UNITED STATES

No. 93-518

FLORENCE DOLAN, PETITIONER *v.* CITY OF TIGARD

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

[June 24, 1994]

Chief Justice Rehnquist delivered the opinion of the Court.

Petitioner challenges the decision of the Oregon Supreme Court which held that the city of Tigard could condition the approval of her building permit on the dedication of a portion of her property for flood control and traffic improvements. 317 Ore. 110, 854 P. 2d 437 (1993). We granted certiorari to resolve a question left open by our decision in *Nollan* v. *California Coastal Comm'n,* 483 U.S. 825 (1987), of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.

The State of Oregon enacted a comprehensive land use management program in 1973. Ore. Rev. Stat. §§ 197.005-197.860 (1991). The program required all Oregon cities and counties to adopt new comprehensive land use plans that were consistent with the statewide planning goals. §§ 197.175(1), 197.250. The plans are implemented by land use regulations which are part of an integrated hierarchy of legally binding goals, plans, and regulations. §§ 197.175, 197.175(2)(b). Pursuant to the State's requirements, the city of Tigard, a community of some 30,000 residents on the southwest edge of Portland, developed a comprehensive plan and codified it in its Community Development Code (CDC). The CDC requires property owners in the area zoned Central Business District to comply with a 15% open space and landscaping requirement, which limits total site coverage, including all structures and paved parking, to 85% of the parcel. CDC, ch. 18.66, App. to Pet. for Cert. G16-G17. After the completion of a transportation study that identified congestion in the Central Business District as a particular problem, the city adopted a plan for a pedestrian/bicycle pathway intended to encourage alternatives to automobile transportation for short trips. The CDC requires that new development facilitate this plan by dedicating land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan. [n.1]

The city also adopted a Master Drainage Plan (Drainage Plan). The Drainage Plan noted that flooding occurred in several areas along Fanno Creek, including areas near petitioner's property. Record, Doc. No. F, ch. 2, pp. 2-5 to 2-8; 4-2 to 4-6; Figure 4-1. The Drainage Plan also established that the increase in impervious surfaces associated with continued urbanization would exacerbate these flooding problems. To combat these risks, the Drainage Plan suggested a series of improvements to the Fanno Creek Basin, including channel excavation in the area next to petitioner's property. App. to Pet. for Cert. G13, G38. Other recommendations included ensuring that the floodplain remains free of structures and that it be preserved as greenways to

minimize flood damage to structures. Record, Doc. No. F, ch. 5, pp. 5-16 to 5-21. The Drainage Plan con cluded that the cost of these improvements should be shared based on both direct and indirect benefits, with property owners along the waterways paying more due to the direct benefit that they would receive. *Id.*, ch. 8, p. 8-11. CDC Chapters 18.84, 18.86 and CDC §18.164.100 and the Tigard Park Plan carry out these recommendations.

Petitioner Florence Dolan owns a plumbing and electric supply store located on Main Street in the Central Business District of the city. The store covers approximately 9,700 square feet on the eastern side of a 1.67 acre parcel, which includes a gravel parking lot. Fanno Creek flows through the southwestern corner of the lot and along its western boundary. The year round flow of the creek renders the area within the creek's 100 year floodplain virtually unusable for commercial development. The city's comprehensive plan includes the Fanno Creek floodplain as part of the city's greenway system.

Petitioner applied to the city for a permit to redevelop the site. Her proposed plans called for nearly doubling the size of the store to 17,600 square feet, and paving a 39 space parking lot. The existing store, located on the opposite side of the parcel, would be razed in sections as construction progressed on the new building. In the second phase of the project, petitioner proposed to build an additional structure on the northeast side of the site for complementary businesses, and to provide more parking. The proposed expansion and intensified use are consistent with the city's zoning scheme in the Central Business District. CDC § 18.66.030. App. to Brief for Petitioner C1-C2.

The City Planning Commission granted petitioner's permit application subject to conditions imposed by the city's CDC. The CDC establishes the following standard for site development review approval:

"Where landfill and/or development is allowed within and adjacent to the 100 year floodplain, the city shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan." CDC § 18.120.180.A.8, App. to Brief for Respondent.

Thus, the Commission required that petitioner dedicate the portion of her property lying within the 100 year floodplain for improvement of a storm drainage system along Fanno Creek and that she dedicate an additional 15 foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway. [n.2] The dedication required by that condition encompasses approximately 7,000 square feet, or roughly 10% of the property. In accordance with city practice, petitioner could rely on the dedicated property to meet the 15% open space and landscaping requirement mandated by the city's zoning scheme. App. to Pet. for Cert. G28-G29. The city would bear the cost of maintaining a landscaped buffer between the dedicated area and the new store. *Id.*, at G44-G45.

Petitioner requested variances from the CDC standards. Variances are granted only where it can be shown that, owing to special circumstances related to a specific piece of the land, the literal interpretation of the applicable zoning provisions would cause "an undue or unnecessary hardship" unless the variance is granted. CDC § 18.134.010. App. to Brief for Respondent B 47. [n.3] Rather than posing alternative mitigating measures to offset the expected impacts of her proposed development, as allowed under the CDC, petitioner simply argued that her proposed development would not conflict with the policies of the comprehensive plan. *Id.*, at E 4. The Commission denied the request.

The Commission made a series of findings concerning the relationship between the dedicated conditions and the projected impacts of petitioner's project. First, the Commission noted that "[i]t is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs." City of Tigard Planning Commission Final Order No. 91-09 PC, App. to Pet. for Cert. G24. The Commission noted that the site plan

has provided for bicycle parking in a rack in front of the proposed building and "[i]t is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed."*Ibid.* In addition, the Commission found that creation of a convenient, safe pedestrian/ bicycle pathway system as an alternative means of transportation "could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion." *Ibid.*

The Commission went on to note that the required floodplain dedication would be reasonably related to petitioner's request to intensify the use of the site given the increase in the impervious surface. The Commission stated that the "anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes."*Id.*, at G37. Based on this anticipated increased storm water flow, the Commission concluded that "the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." *Ibid.* The Tigard City Council approved the Commission's final order, subject to one minor modification; the City Council reassigned the responsibility for surveying and marking the floodplain area from petitioner to the city's engineering department. *Id.*, at G 7.

Petitioner appealed to the Land Use Board of Appeals (LUBA) on the ground that the city's dedication requirements were not related to the proposed development, and, therefore, those requirements constituted an uncompensated taking of their property under the Fifth Amendment. In evaluating the federal taking claim, LUBA assumed that the city's findings about the impacts of the proposed development were supported by substantial evidence. *Dolan* v. *Tigard,* LUBA 91-161 (Jan. 7, 1992), reprinted at App. to Pet. for Cert. D-15, n. 9. Given the undisputed fact that the proposed larger building and paved parking area would increase the amount of impervious surfaces and the runoff into Fanno Creek, LUBA concluded that "there is a `reasonable relationship' between the proposed development and the requirement to dedicate land along Fanno Creek for a greenway."*Id.*, at D-16. With respect to the pedestrian/bicycle pathway, LUBA noted the Commission's finding that a significantly larger retail sales building and parking lot would attract larger numbers of customers and employees and their vehicles. It again found a "reasonable relationship" between alleviating the impacts of increased traffic from the development and facilitating the provision of a pedestrian/bicycle pathway as an alternative means of transportation. *Ibid.*

The Oregon Court of Appeals affirmed, rejecting petitioner's contention that in *Nollan* v. *California Coastal Comm'n,* 483 U.S. 825 (1987), we had abandoned the "reasonable relationship" test in favor of a stricter "essential nexus" test. 113 Ore. App. 162, 832 P. 2d 853 (1992). The Oregon Supreme Court affirmed. 317 Ore. 110, 854 P. 2d 437 (1993). The court also disagreed with petitioner's contention that the *Nollan* Court abandoned the "reasonably related" test. *Id.*, at 118, 854 P. 2d, at 442. Instead, the court read *Nollan* to mean that an "exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve." *Id.*, at 120, 854 P. 2d, at 443. The court decided that both the pedestrian/bicycle pathway condition and the storm drainage dedication had an essential nexus to the development of the proposed site. *Id.*, at 121, 854 P. 2d, at 443. Therefore, the court found the conditions to be reasonably related to the impact of the expansion of petitioner's business. *Ibid.* [n.4] We granted certiorari, 510 U. S. ___ (1993), because of an alleged conflict between the Oregon Supreme Court's decision and our decision in *Nollan, supra.*

The Takings Clause of the Fifth Amendment of the United States Constitution,[1] made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U.S. 226, 239 (1897), provides: "[N]or shall private property be taken for public use, without just compensation." [In.5] One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."*Armstrong* v. *United States,* 364 U.S. 40, 49 (1960). Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. *Nollan, supra,* at 831. Such public access would deprive petitioner of the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna*v. *United States,* 444 U.S. 164, 176 (1979).

On the other side of the ledger, the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in*Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926). "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 413 (1922). A land use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land." *Agins* v.*Tiburon,* 447 U.S. 255, 260 (1980). [In.6]

The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In *Nollan, supra,* we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right--here the right to receive just compensation when property is taken for a public use--in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.
See *Perry* v. *Sindermann,* 408 U.S. 593 (1972); *Pickering* v. *Board of Ed. of Township High School Dist.,* 391 U.S. 563, 568 (1968).

Petitioner contends that the city has forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements. Petitioner does not quarrel with the city's authority to exact some forms of dedication as a condition for the grant of a building permit, but challenges the showing made by the city to justify these exactions. She argues that the city has identified "no special benefits" conferred on her, and has not identified any "special quantifiable burdens" created by her new store that would justify the particular dedications required from her which are not required from the public at large.

In evaluating petitioner's claim, we must first determine whether the "essential nexus" exists between the-legitimate state interest" and the permit condition exacted by the city. *Nollan,* 483 U. S., at 837. If we find that

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[1] FIFTH AMENDMENT No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ***nor shall private property be taken for public use, without just compensation.***

a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development. We were not required to reach this question in *Nollan*, because we concluded that the connection did not meet even the loosest standard. 483 U. S., at 838. Here, however, we must decide this question.

We addressed the essential nexus question in *Nollan.* The California Coastal Commission demanded a lateral public easement across the Nollan's beachfront lot in exchange for a permit to demolish an existing bungalow and replace it with a three bedroom house. 483 U. S., at 828. The public easement was designed to connect two public beaches that were separated by the Nollan's property. The Coastal Commission had asserted that the public easement condition was imposed to promote the legitimate state interest of diminishing the "blockage of the view of the ocean" caused by construction of the larger house.

We agreed that the Coastal Commission's concern with protecting visual access to the ocean constituted a legitimate public interest.*Id.*, at 835. We also agreed that the permit condition would have been constitutional "even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.*, at 836. We resolved, however, that the Coastal Commission's regulatory authority was set completely adrift from its constitutional moorings when it claimed that a nexus existed between visual access to the ocean and a permit condition requiring lateral public access along the Nollan's beachfront lot.*Id.*, at 837. How enhancing the public's ability to "traverse to andalong the shorefront" served the same governmental purpose of "visual access to the ocean" from the roadway was beyond our ability to countenance. The absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into "an out and out plan of extortion." *Ibid.*, quoting *J. E. D. Associates, Inc.* v. *Atkinson,* 121 N. H. 581, 584, 432 A. 2d 12, 14-15 (1981).

No such gimmicks are associated with the permit conditions imposed by the city in this case. Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld. *Agins, supra,* at 260-262. It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100 year floodplain. Petitioner proposes to double the size of her retail store and to pave her now gravel parking lot, thereby expanding the impervious surface on the property and increasing the amount of stormwater run off into Fanno Creek.

The same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation. In theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers: "Pedestrians and bicyclists occupying dedicated spaces for walking and/or bicycling . . . remove potential vehicles from streets, resulting in an overall improvement in total transportation system flow." A. Nelson, Public Provision of Pedestrian and Bicycle Access Ways: Public Policy Rationale and the Nature of Private Benefits 11, Center for Planning Development, Georgia Institute of Technology, Working Paper Series (Jan. 1994). See also, Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102-240, 105 Stat. 1914; (recognizing pedestrian and bicyclefacilities as necessary components of any strategy to reduce traffic congestion).

The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development. *Nollan, supra,* at 834, quoting *Penn Central,* 438 U.S. 104, 127 (1978) (" `[A] use restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial government purpose' "). Here the Oregon Supreme Court deferred to what it termed the "city's unchallenged factual findings" supporting the dedication conditions and found them to be reasonably related to the impact of the expansion of petitioner's business. 317 Ore., at 120-121, 854 P. 2d, at 443.

The city required that petitioner dedicate "to the city as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] . . . and all property 15 feet above [the floodplain] boundary." In addition, the city demanded that the retail store be designed so as not to intrude into the greenway area. The city relies on the Commission's rather tentative findings that increased stormwater flow from petitioner's property "can only add to the public need to manage the [floodplain] for drainage purposes" to support its conclusion that the "requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." City of Tigard Planning Commission Final Order No. 91-09 PC, App. to Pet. for Cert. G37.

The city made the following specific findings relevant to the pedestrian/bicycle pathway:

"In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." *Id.,*at 24.

The question for us is whether these findings are constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit. Since state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them.

In some States, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice. See, *e.g., Billings Properties, Inc.* v.*Yellowstone County,* 144 Mont. 25, 394 P. 2d 182 (1964); *Jenad, Inc.* v. *Scarsdale,* 18 N. Y. 2d 78, 218 N. E. 2d 673 (1966). We think this standard is too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose.

Other state courts require a very exacting correspondence, described as the "specifi[c] and uniquely attributable" test. The Supreme Court of Illinois first developed this test in *Pioneer Trust & Savings Bank* v. *Mount Prospect,* 22 Ill. 2d 375, 380, 176 N. E. 2d 799, 802 (1961). [n.7] Under this standard, if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes "a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations." *Id.,* at 381, 176 N.E. 2d, at 802. We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved.

A number of state courts have taken an intermediate position, requiring the municipality to show a "reasonable relationship" between the required dedication and the impact of the proposed development. Typical is the Supreme Court of Nebraska's opinion in *Simpson* v. *North Platte,* 206 Neb. 240, 245, 292 N. W. 2d 297, 301 (1980), where that court stated:

"The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit."

Thus, the court held that a city may not require a property owner to dedicate private property for some future public use as a condition of obtaining a building permit when such future use is not "occasioned by the construction sought to be permitted." *Id.,*at 248, 292 N. W. 2d, at 302.

Some form of the reasonable relationship test has been adopted in many other jurisdictions.
See, *e.g., Jordan* v. *Menomonee Falls,* 28 Wis. 2d 608, 137 N. W. 2d 442 (1965); *Collis* v. *Bloomington,* 310

Minn. 5, 246 N. W. 2d 19 (1976) (requiring a showing of a reasonable relationship between the planned subdivision and the municipality's need for land); *College Station* v. *Turtle RockCorp.*,680 S. W. 2d 802, 807 (Tex. 1984); *Call* v. *West Jordan,* 606 P. 2d 217, 220 (Utah 1979) (affirming use of the reasonable relation test). Despite any semantical differences, general agreement exists among the courts "that the dedication should have some reasonable relationship to the needs created by the [development]." *Ibid.* See generally, Morosoff, Take My Beach Please!: Nollan v. California Coastal Commission and a Rational--Nexus Constitutional Analysis of Development Exactions, 69 B. U. L. Rev. 823 (1989); see also *Parks* v. *Watson,* 716 F. 2d 646, 651-653 (CA9 1983).

We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. 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. [n.8]

Justice Stevens' dissent relies upon a law review article for the proposition that the city's conditional demands for part of petitioner's property are "a species of business regulation that heretofore warranted a strong presumption of constitutional validity." *Post,* at 7. But simply denominating a governmental measure as a "business regulation" does not immunize it from constitutional challenge on the grounds that it violates a provision of the Bill of Rights. In *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307(1978), we held that a statute authorizing a warrantless search of business premises in order to detect OSHA violations violated the Fourth Amendment. See also *Air Pollution Variance Board of Colo.*v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974); *New York* v.*Burger*, 482 U.S. 691 (1982). And in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980), we held that an order of the New York Public Service Commission, designed to cut down the use of electricity because of a fuel shortage, violated the First Amendment insofar as it prohibited advertising by a utility company to promote the use of electricity. We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances. We turn now to analysis of whether the findings relied upon by the city here, first with respect to the floodplain easement, and second with respect to the pedestrian/bicycle path, satisfied these requirements.

It is axiomatic that increasing the amount of impervious surface will increase the quantity and rate of storm water flow from petitioner's property. Record, Doc. No. F, ch. 4, p. 4-29. Therefore, keeping the floodplain open and free from development would likely confine the pressures on Fanno Creek created by petitioner's development. In fact, because petitioner's property lies within the Central Business District, the Community Development Code already required that petitioner leave 15% of it as open space and the undeveloped floodplain would have nearly satisfied that requirement. App. to Pet. for Cert. G16-G17. But the city demanded more--it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its Greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.

The difference to petitioner, of course, is the loss of her ability to exclude others. As we have noted, this right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna,* 444 U. S., at 176. It is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek, and the city has not attempted to make any individualized determination to support this part of its request.

The city contends that recreational easement along the Greenway is only ancillary to the city's chief purpose in controlling flood hazards. It further asserts that unlike the residential property at issue in *Nollan,* petitioner's property is commercial in character and therefore, her right to exclude others is compromised. Brief for Respondent 41, quoting *United States* v. *Orito,* 413 U.S. 139, 142 (1973) (" `The Constitution extends special safeguards to the privacy of the home' "). The citymaintains that "[t]here is nothing to suggest that preventing [petitioner] from prohibiting [the easements] will unreasonably impair the value of [her] property as a [retail store]." *PruneYard Shopping Center* v. *Robins,* 447 U.S. 74, 83 (1980).

Admittedly, petitioner wants to build a bigger store to attract members of the public to her property. She also wants, however, to be able to control the time and manner in which they enter. The recreational easement on the Greenway is different in character from the exercise of state protected rights of free expression and petition that we permitted in *PruneYard.* In *PruneYard,* we held that a major private shopping center that attracted more than 25,000 daily patrons had to provide access to persons exercising their state constitutional rights to distribute pamphlets and ask passersby to sign their petitions. *Id.,* at 85. We based our decision, in part, on the fact that the shopping center "may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." *Id.,* at 83. By contrast, the city wants to impose a permanent recreational easement upon petitioner's property that borders Fanno Creek. Petitioner would lose all rights to regulate the time in which the public entered onto the Greenway, regardless of any interference it might pose with her retail store. Her right to exclude would not be regulated, it would be eviscerated.

If petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere. See *Nollan,* 483 U. S., at 836 ("Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission'sassumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end"). But that is not the case here. We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building.

With respect to the pedestrian/bicycle pathway, we have no doubt that the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District. The city estimates that the proposed development would generate roughly 435 additional trips per day. [n.9] Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use. But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "could offset some of the traffic demand . . . and lessen the increase in traffic congestion." [n.10]

As Justice Peterson of the Supreme Court of Oregon explained in his dissenting opinion, however, "[t]he findings of fact that the bicycle pathway system `*could* offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will,* or is *likely to,* offset some of the traffic demand." 317 Ore., at 127, 854 P. 2d, at 447 (emphasis in original). No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.

Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization particularly in metropolitan areas such as Portland. The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this

may be done. "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."*Pennsylvania Coal,* 260 U. S., at 416.

The judgment of the Supreme Court of Oregon is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

NOTES

[1] CDC § 18.86.040.A.1.b provides: "The development shall facilitate pedestrian/bicycle circulation if the site is located on a street with designated bikepaths or adjacent to a designated greenway/open space/park. Specific items to be addressed [include]: **(i) Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bikepaths identified in the comprehensive plan. If direct connections cannot be made, require that funds in the amount of the construction cost be deposited into an account for the purpose of constructing paths."** (App. to Brief for Respondent B 33-34).

[2] The city's decision includes the following relevant conditions: "1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] (*i.e.*, all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area." App. to Pet. for Cert. G-43.

[3] CDC § 18.134.050 contains the following criteria whereby the decision making authority can approve, approve with modifications, or deny a variance request:

"(1) The proposed variance will not be materially detrimental to the purposes of this title, be in conflict with the policies of the comprehensive plan, to any other applicable policies of the Community Development Code, to any other applicable policies and standards, and to other properties in the same zoning district or vicinity;

"(2) There are special circumstances that exist which are peculiar to the lot size or shape, topography or other circumstances over which the applicant has no control, and which are not applicable to other properties in the same zoning district;

"(3) The use proposed will be the same as permitted under this title and City standards will be maintained to the greatest extent possible, while permitting some economic use of the land;

"(4) Existing physical and natural systems, such as but not limited to traffic, drainage, dramatic land form or parks will not be adversely affected any more than would occur if the development were located as specified in the title; and

"(5) The hardship is not self imposed and the variance requested is the minimum variance which would alleviate the hardship." App. to Brief for Respondent 49-50.

[4] The Supreme Court of Oregon did not address the consequences of petitioner's failure to provide alternative mitigation measures in her variance application and we take the case as it comes to us. Accordingly, we do not pass on the constitutionality of the city's variance provisions.

[5] Justice Stevens' dissent suggests that this case is actually grounded in "substantive" due process, rather than in the view that the Takings Clause of the Fifth Amendment was made applicable to the States by the Fourteenth Amendment. But there is no doubt that later cases have held that the Fourteenth Amendment does make the Takings Clause of the Fifth Amendment applicable to the States, see *Penn Central Transp. Co.*v. *New York City*, 438 U.S. 104, 122 (1978); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 827 (1987). Nor is there any doubt that these cases have relied upon *Chicago, B. & Q. R. Co.* v.*Chicago*, 166 U.S. 226 (1897), to reach that result. See, *e.g.*, *Penn Central*, *supra*, at 122 ("The issu[e] presented . . . [is] whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a `taking' of appellants' property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment, see *Chicago, B. & Q. R. Co.*v. *Chicago*, 166 U.S. 226, 239 (1897)").

[6] There can be no argument that the permit conditions would deprive petitioner "economically beneficial us[e]" of her property as she currently operates a retail store on the lot. Petitioner assuredly is able to derive *some* economic use from her property. See, *e.g.*, *Lucas* v. *South Carolina*, 505 U. S. ___, ___ (1992) (slip op., at 13); *Kaiser Aetna* v. *United States,* 444 U.S. 164, 175 (1979); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

[7] The "specifically and uniquely attributable" test has now been adopted by a minority of other courts. See, *e.g.*, *J. E. D. Associates., Inc.* v. *Atkinson*, 121 N. H. 581, 585, 432 A. 2d 12, 15 (1981); *Divan Builders, Inc.* v. *Planning Bd. of Twp. of Wayne,* 66 N. J. 582, 600-601, 334 A. 2d 30, 40 (1975); *McKain* v. *Toledo City Plan Comm'n*, 26 Ohio App. 2d 171, 176, 270 N. E. 2d 370, 374 (1971); *Frank Ansuini, Inc.* v. *Cranston*, 107 R. I. 63, 69, 264 A. 2d 910, 913 (1970).

[8] Justice Stevens' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in 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. See, *e.g.*, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city. See *Nollan*, 483 U. S., at 836. This conclusion is not, as he suggests, undermined by our decision in *Moore* v. *East Cleveland*, 431 U.S. 494 (1977), in which we struck down a housing ordinance that limited occupancy of a dwelling unit to members of a single family as violating the Due Process Clause of theFourteenth Amendment. The ordinance at issue in *Moore* intruded on choices concerning family living arrangements, an area in which the usual deference to the legislature was found to be inappropriate. *Id.*, at 499.

[9] The city uses a weekday average trip rate of 53.21 trips per 1000 square feet. Additional Trips Generated = 53.21 X (17,600 9720). App. to Pet. for Cert. G15.

[10] In rejecting petitioner's request for a variance from the pathway dedication condition, the city stated that omitting the planned section of the pathway across petitioner's property would conflict with its adopted policy of providing a continuous pathway system. But the Takings Clause requires the city to implement its policy by condemnation unless the required relationship between the petitioner's development and added traffic is shown.

SUPREME COURT OF THE UNITED STATES

Syllabus

LUCAS *v.* SOUTH CAROLINA COASTAL COUNCIL

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 91-453. Argued March 2, 1992 -- Decided June 29, 1992

In 1986, petitioner Lucas bought two residential lots on a South Carolina barrier island, intending to build single family homes such as those on the immediately adjacent parcels. At that time, Lucas's lots were not subject to the State's coastal zone building permit requirements. In 1988, however, the state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his parcels. He filed suit against respondent state agency, contending that, even though the Act may have been a lawful exercise of the State's police power, the ban on construction deprived him of all "economically viable use" of his property and therefore effected a "taking" under the Fifth and Fourteenth Amendments that required the payment of just compensation. See, *e. g., Agins* v. *Tiburon,* 447 U.S. 255, 261. The state trial court agreed, finding that the ban rendered Lucas's parcels "valueless," and entered an award exceeding $1.2 million. In reversing, the State Supreme Court held itself bound, in light of Lucas's failure to attack the Act's validity, to accept the legislature's "uncontested . . . findings" that new construction in the coastal zone threatened a valuable public resource. The court ruled that, under the *Mugler* v. *Kansas,* 123 U.S. 623, line of cases, when a regulation is designed to prevent "harmful or noxious uses" of property akin to public nuisances, no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value.

Held:

1. Lucas's takings claim is not rendered unripe by the fact that he may yet be able to secure a special permit to build on his property under an amendment to the Act passed after briefing and argument before the State Supreme Court, but prior to issuance of that court's opinion. Because it declined to rest its judgment on ripeness grounds, preferring to dispose of the case on the merits, the latter court's decision precludes, both practically and legally, any takings claim with respect to Lucas's pre-amendment deprivation. Lucas has properly alleged injury in fact with respect to this pre-amendment deprivation, and it would not accord with sound process in these circumstances to insist that he pursue the late created procedure before that component of his takings claim can be considered ripe. Pp. 5-8.

2. The State Supreme Court erred in applying the "harmful or noxious uses" principle to decide this case. Pp. 8-26.

(a) Regulations that deny the property owner all "economically viable use of his land" constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case specific inquiry into the public interest advanced in support of the restraint. Although the Court has never set forth the justification for this categorical rule, the practical--and economic--

equivalence of physically appropriating and eliminating all beneficial use of land counsels its preservation. Pp. 8-13.

(b) A review of the relevant decisions demonstrates that the "harmful or noxious use" principle was merely this Court's early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value free basis; and that, therefore, noxious use logic cannot be the basis for departing from this Court's categorical rule that total regulatory takings must be compensated. Pp. 14-21.

(c) Rather, the question must turn, in accord with this Court's "takings" jurisprudence, on citizens' historic understandings regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they take title to property. Because it is not consistent with the historical compact embodied in the Takings Clause that title to real estate is held subject to the State's subsequent decision to eliminate all economically beneficial use, a regulation having that effect cannot be newly decreed, and sustained, without compensation's being paid the owner. However, no compensation is owed--in this setting as with all takings claims--if the State's affirmative decree simply makes explicit what already inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. Cf. *Scranton* v. *Wheeler,* 179 U.S. 141, 163. Pp. 21-25.

(d) Although it seems unlikely that common law principles would have prevented the erection of any habitable or productive improvements on Lucas's land, this state law question must be dealt with on remand. To win its case, respondent cannot simply proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common law maxim such as *sic utere tuo ut alienum non laedas,* but must identify background principles of nuisance and property law that prohibit the uses Lucas now intends in the property's present circumstances. P. 26.

304 S. C. 376, 404 S. E. 2d 895, reversed and remanded.

Scalia, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, O'Connor, and Thomas, JJ., joined. Kennedy, J., filed an opinion concurring in the judgment. Blackmun, J., and Stevens, J., filed dissenting opinions. Souter, J., filed a separate statement.