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]

JUSTICE SOUTER, dissenting.

This case, like *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), invites the Court to examine the relationship between conditions imposed by development permits, requiring landowners to dedicate portions of their land for use by the public, and governmental interests in mitigating the adverse effects of such development. *Nollan* declared the need for a nexus between the nature of an exaction of an interest in land (a beach easement) and the nature of governmental interests. The Court treats this case as raising a further question, not about the nature, but about the degree, of connection required between such an exaction and the adverse effects of development. The Court's opinion announces a test to address this question, but as I read the opinion, the Court does not apply that test to these facts, which do not raise the question the Court addresses.

First, as to the floodplain and Greenway, the Court acknowledges that an easement of this land for open space (and presumably including the five feet required for needed creek channel improvements) is reasonably related to flood control, see *ante*, at 11–12, 18, but argues that the "permanent recreational easement" for the public on the Greenway is not so related, see *ante*, at 18–20. If that is so, it is not because of any lack of proportionality between permit condition and adverse effect, but because of a lack of any rational connection at all between exaction of a public recreational area and the governmental interest in providing for the effect of increased water runoff. That is merely an application of *Nollan*'s

nexus analysis. As the Court notes, "[i]f 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." *Ante,* at 19. But that, of course, was not the fact, and the city of Tigard never sought to justify the public access portion of the dedication as related to flood control. It merely argued that whatever recreational uses were made of the bicycle path and the one foot edge on either side, were incidental to the permit condition requiring dedication of the 15-foot easement for an 8–foot-wide bicycle path and for flood control, including open space requirements and relocation of the bank of the river by some five feet. It seems to me such incidental recreational use can stand or fall with the bicycle path, which the city justified by reference to traffic congestion. As to the relationship the Court examines, between the recreational easement and a purpose never put forth as a justification by the city, the Court unsurprisingly finds a recreation area to be unrelated to flood control.

Second, as to the bicycle path, the Court again acknowledges the "theor[etically]" reasonable relationship between "the city's attempt to reduce traffic congestion by providing [a bicycle path] for alternative means of transportation," *ante,* at 12, and the "correct" finding of the city that "the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District." *Ante,* at 20. The Court only faults the city for saying that the bicycle path "could" rather than "would" offset the increased traffic from the store, *ante,* at 20–21. That again, as far as I can tell, is an application of *Nollan*, for the Court holds that the stated connection ("could offset") between traffic congestion and bicycle paths is too tenuous; only if the bicycle path "would" offset the increased traffic by some amount, could the bicycle path be said to be related
to the city's legitimate interest in reducing traffic congestion.

I cannot agree that the application of *Nollan* is a sound one here, since it appears that the Court has placed the burden of producing evidence of relationship on the city, despite the usual rule in cases involving the police power that the government is presumed to have acted constitutionally.[1] Having

---

[1]See, *e.g.*, *Goldblatt* v. *Hempstead*, 369 U. S. 590, 594–596 (1962); *United States* v. *Sperry Corp.*, 493 U. S. 52, 60 (1989). The majority characterizes this case as involving an "adjudicative decision" to impose permit conditions, *ante*, at 16, n. 8, but the permit conditions were imposed pursuant to Tigard's Community Development Code. See, *e.g.,* §18.84.040, App. to Brief for Respondent B-26. The adjudication here was of Dolan's requested variance from the permit conditions otherwise required to be imposed by the Code. This case raises no question about discriminatory, or "reverse spot" zoning, which "singles out a particular parcel for different, less favorable

thus assigned the burden, the Court concludes that the City loses based on one word ("could" instead of "would"), and despite the fact that this record shows the connection the Court looks for. Dolan has put forward no evidence that the burden of granting a dedication for the bicycle path is unrelated in kind to the anticipated increase in traffic congestion, nor, if there exists a requirement that the relationship be related in degree, has Dolan shown that the exaction fails any such test. The city, by contrast, calculated the increased traffic flow that would result from Dolan's proposed development to be 435 trips per day, and its Comprehensive Plan, applied here, relied on studies showing the link between alternative modes of transportation, including bicycle paths, and reduced street traffic congestion. See, *e.g.*, Brief for Respondent A–5, quoting City of Tigard's Comprehensive Plan ("`Bicycle and pedestrian pathway systems will result in some reduction of automobile trips within the community'"). *Nollan*, therefore, is satisfied, and on that assumption the city's conditions should not be held to fail a further rough proportionality test or any other that might be devised to give meaning to the constitutional limits. As Members of this Court have said before, "the common zoning regulations requiring subdividers to . . . dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion." *Pennell* v. *San Jose*, 485 U. S. 1, 20 (1988) (SCALIA, J., concurring in part and dissenting in part). The bicycle path permit condition is fundamentally no different from these.

In any event, on my reading, the Court's conclusions about the city's vulnerability carry the

---

treatment than the neighboring ones." *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 132 (1978).

Court no further than *Nollan* has gone already, and I do not view this case as a suitable vehicle for taking the law beyond that point. The right case for the enunciation of takings doctrine seems hard to spot. See *Lucas* v. *South Carolina Coastal Council*, 505 U. S. __, __ (1992) (statement of SOUTER, J.).