

The Harms and Benefits of *Nollan* and *Dolan*

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FRUSTRATION

On an occasion such as this one you should expect me to give an obscure academic talk about the importance of property rights to the welfare of American society. But I am going to break character for a moment and to tell you that right now I am sitting on pins and needles.¹ My particular concern? It has to do with a permit, with whether my wife and I will be able to have a parking pad at the bottom of a hill on land on which we are building a house in the Michigan dunes. I shall not bore you with the details save to say that the rules are at best absurd and at worst counterproductive to the very environmental interests that are involved. They are fashioned in remote places by individuals who have no knowledge of the topography of a particular site, and no interest in acquiring anything. The twists and turns of these delicate negotiations help explain why a large number of individuals, including my wife, who have no particular political interest have become frustrated with business as usual under the name of environmental regulation. The entire process is a comedy of errors. My job here is to explain why comedies of this sort occur, and how they intrude on rational planning and behavior.

Let me start with the intrusion of land use law into real estate sales. Buying and selling land today is no longer a transaction between the buyer and the seller. Virtually every land transaction requires permits, permissions, and approvals in advance. Otherwise the risk is that the buyer will acquire land at a very high price but then will be unable to put it to productive economic use. These endless use procedures have had an adverse impact on the mobility of real estate.

Back to Michigan for a moment. The sellers of our plot of land—it matters that it was two plots of land—were well advised about the

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1. After laborious negotiations, a permit was granted for a happy ending to a complex issue that should never have arisen at all.

conveyancing risk, so they went to the Michigan DNR to obtain a permit to put in a driveway up the side of the hill which serves two building sites. He put that road right between the two plots where he thought it would be appropriate for a little development with two houses. The road went in early because of a standard feature of permit policy: you have to use it or lose it. Typically permits are granted with a six-month or a year fuse: if the owner does not exercise his right within that period, the permit is forfeited and you have to start over again from the beginning. So armed with the permit, our future sellers hired a bulldozer and ran it right up the hillside. Naturally they placed the cut in the wrong place because when we came along, we purchased both plots of land: the road was then relocated to a better and safer position via a second permit.

Yet the difficulties with regulation do not end even when the conveyancing stage is finished. The old cut now has to be repaired when the site is finished. As a land planning matter independent of regulation, the solution is easy. Use the bottom for parking, and terrace the rest to ease the slope and facilitate drainage. Simply restoring the site to its original contour creates a comedy of inconveniences. The slope becomes too steep. It is harder to control erosion. The rain runoff is harder to control. There will be no convenient and flat parking, which makes access perilous in winter. So one look and the solution is clear: level off the bottom, terrace the slope, add a drywell if necessary and some dune grasses, and everybody will be happy.

Everybody but the DNR. No matter what set of advantages that you can design, the DNR has a strong preference against terracing and railway ties. It does not have safety or aesthetics or convenience of the owner built into its calculus. The site remains unimproved during this delay of working out a compromise solution. And all throughout, you are told that only the "necessities of the owner can be taken into account, not his conveniences," as if they had purchased and improved the property with public funds. To it, the dubious honor of being an owner deprives you with control over management, but saddles you with damage to your own property and the risk of liabilities to others. Compensation for loss, delay, and costs are out of the question.

Now some brave soul might say that we need a permitting process to prevent various kinds of harmful externalities. I fully agree that externalities ought to be prevented, especially when harmful. What I find so disconcerting about the process is that the new rash of permit requirements tend to create the very harm that these permits are supposed to eliminate. Regulators tend to work through *per se* rules—uniform directives of one sort or another—because they cannot and do not look at the individual circumstances of a particular case. They don't understand how these various

elements of land management interact. If by some chance they do look at the circumstances, they are so afraid that the exception in one case will become the presumption in the second case and the rule in the third, that they dig in their heels. They are prepared to take the inconvenience in this case to maintain bureaucratic control over all others. We pay the price.

Now sitting between the cross-hairs of regulation doesn't lead to philosophical dispassion. It leads to anger and frustration at the thought that you must risk violation of the law in order to do well by yourself and your neighbors. The question of permits and delays are at the heart of two cases that will be staples of takings law for years to come: *Nollan v. California Coastal Commission*,² and *Dolan v. City of Tigard*.³

NOLLAN V. CALIFORNIA COASTAL COMMISSION

Let me start with one simple fact about *Nollan* that is easy to forget in the effort to figure its holding. This case was born of defiance and frustration, for what happened was that the local California Coastal Commission had passed an ordinance which said that if anybody wishes to tear down a ramshackle, beat-up, old home and put up a nice new home in its place, they have to surrender a lateral easement across the front of their property as a condition for obtaining the new permit. Whereas, if the owner didn't want to build a new home and the Commission wanted your lateral easement, it would have to pay compensation for the physical occupation under the current rules. So, that's where they started out.

The Nollans then contacted the Pacific Legal Foundation and worked their way patiently through the permit process. They their case at the trial Court, but the Commission took the case on appeal. While that appeal was pending before the California Court of Appeals, the Nollans switched course and did the unmentionable, the unthinkable and the profane. They tore down the existing bungalow and started construction on the their new home without a permit and without notifying the Coastal Commission of their actions. The California Court of Appeals decided the appeal for the Coastal Commission,⁴ so the Nollans had to face the risk that their home would be ripped down. But their perseverance paid off when the Supreme Court took the case and sustained their position that cash on the barrelhead had to be paid if the government wished to claim the lateral easement.

So why is *Nollan* so interesting and intriguing as a matter of constitu-

2. 483 U.S. 825 (1987).

3. 114 S. Ct. 2309 (1994).

4. *Nollan v. California Coastal Commission*, 223 Cal. Rptr. 28 (Cal. App. 1986).

tional law? Virtually unlike every prior case of land use planning, *Nollan* raises a genuinely novel issue, one that makes for strange bedfellows on both sides of the question. If you wanted to find the friends of market transactions and contractual freedom, former Justice William J. Brennan would not be your first guess. His is a very distinguished and powerful intellect, but strongly wedded to a tradition that sees private contract and individual exploitation in the same breath. It is only a mite unfair to say that Justice Brennan never saw a contract he liked. But he is squaring off with my former colleague at the University of Chicago, Justice Antonin Scalia, who is more receptive to freedom of contract even if he is not a card-carrying member of our law and economics contingent whose calling card reads: "Contracts move property to higher value uses," a phrase that is often uttered so rapidly that it is easy to forget its real substantive content. But nonetheless, Justice Scalia has some real affection for market transactions: he thinks that most people more or less know what they want.

So if you're now going to speculate about the bargaining with the state problem, which Justice supports contractual freedom when individuals deal with government and who looks askance on those arrangements, you discover a reversal of roles for both men. Justice Brennan extols the virtues of freedom of contract by saying to the extent that you wish to get this permit you have to surrender something in exchange. And he finds that this result is perfectly benign because, after all, the state is better off since granting the permit is in its interest, while the individual is better off in accepting the permit because its conditions are less onerous than the permit it receives. If the transaction leaves both sides better off, who should possibly wish to upset it?

In contrast, Justice Scalia does not see matters this way at all. He doesn't talk that much about both sides being better off. Rather, he stresses that this particular transaction is nothing more and nothing less than out-and-out extortion. He therefore says he will not honor the contract, so that the *Nollans'* legal persistence paid off big time: they had their rebuilt house without having to surrender of a lateral easement across their premises.

Who is right in this strange reversal of roles? Do we really believe in freedom of contract or do we think that under these circumstances there's some reason why that particular ideal ought not to be respected? Here it is very useful to try to ask yourself about the following analogy.

Suppose we had a transaction between two private individuals. When would we embrace and when would we reject freedom of contract? Now in some easy cases we don't like contracts. We don't like contracts that people sign with a gun at their head. We don't like contracts obtained by undue influence. We don't like contracts obtained by fraud, duress, or sharp practice. But even if we incorporate these limitations on freedom of

contract, and even if I have a generally low opinion of public planning authorities, we cannot accuse them of these forms of malfeasance in a *Nollan* situation. They exhibit simply a tough-minded refusal to deal and not old-fashioned duress, corruption, fraud, or violence against the hapless land owner subject to their jurisdiction.

But the law of private contracting turns out to be a bit more complex than this. There's another body of law that prevents you from taking advantage of the abject necessity of your contracting or trading partner. That specific agreement can be set aside such that the compensation you are allowed to extract is limited, roughly speaking, to a competitive rate of return. So there are some very famous cases where people desperately try to make their way to a dock during the middle of a storm, only to be told by its owner, "Sign over your ship to us and we'll allow you to save your life." However, the ship owners manage to have both their ship and their life. In the end, the courts basically order them to pay for the fair use of the dock, including compensation for any damage that they may have inflicted upon it during the self-rescue. But they don't have to turn over everything that they own. These necessity cases are responding to those cases where the use of private monopoly power against another private party leads to contracts that are perfect. The danger that some bargains will take too much from one side and give to the other, thereby leading to a distortion in social choices that is regarded as so grave that these contracts are set aside. The party that flexes its muscles is constrained to a competitive rate of return on its assets.

Now the number of private situations raising this problem turns out to be remarkably small. By maritime custom, most people try to help their neighbors in distress on the sea. They do not put up a "For Sale" sign on the dock in order to extract every last dime from them. But when with local governments, or indeed with governments at any level, the behavior is less benign. The definition of government, Max Weber reminds us, refers to individuals who exercise a monopoly of power over the use of force within that jurisdiction in question. Acquiring a permit from local government brings that monopoly power to the fore, because the landowner does not have his pick of individuals from whom to obtain that permit. It is no longer choosing Jewel, Dominick's, or Safeway for groceries. There's one (more accurately, at least one) permanent authority that the owner must deal with; if he cannot cut a deal with the local authority, he has no place else to turn. Local governments, therefore, have a unique positional power. The constitutional question is, what kind of counterweight should be imposed to forestall the risk of monopoly excesses?

That inquiry is a fairly complicated one, but in *Nollan* some limitations on state power are needed because, as best we can tell, the permit power

does not make the state the co-owner of the land in question. So when the state tries to hold up a developer from using its land, the critical inquiry is whether it is acting for some legitimate state end. These limits on the ends of permitting are vital, otherwise a state may pass first one permit requirement and then another, completely indifferent to the ends they serve. And then it could constantly sell back to the owner the rights it just made subject to permit. Local government could, in effect, create a permit monster that requires a landowner to fork over lots of money to build. It could then demand a higher payment to renew with a new permit once that money has been paid. Or the local government could insist that half the land be surrendered for one permit, only to impose another requirement, willy-nilly, after the land is conveyed in order to commandeer still more. In the end the local government uses its permit powers to become the owners of the land. The process results in a massive transfer of resources from private to public hands, but what's the big deal about that?

If the ultimate question is the efficient use of land or indeed the efficient deployment of any other resources, we have much to worry about. I am concerned with the specter of government ownership because while governments may think they know how to regulate, the last thing they could ever do well is to develop anything. Governments may be capable of vetoing this and worrying about that, but with public housing as our example, they cannot build sensible housing without large subsidies, and often, even with them. We need private ownership to allow only the people with the information about consumer demands and the cost of inputs to coordinate their various activities in such a fashion, first, not to make a mess out of the land use, and second, to develop it well. Indeed, most local governments instinctively know their own limitations. The last role they would like to hold is that of owners of all their local land because then they would have to figure out how to develop it. The only honorable solution would be to sell it right back again to somebody whom they could then regulate out of business.

So clearly there must be some unholy political equilibrium. Only individuals can develop property well, and only governments can restrict its development. The task now is to facilitate a smart kind of interplay between the government veto power and the private power to develop. To see why that task is so complicated, it's very instructive to understand what happens if we allow bargains without limitation over whether and when local government officials will allow or deny permits. It is possible with a couple of simple numerical examples to explain to you even over lunch why the exaction risk identified by Justice Scalia in *Nollan* is a very real problem, with serious negative resource implications for land use development in the United States. The key query is this: why did the Nollans so dread the

government's power to restrict a change in land use by permit? Here is one answer.

Let's suppose that the value of the land in question will be increased by \$2,000 dollars in clear profit if you're allowed to get the permit for some new land use. The government now sashays up to you and says, "We'll let you get that \$2,000 gain if you're willing to surrender to us for public use a lateral easement worth \$500 to you." If faced with the choice of either having no permit and no easement, or getting the permit and surrendering the easement you would surely prefer to be \$1,500 to the good rather than being kept at the status quo ante where your net profit and loss position equals \$0.00. So in a perfectly rational and self-interested way, you will capitulate to the condition, and might even do so if the government demanded an easement worth \$1,000 or \$1,500. Better that you get some profit than no profit. An abject and meek surrender turns out to be your indicated course of action.

Now what's going to happen with the property when it's used by the government? Well, presumably we know what the cost of the landowner was. I've stipulated that to be \$500. Now, if the gain to the public at large from this particular transaction is \$900, then maybe the condition doesn't look so bad. After all, instead of having \$2,000 worth of net gain from this project, combining the permit with the condition yields \$1,500 worth of private gain and \$900 worth of public gain. That's \$2,400 in gain; so overall the society is \$400 to the good. So some could exult, "Aha, Professor Epstein, there is a use for planning at last; your own numbers show that."

Sorry, they don't show that at all. At most they show that where the best use of the property combines real estate development on one portion of the land with a lateral easement on the other portion of the land, then the government can always achieve that happy state of affairs by exercising its condemnation power, using general revenues to purchase the lateral easement for \$500. Owing to its condemnation power, the landowner cannot hold out for more money to disrupt the city's effort to construct a continuous beachfront passageway for public use.

The ability to achieve the desirable result by paying the \$500 quickly leads us to the second scenario. Suppose that the expected increase from developing the property remains at \$2,000. Suppose instead that the exaction from the landowner is \$900 and suppose that the public benefit from the project is only \$500. That is, we flip for public benefit and private loss from the creation of the easement, and do so in ways that are also perfectly plausible. *The landowner will still surrender.* He will say, "Better that I get an \$1,100 profit than be stuck with the status quo ante."

But now look at the position from the point of view of the local

government. Well, \$500 worth of something for nothing is its cost, but the social cost must include the \$900 loss borne by the land owner. Now by attaching the condition to the project, matters don't look so benign. Resource utilization has not gone up from \$2,000; it has gone down by \$400 to \$1,600. By allowing the onerous condition, the local government will in fact take when the land is worth less to it than it was in private hands. The total value of combined private and public holdings declines when the state is allowed to play the exaction game.

So you reply, "How do you prove that this second situation is really different from the first one?" Well, suppose we unbundled the permit from the surrender of the lateral easement. How are things going to look? Well, you'll discover if there's anything sane about how local government works, you will not be able to persuade residents to pay \$900 in taxes to acquire an easement worth only \$500 to them. Now the eminent domain clause and the just compensation requirement impose a price restraint on planners—something that they don't like to talk about. Scarcity is not a welcome part of their vocabulary. It's everybody else's problem, not theirs. But the moment you force the cost back on them, you will discover that they won't take the easement. This illustration shows the critical role of a compensation requirement for state regulation of private property. It is therefore a mistake of gargantuan proportions to assume that the mass of regulation and government restrictions in place today somehow represents the optimal level of government activity, or that somehow we have reached the proper balance between what public and private actors do, so that the only question is how to fund the public projects started under this present division of responsibility. It's very difficult for anyone to believe that there's nothing which can be done to improve the current distribution of power.

I don't know how any individual case will sort itself out. But I do know that if the government has the power to initiate a permit system, then requiring it to pay for its exactions will help dull its appetites. The just compensation rule thus sorts the high from the low value public uses. The government will keep the easement that's worth \$900 to it, but costs only \$500 to acquire from the owner, but it won't take the \$500 easement that costs it \$900. What the Supreme Court did before *Dolan* and *Nollan* was to utterly ignore the difference between those two cases. It didn't make a difference whether condemnation was for a higher or lower value use. So long as your local zoning official could demonstrate some clear value to the public at large, he could impose the exaction regardless of the size of the dislocations on the other end.

Theoretically, it is not the case, I must stress again, that public and private interests are radically disjoint and distinct, as though you could put one in this pocket and the other in that pocket. We're all part of the public

in some cases and we're all private in other cases. But lest we become preoccupied by short term roles, the issue in each and every case is to figure out a set of rules that maximizes the sum value of the two interests, that is, maximizes the value of land and the restrictions thereon divided between public and private holders of the land in question. In his very crude way, Justice Scalia was searching in *Nollan* for a way to knock out some destructive transactions that reduced overall wealth via the exaction game.

DOLAN V. CITY OF TIGARD

Now in *Dolan*, life becomes still more complicated than before. In *Nollan*, ask yourself whether the Coastal Commission could have taken the lateral easement without compensation if the Nollans had decided *not* to build their house. The answer is clearly "No." Its actions would be an outright expropriation. But in *Dolan*, ask whether the City of Tigard could have imposed some restrictions on the Dolan's development if it didn't demand the surrender of the flood easement or the bicycle path.

The new complications come in two familiar flavors. The first is harm prevention and the second is benefit production. On the harm prevention side of the ledger, the argument runs as follows: if you treated Dolan as one landowner and the city as a second landowner, would the city have a private right of action under the law of tort if one party paved over all its land so that water cascaded down at great speed into the lands of another, flooding it? Generally speaking, under the law of nuisance and *Rylands v. Fletcher*,⁵ the landowner would face a very serious risk of liability. So exactions to one side, the city could say: "Look, you have to make sure that your water does not flood the lands of your neighbor, namely us." To the extent, therefore, that this particular concern is embedded in the permit process, the city's claim is legitimate in a way that the *Nollan* exaction was not. The city in *Dolan* can identify a harm it or any other private owner is entitled to prevent without having to offer the invader any quid pro quo in exchange. Thus if we unbundle the harm restriction from the permit process, what restrictions could be properly imposed on the landowner?

If you're thinking in tort-like terms, the relevant restrictions would start with the following stern injunction to the landowner: "Make sure that the water does not cascade off your land and flood public waters or the lands of any other individual. We will tell you what boundaries you cannot cross. In this context it means that you cannot let the water cause external harm." But let the harm be stated in this way and now you have in the first instance

5. L.R. 3 E. & I. App. (H.L. 1868).

the right to figure out how to contain the water on your own land. You may find lots of novel ways to prevent its spread without having to surrender title to the creek. You could grade the land in the opposite direction; you could leave larger portions of the land unpaved; or you could run a system of drywells and culverts to carry the water safely away. But the basic principle would be that once the landowner controlled the externality, the state's interests end. On this logic therefore, the state cannot leap to the conclusion that the moment you request the right to expand the parking pad, you are going to have to surrender control over the creek.

Indeed, if you look closely at the facts in *Dolan*, you will note that the water that went into that creek came from all sorts of other places. Thus, to the extent that the Dolans must yield a flood easement for water generated by their neighbors, the appropriate response is to tax the neighbors who create the externality and, in effect, to provide compensation to the landowner who is forced to surrender land to abate it. *Dolan* thus offers yet another illustration in which planning can have exactly the wrong consequences. All the people who pave over their land first create all sorts of externalities but nothing is done to prevent that from happening. Then, the local government subsidizes those externalities by requiring innocent landowners who come late to the scene to provide the facilities to counteract it. If at stage one, the original developers knew that when waters left their land they would be held accountable for them, then they might have developed their land in a more sensible fashion than they did. It is, unfortunately, all too common in planning to address the whole question of loss prevention only at such time after certain uses are fixed. The limited task at that time is solely to figure out how you minimize loss *given* the fact that people have already done stupid things.

The right way to look at this problem, however, starts before anybody develops land. The objective is to articulate a set of rules that will take into account the loss from the initial development given that subsequent development is likely to take place as well. Hence, the right rule tells the original owners that to the extent their water is going to cause subsequent downstream damage, we want you to know that you can build today, but when that damage occurs tomorrow, you will have to pay a special assessment to pick up your pro rata share of the total cost. So paradoxically, the City of Tigard found a way to subsidize the problem it sought to address. Although the case is a bit more subtle than the case of the Epstein home in Michigan, the argument takes the same general form. All too often, planners look at a situation only when the harm is just about to occur. They don't create a set of incentives that influence the conduct prior to that time. The reason they undertake this job is in part political: the first arrivals vote at time one and they don't want to impose restrictions upon themselves.

When the second wave of settlers come at time two, they may vote too, but they have fewer votes than the first group and can thus be beaten back in the political process. Once we understand what's going on, *Dolan's* rough proportionality test takes this form. Step one: the Oregon state court should determine whether the Dolans can build their parking lot without causing floods. Step two: if they can, then the demand for the flood easement counts as a compensable taking for which the city has to pay full value.

Now the second feature of *Dolan* is every bit as important. One proposition that I'm reluctant to accept, but in the interest of candor must acknowledge, is that all government actions do not always have negative social consequences. To say that they do is almost as silly as saying that the consequences of government action are always positive. Indeed, when I wrote my *Takings*⁶ book, I took great pains to isolate and measure the return benefits from government action and insisted that these counted toward the government's obligation to compensate for regulatory takings. Thus, if the government imposes like restrictions on you and your neighbor, such that you are benefited by the restriction upon your neighbor and he is benefited by the restriction upon you, then *both* of you have at least received some of the constitutionally required compensation. Now it becomes an empirical question as to whether or not some cash supplement is needed to make up the difference.

Thinking about return benefits places the entire law of special improvements—how you build roads and sewers and so forth—in perspective. All these endeavors involve collective action problems that cannot be casually left to the market. They require some government intervention to assess taxes upon on all the affected landowners in order to provide them a benefit that in a well-ordered society will exceed their costs. Having these local special districts, by a sixty-percent vote, make improvements whose cost is prorated by either value or front-footage is an effort in miniature to use government action to create positive sum gains—projects that produce more value than they cost—so that everybody is left better off. No affected landowner should be left with a nasty political grievance.

Now, the second thread in *Dolan* follows this line of argument. The city's view was that this particular bicycle path in public hands would provide a return benefit to the Dolans. Why should they be paid for something that will benefit them in their own right? The government's position at the level of principle is surely not idle. A study of the history of nineteenth century highways will reveal that landowners actively sought

6. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

to donate their lands free of charge to induce the government to build a road. These landowners made a very simple calculation: better to have ninety-nine acres of farm land and one acre dedicated to a road that gets your goods to market than to have a hundred acres of farm land on which all your crops will rot because they cannot be sold. Under those circumstances, the state never paid anybody any compensation. The road itself was ample compensation. But context changes, so it need not follow that this new road that served the Dolan's business is like the nineteenth-century lifeline to civilization.

The City tried to make their case take this form. The only problem with that argument is that it fails on the facts. This particular road did not get anybody in and out of the Dolan's business. It was built to allow City residents to reach the greenway that lay outside the city. The path was for bicycles going by the store, not going to the store. Just imagine seeing the people going to the plumbing supply store, getting on their bicycles, putting the sinks on the rear bike rack, and peddling purposely home: is that the paradigmatic use of the path? It is painfully clear that the city wanted this road whether or not Mrs. Dolan decided to expand her store. The city happily seized on the opportunity of this expansion to defray the costs from its public budget by putting them on one landowner. It is right to insist of the critical role of return-benefits in takings law, but we have to recognize that they cannot be found in this setting.

You may respond that mine is a much too narrow-minded view of the overall situation. Surely the Dolans received some benefit from this. So she did, just like other city residents. But they were not the only ones who got these benefits. Lots of other people shared the identical benefits. As a matter of fairness, should the Dolans foot all the costs when lots of people receive equal benefits, or should those costs be prorated across the citizenry? Tolerating any general inequality in the distribution of benefits and harms has, in the long run, very poor resource consequences as people constantly strive to load the full costs on others, but the point is also telling as a matter of simple fairness.

Suppose ten people in society need an improvement that will cost \$100, what justice is there if nine of those people each receives \$110 worth of benefits while the tenth person gets that same \$110 worth of benefits but pays the full \$100 in cost? Why should the net benefit columns read \$110 for each of the first nine individuals and \$10 for the last? With special assessments, any outcome of uneven gains should provoke genuine concern. Why is this harmful? Because the moment residents know that they can shift those \$100 in cost back and forth across the landscape like a political football, they will spend large sums of money to do just that.

One of the dominant themes of the takings clauses is to invoke the

Constitution to stabilize property rights in order to forestall this constant struggle as citizens seek to gain benefits and ditch liabilities. All of those contests generate frictions from which nobody benefits in the long run. The great advantage of stability is that it reduces the cost of making collective improvements. It's just that problem that the Supreme Court did fully resolve in *Dolan*. I hope that the Court will return to this issue quickly.

THE FUTURE

So now as the hour is drawing to a close, let me just make a couple of points by way of conclusion. Where will the law go after *Dolan*? It is a question that has been asked countless times this morning and I could join in the chorus of people and say, "I don't know but I have a couple of hunches." Here are mine.

First, it seems unmistakable that the level of constitutional scrutiny is likely to rise for land use regulation. The Court does not like the rational basis test anymore, or at least it so intimated. And the Court is right about that. The rational basis test was described to me once as follows: if the lawyer for the state can offer a bad reason with a straight face, then he or she wins. But if you smirk before you finish, then you lose. Now I don't think that the facial muscles should be used to set constitutional norms. The Court seemed to boost the standard one notch higher than this by invoking a standard of rough proportionality, which is nothing more than a form of intermediate scrutiny. What the Court was looking for, I think, on the benefits side was a proportionate distribution of burdens and benefits. Similarly on the harm side, it wanted to prevent the pretext of harm prevention from justifying overbroad restrictions on land use. So I think that there's some real room for the law to grow. The question is how far.

The first question presented by both *Dolan* and *Nollan* is one of classification: what kinds of cases are they? Are they cases where some higher scrutiny is attractive only because the state wanted to occupy some portion of the land? If so, then the cases only apply to physical takings and not the regulatory takings. Or are these cases about the interaction between physical regulatory takings, so that a higher level of scrutiny is applied across the board? Thus, suppose the city says you may build only three stories if you agree to set back twenty feet, but four stories if you set back fifty feet. And it offers you the same kind of bargain found in *Nollan*, save for the fact that only two use restrictions are being traded off, one against another. We don't know, given *Dolan*, whether a higher level of scrutiny will be applied there or whether we're relegated to the straight-face test of rational basis review.

Another point that is not settled is whether this new judicial attitude or

suspicious look will carry over to other portions of the takings clause that don't involve compensation and police power regulation. So, for example, does the *Hawaii Housing Authority v. Midkiff*⁷ reading of the public use requirement, which allows any conceivable justification the state can put forward, continue to apply? Recall that in *Midkiff*, the Supreme Court held (8-0) that the forced transfer of property from landlord to tenant was a taking for public use even though the tenants were held to be just like any other private owner when the transaction was concluded. I don't know whether *Midkiff* can survive *Dolan*, but I know that it should not.

Let me conclude then with the following sage (for me at least) observation. We've heard today that land use planning has grown substantially since its relatively modest inceptions just after the turn of the century. The subject has gotten more complicated as the requirements have become more complicated. Where is it going to end? Well, we don't know where it will end but we know this: the Supreme Court visits the takings issue every year or two or three. It writes some learned opinion and then lets state and lower federal courts fill in the gaps. Sometimes these courts do not go along.

The Supreme Court cannot lead by pulling everybody along. It's not pulling the chain; it is pushing the chain hoping against hope that the chain will not curl up. There is enormous slippage in the system so we really can't figure out what a case means until a second generation of cases decides what it meant. One of the reasons for *Dolan* was the hostile response in the lower courts to *Nollan*. Everywhere you looked the state satisfied the essential nexus test. The lower courts worked a pretty thorough nullification of *Nollan*, which was dutifully confined to its particular facts. We don't know whether the same fate awaits *Dolan*. But the legal uncertainty creates all sorts of opportunities for speculation not only for law professors but also everyone who works in an area that is at the same time dynamic, confusing, and frustrating. Only time will tell what happens next.

7. 467 U.S. 229 (1984).