

# THE DISTINCTION BETWEEN LEGISLATIVE AND ADJUDICATIVE DECISIONS IN *DOLAN V. CITY OF TIGARD*

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*In Dolan v. City of Tigard, the Supreme Court announced a new heightened scrutiny standard for exactions, holding that the exaction must be roughly proportional to the harm the development causes. The Court proceeded to limit the application of the “rough proportionality” standard to adjudicative, and not legislative, land use decisions, reasoning that the risk of municipal “extortion” is much greater in the adjudicative context. In this Note, Inna Reznik surveys the lower courts applying Dolan and finds that there is much confusion over the legislative/adjudicative distinction. She argues that it is difficult to draw a line between legislative and adjudicative land use decisions, and that the distinction does not solve the extortion problem, which is just as likely to occur in the legislative context. Looking to the scholarship of Carol Rose and Vicki Been, the Note concludes that the Court should develop a new exactions standard that identifies those situations with the potential for government overreaching, specifically those in which the landowner has not had the opportunity of voice or exit.*

## INTRODUCTION

For years, the city of Tigard, located outside of Portland, Oregon, has been struggling with several problems in its Central Business District and Fanno Creek floodplain area—flooding, traffic congestion, and insufficient open space.<sup>1</sup> Like other municipalities trying to develop solutions to similar problems, Tigard promulgated regulations requiring that construction in these areas leave some land free of structures. Tigard hoped that these regulations would add to the quality of life in the town, prevent flooding by assisting drainage, and relieve traffic problems by allowing for a bicycle and pedestrian pathway.

Florence Dolan owned a plumbing and electric supply store in Tigard.<sup>2</sup> Her property was located in the Central Business District and in the Fanno Creek floodplain area. Dolan wanted to expand her

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<sup>1</sup> The following facts are taken from the case with which this Note is concerned, *Dolan v. City of Tigard*, 512 U.S. 374, 379-83 (1994); see also *infra* Part I.

<sup>2</sup> At the time of the initial application and through the appeal to the Oregon Supreme Court, Florence Dolan and her husband, John T. Dolan, owned the store. See *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993). She was the sole owner of the property by the time

business by increasing the size of her store and by paving the parking lot. She applied to the town's planning commission to obtain a construction permit. The planning commission was willing to grant the permit, but only on the condition that Dolan allow the city to use 7000 square feet of her 1.67-acre parcel as a public greenway; this dedication included a fifteen-foot strip of land lying to the east of the floodplain boundary that was to be used for a pedestrian/bicycle pathway. Dolan was not satisfied with this condition; from her point of view, the requirements had nothing to do with her project. She appealed several times without success, until the Supreme Court finally heard her case in *Dolan v. City of Tigard*.<sup>3</sup>

*Dolan* is a regulatory takings case<sup>4</sup> specifically dealing with land use exactions,<sup>5</sup> the type of conditions on development that Tigard placed on Florence Dolan. The Court in *Dolan* held that when exactions are challenged under the Takings Clause, the local government has the burden of proving that the condition is "roughly proportional" to the harm the land use sought by the property owner would have caused.<sup>6</sup> The Court reasoned that the burden of proof should be shifted to the government because "the city made an adjudicative de-

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the case made its way to the Supreme Court because her husband had died. See Petitioner's Brief at ii, *Dolan v. City of Tigard* (1994) (No. 93-518).

<sup>3</sup> 512 U.S. 374 (1994).

<sup>4</sup> The Takings Clause of the Fifth Amendment—"nor shall private property be taken for public use, without just compensation," U.S. Const. amend. V—applies to both the power of eminent domain, where the government literally takes property for its preferred uses, and to government regulation of property. See Jesse Dukeminier & James E. Krier, *Property* 1101 (4th ed. 1998). The latter assertion of government power is referred to as a regulatory taking. *Dolan* is one example of a regulatory takings case in which the Supreme Court has moved in a conservative direction by affirming the importance of private property rights and affording them a high degree of judicial protection. See, e.g., Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. Ill. U. L. Rev. 513, 555 (1995) (stating that "*Dolan* must be seen as the latest of several recent Supreme Court decisions affirming the importance of property rights" and that recent decisions "demonstrate the Court's resolve to take property rights seriously"). See generally Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. Envtl. Aff. L. Rev. 509 (1998) (reporting on "Takings Project" of conservatives and libertarians to convince judiciary to protect developers' rights by striking down federal health, safety, and environmental regulation).

<sup>5</sup> Exactions are conditions that municipalities place on the approval of a development project. They can take the form of public facilities dedications, construction of public facilities, purchase or donation of equipment for public use, or payments to defray the costs of public land or facilities. The definition excludes ordinary regulation, such as restrictions on building size, but makes no assumptions about whether the exaction is "fixed and certain" or results from "open-ended negotiations." See James E. Frank & Robert M. Rhodes, Introduction, in *Development Exactions* 1, 2-3 (James E. Frank & Robert M. Rhodes eds., 1987). For a review of exactions jurisprudence, see generally James A. Kushner, *Property and Mysticism: The Legality of Exactions as a Condition for Public Development Approval in the Time of the Rehnquist Court*, 8 J. Land Use & Envtl. L. 53 (1992).

<sup>6</sup> See *infra* note 36 and accompanying text.

cision to condition petitioner's application for a building permit on an individual parcel," rather than a "legislative determination[ ] classifying entire areas of the city" or a "generally applicable zoning regulation[ ]."<sup>7</sup> In the end, the Court ruled that Tigard's conditions violated Dolan's right not to have the government take her property without adequate payment.

The decision in *Dolan* arises not only in the midst of the conflict between the regulatory needs of cities and the business realities of development, but also in a climate of intense debate about the extent to which government can interfere with private property in order to promote social goals.<sup>8</sup> In fact, much of the impetus behind Florence Dolan's continuing appeals came from organizations representing developers concerned about their ability to do their work at a reasonable cost, and political and ideological groups interested in shrinking big, intrusive government.<sup>9</sup>

Florence Dolan—and the special interests supporting her—may indeed have succeeded in their goal of less government interference. The *Dolan* standard places a heavy burden on local governments because it requires them to make "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."<sup>10</sup> In order to pass the *Dolan* test, local governments have been forced to prepare detailed research reports and present complex calculations.<sup>11</sup> Local gov-

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<sup>7</sup> *Dolan*, 512 U.S. at 385, 391 n.8. I shall refer to this as the legislative/adjudicative distinction. Many commentators also believe that the Court made an important distinction between land dedications and other types of exactions. Compare Daniel J. Curtin, Jr. et al., *Nollan/Dolan: The Emerging Wing in Regulatory Takings Analysis*, 28 Urb. Law. 789, 791-95 (1996) (finding that lower courts apply *Dolan* to impact fees as well as land dedications, but only to fees that are individually imposed or adjudicative), with Nancy E. Stroud & Susan L. Trevarthen, *Defensible Exactions After Nollan v. California Coastal Commission and Dolan v. City of Tigard*, 25 Stetson L. Rev. 719, 792 (1996) (arguing that "[t]he most narrow reading of *Dolan* suggests that its principles apply only to conditions of a permit requiring land dedications or easements").

<sup>8</sup> Twenty-three amicus briefs were filed in the Supreme Court for the two sides in the *Dolan* controversy. See Search of Lexis, Genfed Library, BRIEFS file (Oct. 10, 1999).

<sup>9</sup> Various organizations filed amicus briefs in support of Dolan's position. See, e.g., Brief of Defenders of Property Rights, et al. as Amici Curiae in Support of Petitioner, *Dolan* (No. 93-518), available in Lexis, Genfed Library, BRIEFS file; Brief for Amici Curiae National Association of Home Builders et al. in Support of the Petitioner, *Dolan* (No. 93-518), available in Lexis, Genfed Library, BRIEFS file. Many briefs were filed supporting Tigard as well. See, e.g., Brief of the National Association of Counties et al. in Support of Respondent, *Dolan* (No. 93-518), available in Lexis, Genfed Library, BRIEFS file.

<sup>10</sup> *Dolan*, 512 U.S. at 391.

<sup>11</sup> See, e.g., *National Ass'n of Home Builders v. Chesterfield County*, No. 95-3213, 1996 U.S. App. LEXIS 18838, at \*1, \*3-\*4 (4th Cir. July 30, 1996) (unpublished disposition) (noting county's use of complex methodology to calculate necessary capital improvements); *Grogan v. Zoning Bd. of Appeals*, 633 N.Y.S.2d 809, 810 (App. Div. 1995) (relying

ernments may bear heavy costs in preparing such detailed reports.<sup>12</sup> In addition, armed with the *Dolan* decision, developers are more likely to go to court because their chances of winning are higher.<sup>13</sup> This increased litigation against municipalities creates even more costs, both in litigation expenses and the large awards the municipalities are forced to pay when they lose.<sup>14</sup>

By 1998, the number of decisions addressing the scope of *Dolan* appeared to have decreased relative to previous years.<sup>15</sup> One expla-

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on town's individualized determination, as well as environmental assessment form, which discussed specific environmental impacts of proposed construction and best ways to ameliorate them); *Sparks v. Douglas County*, 904 P.2d 738, 745-46 (Wash. 1995) (en banc) (relying on detailed report that documented projected problems with adjoining streets, calculated likely increase in traffic, and specifically explained why dedication was necessary); *Trimen Dev. Co. v. King County*, 877 P.2d 187, 194 (Wash. 1994) (en banc) (relying on comprehensive report assessing park needs, which included specific calculations of how much additional park land was needed to provide for population increases).

<sup>12</sup> See Edward J. Sullivan, *Dolan* and Municipal Risk Assessment, 12 J. Envtl. L. & Litig. 1, 1-2 (1997) (explaining that most scholars agree that local governments have been hurt because "they now shoulder a greater burden of showing that their imposed land use conditions are justified").

<sup>13</sup> Builders are now more likely to use the legal system in their fight against municipalities. In recent years, the National Association of Home Builders Legal Action Fund has seen a rise in applications for monetary assistance in lawsuits. See Gerry Donohue, *Swimming with the Sharks*, *Builder*, Feb. 1998, at 86, 88; see also Sullivan, *supra* note 12, at 2 ("[Local governments] face a greater risk of litigation."); Jane Bowling, *Land Use Attorneys Debate Impact of High Court Decision*, *Daily Rec. (Baltimore, Md.)*, June 2, 1994, at 1, available in 1994 WL 3165880 (quoting land use lawyer as saying that *Dolan* "gives you more arrows in your bow" and provides opportunity for developers to use threats in order to gain "leverage [in] attacking unreasonable conditions"); David W. Dunlap, *Community Interests vs. Property Rights*, *N.Y. Times*, July 21, 1996, § 9 (Real Estate), at 1 (describing view of lawyers for Town of Mamaroneck, involved in takings case, that *Dolan* has given developers asserting takings claims "'a new arrow in the quiver'" and has provided "'a new way of asserting the claim'").

<sup>14</sup> The City of Tigard settled *Dolan* by paying \$1.5 million to obtain the bikepath it had originally required as a condition for development approval. Before this case arose, the city could have bought the bikepath for about \$14,000. See *City of Tigard Will Pay Dolans \$1.5 Million in Bikepath "Takings" Case*, *Bus. Wire*, Nov. 21, 1997, available in Lexis, News Library, BWIRE file.

<sup>15</sup> See Jonathan M. Davidson et al., "Where's *Dolan*?": Exactions Law in 1998, 30 *Urb. Law.* 683, 696-97 (1998). One hypothesis for this trend is that developers do not believe their challenges will be sustained in court now that municipalities are aware of how to fashion exactions that avoid the *Dolan* test. See *id.* Municipalities may have heeded the advice of commentators who have suggested ways for municipalities to deal with the decision. See, e.g., Cordes, *supra* note 4, at 553 (suggesting switch to impact fees because "by their very nature impact fees lend themselves to the quantification and individualized assessment required by *Dolan*"); Sam D. Starritt & John H. McClanahan, *Land-Use Planning and Takings: The Viability of Conditional Exactions to Conserve Open Space in the Rocky Mountain West After Dolan v. City of Tigard*, 114 *S. Ct.* 2309 (1994), 30 *Land & Water L. Rev.* 415, 464 (1995) (urging Rocky Mountain towns to develop strict legislative mandates for exactions, dispensing with all discretion); Sullivan, *supra* note 12, at 19 (suggesting that impact fees with mathematical formulas "have a good chance of withstanding a challenge under *Dolan*"). Some lawyers predicted that local governments would do just

nation for this trend is that increased litigation has had a chilling effect on local governments' exactions practices.<sup>16</sup> For municipalities, this effect may prove onerous because exactions have long been a way for municipalities to put the enormous costs associated with growth and sprawl on the parties creating the costs.<sup>17</sup> Even more troubling is the possibility that the *Dolan* test is inhibiting cities in regulating land use and environmental matters more generally.<sup>18</sup> In fact, some lower courts have applied *Dolan*'s "rough proportionality" test outside the exactions context.<sup>19</sup> However, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,<sup>20</sup> the Supreme Court rejected the argument that *Dolan*'s "rough proportionality" standard is applicable to regulatory takings outside of the context of exactions,<sup>21</sup> thereby removing a weapon to challenge all sorts of government regulation. Even after *Monterey*, though, courts can expand the application of heightened scrutiny—the "rough proportionality" test—through an inconsistent application of the legislative/adjudicative distinction. Some courts are applying the demanding standard to exactions arguably characterized

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this. See, e.g., Bowling, *supra* note 13, at 1 (quoting land use lawyer as saying that although he wishes *Dolan* would force local governments to decrease use of exactions, he really thinks effect will be that planning departments will "be more clever in crafting their exactions"). Alternatively, local governments may have switched to other financing techniques, such as financial development charges that resemble taxes. See Davidson et al., *supra*, at 697.

<sup>16</sup> See Davidson et al., *supra* note 15, at 697; *supra* notes 10-10 and accompanying text; see also Bowling, *supra* note 13, at 1 (noting that even threat of suit can chill government use of exactions).

<sup>17</sup> See Alan A. Altshuler & José A. Gómez-Ibáñez, Regulation for Revenue: The Political Economy of Land Use Exactions 62-63, 77, 95-96 (1993) (describing need for exactions because of local infrastructure demands and because development does not pay for its costs). Furthermore, exactions long have been considered valid for such purposes. See *id.* at 16, 34-43 (describing evolution of exactions practices); Kim I. Stollar, How Much is Enough? Assessing the Impact of *Dolan v. City of Tigard*, 46 Case W. Res. L. Rev. 193, 201-02 (1995) (describing government use of development exactions in this century); *infra* note 126.

<sup>18</sup> Because land use restrictions are often tied to environmental programs, increased success in challenging exactions creates a higher risk of thwarting environmental protection. See, e.g., *K & K Constr., Inc. v. Department of Natural Resources*, 551 N.W.2d 413 (Mich. Ct. App. 1996) (holding that *Dolan* standard is applicable to denial of building permit in order to comply with Wetland Protection Act); Bowling, *supra* note 13, at 1 (describing Maryland's environmental legislation and restrictions it imposes on development).

<sup>19</sup> See, e.g., *Templeton Coal Co. v. Shalala*, 882 F. Supp. 799, 823 n.12 (S.D. Ind. 1995) (stating that "essential nexus" requirement is met to extent that *Dolan* is applicable to employment agreements); *Steel v. Cape Corp.*, 677 A.2d 634, 641-42 (Md. Ct. Spec. App. 1996) (applying *Dolan* to denial of developer's request for rezoning).

<sup>20</sup> 119 S. Ct. 1624 (1999) (holding that takings questions were properly submitted to jury).

<sup>21</sup> See *id.* at 1635-38.

as legislative, thereby further threatening continued municipal use of exactions.<sup>22</sup>

This Note focuses on the legislative/adjudicative distinction with a view toward understanding and critiquing it. Part I discusses the facts and holding of *Dolan* and the lower courts' confusion in applying *Dolan*'s legislative/adjudicative distinction. Part II argues that the distinction is prohibitively difficult to make and is misplaced in the context of local government. Local government structure combines legislative and administrative functions, and the land use process relies heavily on administrative discretion and flexible piecemeal decisionmaking, making it difficult for courts to determine when a decision is sufficiently legislative in character.

Part III argues that applying "rough proportionality" to adjudicative decisions alone does not solve the problems of extortionate behavior and inequitable results associated with exactions. "Extortionate" behavior describes those circumstances where a local government demands costly concessions from a developer to receive an unrelated benefit that the government desires. Inequitable results occur when this extortion randomly hits some permit seekers harder than others. Those problems are just as likely to occur in legislative decisionmaking processes as in adjudicative settings. This Note concludes by urging the Court to reformulate a judicial review standard for exactions by identifying which situations create the potential for government overreaching. Several proposals have already been advanced, and they suggest that courts should scrutinize the fairness of the negotiation process and only engage in substantive review of the "rough proportionality" of the exaction if that process was flawed. Commentators have identified the components of a well-functioning exactions process as "voice," the full participation of all affected interests in negotiation with the municipality, and "exit," the ability of the landowner to leave the municipality if dissatisfied with the result. Such an analysis better explains the *Dolan* Court's concerns with exactions practices, and may ultimately be helpful in developing a new exactions model of review to replace the legislative/adjudicative distinction in applying "rough proportionality."

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<sup>22</sup> See *infra* Part I.B.

## I

*DOLAN v. CITY OF TIGARD* AND THE CONFUSION  
IN THE LOWER COURTSA. *Dolan v. City of Tigard*

In *Dolan*, plaintiff Florence Dolan, the owner of a plumbing and electric supply store, applied for permission to redevelop her property—nearly doubling the size of the store and paving a parking lot.<sup>23</sup> Tigard's Planning Commission granted the permit on the condition that Dolan comply with the provisions of the city's comprehensive plan and Master Drainage Plan, both codified in Tigard's Community Development Code.<sup>24</sup> The applicable provisions required property owners seeking development approval in or adjacent to the Fanno Creek floodplain area to: (1) dedicate "sufficient open land area" for a greenway, free of structures, in order to combat flooding problems; and (2) use portions of the dedicated land for the construction of a pedestrian/bicycle pathway, in order to relieve traffic congestion.<sup>25</sup> The city required Dolan to dedicate 7000 square feet lying in the floodplain as a greenway, roughly ten percent of her property; this dedication included a fifteen-foot strip of land adjacent to the floodplain which was to be used as a pedestrian/bicycle pathway.<sup>26</sup> The dedicated property was sufficient to satisfy the fifteen-percent open space requirement for any development in the Central Business District.<sup>27</sup>

Dolan sought to avoid the conditions by applying for variances from the code requirements but was unsuccessful.<sup>28</sup> She then appealed to the city's Land Use Board of Appeals (LUBA), claiming that the required dedication was not sufficiently related to the development proposal and thus constituted an uncompensated taking in violation of the Fifth Amendment.<sup>29</sup> Once again, she was unsuccessful; LUBA found that a reasonable relationship existed between the dedication and the effects of the store expansion.<sup>30</sup> In subsequent appeals, the Oregon Court of Appeals and the Oregon Supreme Court found

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<sup>23</sup> See *Dolan v. City of Tigard*, 512 U.S. 374, 379 (1994).

<sup>24</sup> See *id.* at 377-80.

<sup>25</sup> See *id.* at 378-82.

<sup>26</sup> See *id.* at 380.

<sup>27</sup> See *id.*

<sup>28</sup> See *id.* at 380-81.

<sup>29</sup> See *id.* at 382. This challenge rested on the argument that the conditions the government placed on her development application did not meet the "essential nexus" test of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), which described the necessary relationship between a condition and the problem created by the development. See Petitioner's Brief at 19-29, *Dolan* (No. 93-518).

<sup>30</sup> See *Dolan*, 512 U.S. at 382-83.

the conditions to be valid because they were reasonably related and had an essential nexus to the impact of the development.<sup>31</sup>

The United States Supreme Court granted certiorari to resolve a question it had left unanswered in the earlier exaction case, *Nollan v. California Coastal Commission*:<sup>32</sup> “[W]hat is the required degree of connection between the exactions imposed . . . and the projected impacts of the proposed development?”<sup>33</sup> Looking to the decisions of state courts, Chief Justice Rehnquist declared a middle ground between very loose and very strict standards for the required relationship.<sup>34</sup> He articulated a new test of “rough proportionality.”<sup>35</sup> “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.”<sup>36</sup> The Court held that the City of Tigard had not met its burden of proof under the “rough proportionality” standard because it did not justify why the floodplain dedication needed to be used as a *public* greenway, instead of a greenway for which Dolan retained title, and its traffic calculations only proved that the pathway “*could*,” instead of “*will*” or “*is likely to*,” relieve traffic congestion.<sup>37</sup>

Although the Court claimed that the new standard was consistent with the reasonable relationship test, the intermediate position of the state courts,<sup>38</sup> some commentators have argued that the Court actually introduced a more intensified level of scrutiny into the exactions

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<sup>31</sup> See *Dolan v. City of Tigard*, 854 P.2d 437, 443 (Or. 1993) (holding that Tigard’s conditions satisfied *Nollan* test), aff’g 832 P.2d 853 (Or. Ct. App. 1992).

<sup>32</sup> 483 U.S. 825 (1987). In *Nollan*, the California Coastal Commission granted a rebuilding permit to the Nollans on the condition that they grant the public access to pass along their beachfront property. The Court held that a taking occurs when there is no “essential nexus” between the exaction and the harm that the exaction seeks to address. See *id.* at 837.

<sup>33</sup> *Dolan*, 512 U.S. at 377. In *Nollan*, the Court concluded that since “even the most untailed standards” were not met, it did not need to reach the question of the required relationship between the condition and the development’s impact. See *Nollan*, 483 U.S. at 838.

<sup>34</sup> The state court decisions included: *Jenad, Inc. v. Village of Scarsdale*, 218 N.E.2d 673 (N.Y. 1966), an example of a standard employing “very generalized statements as to the necessary connection between the required dedication and the proposed development,” which Chief Justice Rehnquist described as “too lax to adequately protect petitioner’s right to just compensation”; *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 176 N.E.2d 799 (Ill. 1961), which introduced the “‘specifi[c] and uniquely attributable’ test” rejected by the majority as an “exacting scrutiny” not constitutionally required; and *Simpson v. City of North Platte*, 292 N.W.2d 297 (Neb. 1980), whose “reasonable relationship” test the Court purported to adopt. See *Dolan*, 512 U.S. at 389-90.

<sup>35</sup> See *Dolan*, 512 U.S. at 391.

<sup>36</sup> *Id.*

<sup>37</sup> See *id.* at 393, 395.

<sup>38</sup> See *id.* at 391.



context.<sup>39</sup> Furthermore, the decision shifted the burden of proof to the government.<sup>40</sup> Both the heightened standard of scrutiny and the burden of proof shift seem misplaced in the exactions context. Modern judicial review generally defers to legislatures on economic regulation matters and issues unrelated to protection of minorities and fundamental rights.<sup>41</sup>

Therefore, in order to justify its standard and burden allocation, the Court characterized Tigar's exactions as adjudicative decisions, as opposed to legislative decisions that would deserve deference.<sup>42</sup> The Court distinguished cases, such as *Village of Euclid v. Ambler Realty Co.*<sup>43</sup> and *Agins v. City of Tiburon*,<sup>44</sup> in which land use regulations were upheld as constitutionally permissible.<sup>45</sup> The Court characterized those cases as "legislative determinations classifying entire areas of the city," while asserting that the present case was "an adjudicative decision to condition petitioner's application for a building permit on an individual parcel."<sup>46</sup> Thus, as a matter of doctrinal necessity, the

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<sup>39</sup> See Robert J. Hopperton, Standards of Judicial Review in the Supreme Court Land Use Opinions 77 (1999) ("Notwithstanding Chief Justice Rehnquist's characterization of this new test as one akin to an 'intermediate position,' the rough proportionality test is an activist standard of review because it reverses the presumption of validity and places the burden of proof on the non-judicial decisionmaker."); Cordes, *supra* note 4, at 543-50 (noting that state courts' "reasonable relationship" test is not synonymous with Court's "rough proportionality" standard because many state courts apply "reasonable relationship" test in very deferential manner); Bowling, *supra* note 13, at 1 ("I think "rough proportionality" goes beyond the "reasonable relationship" standard Maryland has in place . . . . I think it's truly a far stricter standard.") (quoting Stuart Kaplow, attorney representing developers)).

<sup>40</sup> See *Dolan*, 512 U.S. at 391 n.8.

<sup>41</sup> In this way, the *Dolan* Court, continuing a trend in its regulatory takings doctrine, risks returning to the infamous era of *Lochner v. New York*, 198 U.S. 45 (1905), when the Court used substantive due process arguments to strike down social reform legislation for interfering with economic liberty. See Edward J. Sullivan, Substantive Due Process Resurrected Through the Takings Clause: *Nollan*, *Dolan*, and *Ehrlich*, 25 *Env'tl. L.* 155, 155-56 (1995); J. Freitag, Note, Takings 1992: Scalia's Jurisprudence and a Fifth Amendment Doctrine to Avoid *Lochner Redivivus*, 28 *Val. U. L. Rev.* 743, 744-46 (1994). It is widely accepted today that *Lochner* was misguided and that courts should accord legislatures much deference when reviewing economic regulation. See generally 1 Laurence H. Tribe, *American Constitutional Law* §§ 8-6 to 8-7, at 1357-62 (3d ed. 2000).

<sup>42</sup> See *Dolan*, 512 U.S. at 385, 391 n.8 (acknowledging that for challenges to "generally applicable zoning regulations," burden of proof should rest on challenger, but distinguishing this case as "an adjudicative decision to condition petitioner's application for a building permit on an individual parcel" in order to place burden of proof on city).

<sup>43</sup> 272 U.S. 365 (1926).

<sup>44</sup> 447 U.S. 255 (1980).

<sup>45</sup> See *Dolan*, 512 U.S. at 384-85.

<sup>46</sup> *Id.* at 385.

Court limited its new “rough proportionality” standard and burden shifting declaration to adjudicative government actions.<sup>47</sup>

The majority did not clarify the distinction between legislative and adjudicative decisions, and Justice Souter argued in dissent that the majority mischaracterized the case as one involving an adjudicative decision.<sup>48</sup> The permit conditions, Souter recognized, were imposed pursuant to the city’s development code; he thus concluded that the only “adjudication” was over whether to grant a variance from the permit conditions.<sup>49</sup> Furthermore, Justice Souter criticized the “rough proportionality” test. He noted that the Court “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.”<sup>50</sup> He also disagreed with the Court’s extension of the *Nollan* test.<sup>51</sup> According to Justice Souter, the heightened scrutiny and burden shifting were ultimately unjustified.<sup>52</sup>

The lower courts attempting to apply *Dolan* echoed Justice Souter’s questions about the meaning of the legislative/adjudicative distinction. In the section that follows, these lower court cases will be examined in order to show the confusion and inconsistency the Court created by invoking the distinction.

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<sup>47</sup> See Donald C. Guy & James E. Holloway, *The Direction of Regulatory Takings Analysis in the Post-Lochner Era*, 102 *Dick. L. Rev.* 327, 346 (1998) (“[T]he rough proportionality test represents the application of heightened scrutiny under the Takings Clause to adjudicative actions.”); see also *supra* notes 41-42 and accompanying text.

<sup>48</sup> See *Dolan*, 512 U.S. at 413 n\* (Souter, J., dissenting).

<sup>49</sup> See *id.* But see James H. Freis, Jr. & Stefan V. Reyniak, *Putting Takings Back into the Fifth Amendment: Land Use Planning After Dolan v. City of Tigard*, 21 *Colum. J. Envtl. L.* 103, 130-31 (1996) (arguing that adjudicative label was correct because of discretion in granting permits); Starritt & McClanahan, *supra* note 15, at 442-43 (explaining that discretionary decision included whether proposed development was linkable to existing path, thus triggering land dedication condition).

<sup>50</sup> *Dolan*, 512 U.S. at 413 (Souter, J., dissenting).

<sup>51</sup> See *id.* at 414 (“[T]he 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. . . . [T]he Court’s conclusions about the city’s vulnerability carry the Court no further than *Nollan* has gone already . . .”).

<sup>52</sup> See *id.* at 413-14. In his dissent, Justice Stevens also concluded that the “rough proportionality” standard was unjustified: “The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan.” *Id.* at 405 (Stevens, J., dissenting). But see Marshall S. Sprung, *Note, Taking Sides: The Burden of Proof Switch in Dolan v. City of Tigard*, 71 *N.Y.U. L. Rev.* 1301, 1326-36 (1996) (arguing that burden of production shift is justified because it improves fairness and availability of evidence, but burden of persuasion shift would have devastating effects).

### B. Confusion in the Lower Courts

This section surveys the federal and state cases that applied *Dolan*'s "rough proportionality" test to exactions imposed on the approval of development applications, found *Dolan*'s "rough proportionality" test or the legislative/adjudicative distinction inapplicable, or failed to mention *Dolan*'s distinction between legislation and adjudication even though it was relevant.<sup>53</sup> Because the focus is on the role of the legislative/adjudicative distinction in each court's decision of whether to apply *Dolan*, the cases are grouped according to whether the exaction is: (1) scheduled—an amount of money or land specified in advance by a legislative body; (2) negotiated—authorized by a legislative body but individually determined, by either the legislature or an administrative body, in response to a specific development proposal;<sup>54</sup> or (3) not clear.<sup>55</sup>

#### 1. Scheduled Exactions

Of the eleven cases involving exactions that were scheduled by the legislative body, three explicitly stated that *Dolan* reaches legislative, as well as adjudicative, exactions.<sup>56</sup> For example, in *Curtis v.*

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<sup>53</sup> The research for this section of the Note was conducted through Westlaw by searching for all lower federal and state court cases that cited to *Dolan*. Search of Westlaw, ALLCASES database (Aug. 27, 1998). The search initially yielded 171 results, most of which were not relevant to the project because they mention *Dolan* for reasons other than resolving challenges to the proportionality of exactions: for general takings propositions; to apply the *Agins* takings test that "land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,'" *Dolan*, 512 U.S. at 385 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)); or to mention the unconstitutional conditions doctrine. In addition, many cases discussed the "rough proportionality" standard—either applying it or rejecting its application—in the context of challenges to nonexaction land use regulations. For discussion of the Supreme Court's recent rejection of the relevance of *Dolan* to regulations that are not exactions, see *supra* notes 18-22 and accompanying text. These cases do not apply to the analysis and thus have not been included in this section.

<sup>54</sup> All that is fixed is the process for negotiation, but the outcome is uncertain unless a pattern can be discerned from previous negotiations. See Frank & Rhodes, *supra* note 5, at 9 (describing difference between scheduled and negotiated exactions).

<sup>55</sup> In these cases, the reported opinion does not provide enough information on the context of the exaction's imposition to be able to determine whether the exaction was scheduled or negotiated.

<sup>56</sup> See *National Ass'n of Home Builders v. Chesterfield County*, 907 F. Supp. 166, 168-69 (E.D. Va. 1995) (applying "rough proportionality" to facial attack of widely applicable county cash proffer policy and upholding policy because it is possible to apply it in accordance with "rough proportionality"), *aff'd*, 92 F.3d 1180 (4th Cir. 1996); *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390-91 (Ill. App. Ct. 1995) (concluding that *Dolan* should apply to legislatively enacted dedication exaction for highway expansion); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Me. 1998) (stating that legislative nature of exaction was only one factor in analysis of fire protection ordinance under *Dolan*).

*Town of South Thomaston*,<sup>57</sup> a fire protection ordinance required all developers of subdivisions with inadequate water supplies to construct a fire pond and to convey an easement to the town to maintain and use the pond.<sup>58</sup> The court stated that “the legislative nature of the exaction is but one factor in our takings analysis,” thus rejecting the notion that legislation is automatically shielded from a “rough proportionality” analysis.<sup>59</sup> On the other hand, five cases found *Dolan* inapplicable because the exaction was legislative, and not adjudicative.<sup>60</sup> For example, *San Mateo County Coastal Landowners’ Ass’n v. County of San Mateo*<sup>61</sup> involved the voter-enacted Coastal Protection Initiative, which included a requirement that applicants for land division grant the county a conservation or agricultural easement as a condition for approval.<sup>62</sup> Here, the court explained: “The [*Dolan*] Court went to some lengths to distinguish the situation in *Dolan*, involving an adjudicative decision by the city, from the traditional legislative and land-use function undertaken by local governments at issue in this case.”<sup>63</sup> Thus, the court concluded, “rough proportionality” was inapplicable to a “legislatively adopted zoning scheme.”<sup>64</sup> Two other cases, however, applied the “rough proportionality” test without discussing the issue of legislative versus adjudicative exactions.<sup>65</sup>

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<sup>57</sup> 708 A.2d 657 (Me. 1998).

<sup>58</sup> See *id.* at 658-59.

<sup>59</sup> *Id.* at 660.

<sup>60</sup> See *Home Builders Ass’n v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997) (en banc) (finding *Dolan* inapplicable to impact fee ordinance because instant case “involves a generally applicable legislative decision”); *GST Tucson Lightwave, Inc., v. City of Tucson*, 949 P.2d 971, 978 (Ariz. Ct. App. 1997) (holding *Dolan* inapplicable to legislatively imposed fee that served as condition for approval of long distance carrier’s application for telephone rights of way); *San Mateo County Coastal Landowners’ Ass’n v. County of San Mateo*, 45 Cal. Rptr. 2d 117, 132 (Ct. App. 1995) (finding agricultural and open space easement requirements to be part of “legislatively adopted zoning scheme” and thus shielded from *Dolan* analysis); *Waters Landing Ltd. Partnership v. Montgomery County*, 650 A.2d 712, 724 (Md. 1994) (holding that *Dolan* does not control impact fee ordinance because of its legislative nature); *Home Builders Ass’n v. City of Beavercreek*, Nos. 94-CV-0012, 94-CV-0062, 1996 WL 812607, at \*17-\*18 (Ohio Ct. C.P. (Greene County) Feb. 12, 1996) (same). For the cases that involved impact fees, the courts also were persuaded that *Dolan* did not apply because the exactions did not require dedication of land. “Impact fees are one-time charges imposed on a developer as a condition to receiving a building permit.” Noreen A. Murphy, Note, *The Viability of Impact Fees After Nollan and Dolan*, 31 New Eng. L. Rev. 203, 213 (1996). They may be imposed on any new development, and they often have been used to fund a variety of projects unrelated to the particular development. See *id.*

<sup>61</sup> 45 Cal. Rptr. 2d 117 (Ct. App. 1995).

<sup>62</sup> See *id.* at 121, 129.

<sup>63</sup> *Id.* at 131.

<sup>64</sup> *Id.* at 132.

<sup>65</sup> See *Sparks v. Douglas County*, 904 P.2d 738, 746 (Wash. 1995) (en banc) (upholding ordinance imposing dedication exaction for compliance with “rough proportionality”);

In conclusion, for scheduled exactions, those closest to legislative decisions, just as many courts applied *Dolan*'s "rough proportionality" test as refused to apply it because of the Supreme Court's limitation of the standard to adjudicative decisions—five courts on each side. For those applying the standard, however, two out of five did not acknowledge that the case involved a legislative decision.

## 2. *Negotiated Exactions*

Of the nine cases that involved exactions that were determined on an individual basis, three concluded that the burden-shifting "rough proportionality" test only applies to adjudicative, not legislative decisions, but those courts differed as to their characterization of the exaction. In *Ehrlich v. City of Culver City*,<sup>66</sup> the Supreme Court of California determined that a monetary exaction imposed on the approval of a development application was adjudicative; it reasoned that the recreational facilities fees at issue were not "legislatively formulated development assessments imposed on a broad class of property owners" but instead were exactions imposed "on an individual and discretionary basis."<sup>67</sup> On the other hand, the court in *Loyola Marymount University v. Los Angeles Unified School District*<sup>68</sup> found a school development fee to be legislative because it fell within the "general category of development fees."<sup>69</sup> The impact fees in these two cases were identical because they were both determined on an individual basis, although different governmental bodies determined them.<sup>70</sup>

Another negotiated exactions case vaguely referred to the legislative/adjudicative distinction in order to shift the burden of proof to the

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*Trimen Dev. Co. v. King County*, 877 P.2d 187, 189 (Wash. 1994) (en banc) (same); see also *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995) (finding *Dolan* inapplicable for other reasons).

<sup>66</sup> 911 P.2d 429, 444 (Cal. 1996) (concluding that impact fee is subject to *Dolan* because it is imposed "on an individual and discretionary basis"); see also *Goss v. City of Little Rock*, 90 F.3d 306, 309-10 (8th Cir. 1996) (finding *Dolan* to be applicable to individually determined road dedication condition).

<sup>67</sup> See *Ehrlich*, 911 P.2d at 444.

<sup>68</sup> 53 Cal. Rptr. 2d 424, 434-35 (Ct. App. 1996) (declining to apply *Dolan* test to legislatively authorized school development fee imposed on broad class of property owners but individually determined by school district board). For an explanation of a development or impact fee, see *supra* note 60.

<sup>69</sup> *Id.* at 435.

<sup>70</sup> In *Ehrlich*, the city council imposed the fee after conducting studies to determine the cost of constructing replacement recreational facilities. See *Ehrlich*, 911 P.2d at 434-35. In *Loyola Marymount University*, state law authorized governing boards of local school districts to determine and levy school development fees against individual development applications. See *Loyola Marymount Univ.*, 53 Cal. Rptr. 2d at 427-28.

government.<sup>71</sup> The court stated that “the government bears the burden of justifying its conduct . . . at least when its conduct is quasi-judicial in nature.”<sup>72</sup> It is unclear whether the court was limiting the application of *Dolan* to adjudication. Furthermore, two cases applied the *Dolan* standard without reference to the legislative/adjudicative distinction,<sup>73</sup> and three other cases declined to apply *Dolan*’s “rough proportionality” test for other reasons.<sup>74</sup>

The results show that for those courts presented with challenges to negotiated exactions, those closest to adjudicative decisions, five out of nine applied *Dolan*’s “rough proportionality” standard, although three of those five were unclear as to whether the application depended on the adjudicative characterization of the exaction.

### 3. Indeterminate Exactions

In nine cases, the courts did not clarify whether the exaction was specified by the legislature or determined on an individual basis. In three cases, the Oregon Court of Appeals applied *Dolan* and admitted that it was disregarding the Supreme Court’s statement that heightened scrutiny should turn on the characterization of the exaction as legislative or adjudicative.<sup>75</sup> The first case to take this position was *Schultz v. City of Grants Pass*,<sup>76</sup> in which the Oregon Court of Appeals stated that “the character of the restriction remains the type that

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<sup>71</sup> See *Burton v. Clark County*, 958 P.2d 343, 357 (Wash. Ct. App. 1998) (finding *Dolan* to preclude imposition of individually determined road dedication exaction).

<sup>72</sup> *Id.* at 351-52.

<sup>73</sup> See *Lordan v. Feld*, No. CA945144, 1995 WL 809480, at \*4 (Mass. Super. Ct. March 16, 1995) (holding that *Dolan* precluded application of planning board regulation imposing road extension exaction on subdivision approval); *Kottschade v. City of Rochester*, 537 N.W.2d 301, 308 (Minn. Ct. App. 1995) (holding that city’s individually determined road dedication condition met “rough proportionality” test).

<sup>74</sup> See *Snider v. Board of County Comm’rs*, 932 P.2d 704, 709 (Wash. Ct. App. 1997) (refusing to apply *Dolan* because of distinction between dedications and other types of exactions); *Kiewit Constr. Group, Inc. v. Clark County*, 920 P.2d 1207, 1213 (Wash. Ct. App. 1996) (distinguishing *Dolan* because access ramp condition was not sole means of obtaining conditional use permit); *Hoepker v. City of Madison Plan Comm’n*, 563 N.W.2d 145, 153 (Wis. 1997) (finding *Dolan* inapplicable because condition was not statutorily authorized and would contravene legislative procedures, and because takings claim was not ripe).

<sup>75</sup> See, e.g., *Art Piculell Group v. Clackamas County*, 922 P.2d 1227, 1235 n.6 (Or. Ct. App. 1996) (“[T]he fact that a specific condition that, by its nature, is subject to the rough proportionality test is mandated by general local legislation does not alter the *Dolan* analysis in any way.”); *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360, 365 (Or. Ct. App. 1994) (stating that *Dolan* applies “whether it is legislatively required or a case-specific formulation” and that “[t]he nature, not the source, of the imposition is what matters”); *Schultz v. City of Grants Pass*, 884 P.2d 569, 573 (Or. Ct. App. 1994) (disregarding *Dolan*’s legislative/adjudicative decision, and focusing instead on character of decision to determine whether to apply “rough proportionality” standard).

<sup>76</sup> 884 P.2d 569 (Or. Ct. App. 1994).

is subject to the analysis in *Dolan*,<sup>77</sup> and that the significant distinction is the one between land dedications and other types of exactions.<sup>78</sup> Five other decisions applied the “rough proportionality” test without mentioning the legislative versus adjudicative difference at all.<sup>79</sup>

Therefore, for those cases in which the court did not clarify the nature of the exaction, the great majority—eight out of nine—applied the “rough proportionality” standard, with three cases explicitly rejecting the legislative/adjudicative distinction and five cases not commenting on it.

#### 4. Summary and Implications of Results

Overall, *Dolan*'s demanding standard was applied in over half of the cases surveyed (eighteen out of twenty-nine) even though the exactions challenges involved slightly more scheduled than negotiated exactions (eleven scheduled and nine negotiated). This outcome is troubling because of the difficulties for municipalities in the face of an expansion of the “rough proportionality” standard's application.<sup>80</sup>

This survey of the caselaw reveals that the lower courts' application of the legislative/adjudicative distinction is inconsistent.<sup>81</sup> There

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<sup>77</sup> *Id.* at 573.

<sup>78</sup> “[W]hat triggers the heightened scrutiny of exactions is the fact that they are ‘not simply a limitation on the use’ to which an owner may put his or her property, but rather a requirement that the owner deed portions of the property to the local government.” *Id.* (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)). But see *Clark v. City of Albany*, 904 P.2d 185, 189 (Or. Ct. App. 1995) (“For purposes of takings analysis, we see little difference between a requirement that a developer convey title to the part of the property that is to serve a public purpose, and a requirement that the developer himself make improvements on the affected and nearby property and make it available for the same purpose.”).

<sup>79</sup> See *Reynolds v. Inland Wetlands Comm'n*, No. 309721, 1996 WL 383363, at \*2 (Conn. Super. Ct. June 10, 1996) (concluding that conservation easement condition fails *Dolan* standard); *Sarasota County v. Taylor Woodrow Homes Ltd.*, 652 So. 2d 1247, 1251 (Fla. Dist. Ct. App. 1995) (holding that *Dolan* applies to rezoning resolution imposing various conditions); *Grogan v. Zoning Bd. of Appeals*, 633 N.Y.S.2d 809, 810 (App. Div. 1995) (finding that scenic and conservation easement passed “rough proportionality”); *Clark*, 904 P.2d at 190 (holding that city failed to prove that street improvement exactions satisfy *Dolan*); *Nielsen v. Merriam*, No. 40106-8-I, 1998 WL 390442, at \*2 (Wash. Ct. App. July 13, 1998) (holding that road extension exaction, creating private easement, failed *Dolan* test); see also *Donwood, Inc. v. Spokane County*, 957 P.2d 775, 779 (Wash. Ct. App. Mar. 19, 1998) (finding *Dolan* inapplicable for other reasons).

<sup>80</sup> See discussion *supra* Introduction.

<sup>81</sup> Similar confusion surfaced in the Florida and Oregon courts after those state courts announced a rule differentiating between legislative and adjudicative decisions. See *infra* notes 86-87, 103.

Despite this confusion, however, the Supreme Court has not clarified its position on the applicability of *Dolan*. The Court denied certiorari in a case that would have allowed it to address the issue. See *Parking Ass'n of Georgia v. City of Atlanta*, 450 S.E.2d 200 (Ga.

is considerable disagreement over whether legislative decisions are subject to *Dolan*'s heightened scrutiny review. Furthermore, for those courts that do believe the legislative/adjudicative characterization is significant, disagreement exists over how to determine which decisions are legislative and which are adjudicative. Given the state of confusion, the distinction needs to be examined more closely in order to determine whether it is possible to apply such a distinction in a satisfactory way. Furthermore, because "rough proportionality" is often applied in the context of arguably legislative decisions, it is necessary to discuss whether the standard is an effective answer to the problems associated with exactions. Parts II and III take up this task.

## II

### THE IMPRACTICAL NATURE OF THE LEGISLATIVE/ ADJUDICATIVE DISTINCTION

The exercise of differentiating between legislative and adjudicative decisions encounters practical difficulties for two reasons.<sup>82</sup> First, local governments are not structured under strict separation of powers principles. Part II.A will address this argument. Second, the nature of the land use decisionmaking process relies on flexibility and discretion. Part II.B will describe this phenomenon and what it means for the viability of the legislative/adjudicative distinction.

The *Dolan* opinion did not specify how lower courts should draw the line between legislative and adjudicative decisions, but the academic literature has proposed a variety of methods.<sup>83</sup> The approaches

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1994), cert. denied, 515 U.S. 1116 (1995). Dissenting from the denial of certiorari, Justices Thomas and O'Connor urged that the lower courts needed to receive clarification on the legislative versus adjudicative dilemma since they were in conflict over its effect on the applicability of *Dolan*. See *id.* at 1117-18. They stated that the "distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference" and that the legislative/adjudicative distinction has no merit. *Id.* at 1118.

<sup>82</sup> This Note assumes that adjudicative, administrative, and quasi-judicial are synonymous, but other commentators have attempted to separate these definitions. See, e.g., Robert Lincoln, Executive Decisionmaking by Local Legislatures in Florida: Justice, Judicial Review and the Need for Legislative Reform, 25 *Stetson L. Rev.* 627, 645-51 (1996).

<sup>83</sup> The reason these methods exist is because courts have long treated legislation differently from adjudication. For instance, adjudicative decisions generally are afforded less deference by courts, while legislative determinations are assumed to be constitutionally valid unless arbitrary. See Robert C. Ellickson & Vicki L. Been, Land Use Controls 405, 413-14 (2000). Furthermore, adjudicative decisions are reviewed for rationality based on what is contained in the record rather than on any rational reason that the court can create. See *Land Use and the Constitution: Principles for Planning Practice* 43 (Brian W. Blaesser & Alan C. Weinstein eds., 1989) (stating that, when reviewing administrative decisions, courts consider whether decision was "based on the record supported by reasons and findings of fact"). In addition, adjudicative decisions demand greater procedural due process



can be classified generally as formal or functional.<sup>84</sup> The formal approach focuses on the nature of the decisionmaking *body*: Elected bodies make legislative decisions while appointed boards make administrative decisions.<sup>85</sup> On the other hand, the functional approach examines the *nature* of the decision: Under this method, legislative action is “open-ended, affecting a broad class of individuals or situations,” while adjudicative action is “narrow in scope, focusing on specific individuals or on specific situations.”<sup>86</sup> Another formulation of the functional approach describes legislation as prospective policy formulation and adjudication as retrospective application of existing policy.<sup>87</sup>

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protections, such as notice and hearing requirements. See *id.* at 40 (“The due process clause requires minimal standards of fairness in administrative and quasi-judicial decision-making in land use regulation. These procedural requirements of the due process clause do not apply to legislative decision-making.”); *id.* at 42-43 (listing elements of procedural due process).

<sup>84</sup> See Lincoln, *supra* note 82, at 643-51 (describing formal and functional approaches, and proposing “structural” approach because of dissatisfaction with two existing ones).

<sup>85</sup> See *Developments in the Law—Zoning*, 91 Harv. L. Rev. 1427, 1509 (1978) [hereinafter *Developments*]; Ellickson & Been, *supra* note 83, at 318-20.

<sup>86</sup> See Michael S. Holman, Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 Ohio St. L.J. 130, 134-35 (1972) (applying approach by describing adoption of comprehensive plan as legislative act and decisions granting variances as administrative); see also Ellickson & Been, *supra* note 83, at 318-20 (contrasting legislative role of planning commission with adjudicatory role of board of adjustment); *Land Use and the Constitution*, *supra* note 83, at 41 (noting that when decision affects limited number of individuals or specific piece of land, courts are more likely to characterize it as quasi-judicial or administrative). This approach was also followed by the Oregon Supreme Court in *Fasano v. Board of County Comm’rs*, 507 P.2d 23, 26 (Or. 1973) (*en banc*) (characterizing ordinances declaring “general policies without regard to a specific piece of property” as legislative and determinations as to specific pieces of property as quasi-judicial and thus accorded less judicial deference).

<sup>87</sup> See *Snyder v. Board of County Comm’rs*, 595 So. 2d 65, 72 (Fla. Dist. Ct. App. 1991) (describing adjudication as “the application of the legislated general rule of zoning law to a particular instance and parcel of land”), quashed on appeal on other grounds, 627 So. 2d 469 (Fla. 1993); Holman, *supra* note 86, at 136 (admitting that approach is flawed because “to some extent judicial action is predicated on its future impact, and legislative action is based upon historic events”); see also *Land Use and the Constitution*, *supra* note 83, at 40 (“In administrative or quasi-judicial decision-making, a governmental body applies an established land use policy to a land use controversy involving a specific parcel of property.”); *id.* at 41 (stating that in some states, procedural due process applies to some legislative acts that courts have held to be quasi-judicial, such as decisions on special use permits, because ordinance provides standards for decisions).

One commentator has proposed a two-part functional inquiry: First, determine whether the underlying facts on which the decision is based are legislative, generalizations concerning a state of affairs, or administrative, relating to particular situations or individuals; and second, examine whether the result of the government action is a “differentiable impact on specifiable individuals” and thus administrative. See *Developments*, *supra* note 85, at 1510.

In the exactions context, the functional approach blends together with the discretionary approach, which differentiates legislation from adjudication according to the amount of discretion possessed by the body applying the exaction. The more judgment or discretion available to the body applying the exaction, the more likely it is to be labeled an adjudicative determination.<sup>88</sup> The two methods often go hand-in-hand because when a government body is making a functionally adjudicative decision by focusing on a particular party and applying preexisting policies, it is also likely to possess considerable discretion in how to apply the policies to the particular situation.

The discussion that follows explores the usefulness of these methods for drawing the line between legislative and adjudicative decisions. It also argues that certain aspects of the land use decisionmaking process make these methods difficult to use in practice.<sup>89</sup>

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<sup>88</sup> See, e.g., *Home Builders Ass'n v. City of Beavercreek*, Nos. 94-CV-0012, 94-CV-0062, 1996 WL 812607, at \*17 (Ohio Ct. C.P. (Greene County) Feb. 12, 1996) (characterizing impact fee as legislative because “[t]here is little discretion left to the city commissioners”); *Starritt & McClanahan*, supra note 15, at 442 (“Discretionary interpretation of statutory mandates figures prominently in a court’s determination that an act is adjudicative.”); Amy C. Brandt, Comment, *Sedona’s Sustainable Growth Ordinance: Testing the Parameters of Dolan v. City of Tigard*, 28 *Ariz. St. L.J.* 1297, 1325 (1996) (stating that absence of adjudicative discretion resulted in determination that action was legislative in *Home Builders Ass'n v. City of Scottsdale*, 902 P.2d 1347, 1351-52 (Ariz. Ct. App. 1995), aff’d, 930 P.2d 993 (Ariz. 1997)).

<sup>89</sup> Due to the influence of the Standard Zoning Enabling Act (SZE), prepared by the United States Chamber of Commerce in 1922, the government structures employed in land use decisions are fairly similar from state to state. See Ellickson & Been, supra note 83, at 318-19; Quintin Johnstone, *Government Control of Urban Land Use: A Comparative Major Program Analysis*, 39 *N.Y.L. Sch. L. Rev.* 373, 406 (1994) (noting that SZE was followed by many states and significantly influenced evolution of zoning). The locally elected legislative bodies have various names: city council, board of aldermen, board of county supervisors, county commissioners, town commissioners, or township board. The administration of land use is left to the planning commission and the board of zoning appeals, typically composed of lay persons appointed by the local governing body. Traditionally, city councils have the exclusive power to amend the text or map of a zoning ordinance. Planning commissions hold public hearings on proposed zoning amendments, recommend to the legislative body whether the amendments should be adopted, have a role in reviewing proposed subdivision maps and site plans, process special exceptions, and prepare the general plan. The Zoning Board of Appeals generally makes final decisions on variances and hears appeals from building permit denials. See Ellickson & Been, supra note 83, at 319.

Some jurisdictions, however, have departed significantly from the SZE in that they allow legislative bodies to retain the power of granting conditional use permits. See *id.* at 338; see also C. Dallas Sands et al., *Local Government Law* § 11.03, at 11-13 (1997) (giving example that city council may be vested with power to grant special use permits that are adjudicative in nature). Others allow elected commissioners who sit on the legislative body to be members of an administrative body also. See, e.g., *Turner v. City of Mobile*, 424 So. 2d 578, 579-80 (Ala. 1982) (finding that planning commission that included all three members of city board of commissioners is permissible and consistent with statute); Lincoln,

A. *Local Government Structure—Problems with the Formal Approach*

Local governments do not exhibit, nor must they follow, strict notions of separation of powers requiring independent legislative, executive, and judicial branches with distinct roles.<sup>90</sup> In the local government context, a neat separation does not exist. Instead, local government bodies combine legislative, administrative, and judicial functions.<sup>91</sup> Legislative bodies perform various administrative functions, and administrative bodies exhibit legislative qualities. Thus, the formal approach to making the distinction is ineffective in practice.

The example of rezoning illustrates this point well. The locally elected legislative bodies traditionally have been the only entities with the power to enact rezonings that amend the text or map of a zoning ordinance.<sup>92</sup> Rezoning, though, while adopted by the legislative body like other legislation, do not exhibit the characteristics of typical legislative enactments that apply to a large number of parties and declare widely applicable policies. Instead, rezoning decisions are usually site specific; they rely on the particular facts of the case and affect a limited number of parties.<sup>93</sup> Thus, through their exclusive power to re-

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supra note 82, at 628 (noting that many administrative decisions are made at local level by elected commissioners who also sit in legislative capacity); see also *Building Auth. v. State*, 321 S.E.2d 97, 103 (Ga. 1984) (recognizing that county commission is both executive and legislative branch).

<sup>90</sup> See, e.g., *Building Auth. v. State*, 321 S.E.2d 97, 102 (Ga. 1984) (adhering to longstanding holding that state constitution's separation of powers provision does not apply to municipalities or county governments). Historically, separation of powers did not apply to local governments because they were considered administrative bodies with little policymaking power. See *Lincoln*, supra note 82, at 629. Also, some statutes allow state governments to mix the branches. See *id.* at 656-57, 659 (recognizing that some statutes allow local governments to mix legislative and administrative functions, and to leave executive power in hands of legislature).

<sup>91</sup> See *Venhaus v. Pulaski County Quorum Court*, 726 S.W.2d 668, 669-70 (Ark. 1987) (involving county judge who also acted as chief administrative officer of county); *Village of Covington v. Lyle*, 433 N.E.2d 597, 598 (Ohio 1982) (finding that statutory form of government combining executive and judicial functions, in which mayor presides over court that may decide contested misdemeanor case, does not violate due process); Osborne M. Reynolds, Jr., *Handbook of Local Government Law* 195 (1982) ("The tripartite division of the federal and state governments into independent branches is not reflected in the set-up of a great many cities. . . . There is much overlapping of administrative, legislative, and even judicial functions among municipal organs . . .").

<sup>92</sup> See 83 Am. Jur. 2d *Zoning and Planning* § 614 (1992) [hereinafter *Zoning and Planning*] (recognizing that "power to amend generally is delegated to the legislative body in which the power to adopt the original zoning ordinance is vested"); Bruce M. Kramer, *Local Land Use Regulation of Extractive Industries: Evolving Judicial and Regulatory Approaches*, 14 *UCLA J. Envtl. L. & Pol'y* 41, 42-43 (1995/96) ("The legislative body is the only entity which can enact or amend a land use ordinance.").

<sup>93</sup> See *Fasano v. Board of County Comm'rs*, 507 P.2d 23, 26-27 (Or. 1973) (en banc); Carolyn M. Van Noy, Comment, *The Appearance of Fairness Doctrine: A Conflict in Val-*

zone, local legislative bodies make decisions that are functionally administrative, or quasi-judicial, decisions.<sup>94</sup>

Special use permits offer another example because although they are sometimes processed by legislative bodies, they exhibit the individualization normally associated with adjudicative decisions. For example, in *Amoco Oil Co. v. Village of Schaumburg*,<sup>95</sup> the Village Board of Trustees, a legislative body, passed an ordinance granting a special use permit and site plan approval with attached conditions.<sup>96</sup> However, such a legislative act involved a fact-specific determination of how Amoco's proposed redevelopment of its service station would affect the surrounding area.<sup>97</sup> This was not ordinary legislation, and a formal approach that would call it so is shortsighted.

Some jurisdictions further conflate legislative and administrative functions.<sup>98</sup> Conditional use permits and special exceptions are usually processed by the planning commission, an administrative body.<sup>99</sup> Some states, though, allow legislative bodies to retain the power of granting conditional use permits.<sup>100</sup> Moreover, some jurisdictions allow members of an administrative body to be elected commissioners who also sit on the legislative body.<sup>101</sup>

Therefore, distinguishing between legislative and adjudicative land use decisions using the formal approach is difficult in practice and may produce inconsistent and unusual results. The legislative/adjudicative distinction is an example of federal and state concepts being inappropriately applied in the local government context.<sup>102</sup>

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ues, 61 Wash. L. Rev. 533, 540 (1986) ("The decision to . . . rezone . . . is adjudicatory [because] [t]he specific facts of the individual case before the decisionmakers shape the results.").

<sup>94</sup> See *Fasano*, 507 P.2d at 26-27; Zoning and Planning, *supra* note 92, § 609 (noting that some courts have characterized amendment process as quasi-judicial in nature).

<sup>95</sup> 661 N.E.2d 380 (Ill. App. Ct. 1995).

<sup>96</sup> The ordinance was later repealed. See *id.* at 383.

<sup>97</sup> The Board of Trustees received recommendations on this question from the Zoning Board of Appeals, which had held hearings on the matter. See *id.* at 382-83.

<sup>98</sup> See, e.g., *Building Auth. v. State*, 321 S.E.2d 97, 103 (Ga. 1984) (recognizing that county commission is both executive and legislative body).

<sup>99</sup> See *supra* note 89.

<sup>100</sup> See *Ellickson & Been*, *supra* note 83, at 338 ("Some state enabling acts allow the legislative body of a local government to retain the power to grant special permits."); *Sands et al.*, *supra* note 89, § 11.03, at 11-13 (giving example that city council may be vested with power to grant special use permits that are adjudicative in nature).

<sup>101</sup> See *supra* note 89.

<sup>102</sup> See Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Cal. L. Rev. 837, 846 (1983) (stating that "'legislative' [and] 'judicial' . . . rubrics are drawn from a separation-of-powers doctrine more appropriate to larger governmental units").

*B. Nature of Land Use Decisionmaking—Problems with the Functional and Discretionary Approaches*

The discussion above showed how a functional approach, with a focus on the nature of the decision, is preferable to a formal approach that differentiates based on the governmental body making the decision. However, as this section will show, the functional approach to drawing a distinction between legislative and adjudicative actions, and the discretionary approach, which is similar to the functional approach as explained in the beginning of Part II, are also ineffective. Furthermore, they impose significant costs on courts trying to apply the distinction.<sup>103</sup>

A functional approach distinguishing between decisions affecting a broad range of individuals and those focusing on specific pieces of land or people may not be useful given the nature of certain land use decisions. The fact that only a single property owner is affected by a particular decision does not mean that in the future that decision will not have widespread community effects.<sup>104</sup> For instance, a decision

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<sup>103</sup> In addition to the costs discussed in this section, courts may also face a difficult line-drawing task if forced to differentiate legislation from adjudication based on the number of people involved or on the size of the plot. This type of line drawing proved difficult for Oregon courts after *Fasano v. Board of County Comm'rs*, 507 P.2d 23, 26-27 (Or. 1973) (en banc), announced a rezoning review standard that relied on this distinction. Compare *Green v. Hayward*, 552 P.2d 815, 822 (Or. 1976) (finding rezoning of adjoining 50-acre and 90-acre plots to be quasi-judicial), with *Parelius v. City of Lake Oswego*, 539 P.2d 1123, 1124 (Or. Ct. App. 1975) (finding rezoning of 72.9-acre tract of land to be legislative), and *Neuberger v. City of Portland*, 603 P.2d 771, 777 (Or. 1979) (finding rezoning of 601-acre parcel to be quasi-judicial). A similar situation occurred after *Snyder v. Board of County Comm'rs*, 595 So. 2d 65, 78 (Fla. Dist. Ct. App. 1991) (holding that "rezoning actions which have an impact on a limited number of persons or property owners . . . are in the nature of executive or judicial or quasi-judicial action but are definitely not legislative in character"), quashed on appeal on other grounds, 627 So. 2d 469 (Fla. 1993). Compare *Board of County Comm'rs v. Karp*, 662 So. 2d 718, 719-20 (Fla. Dist. Ct. App. 1995) (finding rezoning of one parcel out of 48 on 179-acre property to be legislative action), with *Battaglia Properties, Ltd. v. Florida Land & Water Adjudicatory Comm'n*, 629 So. 2d 161, 165 (Fla. Dist. Ct. App. 1993) (characterizing rezoning of 120-acre parcel as quasi-judicial decision). In addition, commentators have criticized the *Fasano* and *Snyder* courts for creating such a confusing standard. See, e.g., Paul R. Gougelman III, *The Death of Zoning as We Know It*, Fla. Bar J., Mar. 1993, at 25, 26 (explaining that it has taken Oregon many years and much litigation to figure out meaning of quasi-judicial decision); Thomas G. Pelham, *Quasi-Judicial Rezonings: A Commentary on the Snyder Decision and the Consistency Requirement*, 9 J. Land Use & Envtl. L. 243, 271 (1994) (noting that it is unclear how many property owners constitute "limited number" such that *Snyder* test classifies rezoning action impacting those owners as quasi-judicial); Jeffrey M. Taylor, Note, *Untangling the Law of Site-Specific Rezoning in Florida: A Critical Evaluation of the Functional Approach*, 45 Fla. L. Rev. 873, 909-10 (1993) ("Given the uncertainty of the theory behind [the *Snyder*] test, courts would likely develop inconsistent conclusions based on varying views of minor size and limited interest.").

<sup>104</sup> See Lincoln, *supra* note 82, at 647 (arguing that focus on number of persons affected does not truly address issue); Van Noy, *supra* note 93, at 540 ("The . . . decision turns not so

designating an area as blighted for the purpose of redevelopment may apply to only one piece of land and one property owner but certainly will affect many people, including residents of the community, business owners, and outsiders who are interested in the community for residential or commercial purposes.<sup>105</sup> Thus, it is unclear whether under the functional approach, this action should be classified as legislative, because it affects a large number of people, or adjudicative, because it focuses on a particular parcel of land and a particular land owner. Similarly, many interest groups may be involved in a significant community decision that only involves one big landowner.<sup>106</sup>

Furthermore, the evolution of zoning may complicate the practical application of the discretionary approach. In its early form, zoning was seen as a land use control program that could determine development in advance.<sup>107</sup> Local governing bodies could set standards, and these standards would clearly set out what was and was not permissi-

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much on facts peculiar to specific parcels of land as on more general considerations about the community affected.”).

<sup>105</sup> Some constituents will be in favor of such a move because new businesses will have a chance to locate, while others may not want the area to become too commercial. For real-world examples of such situations, see Sandy Coleman, Residents Weigh Stop & Shop Plan, *Boston Globe*, Dec. 20, 1998, City Weekly Section, at 4 (describing informational community meeting attended by 200 people concerning construction of supermarket on blighted site); Kevin Diaz, Landlord Group's Tactics Get Notice, *Star Tribune* (Minneapolis-St. Paul), Nov. 30, 1998, at 1B, available in Lexis, News Library, STRIB file (reporting on landlords protesting city policy of tearing down blighted buildings); Jack Money, Businesses on Fringe of Bombing Site Ready for Renewal, *Sunday Oklahoman* (City Ed.), Apr. 26, 1998, Special Section, at 17, available in Lexis, News Library, DLYOKN file (describing various commercial interests concerned with redevelopment plan of downtown Oklahoma City).

<sup>106</sup> See Carol M. Rose, *New Models for Local Land Use Decisions*, 79 *Nw. U. L. Rev.* 1155, 1159 (1985) (noting that large-scale local land decisions may involve many different interest groups); Coleman, *supra* note 105, at 4 (describing different interest groups involved in proposal for new Stop & Shop supermarket: 100-member East Somerville Neighborhood Association opposing plan, senior citizens, 700 residents who signed supportive petition, and Stop & Shop counsel); Paula McMahon, *Group Accepts Beach Plan*, *Sun-Sentinel* (Ft. Lauderdale) (South Broward Ed.), Oct. 16, 1998, Community Close-Up Section, at 1, available in Lexis, News Library, SUNSEN file (describing opposition of various environmental groups and city commissioners to subsidy plan for two large beach-front developers); Linda Reid, *Enough is Enough*, *Traffic World*, Jan. 11, 1999, at 39 (reporting on proposal by developer to build bulk commodities terminal in state of Washington and noting opposition from environmental groups who say it will harm fish spawning grounds, and other groups concerned with risk of increased collision between ships).

<sup>107</sup> See *Snyder*, 595 So. 2d at 72 (“Historically, zoning developed as a governmental effort to create a fixed blue-print of development. The original zoning ordinances were to have broad uniform application to all.”); Mark Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 *N.D. L. Rev.* 161, 166 (1989) (“Early zoning theory . . . envisioned a planned, almost static land development . . .”); Johnstone, *supra* note 89, at 406 (“Zoning in its earlier form contemplated a land control program that could rationally and fairly determine in advance how urban areas should develop in the future . . .”).

ble.<sup>108</sup> The early vision recognized the need for flexibility—for variances and other similar exceptions—and contemplated that an administrative body would handle these occasional discretionary functions.<sup>109</sup>

The original vision of zoning, however, has been substantially modified. It has become clear that a form of zoning that attempts to anticipate and determine in advance all future land uses cannot accommodate the pressures for change in land development.<sup>110</sup> Thus, in order to adapt to changing circumstances and demands, zoning has evolved from its original, rigid prospective focus to a system of flexibility and discretion in administrative bodies.<sup>111</sup> Changes to zoning classifications have become normal procedure, not an exception, thus weakening the notion that zoning categories are determined in advance and apply uniformly.<sup>112</sup> As Carol Rose has described, “small adjustments are the everyday fare of local land regulations.”<sup>113</sup> Thus, the legislative/adjudicative test is misplaced in a land use system where development proceeds mainly on a piecemeal, individualized basis in response to developer requests, and therefore few decisions, by the terms of the test, can be categorized as legislative.<sup>114</sup>

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<sup>108</sup> See *Snyder*, 595 So. 2d at 72 (“It was believed that the local governmental body would allow or disallow under fixed terms, applicable to all, a particular type of development . . . .”); Johnstone, *supra* note 89, at 407 (describing early zoning as “self-executing in that the ordinance would clearly set forth what could or could not be done”).

<sup>109</sup> See Cordes, *supra* note 107, at 166 (describing how early vision of zoning contemplated “only minor adjustments through the use of variances, special-use permits, and rezoning,” and noting that “the above forms of relief . . . were clearly intended to be used infrequently and in exceptional cases”); Johnstone, *supra* note 89, at 406-07 (noting that objective of early zoning was “to create stability” but that “it was recognized that some flexibility in the system might, on occasion, be needed”).

<sup>110</sup> See Johnstone, *supra* note 89, at 407 (“It has become evident that the relatively fixed and predetermined form of zoning as initially conceived is unsuited to the manifold pressures for change, often unpredictable, in how land, especially urban land, should be developed and used.”).

<sup>111</sup> See Cordes, *supra* note 107, at 168 (“Both courts and commentators have recognized that discretion is an inevitable and necessary part of zoning decisionmaking.”); Johnstone, *supra* note 89, at 406-07 (noting move in many localities toward more flexibility and more discretion for local zoning administrators and governing bodies).

<sup>112</sup> See *Snyder*, 595 So. 2d at 72-73 (explaining that although original vision of zoning was that of “fixed-blueprint of development,” the reality today is that land is zoned with “a ‘wait and see’ attitude,” and consequently, “rezoning becomes not the exception, but the rule”).

<sup>113</sup> Rose, *supra* note 102, at 841.

<sup>114</sup> Furthermore, closely scrutinizing adjudicative decisions may be undesirable because of the loss of flexibility. See Stanley D. Abrams, *Flexible Zoning Techniques to Meet State and Local Growth Policies*, 1994 A.L.I.-A.B.A. Land Use Inst.: Plan., Reg., Litig., Eminent Domain, & Compensation 537, 539-40 (urging that “traditional Euclidian zoning is too rigid . . . to ensure success” and must be replaced by “flexible zoning techniques”); Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. Land Use & Envtl. L. 45, 78-80 (1994) (advocating flexible zoning scheme); James Marwedel, *Opting for Performance:*

As with zoning decisions, in the area of exactions, municipalities are not always able to determine the appropriate exaction in advance and sometimes assess exactions on a case-by-case basis. Thus, the discretionary approach may be an unrealistic and ineffective way for courts to separate legislative from adjudicative actions. Exactions are traditionally considered to be either imposed through ordinances that specifically mandate the type and amount of the condition to be exacted, or the result of negotiations on an ad hoc, project-by-project basis, between the municipality and the permit seeker.<sup>115</sup> However, there are also many hybrid situations, where the ordinance gives the administrative body some guidance but also allows for some discretion. Exactions surveys have shown that for some types of exactions, over one-third were imposed utilizing a standard with some flexibility.<sup>116</sup>

This fact may explain the disagreement between the majority opinion and Justice Souter's dissent in *Dolan*. Souter would have

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An Alternative to Conventional Zoning for Land Use Regulation, 13 J. Plan. Literature 220, 221 (1998) (noting that some have argued that "conventional zoning is not flexible enough to adequately handle changes in market demands, development technology, community values, and economic and social conditions"); Stewart E. Sterk, Publicly Held Servitudes in the New Restatement, 27 Conn. L. Rev. 157, 167 (1994) ("Zoning without individualization is neither desirable as a matter of planning theory nor possible as a matter of hard political reality.").

In fact, a case-by-case zoning process may be more economically efficient. Economic theory posits that free, voluntary exchange of entitlements produces an efficient result and that judicial rules inhibiting such exchanges form barriers to efficiency, and prevent results "that leave all parties—the community, the developer, and ultimately the developer's customers—better off." William A. Fischel, Introduction: Utilitarian Balancing and Formalism in Takings, 88 Colum. L. Rev. 1581, 1583 (1988) [hereinafter Fischel, Utilitarian Balancing]. Thus, the heightened scrutiny of adjudicative exactions established in *Dolan* would decrease efficiency because it inhibits a flexible negotiations process. See William A. Fischel, The Economics of Land Use Exactions: A Property Rights Analysis, 50 Law & Contemp. Probs. 101, 104-05 (1987) (describing rules that require "payments by developers [to] be earmarked for expenditures related to the project" as example of inefficient judicial restraint). But see Marwedel, *supra*, at 221 (stating that main virtues of conventional, non-flexible zoning are certainty and predictability to developers); *infra* Part III.A (discussing fear of extortion in adjudicative exactions setting).

<sup>115</sup> See generally *supra* Part I.B.

<sup>116</sup> See Elizabeth D. Purdum & James E. Frank, Community Use of Exactions: Results of a National Survey, in Development Exactions, *supra* note 5, at 128. For land dedication exactions, 18.1% were formula based, 25.0% were made utilizing a standard with some flexibility, and 29.5% were case-by-case determinations. For building or installing facilities, 10.7% were formula based, 34.4% utilized a standard with some flexibility, and 25.9% were done on a case-by-case basis. For fee payments, 25.4% were formula based, 7.8% utilized a standard with some flexibility, and 17.0% were done on a case-by-case basis. See *id.* at 128; see also Gus Bauman & William H. Ethier, Development Exactions and Impact Fees: A Survey of American Practices, 50 Law & Contemp. Probs. 51, 57 (1987) (reporting on exactions survey that showed that some communities considered unwritten policies, which usually involve some flexibility, to be official policies).



classified the exaction as legislative because it was imposed pursuant to the city's development code, but the majority considered it adjudicative because it was applied on an individualized basis.<sup>117</sup> The inability to use the discretionary or functional approach to distinguish legislative from adjudicative decisions may also explain some of the confusion in the lower courts struggling to interpret *Dolan*.<sup>118</sup> An example from the caselaw is a good illustration of the problems that courts have in determining whether a decision is legislative or adjudicative based on the functional or discretionary approaches. In *Loyola Marymount University v. Los Angeles Unified School District*,<sup>119</sup> a California statute authorized school district boards to place conditions on development projects in order to fund construction and upkeep of school facilities, and set forth guidelines regarding these conditions.<sup>120</sup> Pursuant to this section, the school district imposed a school development fee on the university's application for a construction permit, determining that the construction was within the statute's reach.<sup>121</sup> The court determined that this was a broadly applicable fee and thus shielded from *Dolan*'s heightened scrutiny.<sup>122</sup> However, this exaction seems to be somewhere in the middle of adjudicative and legislative; the legislature gave some guidelines, but the administrative body retained considerable discretion as well.

Because exactions may be imposed according to some preestablished standards, but also with some flexibility, it may be quite difficult for courts to draw the line between legislative and adjudicative exactions by focusing on the extent to which the decisions are discretionary. In reality, the discretionary powers of municipal authorities exist along a continuum and seldom fall into the neat categories of a fully predetermined legislative exaction or a completely discretionary administrative determination as to the appropriate exaction.

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<sup>117</sup> See *supra* notes 42-46 and accompanying text. A Tigard planner noted that the rationale for the conditions came from studies conducted in the 1970s and 1980s that showed that flooding would occur if the floodplain was not protected. Thus, the floodplain was designated a recreational greenway in the comprehensive plan. In fact, prior to the *Dolan* case, two other property owners gave up land for the bikepath when proposing development in the floodplain. See Robin Franzen, *Oregon's Takings Tangle: The Planning World Awaits the Supreme Court's Decision in Dolan v. Tigard*, *Planning*, June 1994, at 13.

<sup>118</sup> See *supra* Part I.B.

<sup>119</sup> 53 Cal. Rptr. 2d 424 (Ct. App. 1996).

<sup>120</sup> See *id.* at 427-28.

<sup>121</sup> See *id.* at 427.

<sup>122</sup> See *id.* at 434-35.

### III THE DANGER OF EXACTIONS AND AVAILABLE PROPOSALS THAT ADDRESS THE PROBLEM

As discussed above, it may be prohibitively difficult and unrealistic to draw a line between legislative and adjudicative decisions. However, as the Court in *Dolan* suggested, perhaps the distinction is warranted, no matter how difficult it is to make, because the nature of adjudicative exactions makes heightened scrutiny necessary. Part III.A argues that the problems associated with exactions, and with the land use process in general, will not be solved by applying “rough proportionality” only to adjudicative decisions. The extortion and inequitable economic burdens that local governments potentially impose on landowners through administrative processes can occur just as easily in the legislative context.

It may be time to reconsider the effectiveness of *Dolan*’s legislative/adjudicative distinction on which the application of the “rough proportionality” test relies. Scholars have suggested a more effective way to combat the Court’s concerns with exactions—a close examination of the negotiation process in order to uncover inequities to the landowner. Part III.B explains the elements of voice and exit that commentators have identified as necessary to assure a fair negotiation process.

#### A. *A Line that Does Not Solve the Exactions Problem*

The Court in *Dolan* applied strict scrutiny because it was concerned with the risk that municipalities would impose exactions in an “extortionate” manner, demanding wholly unrelated and arbitrary conditions from a vulnerable permit seeker. For instance, when discussing *Nollan*, the Court stated that in the absence of a nexus between the development condition and the harm to be avoided, the local government was merely “trying to obtain an easement through gimmickry” and was practicing an “out-and-out plan of extortion.”<sup>123</sup> In addition, the Court discussed the distinction that must be made between a valid exercise of the police power and an unconstitutional exaction as one that involves determining whether “the requirement . . . is merely being used as an excuse for taking property

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<sup>123</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (quoting *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 837 (1987) (quoting *J.E.D. Assocs. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981))).

simply because at that particular moment the landowner is asking the city for some license or permit.’”<sup>124</sup>

The fear of government misbehavior is not new in the municipal government context, or in the land use context in particular.<sup>125</sup> In the context of exactions, extortion has become a shorthand way to describe the situation in which a local government takes advantage of a developer by extracting concessions from him during the permit approval process in order to receive some benefit desired by the government but unrelated or disproportionate to the proposed development at hand. Government decisionmaking can also lead to arbitrary results where similar developments are subject to very different conditions. Exactions have been seen by many as posing the threat of excessive regulation because governments may be encouraged to use exactions as a way to raise money.<sup>126</sup> In addition, many fear that mu-

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<sup>124</sup> Id. at 390 (quoting *Simpson v. City of North Platte*, 292 N.W.2d 297, 301 (Neb. 1980)).

<sup>125</sup> See, e.g., *Snyder v. Board of County Comm’rs*, 595 So. 2d 65, 73 (Fla. Dist. Ct. App. 1991) (describing rezoning process as highly politicized and based on “whose ox is being fattened or gored” and worrying that local governments would attempt to “make a rezoning decision as leverage in order to negotiate, impose, coerce and compel concessions and conditions on the developer”), quashed on appeal on other grounds, 627 So. 2d 469 (Fla. 1993); *Fasano v. Board of County Comm’rs*, 507 P.2d 23, 30 (Or. 1973) (en banc) (justifying its holding that rezonings should not be granted legislative presumption of validity by stressing “the almost irresistible pressures that can be asserted by private economic interests on local government”); Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 21, *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (No. 93-518) (describing imposition of exactions as “process generat[ing] wrangling and deception” and forum for “destructive strategic games” between municipality and its citizens); Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 Colum. L. Rev. 473, 475 (1991) (noting that fear that “land use regulators will ‘extort’ property owners has its roots in the allegations of coercion and illicit motive that long have animated judicial and academic debate”); Frona M. Powell, Challenging Authority for Municipal Subdivision Exactions: The *Ultra Vires* Attack, 39 DePaul L. Rev. 635, 637, 671 (1990) (recognizing that extortion is used as argument by opponents of exactions); Theodore C. Taub, Florida’s Growth Management Concurrency Doctrine—Moratorium or Impetus to Fund Needed Infrastructure, 1989 A.L.I.-A.B.A. Land Use Inst.: Plan., Reg., Litig., Eminent Domain, & Compensation 444, 445 (describing exactions process as “freewheeling”).

<sup>126</sup> See Been, *supra* note 125, at 504 (adding that underregulation could also result from municipalities becoming dependent on exactions for producing revenue, thereby selling development cheaply).

However, there is little agreement over what constitutes extortion, and many others view exactions as an appropriate and efficient land use tool. Exactions force the developer and her customers to contribute to the increased infrastructure costs necessitated by the development. See *id.* at 482-83; Bowling, *supra* note 13, at 1 (“Exactions are required because, as you develop property more intensely, you place more of a burden on local government’s infrastructure. Exactions allow government to defray that burden.” (quoting Kurt J. Fischer, land use lawyer for Maryland municipalities)). Exactions also mitigate the negative effects of development, allow for growth that dwindling municipal finances would otherwise stall, and serve as a growth control measure. See *Home Builders Ass’n v.*

municipalities will overcharge: They will charge the developer more than the costs of the development to the community and redistribute the extra amount to residents.<sup>127</sup> It is also a way to avoid raising taxes, a politically unpopular move.<sup>128</sup>

Several of the lower courts applying *Dolan* have made explicit what the Court did not: They consider extortion to be more likely when the exaction is imposed on an individual basis.<sup>129</sup> Commentators argue that abusive behavior is more likely in an adjudicative setting because the decisionmaking process is discretionary in nature.<sup>130</sup>

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City of Beavercreek, Nos. 94-CV-0012, 94-CV-0062, 1996 WL 812607, at \*2 (Ohio Ct. C.P. (Greene County) Feb. 12, 1996) (calculating impact fee by determining “cost of improvements necessitated by . . . development” and subtracting funds raised through other means); Been, *supra* note 125, at 482-83. Finally, economic theory urges that administrative bodies of local governments can be seen as economic actors who share the market with other municipalities, and consequently, exactions are not extortion but rational economic behavior. See generally *id.*

<sup>127</sup> See Been, *supra* note 125, at 504; Christopher J. St. Jeanos, Note, *Dolan v. Tigard* and the Rough Proportionality Test: Roughly Speaking, Why Isn't a Nexus Enough?, 63 Fordham L. Rev. 1883, 1903-07 (1995); see also Daniel William Russo, Note, Protecting Property Rights with Strict Scrutiny: An Argument for the “Specifically and Uniquely Attributable” Standard, 25 Fordham Urb. L.J. 575, 595-96 (1998) (arguing that bundling permits and exactions increases risk of overreaching); Sprung, *supra* note 52, at 1332 (arguing that when government overstates its entitlement through exaction, it “has used its power to excess and has not paid for the consequences”).

<sup>128</sup> See Taub, *supra* note 125, at 445.

<sup>129</sup> See, e.g., Ehrlich v. City of Culver City, 911 P.2d 429, 460 (Cal. 1996) (“[W]hen a municipality singles out a property developer for a development fee not imposed on others, a somewhat heightened scrutiny of that fee is required to ensure that the developer is not being subject to arbitrary treatment for extortionate motives.”); *id.* at 439 (“[A] discretionary context presents an inherent and heightened risk that local government will manipulate the police power to impose conditions *unrelated* to legitimate land use regulatory ends.”); Loyola Marymount Univ. v. Los Angeles Unified Sch. Dist., 53 Cal. Rptr. 2d 424, 434 (Ct. App. 1996) (commenting that legislatively formulated exactions imposed on broad class of property owners present less risk of extortion).

Michael Allan Wolf has suggested that the reasoning of the *Fasano* court, which also found that adjudicative land use decisions were not entitled to deference normally accorded to legislation, see *supra* notes 86, 103, 125, influenced the *Dolan* Court. See Michael Allan Wolf, Fruits of the “Impenetrable Jungle”: Navigating the Boundary Between Land-Use Planning and Environmental Law, 50 Wash. U. J. Urb. & Contemp. L. 5, 55 (1996) (noting that like *Fasano* court, *Dolan* Court was “worried that the Tigard City Planning Commission may have been so anxious to realize an agenda . . . that it overlooked the legitimate grievances of the landowner”).

<sup>130</sup> See, e.g., Brian W. Blaesser, Discretionary Land Use Controls: Avoiding Invitations to Abuse of Discretion 5-15 (1997) (discussing five categories where discretionary abuse is most prevalent: conditional uses; vague regulatory statements of purpose; advisory commissions whose recommendations are given substantial weight by legislatures; procedures requiring advisory boards to give approval; and application review processes). There is an idea that exactions should not be allowed because the process of negotiating exactions often involves haggling between a planning board and an applicant over money, and this is what causes the government abuse. See Fred P. Bosselman, Selected Recent State Court Cases on Developer Exactions, 1989 A.L.I.-A.B.A. Land Use Inst.: Plan., Reg., Litig., Eminent Domain, & Compensation 67, 69-72.

Such discretion results in government arbitrariness and undermines the rule of law.<sup>131</sup> A case-by-case determination may be particularly problematic because it makes it difficult for the developer to predict the ultimate cost of her project and because of the potential for unequal treatment.<sup>132</sup> Thus, they consider heightened scrutiny for adjudicative exactions a solution to the “extortion” problem because it forces local governments to “improve the substantive formulation of standards for discretionary review.”<sup>133</sup> Legislative enactments, on the other hand, which affect many people, are less likely to violate the Takings Clause<sup>134</sup> because the legislative and political processes will protect landowners.<sup>135</sup>

It is difficult nevertheless to see how *Dolan*’s application of the legislative/adjudicative distinction would solve the problem. In the local government setting, legislative bodies and legislative decisions can also exhibit the evils of overcharging and excessive regulation, while the adjudicative context may incorporate safeguards that decrease the possibility of such extortion.<sup>136</sup> Thus, if legislative decisions are shielded from the “rough proportionality” standard and adjudicative decisions are subjected to it, the result may be that extortionate behavior is granted deference, while fair processes are overly scrutinized.

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<sup>131</sup> See Stewart E. Sterk, *Nollan*, Henry George, and Exactions, 88 Colum. L. Rev. 1731, 1747-51 (1988). Sterk also cites the “death of planning” and increased opportunities for rent-seeking behavior as additional dangers of exaction schemes. See *id.* at 1742-47.

<sup>132</sup> See Bauman & Ethier, *supra* note 116, at 62 (“A project-by-project approach to exaction policy . . . creates not only uncertainty, with all its financial ramifications, but also the possibility of uneven governmental treatment, as well as an arbitrary system for dealing with public facility requirements.”); Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 Wis. L. Rev. 873, 900 (noting that “the ad hoc nature of bargaining for exactions raises serious concerns about inequities in the exercise of discretion”).

<sup>133</sup> Blaesser, *supra* note 130, at 45.

<sup>134</sup> See Craig R. Habicht, Note, *Dolan v. City of Tigard*: Taking a Closer Look at Regulatory Takings, 45 Cath. U. L. Rev. 221, 265 n.201 (1995) (arguing that legislation is less likely to violate takings principle that government should not force individuals to pay for goods needed by public at large because legislation “affect[s] a larger number of individuals and thereby diffuse[s] the public burden”).

<sup>135</sup> See Brandt, *supra* note 88, at 1324 (noting that many cases applying *Dolan* support proposition that “heightened scrutiny is only necessary when the legislative and political processes are absent or substantially reduced”).

<sup>136</sup> See, e.g., St. Jeanos, *supra* note 127, at 1899 (noting that legislators can also perform “taking by subterfuge” (quoting Frank Michelman, *Takings*, 1987, 88 Colum. L. Rev. 1600, 1612 (1988))). In addition, a decision of a legislative body may not really be what is considered “legislative” at all. See *supra* Part II.A. “From the point of view of the property owner, the consequence of a taking is the same whether done by the legislative, executive, or judicial branches of government.” James L. Huffman, *Dolan v. City of Tigard*: Another Step in the Right Direction, 25 *Envl. L.* 143, 150 (1995).

Legislative processes in small communities do not function according to the representative democracy model applicable to the larger governments of the federal and state systems. The federal model breaks down perhaps most dramatically in the assumptions about majority influence over the legislature. For jurisdictions with many voters, it is assumed that “the coalition-building safeguard” will somewhat protect minorities from majoritarian oppression.<sup>137</sup> Local governments, however, come closer to a pure form of majoritarianism because “they usually lack the electoral diversity that comes with large land area and large population.”<sup>138</sup> This lack of diversity means that elections and legislative decisions are characterized by concern over single issues and, consequently, that minorities cannot form coalitions to protect their interests.<sup>139</sup>

Therefore, legislative land use decisions made at the local level may reflect classic majoritarian oppression. And developers, whose interests judicial rules like *Dolan* aim to protect, are precisely the kind of minority whose interests might actually be ignored.<sup>140</sup> For instance, the single issue that characterizes the legislative process of many suburban communities in the United States is the antidevelopment issue.<sup>141</sup> The majority of suburban households live in owner-occupied units, and thus, discrimination against a prodevelopment minority is quite likely given that they are so outnumbered.<sup>142</sup>

In addition to majoritarianism, other characteristics of the land use legislative process also create a substantial chance for government overreaching. For instance, municipalities do not take outsiders’ views into account since, by their nature, outsiders do not have the opportunity to vote.<sup>143</sup> Developers may be precisely these outsid-

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<sup>137</sup> Rose, *supra* note 102, at 873.

<sup>138</sup> Fischel, *Utilitarian Balancing*, *supra* note 114, at 1582.

<sup>139</sup> See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 *Yale L.J.* 385, 405-07 (1977); Rose, *supra* note 102, at 872-73.

<sup>140</sup> This discussion applies to small, local developers and large, outside ones since in both cases their interests represent a minority position in small municipalities.

<sup>141</sup> See Ellickson, *supra* note 139, at 406-07.

<sup>142</sup> See *id.* at 406. It makes sense that majorities would want to receive the benefits from the overcharge imposed on the developer, and that a government responsive to the majority would aim to satisfy this desire. Extortion in the exactions context is defined precisely as this kind of overcharging. See *supra* notes 126-28 and accompanying text.

<sup>143</sup> See Fischel, *Utilitarian Balancing*, *supra* note 114, at 1582 (noting that political costs of growth controls and exclusionary zoning is minimal because those affected live outside of jurisdiction); Russo, *supra* note 127, at 597 (“Often, local politics create factions that discriminate against outside developers or individuals who do not have voting rights or political clout within the community. Upon entering the community with a development proposal, these individuals must face local land use regulations without the aid of the political process.”); Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 *Vand. L. Rev.* 831, 832 (1992) (“[U]nconstrained municipalities

ers.<sup>144</sup> For example, in *Home Builders Ass'n v. City of Scottsdale*,<sup>145</sup> an organization representing Arizona developers challenged an impact fee ordinance.<sup>146</sup> The Arizona Supreme Court did not apply *Dolan*'s "rough proportionality" test because it reasoned that the case presented a legislative decision and thus did not pose the threat of "regulatory leveraging" present in administrative decisions where developers are bargaining with government officials.<sup>147</sup> However, there may be many developers, including the ones involved in this case, interested in the city as a site for business but who did not have a chance to vote for the officials who made the legislative determination to enact an impact fee.

On the other hand, the lack of political voice developers might face is counterbalanced by the possibility that they are wielding a different kind of political power. Developers might use their economic strength to exert "irresistible pressures" on local government, thus harming city residents.<sup>148</sup> For instance, in Detroit, a community group called Community Coalition opposed the granting of casino licenses to the MGM Grand company because it had the fewest African American investors<sup>149</sup> and gathered petition signatures threatening to bring

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might use exactions to 'extort' money from outsiders inadequately represented in municipal political processes . . .").

<sup>144</sup> The immediate discussion obviously only applies to outside developers. Although *Dolan*'s "rough proportionality" standard applies to all landowners, including small business owners such as Florence Dolan, see *infra* note 178 and accompanying text, a focus on large outside developers is useful because they are the parties that tend to take advantage of prodevelopment takings doctrines. See cases cited and discussed *supra* Part I.B; see also *infra* note 173 and accompanying text (noting that few municipalities impose exactions on long-time residents).

<sup>145</sup> 930 P.2d 993 (Ariz. 1997).

<sup>146</sup> See *id.* at 994.

<sup>147</sup> See *id.* at 1000.

<sup>148</sup> See *Fasano v. Board of County Comm'rs*, 507 P.2d 23, 30 (Or. 1973) (en banc); see also Karkkainen, *supra* note 114, at 58-59 (noting critique of zoning—for which "substantial evidence" exists—that "well-connected developers" succeed in getting zoning they need and that local officials use zoning power to get bribes and other private benefits from developers); Durwood McAlister, Editorial, City's Redevelopment Plan Must Be Nurtured, *Atlanta J. & Const.*, Oct. 17, 1991, at A16, available in Lexis, News Library, ATLJNL file (urging that "[t]here must be careful, constant and intensive oversight" of Atlanta redevelopment project because "[a]ny project of this size . . . invites cronyism and inside deals").

These fears can apply to both small, local developers who have long-standing political connections and large, outside developers with deep pockets. Although this kind of influence is not exactly the extortion posited by the *Dolan* Court and the lower courts following it, see *supra* notes 123-35 and accompanying text, its existence nonetheless challenges the assertion that local government legislative processes are necessarily more trustworthy than adjudicative ones.

<sup>149</sup> See Charles Hurt, Council Ponders Casino Rezoning, *Det. News*, Oct. 9, 1998, at 10C.

the issue to voters through a referendum.<sup>150</sup> City officials interpreted a city charter provision as eliminating the possibility of a referendum and passed the ordinance allowing the casino to begin operation.<sup>151</sup> Much suspicion surrounded the decision, and many claimed that “inside deals” between government officials and casino executives fueled the effort to pass the ordinance.<sup>152</sup>

In contrast to the many inequities that can arise in the legislative context, adjudicative settings offer mechanisms that may enhance equal treatment of competing interests. Parties to adjudicative proceedings usually retain significant procedural rights, including notice, the opportunity to be heard, and the right to cross-examine witnesses.<sup>153</sup> For example, hearings on variances allow interested parties to debate the correct interpretation of the substantive standards and the best application of the standards to the facts of the particular case.<sup>154</sup> Thus, even though a court does not review the substantive decision of an administrative body, procedural norms assure that the outcome is not arbitrary and that the decisionmakers receive all relevant information in order to achieve an informed and, hopefully, acceptable resolution.<sup>155</sup> Similar models that have been developed as a

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<sup>150</sup> See Santiago Esparza, *Judge Rejects Effort to Block MGM Casino*, *Det. News*, Jan. 14, 1999, at 2D.

<sup>151</sup> See *id.*; see also Hurt, *supra* note 149, at 10C (describing efforts by city administrators to inoculate casino license against referendum).

<sup>152</sup> See Hurt, *supra* note 149, at 10C (reporting on zoning ordinance changes in Detroit that are attempt by mayor and casino developers to block referendum on decision whether to grant casino license); Becky Yerak, *Casino Operator Fears Opposition May Hurt Detroit*, *Det. News*, Oct. 25, 1998, at 8C (reporting on “speech peppered with strongly worded rebukes and crowd-pleasing zingers” in which casino developer “warned that the city risks becoming an unsafe place to do business unless it makes changes in its political process” and urged city to disregard 5000-signature petition to halt casino project).

<sup>153</sup> See generally Ellickson & Been, *supra* note 83, at 413-15.

<sup>154</sup> See *Developments*, *supra* note 85, at 1505, 1507 (labeling this debate as “representational function” of due process); see also *Zoning and Planning*, *supra* note 92, §§ 774-786 (describing hearing requirements for decisions of boards of adjustments, which decide variance requests).

<sup>155</sup> See *Developments*, *supra* note 85, at 1507-08 (labeling these norms as “dignity function” of due process); Cordes, *supra* note 107, at 161 (noting “a growing recognition that . . . the meaningful assurance for proper zoning decisions must come from procedural rather than substantive protections”); *id.* at 169-70 (“Procedural safeguards not only would insure the presence of full information before decisionmakers, but would also promote the legitimacy and acceptability of decisions by allowing participation of landowners in the decisionmaking process.”). But see Jane Rutherford, *The Myth of Due Process*, 72 *B.U. L. Rev.* 1, 4-5 (1992) (arguing that due process has not protected certain segments of society and that equality principle is necessary for due process analysis to be effective); Lee Renzin, *Note, Advice, Consent, and Senate Inaction—Is Judicial Resolution Possible?*, 73 *N.Y.U. L. Rev.* 1739, 1767 & n.134 (1998) (stating that “[o]ne of the most prevalent criticisms of the procedural due process theory . . . is that procedural review of legislation is merely a ‘front’ for what truly amounts to substantive review”).



way to deal with the problems of exactions will be discussed in the next section.

*B. Looking to Existing Proposals to Formulate a Judicial Review Standard for Exactions*

Given the uncertainty over whether legislative land use decision-making is fairer than adjudicative processes, one may draw the conclusion that the “rough proportionality” standard should be applied to all exactions without making the legislative/adjudicative distinction.<sup>156</sup> However, such an extension of heightened scrutiny would be inconsistent with the *Dolan* Court’s reasoning. The *Dolan* Court itself explained its creation of the “rough proportionality” standard, which places the burden on the local government to justify the exaction, by limiting it to adjudication, as opposed to legislation which carries a presumption of constitutional validity.<sup>157</sup> Therefore, the extension of the “rough proportionality” test to all exactions would require new reasoning—currently unarticulated—which would be responsive to the *Dolan* dissent’s argument that even the Court’s current exactions review standard runs counter to accepted judicial review doctrine.<sup>158</sup>

The legislative/adjudicative distinction is not a useful determinate for applying heightened scrutiny because it does not adequately identify dangerous exactions,<sup>159</sup> but at the same time, some guard against government abuses in the exactions context is needed. The focus should be on recognizing which situations create great potential for the government to take advantage of permit seekers and to act arbitrarily. Land use scholars have already developed several theories and proposals to identify these situations, and it would be useful for

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<sup>156</sup> Justices O’Connor and Thomas have suggested that *Dolan* should apply to both legislative and adjudicative decisions. See *supra* note 81. For agreement, see Cordes, *supra* note 4, at 539-40 (arguing that “*Dolan* should apply to permit conditions even when imposed pursuant to legislative requirements”). In addition, after *Nollan*, Stewart Sterk suggested that heightened scrutiny might be appropriate as a way to constrain rent-seeking behavior on the part of municipalities. See Sterk, *supra* note 131, at 1744-47. After *Dolan*, similar reactions surfaced. See, e.g., St. Jeanos, *supra* note 127, at 1896-1907 (arguing that *Dolan* heightened scrutiny prevents municipalities from abusing police power, acting unfairly, and overreaching because of monopoly power over land use); see also Russo, *supra* note 127, at 577 (arguing for even higher level of scrutiny, namely “specifically and uniquely attributable” test).

<sup>157</sup> See *supra* notes 41-47 and accompanying text.

<sup>158</sup> See *supra* note 52; see also *supra* notes 41-47 and accompanying text. If the Court characterized all exactions as adjudicative, heightened scrutiny could be applied to all exactions without running afoul of the presumption of constitutionality afforded to generally applicable regulations. However, even given the difficulties in determining which exactions are legislative and which are adjudicative, see *supra* Part II, it seems that at least for some exactions, it would be hard to characterize them as anything but legislative.

<sup>159</sup> See *supra* Part III.A.

the Court to look to these proposals in formulating a judicial review standard for exactions, instead of using the ineffective legislative/adjudicative distinction. As many commentators have argued, those situations are present where aspects of the exactions *process* are flawed. Thus, courts should defer to legislatures where procedural protections are adequate, but should apply heightened scrutiny as developed by the *Dolan* Court when the process has failed or is likely to fail.<sup>160</sup>

Many commentators have stressed that sufficient procedural safeguards must accompany land use proceedings. Justice Stevens has argued that the Due Process Clause is a more appropriate vehicle than the Takings Clause by which to decide whether a local government has unfairly treated a property owner.<sup>161</sup> He believes that the Due Process Clause can protect property owners because it requires the government “to employ fair procedures in the administration and enforcement of all kinds of regulations.”<sup>162</sup> If these fair procedures are followed, Justice Stevens does not believe that a land use regulation should be considered a taking.<sup>163</sup> In addition, commentators have suggested that the problem of unfairness can be addressed by developing a standard procedural code—an administrative procedure act for local governments.<sup>164</sup>

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<sup>160</sup> This type of argument—that judges should only intervene where the political process is flawed—is similar to the central theme of John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980), and to William A. Fischel’s endorsement of this theme in the land use context, see William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 *Chi.-Kent L. Rev.* 865, 889 (1991) (“[I]n the long run, democratic political processes are firmer guarantees of individual freedoms, including economic freedoms, than any intellectual apparatus imposed upon them.”). This Note takes the position that such protection is sufficient in the exactions context because it concerns economic freedoms, but does not take a position on whether such an approach is sufficient when dealing with other kinds of individual freedoms. Cf. *id.* (“[J]udicial review of most economic regulations adopted in a democratic society should not be held by judges to require just compensation . . .”).

<sup>161</sup> See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 339 (1987) (Stevens, J., dissenting) (“[I]t is the Due Process Clause rather than [the regulatory takings doctrine] that protects the property owner from improperly motivated, unfairly conducted, or unnecessarily protracted governmental decisionmaking.”).

<sup>162</sup> *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 205 (1985) (Stevens, J., concurring). According to Justice Stevens:

The Due Process Clause of the Fourteenth Amendment requires a State to employ fair procedures in the administration and enforcement of all kinds of regulations. . . . [A]s long as fair procedures are followed, I do not believe there is any basis in the Constitution for characterizing the inevitable by-product of every [land use] dispute as a “taking” of private property.

*Id.*

<sup>163</sup> See *id.*

<sup>164</sup> For elaboration of one proposal, see Lincoln, *supra* note 82, at 694-98 (suggesting, among other things, that minimum procedures should be mandated by legislation, includ-

Carol Rose has focused on land use processes in her proposal of how to test the fairness and reasonableness of a land use decision. She argues that local land use decisions generally proceed in piecemeal fashion and aim to resolve and accommodate conflicts over property interests; the best dispute-resolution model in such an environment is negotiation and mediation.<sup>165</sup> Rose goes on to argue that “a mediation model . . . should strive to assure fairness and due consideration.”<sup>166</sup> Due consideration is assured through “voice,” and fairness is analyzed through the availability of “exit” when outcomes are predictable.<sup>167</sup> Voice is available when “interested parties [have] had enough opportunity to participate.”<sup>168</sup> The necessary elements of such participation include “a process for confronting factual and normative issues,” in which parties can make proposals and arrive at a “mutually acceptable solution.”<sup>169</sup> Sometimes appropriate parties may not step forward because their individual interest is weak due to

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ing: notice to all affected parties, substance and basis of decision in writing, and method of appeal).

Other commentators also have stressed the importance of developing procedural safeguards in land use matters, particularly rezonings. See Holman, *supra* note 86, at 139-43 (suggesting safeguards of: impartial tribunal, notice and opportunity to be heard, procedures consistent with fair trial, and process by which reviewing court can determine whether law and procedure were observed); Laurie Reynolds, *Local Subdivision Regulation: Formulaic Constraints in an Age of Discretion*, 24 Ga. L. Rev. 525, 548-49 (1990) (proposing that courts examine particular regulatory process to determine what types of procedural safeguards would best protect landowners, instead of using inaccurate legislative/quasi-judicial labeling approach to determine safeguards); Rose, *supra* note 102, at 867-70, 882-93 (criticizing *Fasano* labeling approach for simply placing federal administrative law concepts into local government setting, instead of determining what safeguards are necessary in unique local decisionmaking process). But see Carl J. Peckinpugh, Jr., *Comment, Burden of Proof in Land Use Regulation: A Unified Approach and Application to Florida*, 8 Fla. St. U. L. Rev. 499, 520 (1980) (agreeing with *Fasano* labeling approach).

In addition, some commentators have suggested that public participation can alleviate the problem of developers exerting undue influence on government officials. See, e.g., Karkkainen, *supra* note 114, at 83-84 (arguing that “decentralized and participatory neighborhood zoning process” allows full information about preferences to emerge, shifts decisionmaking away from “‘interest group’ paradigm,” and “combat[s] bribery and the corrupting influence of political contributions by developer interests”).

<sup>165</sup> See Rose, *supra* note 102, at 847, 887-92 (advocating adoption of framework of “dispute mediations” to resolve disagreements about piecemeal land use changes in which government’s role in land use conflicts is as mediator between and among neighbors and developers).

<sup>166</sup> *Id.* at 893.

<sup>167</sup> See *id.* at 907-10. These two concepts were developed originally in the industrial organization context by Albert O. Hirschman, see generally Albert O. Hirschman, *Exit, Voice, and Loyalty* (1970), and have been applied to the land use context by other scholars as well. Professor Been uses the “exit framework” to explain why heightened scrutiny may be inappropriate in the exactions context. See *infra* notes 172-75 and accompanying text.

<sup>168</sup> Rose, *supra* note 102, at 894.

<sup>169</sup> *Id.* at 896-97.

cumulative or future effects; in this case, preexisting studies or impact reviews can act as a substitute.<sup>170</sup> In addition, voice requires that the government fully disclose the reasons for its decision; this furthers a fair outcome because a government is encouraged to consider alternatives and because a party will be satisfied that her objections have been heard.<sup>171</sup>

“Exit” is present when the party can “choose to avoid the deal” by leaving the community.<sup>172</sup> Vicki Been has argued that heightened scrutiny may be inappropriate in the exactions context because the threat that the developer will leave prevents the government from overreaching.<sup>173</sup> This concept takes its cue from the economic princi-

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<sup>170</sup> See *id.* at 895-96.

<sup>171</sup> See *id.* at 899-900. In a political context, voice can refer to the ability to have an effect on the legislative process. This ability is diminished when the landowner lives outside of the jurisdiction and is consequently not represented by the legislators. See discussion *supra* Part III.A. Some argue that legislative voice is also weakened when factionalism is strong in the community because the special-interest coalition building necessary for a well-functioning majoritarian democracy is not present. See Fischel, *supra* note 160, at 893 (explaining difference between effective special interest, pluralist democratic model and dangerous paradigm of majoritarian factionalism where median voter dominates local politics); discussion *supra* Part III.A; see also Carol M. Rose, Takings, Federalism, Norms, 105 *Yale L.J.* 1121, 1133-38 (1996) (book review) (arguing that voice may be more significant in local government setting).

<sup>172</sup> See Been, *supra* note 125, at 509 (“[A] developer dissatisfied with a community’s exactions policy can take the project to another jurisdiction that offers better terms.”); Rose, *supra* note 102, at 901; see also Hirschman, *supra* note 167, at 21-29 (describing exit option in business firm setting and arguing that it results in “efficient allocation of resources”). The idea that local governments respond to competition for residents was introduced by Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416 (1956) (arguing that local governments are subject to same market mechanisms as economic market for goods and that competition for residents forces them to arrive at optimal allocation of public goods). Tiebout was making a descriptive, not a normative, argument, and other scholars have argued that his model of government in which “the critical actors are those with the weakest ties to the locality” is not a desirable reality. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 *Colum. L. Rev.* 346, 415-16 (1990). Tiebout’s descriptive claim, though, is generally accepted. See Been, *supra* note 125, at 517-28 (showing that empirical data supports “Tiebout’s core observation—that local jurisdictions compete for residents”). But see *id.* at 515 nn.197-98 (listing sources critiquing Tiebout’s assumptions); Briffault, *supra*, at 415 n.304 (“The Tiebout model . . . has been subject to considerable debate on positive as well as normative grounds.”).

<sup>173</sup> See Been, *supra* note 125, at 476 (“[S]cholars should examine the exit options available to property developers who are unhappy with the conditions upon which a local government has offered a land use permit, and evaluate whether those protections render heightened judicial scrutiny such as the *Nollan* nexus test unnecessary or inadvisable.”). But see generally Sterk, *supra* note 143 (arguing that market forces are inadequate to eliminate potential for municipalities to abuse exactions process because municipalities may operate with exclusion, not competition, as land use objective; even with competition, municipalities can extract high rents from landowners; and some municipalities are so unique as to behave like monopoly).

For long-standing residents with diminished options as to relocation, the environment of competition does not exist, and government will therefore not be constrained in its im-

ple that if a producer faces adequate competition, he will charge a fair price. Carried over to the government setting, the theory of competitive federalism argues that in the same way, a government will be constrained from unfair behavior if it has to compete for the chance to regulate.<sup>174</sup> Without exit, the government has essentially created a monopoly situation and is not operating under the disciplining market forces of competition.<sup>175</sup>

As Rose and Been have proposed, where the safeguards of voice and exit exist, heightened judicial scrutiny is unnecessary because those two aspects of the land use process will on their own work to produce fair results. Where voice is not effective or exit is unavailable, substantive review of the result as developed by the *Dolan* Court becomes warranted. A court needs to step in to constrain the government because the landowner did not have an opportunity to argue for such constraints, nor did she have the ability to leave the jurisdiction if not satisfied with the result.

If the Court in *Dolan* had utilized the voice and exit framework just described, it would have arrived at the conclusion that scrutiny of the substantive result was unnecessary to protect Dolan from government abuse. Dolan certainly had voice. At each step of her lengthy application process—initial application to the City Planning Commission for the permit, then a request for variances from the conditions that was reviewed by both the Commission and the city council, and finally an appeal to LUBA<sup>176</sup>—Dolan had the opportunity to argue her position and the relevant government body explained the reasons for its decision.<sup>177</sup> Evaluating whether Dolan had the exit option is a

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position of exactions. Few jurisdictions actually impose exactions on such residents, though. Furthermore, the ability to voice their dissatisfaction through the political process is likely to be available for these types of homeowners. See *id.* at 543. Note that in the *Dolan* caselaw, there does not seem to be any case in which an exaction was imposed on an ordinary resident who would have limited options to exit. See *supra* Part I.B. And *Dolan* itself was a case about commercial, not residential, property.

<sup>174</sup> See Been, *supra* note 125, at 475 (noting that law incorporates market assumption that market forces will constrain overreaching where government competes for opportunity to regulate); see also *id.* at 506-07 (“Just as competition among producers of products and services constrains greed, the theory of competitive federalism postulates that competition among and within governments and between a government and private parties serves as a significant constraint upon the behavior of the politicians and bureaucrats who make up the government.”). Data show that a competitive market exists for exactions because they tend to impose lower costs than the actual cost of providing the services. See *id.* at 511-28. However, as in most markets, perfect competition does not exist. See *id.* at 529-33.

<sup>175</sup> See *id.* at 476.

<sup>176</sup> See *Dolan v. City of Tigard*, 512 U.S. 374, 379-83 (1994).

<sup>177</sup> See *id.*

more difficult question.<sup>178</sup> As Richard Briffault explained, “people are not equally mobile, and exit is not equally easy for all residents.”<sup>179</sup> Thus, the question becomes: When does an individual have enough ease of mobility such that the exit option sufficiently protects her from government overreaching? This Note takes the position that it is fair to attribute the exit option to businesses while it is generally unfair to assume the same for residents. To quote the language of Briffault again: “Residents are, to some degree, grounded by social forces. The relocation decisions of businesses and investors, by contrast, are usually less constrained by feelings of community or attachments to the neighborhood.”<sup>180</sup>

The focus on voice and exit as ways to assess the procedural adequacy of adjudicative decisions serves two purposes. It assures that the landowner has been treated fairly, and it stresses the importance of acknowledging the reality of exactions. Legislative bodies do not always have all the necessary information they need to make an ad-

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<sup>178</sup> It also may explain why Dolan’s situation was such a good case to bring to the Supreme Court: At first glance, she elicits much sympathy since she was a longtime small-business owner in the Tigard community. But for purposes of the exit analysis, she should be considered a business owner, not a resident, because the conditions placed on her development application applied to her business property, not her private residence.

<sup>179</sup> Briffault, *supra* note 172, at 420.

<sup>180</sup> *Id.* at 421 (footnote omitted); see also Fischel, *supra* note 160, at 891 (“Businesses can normally protect themselves through the political process and by the self-help remedy of relocation and reallocation.”); *id.* (“The term exit includes downsizing and other elastic supply responses, not just physically leaving the jurisdiction.”). Briffault goes on to explain that residents have less mobility because of economic factors: the inability to move to a more affluent neighborhood even if they desire the improved services; prohibitively high relocation costs; and the necessity to reside where there is job access. See Briffault, *supra* note 172, at 420. Residents are also constrained in mobility by social factors: for example, sentimental ties to a community and the need to live near family and friends. See *id.* at 421; see also Elaine B. Sharp, “Exit, Voice, and Loyalty” in the Context of Local Government Problems, 37 *W. Pol. Q.* 67, 73 (1980) (concluding that mobility differs by race, with blacks less likely to move than whites). But see William A. Fischel, *Lead Us Not into Penn Station: Takings, Historic Preservation, and Rent Control*, 6 *Fordham Envtl. L.J.* 749, 751 (“Exit does not work where the asset being regulated is immovable or otherwise inelastic in supply . . . . The paradigm of that, of course, is land. . . . [B]ecause land cannot exit, being immovable, it is also vulnerable to excessive regulation.”). The answer to Fischel’s argument may be that although the land itself cannot move, the business owner currently occupying the land can move to another piece of land, and the threat that this business capital may move is what constrains local governments. See Rose, *supra* note 171, at 1133 (“You may not be able to move your land out of a local jurisdiction if you disapprove of a local measure, but you can move your other business assets. That is why exit can be a constraint on local government.” (footnote omitted)).

For a more nuanced and data-supported explanation of when exit is not a sufficient protection from excessive government regulation, and for an argument that exit is a sufficient protector for developers but not necessarily for landowners who owned land in the jurisdiction before it began to impose exactions, see Been, *supra* note 125, at 476 n.19, 539-43.

vance determination as to the appropriate exaction to impose; instead, they rely on the help of administrative bodies to fill in the details.<sup>181</sup> Any judicial review standard for exactions should take into account the necessity of such administrative discretion and flexibility and recognize that it is often impossible to formulate rigid norms prospectively. Scrutinizing procedural safeguards in the first instance and reserving substantive scrutiny for circumstances where procedural protections have failed promote this goal by recognizing the unique qualities of the local government setting.

### CONCLUSION

The distinction that the *Dolan* Court made between legislative and adjudicative decisions created much confusion in the lower courts, resulting in inconsistent application of the distinction and disagreement over whether the characterization of the decision should determine the application of “rough proportionality.” Upon closer examination of the problem, it is clear that no method exists that would make the line between legislative and adjudicative decision-making easy to draw because the reality of most local government structures and of the land use process is in conflict with the distinction.

Moreover, the distinction fails to address the policy problems *Dolan* intended to solve: coercive and unfair government behavior. Several frameworks already have been developed that can be used to create a new exactions standard. A framework that strives to assure a fair negotiation process—through the analysis of the principles of voice, or adequate participation, and exit, or the opportunity to walk away from the deal—is particularly useful for the development of a new standard. Alternatively, lower courts can use this framework to understand how to deal with the concerns of the *Dolan* Court. The Court justified the creation of the “rough proportionality” standard by

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<sup>181</sup> See Purdum & Frank, *supra* note 116, at 128 (reporting that, for land dedications and for requirements to build or install facilities, results of survey show case-by-case determination or flexible standard was used more than half of time); Sterk, *supra* note 143, at 851 (“[P]re-set standards rarely determine the amount of municipal exactions; instead, exactions are generally the product of dealmaking between municipality and developer.”); see also Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 *UCLA L. Rev.* 77, 132 (1995) (noting that nuisance law also uses case-by-case treatment).

Similarly, Carol Rose argues that, because local governments operate on a small scale and quite differently from state and national legislatures, they need their own judicial review models, see Rose, *supra* note 106, at 1171, which emphasize the importance of “identify[ing] and build[ing] upon the factors that lend legitimacy and institutional competence to local decisionmaking,” see Rose, *supra* note 102, at 846; *id.* at 882-910. Rose described real-life land use regulation as local boards mediating deals between neighbors and developers, not applying predetermined, general standards. See Rose, *supra* note 106, at 1169-70.

distinguishing adjudicative decisions because it was concerned about the ability of an individual landowner to protect herself from the unfair behavior of government officials. Thus, before scrutinizing the substantive result of the exactions process, courts should first determine whether the unfairness with which the Court was concerned really does exist in a particular case.



