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CLARIFYING THE SUPREME COURT'S TAKING CASES—
AN IRREVERENT BUT OTHERWISE UNASSAILABLE
DRAFT OPINION IN *Dolan v. City of Tigard*

DOUGLAS W. KMIEC*

INTRODUCTION

The U.S. Supreme Court has once again signaled a desire to opine upon the land use/regulatory taking issue by agreeing to hear the case of *Dolan v. City of Tigard*,¹ argued before the Court March 23, 1994.

As someone who regularly purports to tell the Court how it should have decided land use cases in practitioner or academic writing,² I thought I would help the Court in advance this time. In particular, since the Court has expressed considerable difficulty in deciding the so-called "taking" cases, as a good sport (which I hope the members of the Court are as well), I have prepared a draft opinion in *Dolan*. Realizing this is more than a little presumptuous, as I have not been nominated for the Court, let alone had my nomination approved by the U.S. Senate,³ here, nonetheless, it is.

I. FACTUAL SUMMARY OF *Dolan v. City of Tigard*

The Dolans own 1.67 acres of land in downtown Tigard, a suburb of Portland, Oregon, on which they run an electric and plumbing supply business. The land, currently used for general retail sales, is within the city's "central business district" zone and is subject to an "action area" overlay zone (CBD-AA zone).⁴ The Dolans applied to the city for a permit to replace the existing 9,700-square foot building with a 17,600-square foot building in which to relocate their electric and plumbing supply business. The Dolans also wanted to expand their parking lot.⁵

* Professor of Law, University of Notre Dame; fmr. Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice. This draft opinion was initially prepared to accompany the keynote address to the Rocky Mountain Land Use Institute at the University of Denver College of Law, March, 1994. The author thanks Professor Edward H. Ziegler for the invitation to address the conference. No disrespect to any person living or dead (especially those who are still living and can respond in kind) is intended by the author; what is intended, and recommended, is the willingness to laugh at our ability to make that which is straightforward, complex.

1. 854 P.2d 437 (Or.), cert. granted, 114 S. Ct. 544 (1993).

2. See DOUGLAS W. KMIEC, ZONING AND PLANNING DESKBOOK (1986 & Supp. 1994); Douglas W. Kmiec, *Will the Supreme Court Bring Coherence to Takings Law?*, 15 ZONING & PLAN. L. REP. 57 (1992); Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630 (1988).

3. or Anita Hill

4. *Dolan v. City Tigard*, 854 P.2d 437, 438 (Or.), cert. granted, 114 S. Ct. 544 (1993).

5. *Id.*

Tigard granted the Dolans' application, but required as conditions that the Dolans dedicate the portion of their property lying within the 100-year floodplain of Fanno Creek for improvement of a storm drainage system and an additional fifteen-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway.⁶ The required dedication comprises about 7,000 square feet, or approximately ten percent of the total property.⁷

The Dolans requested a variance from these conditions.⁸ In its final order denying the variance the city's zoning commission made the following pertinent findings.

It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of the facility's customers and employees. It is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed. In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.⁹

The report went on to address the required dedication of the portion of the property that lies in the Fanno Creek floodplain.

[T]he Commission finds that the required dedication would be reasonably related to the applicant's request to intensify the usage of this site, thereby increasing the site's impervious area. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes.¹⁰

The Dolans appealed the variance denial to the Oregon Land Use Board of Appeals,¹¹ the Oregon Court of Appeals, and the Oregon

6. *Id.* at 439.

7. *Id.* at 439 n.3.

8. *Id.* at 439.

9. *Dolan*, 854 P.2d at 439.

10. *Id.* at 439-40.

11. *Id.* at 440.

Supreme Court,¹² all of which affirmed the denial and the required conditions on the permit.¹³

With the Supreme Court's indulgence, here is my version of the resolution of the case presented.¹⁴

II. DRAFT OPINION IN *Dolan v. City of Tigard*

Judgment of the Oregon Supreme Court reversed and case remanded.

KMIEC, J., [sitting in for Justice Ginsburg—because who knows what her views are on this stuff], delivered the opinion of the Court, in which the CHIEF JUSTICE, and Justices SCALIA and THOMAS join. Justices O'CONNOR and KENNEDY file a concurring opinion [in order to maintain their reputation as swing voters]. Justices STEVENS and BLACKMUN dissent on the merits, since modern government hardly could go on if it had to compensate for alleged takings of property like the one in this case. Justice SOUTER dissents, finding the writ of certiorari to have been granted improvidently.¹

John Dolan died during the course of this litigation. His widow, Florence, carried the case to this Court.²

We've said so darn much on this regulatory taking puzzle, it may be helpful to briefly summarize the legal principles that can be derived from our prior cases.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), we invalidated a law that required Mrs. Loretto, as landlady, to allow a cable television company to install a cable running down the front of her building and a cable box on her roof. We observed that where the character of the government's action is in the form of a permanent physical occupation, it is not only an important factor in resolving whether the action works a taking but it is also determinative. *Id.* at 426.

12. *Dolan v. City of Tigard*, 832 P.2d 853 (Or. Ct. App. 1992), *aff'd*, 854 P.2d 437 (Or.), *cert. granted*, 114 S. Ct. 544 (1993).

13. *Dolan*, 854 P.2d at 444.

14. Obviously, for those readers nodding off, the indicated judicial alignment is my speculation as well; it does not represent the actual votes of the Justices.

1. Maybe even incautiously, dare he say, impetuously. *See* *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2925 (1992) (statement of Souter, J.). In any event, the cover on the brief was the wrong shade of grey. *Cf.* *Yee v. City of Escondido*, 112 S. Ct. 1522, 1532 (1992) (discussing SUP. CT. R. 14.1(a) which, although it does not address brief cover color, has had an all-purpose helpfulness in ridding the Court of these nettlesome land use cases). Justice Souter's separate concurring opinion from *Yee* follows in its entirety:

I concur in the judgment and would join the Court's opinion except for its references to the relevance and significance of petitioners' allegations to a claim of regulatory taking.

Id. at 1535. Huh?

2. Need we point out that before Christ, it was written:

Do justice, that you may live long upon earth. Calm the weeper, do not oppress the widow, do not oust a man from his father's property. . . .

The Teaching for Merikare, c. 2135-2040 B.C. in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 4 (Emily Morrison Beck, ed., 15th ed. 1980). The teaching was in essence a treatise on kingship addressed by a king of Heracleopolis to his son and successor, Merikare. *Id.* at 3 n.9.

: *Loretto* was an easy case. We've asked our clerks to find more of them in the cert pool. Instead, they gave us this case. You just can't find good help.

In *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992), we told John and Irene Yee, mobile home park owners, that they did not suffer a physical taking, even though the combined effect of city and state law gave tenants an alienable right to occupy their mobile home lots indefinitely at a fixed price. We understand that this case serves as regulatory inspiration for Mrs. Clinton's health care reforms. The majority is not sure that's so good, but in any event, we noted with our usual level of inscrutability that where landowners open their property to occupation by others (by renting), they "cannot assert a *per se* right to compensation based on their inability to exclude particular individuals," a point we premised upon *PruneYard Shopping Center v. Robins*, 447 U. S. 74 (1980), where we upheld a California law precluding a private shopping mall from excluding leafletters. *Yee*, 112 S. Ct. at 1530.

If this result seems hard to square with *Loretto*, it probably is. As people appointed for life and whose salaries cannot be diminished, we sometimes feel little obligation to be consistent. The distinction we manufactured to distinguish *Yee* from *Loretto* was that the Yees voluntarily chose to go into the mobile home business, and thus, we said they could avoid the regulation—get this—by going out of business. In the more polite words of our opinion, there was no "required acquiescence." *Id.* at 1528 (quoting *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987)). Why *Loretto* is any different than *Yee* is a bit mystifying—after all, Mrs. Loretto, too, could have avoided the cable installation by tearing down her apartment structure and enjoying the passive recreational beauty of a vacant lot.

Nevertheless, if you wish to humor us, perhaps the distinction between *Loretto* and *Yee* is that in the former we could see and understand the cable and box as physically occupying Mrs. Loretto's space; in *Yee*, we were unwilling to concede that the combined effect of rent control and tenant limitations was to physically impose tenants on landlords. Thus, our formal holding goes something like this—*Loretto* held that compensation for a *per se* physical taking could not be avoided by arguing that the owner can go out of business because her right to do business (rent) may not be conditioned on forfeiting her right to compensation for a *per se* taking. In *Yee*, there was no right to compensation to be forfeited because a city rent control ordinance, even when considered against a state tenant limitation, is a regulation of use, not a physical occupation. It would be a different case, we said, if the government required a physical occupation (of the type imposed on Mrs. Loretto), *Yee*, 112 S. Ct. at 1531, or prevented the owner from making a change in use (going out of business). *Id.* at 1528-29. There must, in short, be elements of "required acquiescence" present.

We bet we got everybody's attention with our decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), when we invalidated a beach easement condition on a building permit because, ostensibly, an

easement facilitating the strolling of people already on the beach did not advance the government's objective of breaking down the "psychological barrier"—caused by the enlargement of Jim and Marilyn's home—directed at people off the beach. Much to the consternation of our dissenting brethren today, this opinion seems to require that courts actually inquire into whether land use regulation bears a meaningful relationship to its intended end. Thus, we said an outright taking of an easement would be a *per se* taking requiring compensation, just like in *Loretto*. However, a landowner seeking a permit can be required to make a property concession, if that concession or condition substantially furthers governmental purposes that would justify denial of the permit. The condition or concession must serve the same purpose as the justification for prohibiting the use without a permit. *Id.* at 831-37.

Even though some Supreme Court commentators have always looked upon *Nollan* as something of an aberration,³ they are quite fond of the Court's opinion in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), which denied the owner of a railroad terminal the ability to build an office tower above it because the landmarks commission thought the terminal too pretty to change. Justice William Brennan wrote the majority opinion, in which we held that in determining whether there is a regulatory taking, the Court's inquiry is premised upon the application of several *ad hoc*⁴ factual inquiries. *Id.* at 124. The inquiry includes: (1) the "economic impact" of the regulation, or in other words, does a valuable use remain considered in light of the whole, not separate elements of, the property—a view Justice Brennan exhumed from Justice Brandeis's dissenting opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); (2) whether the regulation has interfered with "distinct investment-backed expectations," that is, whether the state law or other representations of government give the owners a "vested right" or whether the owners have an "investment-backed" expectation in a subpart, like air rights, of the property; and (3) the "character" of the government's action—physical invasion vs. regulation. Prior to *Penn Central*, many lawyers schooled in the common law (and even our precedents) presumed that the "character" issue referred to whether the regulation was for harm prevention or benefit acquisition. In a crafty lil' footnote, however, Justice Brennan said it didn't matter to him whether regulation was aimed at controlling noxious uses or maintaining pretty things like landmark buildings. *Penn Central*, 438 U.S. at 133 n.30.

Skipping over the repetition of *Penn Central* in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (upholding state law precluding a mining company from removing twenty-seven million tons of coal from the earth), we come to our recent opinion in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). In *Lucas*, we questioned

3. Attributable no doubt to the decade of greed, tax cuts, defense build-up, and "court packing" inspired by then President Ronald Reagan.

4. You know you're in trouble when we start out by admitting that we're going to be *ad hoc*.

whether South Carolina had a good enough reason to tell Dave Lucas that he couldn't build houses on a pair of subdivided lots worth close to a million dollars, even though there were already houses on either side of the lots. We observed that regulation denying an owner all "economically viable use of his land" constitutes a discrete category of regulatory takings that requires compensation. *Id.* at 2893-94. This obligation to compensate cannot be avoided merely by asserting that the regulation is aimed at a harmful or noxious use.

Thus, we pointed out that harmful or noxious use is the forerunner of the current taking test, which asserts that regulation will be a taking if it fails to substantially advance a legitimate state interest. A total deprivation of economic value can only be sustained under this standard where a "logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 2899. In other words, this type of profound or severe regulation must do no more than duplicate that of common law nuisance. In a case of total deprivation like *Lucas*, the government bears the burden of proof, *id.* at 2901-02, which we understand South Carolina failed to meet on remand. *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992). Before the issue of actual damages could be tried, South Carolina entered into a negotiated settlement with Mr. Lucas whereby he received \$425,000 for each of the two lots and \$725,000 in interest, attorney's fees and costs, for a whopping regulatory taking total of \$1,575,000. Apparently, however, it's no fun regulating if it's not for "free," as South Carolina has now resold Mr. Lucas' lots to a construction company for \$785,000.

Justice SCALIA wrote a crafty lil' footnote of his own in *Lucas*, noting that whether a regulation results in total deprivation is to be determined in relation to how the owner's reasonable expectations have been shaped by the state's law of property—that is, whether and to what extent the state law has recognized and protected the particular interest alleged to be taken. *Lucas*, 112 S. Ct. at 2894 n.7. Justice SCALIA gives two very different types of examples of where such calculation problems arise—deprivation of 90% of a fee simple vs. deprivation of the fee simple, itself. The first percentage example is quantitative; the other is definitional—that is, related to a recognized estate in land. It's unclear whether Justice SCALIA thought the percentage example merited compensation, and he gave up thinking about it, by deciding that he didn't have to decide this issue in *Lucas* because the pleading established a total deprivation. *Id.*

The significance of the interpretation of this footnote cannot be understated because it determines whether the holding in *Lucas* is limited to the mercifully rare case of total wipeout of everything or whether it can be made to apply to the far more plentiful case where the state's law of property affirms segmented interests in property and one of those segments—like the air rights in *Penn Central* or the twenty-seven million tons of coal and accompanying support estates in *Keystone*—is rendered useless by regulation. In keeping with the tradition of the Court, we won't settle this issue today either, but will continue to tease you.

Having bored you silly with the restatement of our prior law, let's turn now to the Dolans (rhymes with Nollans) and the insistence of the City of Tigard that customers buying heavy metal pipes, bathtubs, and such at a retail plumbing supply store might like the convenience of transporting these items by bicycle.

The central issue for review in this Court is the constitutional validity of the stated conditions on the permit, and thus, this case presents another opportunity for this Court to resolve the nettlesome problem of when regulation goes "too far," in the immortal but less than helpful words of Justice Oliver Wendell Holmes. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). As is well known, if regulation does go "too far," it merits compensation under the Constitution's taking clause, which provides that "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V (applied to the city in this instance via U.S. CONST. amend. XIV).

While the authorized physical invasion in this case might suggest that the case could be easily resolved on the basis of our *per se* or categorical rule stated in *Loretto*, our later decisions in *PruneYard* and *Yee*, and more particularly, the very decision of *Nollan* on which the landowners rely greatly, suggest that some physical invasions or property concessions are not compensable. In particular, from *Yee* we know that there must be "required acquiescence" in the sense that the landowner must be put to the choice of forfeiting the right to constitutional compensation for physical occupation in order to make lawful use of property. In *Yee*, we pretended to avoid that impermissible choice, dubiously, to be sure, because we concluded that rent control and tenant limitations did not amount to a physical occupation, and therefore, there was no right to compensation to be forfeited.

But here, the condition does mandate physical invasion; indeed, it is conditioned on far more—the actual conveyance or dedication of property in exchange for a permit to make an otherwise lawful expansion of a commercial structure. It is true, of course, that in *Nollan* we held that a property concession could be required of a landowner as a condition of a grant of a permit if the condition substantially furthers the same governmental purposes that would justify a denial of the permit. Two issues thus emerge: what are the government's purposes here, and do the conditions substantially advance those purposes?

As to the city's purposes, Tigard's concerns are for a complete bicycle pathway and an adequate drainage system. It is not for this Court to question these purposes. As we said in *Nollan*, our cases make clear that a broad range of governmental purposes can satisfy the requirements. *Nollan*, 483 U.S. at 834-35. However, our decision in *Penn Central* as well as *Keystone* suggests that one salient factor is the "character," or "purpose" if you will, of the government's action. In this regard, we believe there are less taking concerns raised by regulation aimed at controlling a harmful or noxious use, than by regulation that is merely trying to secure a benefit for the community at large from a particular landowner.

Of course, in *Lucas*, we pointed out the difficulty of distinguishing between harms and benefits, a distinction that was blurred by Justice Brennan in a footnote in *Penn Central*. To bring clarity to this matter, we opined in *Lucas*, that at least in the case where regulation has totally denied an owner of all economic viability, there must be an antecedent inquiry to determine whether the regulatory limitation can properly be said to inhere in the owner's title. *Lucas*, 112 S. Ct. at 2899. That is, the government regulator must show that the regulation merely denies a use that the landowner should have never expected to undertake or make.

Tigard argues that *Lucas* is not applicable to this case because the Dolans cannot possibly claim that the conditions here deprive them of all economic value. This, of course, raises the issue of how to properly characterize what has been lost. Our brothers Holmes and Brandeis in *Pennsylvania Coal* differed greatly over this issue—Holmes focused on the complete taking of the part, *Pennsylvania Coal*, 260 U.S. at 414, and Brandeis focused on the incomplete taking of the whole. *Id.* at 419 (Brandeis, J., dissenting). Even though Brandeis dissented in *Pennsylvania Coal*, his view seemed to prevail in *Penn Central* and *Keystone* with an important qualification. See *Penn Central*, 438 U.S. at 130-31; *Keystone*, 480 U.S. 496-502. In *Penn Central*, we observed that taking considerations must also be informed by a landowner's reasonable investment backed expectations, and these in turn will be informed by the state's law of property. We reiterated this proposition in *Lucas*, although it was unnecessary in that context to expand on the point.

Can it be said that the Dolans have been deprived of all economic viability with respect to "reasonable investment-backed expectation;" that is, a property interest or segment discretely recognized under state law? We think so. Easements of the type requisitioned by Tigard for the bikeway have long been part of the common law and are a recognized part of the law of the State of Oregon. See *State v. California Or. Power Co.*, 358 P.2d 524, 526-27 (Or. 1961); *Steelhammer v. Clackamas County*, 135 P.2d 292, 296 (Or. 1943). So too, the city requires the Dolans to convey a subdivided portion of their recognized fee interest in land that exists within the designated floodplain. One hundred percent of these interests are conveyed to Tigard, and in our judgment this places the burden on Tigard to demonstrate that the bikeway and floodplain dedications inhere in the title of all similarly situated landowners. This we think Tigard will be unable to show, although we remand for this purpose.

Our concurring members dispute the applicability of *Lucas* to these facts, choosing to reach a common result, but relying instead upon our decision in *Nollan*. *Nollan*, unlike *Lucas*, does not substantively inquire into whether the government's regulation is the equivalent of the common law of nuisance, and thus, logically denies the landowner nothing to which he would be entitled. Rather, *Nollan* focuses on the nexus between regulatory means and ends and the landowner's responsibility for the need for the regulation at all. Even if we were to agree with concurring Justices KENNEDY and O'CONNOR and assume that *Lucas* does not apply

because of the value remaining in the Dolans' parcel, we think the outcome under *Nollan* would be much the same.

In *Nollan*, we articulated that the nexus requirement "was more than a pleading requirement," *Nollan*, 483 U.S. at 841, and we described the standard of substantially advancing a legitimate state interest. While Tigard argues that this does not alter the rational basis or reasonably related standard, we think Tigard misreads *Nollan*. We specifically advanced in *Nollan* that the judicial standard of review applied in taking cases like this one is higher than that applied in general due process or equal protection challenges to economic regulation. *Id.* at 834 n.3. Moreover, with great relevance to this case, we posited that if a landowner is singled out to bear the burden of problems that have been generally created, such singling out might well violate the Takings or Equal Protection Clauses. *Id.* at 835 n.4.

We think the Dolans are being singled out here. Tigard's interest is really a complete bike pathway. There is no credible showing in this record that the Dolans' plans necessitate the bikeway generally nor increase traffic to necessitate facilitating this alternative form of transportation. Bikeways are nice, but they are general community improvements that rebound to the benefit of the community, and therefore, they ought to be paid for by the community from general revenues, not exacted (need we say, extorted) from this individual landowner. So too, the record contains no hard information about how the Dolans' plan necessitates the dedication for drainage. True, the landowners' expansion will cover more ground, making it somewhat more impervious, but this is a far cry from justifying that the particular greenway is thereby needed to address an identified drainage problem caused by this landowner.

By these comments, Tigard may insist that we are second-guessing the local legislature, and in truth, we can see how inquiring as to what is needed or necessitated by a particular land use gives this impression. However, we do not question the legitimacy of avoiding flooding or traffic congestion,⁵ or even promoting bike riding, we merely do not see how, in the *Nollan* sense of avoiding disproportionate singling out, this landowner can be asked to donate his land for those purposes on this record. Because this focus on the nexus between this landowner and the government's stated end or objective is somewhat different than that raised in *Nollan*, (which was merely the nexus between regulatory means and end), the majority chooses to more forthrightly address the legitimacy of this governmental condition in terms of the *Lucas* methodology that asks simply whether the failure of the Dolans to provide a bikeway and drainage greenway could be said to be nuisance-like in light of the separate property interests previously recognized by the state in statute and common law? Again, we doubt it, but we remand for proper proceedings on this point.

Reversed and remanded.

5. *Contra* *Lochner v. New York*, 198 U.S. 45 (1905).

The concurring opinion of Justices KENNEDY and O'CONNOR are as reflected in the Court's opinion. If they want it published separately, let them write their own law review article.

The dissenting opinions of Justices BLACKMUN, STEVENS, and [wouldn't you know it] SOUTER⁶ are omitted. They're all wrong, anyway. Trust me on this one. I'm not kidding.⁷

6. John Sununu call your office.

7. Well, not entirely.