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## Exacting Public Beach Access: The Viability of Permit Conditions and Florida's State Beach Access Laws After *Dolan v. City of Tigard*

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# EXACTING PUBLIC BEACH ACCESS: THE VIABILITY OF PERMIT CONDITIONS AND FLORIDA'S STATE BEACH ACCESS LAWS AFTER *DOLAN V. CITY OF TIGARD*

SHAWN M. WILLSON\*

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## I. INTRODUCTION

Many coastal states have laws specifically designed to protect or enhance public access to beaches. Some states, including Florida,<sup>1</sup> South Carolina,<sup>2</sup> North Carolina,<sup>3</sup> Texas,<sup>4</sup> and California,<sup>5</sup> allow a

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1. See FLA. STAT. § 161.55(6) (1995) (providing that a developer cannot interfere with existing beach access unless the developer provides a comparable alternate accessway); FLA. STAT. § 161.053(5)(e) (1995) (allowing the Department of Environmental Protection (DEP) to require an alternate accessway where the granting of a permit will cause unavoidable interference with public beach access).

2. See S.C. CODE ANN. § 48-39-150(A)(5), (B) (Law. Co-op. 1987 & Supp. 1996) (allowing DEP to consider the extent to which a proposed development will affect public beach access in granting or denying a development permit and providing that DEP may condition the permit on whatever measures it deems necessary for protection of the public interest).

3. See N.C. GEN. STAT. § 113A-120(a), (b) (1996) (providing that a development permit may be conditioned upon the applicant's amending of a proposal to protect the public interest with respect to various factors, including beach access).

local government, a department created of environmental protection, or a coastal management authority to grant development permits for construction in coastal areas based on compliance with certain conditions. The imposed conditions are designed to make the development consistent with a local comprehensive plan or the beach preservation policies of the state. Often, these conditions require landowners to dedicate land on their property for a public easement to or across the beach if the development interferes with public access.<sup>6</sup>

Following the United States Supreme Court's decisions in *Nollan v. California Coastal Commission*<sup>7</sup> and *Dolan v. City of Tigard*,<sup>8</sup> local governments may not find permit conditions as valuable a tool in preserving beach access. If the permit condition exacted by the city does not have an essential nexus to the legitimate state interest of preserving public access and is not roughly proportional to the projected impact on the development, then the government must compensate the landowner for a regulatory taking under the Fifth Amendment.<sup>9</sup> While the preservation of beach access is an important goal for coastal cities, a municipality may find compensation for access expensive and discouraging.

This Comment analyzes the viability of Florida's beach access laws in light of *Nollan* and *Dolan* and explores the effect these cases might have on permitting for coastal construction at a local level. Part II looks at Florida's current beach access laws, focusing on statutes governing beach and shore preservation and local comprehensive planning. Part III discusses the two recent exactions cases and explores what might constitute a regulatory taking under the Supreme Court's current test. Because the Supreme Court did not clearly define one element of the test, the "rough proportionality" standard, Part III also discusses subsequent cases and opinions of scholars interpreting that element. Part IV anticipates the effect *Dolan* may have on future permit conditions for beach access and comments on problems that *Dolan* may create in relation to present state beach access laws. Finally, Part V suggests measures Florida

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4. See TEX. NAT. RES. CODE ANN. § 61.015(g) (West 1978 & Supp. 1997) (providing that a local government may impose any reasonable conditions it finds necessary to ensure adequate public beach access).

5. See CAL. PUB. RES. CODE § 30212(a) (West 1996) (requiring new development projects to provide public access to and along the shoreline unless adequate access exists nearby).

6. See *supra* notes 1-5 and accompanying text.

7. 483 U.S. 825 (1987).

8. 512 U.S. 374 (1994).

9. See *id.* at 391.

can take to ensure the effectiveness of such laws and to aid municipalities in imposing proper permit conditions.

## II. STATE BEACH ACCESS LAWS

Coastal states preserve perpendicular access to beaches using both common law and statutory remedies.<sup>10</sup> Most coastal state legislatures created beach access laws in compliance with the federal Coastal Zone Management Act of 1972 (CZMA).<sup>11</sup> The CZMA seeks "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations" by providing federal funds and guidelines to state coastal management programs that comply with the requirements of the Act.<sup>12</sup> Specifically, the CZMA requires state programs to provide for various objectives, including public access to the coast for recreation purposes.<sup>13</sup> Even states that do not have programs approved by the CZMA recognize the importance of public beach access and have developed laws to deal with the problems created by the need for beach access.<sup>14</sup>

### A. Florida's Beach Access Laws

Provisions addressing protection of beach access are located in chapter 161, *Florida Statutes*, entitled "Beach and Shore Preservation."<sup>15</sup> The statute makes perpendicular public access a requirement for construction within a coastal building zone "[w]here the public has established an accessway through private lands to lands sea-ward [sic] of the mean high tide or water line by prescription, prescriptive easement, or any other legal means. . . ."<sup>16</sup> The developer cannot interfere with the public's access right unless the

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10. See Daniel Summerlin, *Improving Public Access to Coastal Beaches: The Effect of Statutory Management and the Public Trust Doctrine*, 20 WM. & MARY ENVTL. L. POL'Y REV. 425, 426 (1996).

11. 16 U.S.C. § 1452 (1985 & Supp. 1997). Only six of the 35 eligible states do not have federally-approved coastal management plans under the CZMA. See COASTAL AND OCEAN LAW 156 (Joseph J. Kalo et al. eds., 2d ed. 1994); see also Summerlin, *supra* note 10, at 438-43 (discussing the coastal management programs developed by North Carolina and California).

12. 16 U.S.C. § 1452(1); see also Summerlin, *supra* note 10, at 430.

13. See 16 U.S.C. § 1452(2)(E); see also Summerlin, *supra* note 10, at 431.

14. The Texas Open Beaches Act dedicates an entire subchapter to the subject of public access. See TEX. NAT. RES. CODE ANN. § 61.011(a) (1995) (stating that "[i]t is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico . . . ."); see also Summerlin, *supra* note 10, at 442.

15. FLA. STAT. ch. 161 (1995).

16. *Id.* § 161.55(6).

developer provides a comparable alternative accessway.<sup>17</sup> The developer's ability to relocate, improve, or consolidate existing accessways hinges upon whether the new accessway is of substantially similar quality and convenience to the public, is approved by the local government, is approved by DEP (when the involved improvements are seaward of the coastal construction line), and is consistent with the coastal management element of the local comprehensive plan.<sup>18</sup>

The coastal management element, discussed in section 163.3177(6)(g), *Florida Statutes*, sets forth the policies that will guide the local government in its decisions and implementation of ten objectives listed therein.<sup>19</sup> While none specifically include beach access, access could fall under the broad language of several of these objectives. For example, the objectives include the: "[m]aintenance, restoration, and enhancement of the overall quality of the coastal zone environment, including, but not limited to, its amenities and aesthetic values;"<sup>20</sup> "orderly and balanced utilization and preservation, consistent with sound conservation principles, of all living and nonliving coastal resources;"<sup>21</sup> and "[a]voidance of irreversible and irretrievable loss of coastal zone resources."<sup>22</sup>

Each element mandated by section 163.3177(6)(g) must be based on studies, surveys, and data and must be consistent with other coastal resource plans prepared and adopted under general or special law.<sup>23</sup> The coastal management element must also contain a map of "existing coastal uses, wildlife habitat, wetland and other vegetative communities, undeveloped areas, areas subject to coastal flooding, public access routes to beach and shore resources, historic preservation areas, and other areas of special concern to local government."<sup>24</sup> In addition, the coastal management element must have a component for shoreline use that identifies public access to beach

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17. *See id.*

18. *See id.* § 161.55(6)(a)-(d).

19. *See id.* § 163.3177(6)(g). Another Florida statute provides a description of what the coastal management element is to be based upon, and what it should contain. *See id.* § 163.3178(2).

20. *Id.* § 163.3177(6)(g)(1).

21. *Id.* § 163.3177(6)(g)(3).

22. *Id.* § 163.3177(6)(g)(4).

23. *See id.* § 163.3178(2).

24. *Id.* § 163.3178(2)(a) (emphasis added). The element must also contain ten other requirements including an analysis of the environmental, socioeconomic, and fiscal impacts created by the future land use plan, an analysis of the effects of drainage systems and the impacts of potential pollution, an outline of the principles for hazard mitigation and for the protection of human life against the threat of natural disasters, and an outline of the principles for protecting or restoring existing beach and dune systems. *See id.* § 163.3178(2)(b)-(e).

and shoreline areas and addresses the need for water-dependent and water-related facilities in those areas.<sup>25</sup>

Section 161.053, *Florida Statutes* also deals with beach and shore preservation, regulating construction control setback lines, and contains language that promotes the protection of beach access.<sup>26</sup> For purposes of that section, "access" or "public access" is defined as "the public's right to laterally traverse the sandy beaches of this state where such access exists on or after July 1, 1987."<sup>27</sup> Section 161.053(1)(a) sets forth the public policy behind the establishment of the control lines, stating:

[T]he beaches in this state and the coastal barrier dunes adjacent to such beaches . . . represent one of the most valuable resources of Florida and . . . it is in the public interest to preserve and protect them from imprudent construction which can jeopardize the stability of the beach-dunes system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or *interfere with public beach access*.<sup>28</sup>

Where a developer wishes to build a structure seaward of a coastal construction line, DEP may grant a permit for the structure after DEP considers certain facts and circumstances, including potential impacts of the location of the structure.<sup>29</sup> DEP must limit construction that interferes with lateral beach access but can require an alternate accessway as a condition to granting a permit if interference with public access is unavoidable.<sup>30</sup> Individual counties may also establish their own coastal construction zoning and building codes in lieu of the provisions of section 161.053, as long as the zones and codes are approved by DEP.<sup>31</sup> The requirement for these codes mimics the general policy set forth at the beginning of the section, as the zoning codes must be "adequate to preserve and protect the beaches and coastal barrier dunes . . . from imprudent construction that will jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or *interfere with beach access*."<sup>32</sup> Florida law, however, provides little guidance to help DEP or a local government in its decision to impose a permit condition.

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25. See *id.* § 163.3178(2)(g).

26. See *id.* § 161.053.

27. *Id.* § 161.021(1).

28. *Id.* § 161.053(1)(a) (emphasis added).

29. See *id.* § 161.053(5)(a)(3).

30. See *id.* § 161.053(5)(e).

31. See *id.* § 163.053(4).

32. *Id.* (emphasis added).

Section 161.053(5)(e) merely provides that "[t]he width of such alternate access may not be required to exceed the width of the access that will be obstructed as a result of the permit being granted."<sup>33</sup>

### III. PERMIT CONDITIONS AND REGULATORY TAKINGS AFTER *NOLLAN* AND *DOLAN*

In exacting a permit condition, a municipality could go beyond the traditional authority conferred upon it by the legitimate police powers of protecting the public health, morals, and safety.<sup>34</sup> Thus, a permit condition might constitute a Fifth Amendment taking if it contains a condition on development that impedes the property rights of an individual and is not justified by those police powers.<sup>35</sup> For instance, any permit condition that requires a landowner to dedicate an easement to the public impairs individual property rights by taking away the landowner's right to exclude others from his or her land and by allowing a permanent physical invasion.<sup>36</sup>

Although not a permit condition case, the United States Supreme Court recognized this right to exclude in *Kaiser-Aetna v. United States*.<sup>37</sup> There, developers sought to deny access to the public after dredging an existing channel known as Kuapa Pond.<sup>38</sup> The United States argued that the channel became part of the navigational servitude following the developers' improvements and required that the public have a right of access to the improved pond.<sup>39</sup> However, the Supreme Court held that the United States could not require Kaiser-Aetna to allow the public free access without invoking the government's powers of eminent domain.<sup>40</sup> The Court held that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within the category of interests that the

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33. *Id.* § 161.053(5)(e).

34. See John P. Seibels, Jr., *Nollan and Dolan: Exaction Packed Adventures in Takings Jurisprudence*, 4 S.C. ENVTL. L. J. 1, 2 (1995).

35. See *id.*

36. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-33 (1982); *Kaiser-Aetna v. United States*, 444 U.S. 164, 179-80 (1979). In *Nollan*, the Court stated:

We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

*Nollan*, 483 U.S. at 832.

37. 444 U.S. 164 (1979).

38. See *id.* at 168-69.

39. See *id.* at 170.

40. See *id.* at 180.

Government cannot take without compensation."<sup>41</sup> The Court further noted that the imposition of the navigational servitude would result in an actual physical invasion of the developers' land.<sup>42</sup>

The Army Corps of Engineers could have required Kaiser-Aetna to obtain a permit before dredging the channel but instead told them that the permit was unnecessary.<sup>43</sup> Interestingly, the Court stated in dicta that the government could either have denied the dredging permit altogether if the dredging would have impaired navigation on the bay or have conditioned the granting of the permit on the developers' agreement to take measures to promote navigation.<sup>44</sup>

#### A. *Nollan v. California Coastal Commission*

Eight years after *Kaiser-Aetna*, the Supreme Court directly addressed the constitutionality of a permit condition requiring beach access in *Nollan v. California Coastal Commission*.<sup>45</sup> The Nollans owned beachfront property and wished to replace an existing bungalow on the property with a three-bedroom house.<sup>46</sup> The California Coastal Commission granted their permit application for the structure subject to the condition that the Nollans record a deed restriction granting an easement to the public to pass laterally on the Nollans' beach.<sup>47</sup> The Nollans brought suit, claiming the condition was an unconstitutional taking of their property under the Fifth Amendment.<sup>48</sup>

In order to determine the validity of the exaction, the Court looked to whether the exaction had an essential nexus to the governmental purpose the exaction was designed to serve.<sup>49</sup> According to the Commission, the easement was needed to protect the ability of the public to see the beach, to overcome the "psychological barrier" that development along the shore created, and to prevent congestion on the public beaches.<sup>50</sup> The Court did not believe that the easement for lateral access was reasonably related to these ends.<sup>51</sup> The Court found it "impossible" to understand how allowing people using the public beaches to walk across the Nollans' property reduced

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41. *Id.* at 179-80.

42. *Id.* at 180.

43. *See id.* at 167.

44. *See id.* at 179.

45. 483 U.S. 825 (1987).

46. *See id.* at 828.

47. *See id.*

48. *See id.* at 829.

49. *See id.* at 836-37.

50. *Id.* at 835.

51. *See id.* at 837.



obstacles to viewing the beach; nor could it understand how the lateral access condition reduced the psychological barrier or additional congestion caused by the development.<sup>52</sup> The Court therefore concluded that the Commission either had to remove the impermissible condition or compensate the Nollans for the easement.<sup>53</sup>

### 1. *What is a Valid Exaction Under Nollan?*

Despite its holding, the *Nollan* Court noted that permit conditions are constitutionally valid in several instances. For instance, a permit condition that serves the same legitimate police power as a refusal to issue the permit is not a taking if the refusal to issue the permit itself does not constitute a taking.<sup>54</sup> The Court stated:

[I]f the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power . . . to forbid construction of the house altogether, imposition of the condition would also be constitutional.<sup>55</sup>

Furthermore, a permit condition is valid if it has an essential nexus to the legitimate state interest offered to justify the exaction.<sup>56</sup> Thus, the condition would be valid if it required the Nollans to provide a viewing spot on their property.<sup>57</sup> A viewing spot would have an essential nexus to the public purpose of protecting the public's view of the ocean with which the development would interfere.<sup>58</sup> The Court concluded:

Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end.<sup>59</sup>

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52. *Id.* at 838-39.

53. *See id.* at 841-42.

54. *See id.* at 836.

55. *Id.*

56. *See id.* at 837.

57. *See id.* at 836.

58. *See id.*

59. *Id.*

Unless a condition serves the same governmental purpose as the development ban, the building restriction becomes nothing more than an "out-and-out plan of extortion," allowing the government to obtain an easement without compensating the landowner.<sup>60</sup>

In 1994, the Court added an additional prong to the regulatory takings analysis.<sup>61</sup> In *Dolan v. City of Tigard*,<sup>62</sup> the owner of a plumbing and electrical supply store applied for a permit to redevelop her site by expanding the size of her store and paving a parking lot.<sup>63</sup> The City Planning Commission conditioned the granting of Dolan's permit application on her agreement to dedicate portions of her property for a public greenway system and for a pedestrian and bicycle pathway.<sup>64</sup> Dolan disputed those conditions, arguing that the dedication requirements were not related to the proposed development and were thereby an uncompensated taking under the Fifth Amendment.<sup>65</sup>

The *Dolan* Court sought to resolve the question left open in *Nollan's* essential nexus concept by clarifying how much of a connection must exist between permit exactions and the projected impacts of the development.<sup>66</sup> The *Dolan* Court concluded that a permit condition is not deemed a taking if the condition imposed bears a "rough proportionality" to the nature and extent of the impact of the proposed development.<sup>67</sup> While a precise mathematical calculation is not necessary to prove the connection, a municipality must "make some sort of individualized determination."<sup>68</sup>

In *Dolan*, the Court found that the permit conditions met the first prong of the test.<sup>69</sup> An essential nexus existed between the greenway exaction limiting development in a 100-year floodplain and the city's interest in preventing flooding along an adjacent creek.<sup>70</sup> A nexus also existed between the bicycle path exaction and the legitimate public purpose of reducing traffic congestion.<sup>71</sup>

The Court did not find, however, that the conditions bore the required relationship to the projected impact of Dolan's proposed

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60. *Id.* at 837 (quoting *J.E.D. Assoc., Inc. v. Atkinson*, 432 A.2d 12, 14-15 (1981)).

61. See Seibels, *supra* note 34, at 18-21 (discussing the prongs of the regulatory takings analysis).

62. 512 U.S. 374 (1994).

63. See *id.* at 379.

64. See *id.* at 379-80.

65. See *id.* at 382.

66. See *id.* at 386.

67. *Id.* at 391.

68. *Id.*

69. See *id.* at 387.

70. See *id.*

71. See *id.* at 387-88.

development.<sup>72</sup> While the permit conditions were designed to promote legitimate state interests, the city's findings on the impact of the development did not justify the need for the exactions.<sup>73</sup> Although limiting development in the floodplain would alleviate some threat of flooding, the city did not explain why that portion of the property had to be owned by the public in order to further the legitimate interest of flood control.<sup>74</sup> At the same time, the dedication of the floodplain easement would significantly and adversely affect Dolan's property rights by compromising her right to exclude others in the greenway.<sup>75</sup> The Court did recognize that "[i]f petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere."<sup>76</sup>

With respect to the dedication of the bicycle path, the city estimated that the proposed development would generate approximately 435 additional vehicle trips per day and that the creation of the pathway "could offset some of the traffic demand . . . and lessen the increase in traffic congestion."<sup>77</sup> The Court did not consider these findings sufficient, stating: "The findings of fact that the bicycle pathway system 'could offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system will, or is likely to, offset some of the traffic demand."<sup>78</sup> The Court stressed that the city had to make some effort to quantify its finding.<sup>79</sup> As a result, the Court held that neither the dedication of public greenway space nor the pedestrian/bicycle path were roughly proportional to the impacts of the expansion of the store and the paving of the parking lot.<sup>80</sup>

### *B. The Meaning of "Rough Proportionality"*

Although the Court sought to clarify its stance on regulatory takings, the *Dolan* decision left open another question for interpretation by the lower courts. The Supreme Court did not provide a well-

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72. See *id.* at 394-95.

73. See *id.* at 393.

74. See *id.* at 391.

75. See *id.* at 393.

76. *Id.*

77. *Id.* at 395.

78. *Id.* (quoting *Dolan v. City of Tigard*, 854 P.2d 437, 447 (Or. 1993)).

79. See *id.*

80. See *id.* at 396.

defined analytical framework to guide lower courts in the application of the rough proportionality standard.<sup>81</sup>

Scholars analyzing the rough proportionality standard disagree on its requirements and the difficulty local governments may have in meeting it.<sup>82</sup> Further, current cases facing the issue have failed to set forth definitive boundaries.<sup>83</sup> According to William Funk, a law professor at Northwestern School of Law at Lewis and Clark College, the test "is not particularly demanding" by its terms or in light of the Court's analysis of the conditions imposed by the city.<sup>84</sup> He compares the test to other standards created by the Supreme Court, analogizing rough proportionality to the mid-level scrutiny applied in gender classifications.<sup>85</sup> While strict scrutiny bears a presumption of unconstitutionality and rational basis bears one of constitutionality, the substantial relationship requirement has no presumption at all.<sup>86</sup> Rough proportionality, which also appears to offer no clear presumption, suffers from the same open-ended quality as the substantial relationship standard and does not provide much guidance in predicting future outcomes.<sup>87</sup>

Like gender classifications, Funk believes the rough proportionality test will develop a "shorthand" to lessen some of its subjective quality.<sup>88</sup> His distinction centers around the existence of preconceived conditions in a city's master plan.<sup>89</sup> In *Dolan*, city ordinances mandated that the city planning commission require the dedication of space for the greenway and bike path in order for the commission

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81. See James E. Holloway & Donald C. Guy, *Land Dedication Conditions and Beyond the Essential Nexus: Determining "Reasonably Related" Impacts of Real Estate Development under the Takings Clause*, 27 TEX. TECH L. REV. 73, 130, 132 (1996) (discussing the "broad framework" of the rough proportionality test and the implications of *Dolan* on land dedication conditions); see also Seibels, *supra* note 34, at 22 (stating that the "essential nexus" and "rough proportionality" tests are "in the eye of the beholder"); William Funk, *Reading Dolan v. City of Tigard*, 25 ENVTL. L. 127, 139 (1995) (conceding that the rough proportionality test is "somewhat open-ended" and stating that the lower courts will make the "real value decisions"); 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, 806-12 (1996) (discussing the potential impacts of *Dolan* on the way exactions are calculated and reviewing the current cases that interpret the standard).

82. See Holloway & Guy, *supra* note 81, at 132; Stroud & Trevarthen, *supra* note 81, at 805-22; Funk, *supra* note 81, at 137-42; Jill I. B. Inbar, "A One Way Ticket to Palookaville": *Supreme Court Takings Jurisprudence after Dolan and its Implications for New York City's Waterfront Zoning Resolution*, 17 CARDOZO L. REV. 331, 371 (1995).

83. See Stroud & Trevarthen, *supra* note 81, at 821-22 (stating that Florida courts have not yet had the opportunity to apply *Dolan*).

84. Funk, *supra* note 81, at 141.

85. See *id.* at 137-38.

86. See *id.* at 137.

87. See *id.* at 137-38.

88. *Id.* at 138.

89. See *id.* at 137-38.

to approve site development in the 100-year floodplain.<sup>90</sup> Professor Funk asserts that such preconceived conditions weigh against rough proportionality because no particular relation could exist between the conditions and the impacts of a specific development.<sup>91</sup> In contrast, a finding of rough proportionality would be more likely where the city imposed conditions after contemplation of, and in response to, a specific development.<sup>92</sup>

Under either alternative, Funk concludes that "the rough proportionality test does not seem to impose insuperable obstacles to local government" and that the Court's analysis of the failures of the conditions in *Dolan* "suggests relatively easy hurdles."<sup>93</sup> He further comments that "had Tigard done some study (or relied upon some general national planning study) to estimate bikepath usage that would reduce automobile usage, and that study had shown some relationship to the estimated increase in traffic, that would have been enough" to satisfy the standard.<sup>94</sup>

Others believe that state courts will apply the rough proportionality standard in a manner not unlike the reasonable relationship test, which requires a municipality to show a reasonable relationship between the required dedication and the impact of the proposed development.<sup>95</sup> Prior to the decision in *Dolan*, many state courts addressing the same issue had already adopted the reasonable relationship test.<sup>96</sup> Although the *Dolan* Court stated that the reasonable relationship test was closest to the federal constitutional norm, the Court refused to specifically adopt the test as such because the name could create confusion with its similarity to the term "rational basis."<sup>97</sup> Instead, the Court termed its requirement "rough proportionality."<sup>98</sup> Thus, some scholars feel that lower courts will look to current state decisions analyzing the reasonable relationship standard for guidance.<sup>99</sup>

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90. See *Dolan v. City of Tigard*, 512 U.S. 374, 379-80 (1994) (citing CITY OF TIGARD COMMUNITY DEV. CODE § 18.120.180.A.8).

91. See Funk, *supra* note 81, at 138.

92. See *id.*

93. *Id.* at 139.

94. *Id.*

95. See Stroud & Trevarthen, *supra* note 81, at 806-07.

96. See, e.g., *City of College Station v. Turtle Rock Corp.*, 680 S.W. 2d 802 (Tex. 1984); *Simpson v. City of North Platte*, 292 N.W.2d 297 (Neb. 1980); *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979); *Collis v. City of Bloomington*, 246 N.W.2d 19 (Minn. 1976); *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442 (Wis. 1965).

97. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); see Stroud & Trevarthen, *supra* note 81, at 806-07.

98. *Dolan*, 512 U.S. at 396.

99. See Stroud & Trevarthen, *supra* note 81, at 806-07.

Finally, other scholars view the rough proportionality test as a rigorous standard for local governments to meet in light of the *Dolan* Court's willingness to strengthen individual private property rights.<sup>100</sup> They maintain that *Nollan* and *Dolan* represent a backlash against a traditionally deferential standard favoring land use regulation and indicate a trend toward heightened protection of individual property rights.<sup>101</sup> Further, they argue that *Dolan* creates an obstacle to the promulgation of land use regulations and the imposition of permit conditions by shifting the burden to the government to demonstrate that its actions are constitutional.<sup>102</sup> The test favors the landowner by forcing the government to justify a general land use regulation on a case-by-case basis, evaluating the effect on one landowner at a time.<sup>103</sup> According to this view, rough proportionality is a "virtually insurmountable" standard in situations where data is not readily quantifiable.<sup>104</sup> Even extensive empirical studies cannot quantitatively demonstrate the impact of a proposed development or the burden of a permit condition in certain situations.<sup>105</sup>

### 1. Land Dedication Cases Addressing *Dolan* and Rough Proportionality

Florida courts have yet to decide a case which specifically utilizes the *Dolan* analysis and its rough proportionality standard.<sup>106</sup>

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100. See Inbar, *supra* note 82, at 333. One scholar asserts that city land use planners must now undertake a cost-benefit analysis before enacting land use regulations in order to weigh the potential costs of litigation by private landowners seeking redress under *Dolan*, the potential costs of just compensation and the public benefits which could be attained under such regulations. See Allison B. Waters, *City Planners Must Bear the Burden of Rough Proportionality in Exactions and Land Use Regulation*, *Dolan v. City of Tigard*, 114 S. Ct. 2309, 37 S. TEX. L. REV. 267, 297-98 (1996) (recommending that planners always engage in such an analysis to avoid *Dolan*'s "wild card threat" that compensation may be required and to protect against bankrupting public offers).

101. See Inbar, *supra* note 82, at 332-33; see also Mark V. Hanrahan, *Dolan v. City of Tigard: Rough Proportionality as the Supreme Court's Next Step in Takings Jurisprudence*, 12 GA. ST. U. L. REV. 553, 574-75 (1996) ("The property-protective bent of the Court is reflected in the rough proportionality test because more than a simple essential nexus or logical relationship is required if the exaction in question is to pass constitutional muster. Rough proportionality presents a higher threshold for government to surmount to effect development exactions.").

102. See Inbar, *supra* note 82, at 333; Waters, *supra* note 100, at 298.

103. See Inbar, *supra* note 82, at 368. The test also increases costs for the local government by requiring an individualized determination in each case. See Brian B. Williams, Note, *Dolan v. City of Tigard: A New Era of Takings Clause Analysis*, 74 OR. L. REV. 1105, 1124 (1995). Prior to *Dolan*, the type of showing necessary to show a reasonable relationship was relatively inexpensive for municipalities. See *id.* The environmental and engineering studies that may now be required to illustrate rough proportionality are both expensive and time consuming. See *id.*

104. Inbar, *supra* note 82, at 368.

105. See *id.* at 366.

106. See Stroud & Trevvarthen, *supra* note 81, at 821-22.

Although cases have acknowledged *Dolan's* holding, any discussion of the rough proportionality standard has been merely dicta.<sup>107</sup> In *Sarasota County v. Taylor Woodrow Homes, Ltd.*,<sup>108</sup> a land developer and the county reached a resolution that authorized the rezoning of property and the approval of a development of regional impact.<sup>109</sup> The resolution contained certain requirements, including an agreement by the developer to build a private waste water treatment system at its own expense for the benefit of its development.<sup>110</sup> The developer agreed to dedicate the system to the county free of charge if the development was not completed by the time the county decided to proceed with a waste water treatment facility of its own in the area.<sup>111</sup> When the county exercised its right to request the dedication almost twenty years later, the developer refused to dedicate the property, claiming that the request was an unconstitutional taking of private property.<sup>112</sup>

The court recognized *Dolan* for the proposition that "the government cannot compel a person to give up a constitutional right to property in exchange for a discretionary benefit where the property sought has little relationship to the benefit."<sup>113</sup> However, the court refused to decide the constitutional issue and remanded the case for further factual findings on the contract dispute.<sup>114</sup> Nevertheless, the court suggested that an essential nexus existed between the development and a permit condition by the county requiring a sewer system in that location.<sup>115</sup>

With respect to rough proportionality, the court indicated that an evaluation of the impacts of the dedication on the costs borne by residents would be an element in quantifying the data:

If that nexus existed in 1974, then the next question that needed to be addressed at that time was whether "rough proportionality" existed between the impact of the proposed project and a dedication by which the developer would provide the sewer system free

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107. See, e.g., *Sarasota County v. Taylor Woodrow Homes, Ltd.*, 652 So. 2d 1247 (Fla. 2d DCA 1995); *Department of Transp. v. Heckman*, 644 So. 2d 527, 530 (Fla. 4th DCA 1994) (citing *Dolan* for the proposition that landowners cannot be forced to relinquish their rights to just compensation when their land is taken for a public purpose in exchange for a benefit granted by the government, where the property sought has little or no relationship to that benefit); see also *Stroud & Trevarthen*, *supra* note 81, at 821-22.

108. 652 So. 2d 1247 (Fla. 2d DCA 1995).

109. See *id.* at 1249.

110. See *id.*

111. See *id.*

112. See *id.* at 1250.

113. *Id.* at 1251.

114. See *id.* at 1252.

115. See *id.*

of charge to the County. Given that nothing in life is free, such a dedication would appear to require the developer to pass the costs of the system on to the new residents either through the sales price of the real property or through county authorized utility rates.<sup>116</sup>

However, the court did not suggest how such a determination could be made. It simply noted that rough proportionality could not be decided as a matter of law on the existing pleadings.<sup>117</sup>

Several cases in other jurisdictions have applied *Dolan* directly, providing more insight into the rough proportionality standard. An Oregon case, *J.C. Reeves Corp. v. Clackamas County*,<sup>118</sup> could be particularly useful in determining the constitutionality of permit conditions requiring public access. In that case, the applicant sought a permit to develop a 4.9-acre parcel into a residential subdivision.<sup>119</sup> A city street ran along the parcel's eastern border, and another tract of undeveloped land lay along its southern border.<sup>120</sup> To provide access to the adjacent tract, the applicant sought to extend this existing street, which ran up to the parcel's northern border,<sup>121</sup> to a new street to be built along the parcel's southern property line.<sup>122</sup> In his proposal, the applicant placed a "spite strip," a one-foot strip of land that would not be dedicated, for the purpose of creating the right-of-way between that new street, the proposed right-of-way, and the southern property line.<sup>123</sup> The hearing officer conditioned the approval of the application on construction of improvements to the street running along the land's eastern border and on the elimination of the spite strip.<sup>124</sup>

The court first noted that the Supreme Court in *Dolan* did not view the rough proportionality test "to be a radical departure" from the reasonable relationship standard<sup>125</sup> and found that the hearing officer's findings on the street improvement condition were not sufficient to fulfill the *Dolan* requirement.<sup>126</sup> The hearing officer's order contained conclusory statements about the benefits of the street improvements<sup>127</sup> but did not make any comparison between

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116. *Id.*

117. *See id.*

118. 887 P.2d 360 (Or. Ct. App. 1994).

119. *See id.* at 361.

120. *See id.*

121. *See id.*

122. *See id.* at 361-62.

123. *Id.* at 362.

124. *See id.*

125. *See id.* at 363.

126. *See id.* at 365.

127. *See id.* at 364.



the effects of traffic and the need for the improvements required by the county.<sup>128</sup>

Unlike the street improvement condition, the court upheld the condition that eliminated the spite strip.<sup>129</sup> The hearing officer found:

DTD [County Transportation Department] has determined that it is necessary to dedicate the road to the property line to provide access to the property to the south. DTD's reasoning is that the property to the south is too narrow to develop lots and provide for an additional east-west roadway, and the property will require access to this road when development occurs.<sup>130</sup>

The court concluded that these findings satisfied the *Dolan* requirement and stated that "[l]ittle could seem clearer than that the location of a 21-lot subdivision with an internal roadway can have profound impacts on access and traffic."<sup>131</sup> The court held that the elimination of the spite strip was an appropriate condition for providing access to the neighboring property since the proposed development would interfere with or eliminate that access, and the adjacent property was not large enough to provide adequate access on its own.<sup>132</sup> With the presence of the spite strip, the amount of land available for the right-of-way was insufficient.<sup>133</sup> The court stated, "[I]t is the fact of the strip's presence that threatens access, and no questions of level or intensity remain to be resolved."<sup>134</sup> Thus, further findings as to the proportionality were unnecessary.<sup>135</sup> Since the strip interfered with access, a condition creating or enhancing access directly countered the impact and did not require quantifiable data.<sup>136</sup>

Another Oregon case, *Schultz v. City of Grants Pass*,<sup>137</sup> is also helpful in understanding the rough proportionality standard. Petitioners in *Schultz* sought a development permit to partition their 3.85-acre parcel into two lots.<sup>138</sup> The city conditioned permit approval on the dedication of two city and county rights-of-way.<sup>139</sup> In

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128. See *id.* at 365.

129. See *id.* at 366.

130. *Id.*

131. *Id.*

132. See *id.*

133. See *id.*

134. *Id.*

135. See *id.*

136. See *id.*

137. 884 P.2d 569 (Or. Ct. App. 1994).

138. See *id.* at 570.

139. See *id.*

justifying the conditions, the city, imagining a worst-case scenario, based its findings on the impact of any future potential development of the lots as opposed to the impact of the mere partitioning of one lot into two.<sup>140</sup> The court held that the city could justify the conditions based on the present application and not on speculation as to any future uses.<sup>141</sup> The court also found that the city's data did not comport with the meaning of rough proportionality.<sup>142</sup> An increase of eight vehicle trips a day generated by the development did not require the dedication of 20,000 square feet of the petitioners' property without compensation.<sup>143</sup>

*a. Rough Proportionality as a Mixed Question of Law and Fact*

Interestingly, one court recently held that the issue of rough proportionality is a mixed question of law and fact that may be submitted to a jury.<sup>144</sup> Quoting the Supreme Court's language on "individualized determinations," the court stated that the description indicated an essentially factual inquiry.<sup>145</sup> The court cited several cases that submitted to the jury a reasonableness issue that was fact-bound in nature or was based largely "on the application of the fact-finding tribunal's experience with the mainsprings of human conduct."<sup>146</sup>

*2. Impact Fee Exactions and Dolan's Rough Proportionality Standard*

In lieu of the land dedications required in the cases discussed above, some municipalities exact impact fees as a precondition to development.<sup>147</sup> In Florida, neither section 161.053 nor section

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140. See *id.* at 573. This aspect of *Schultz* differs from *J.C. Reeves Corp.*, which allowed the city to require a condition based upon future development of the adjacent property. See notes 118-136 and accompanying text.

141. See *Schultz*, 884 P.2d at 573.

142. See *id.*

143. See *id.* Following *Schultz*, an Illinois court similarly held that an exaction requiring over twenty percent of the plaintiff's property did "not correspond with the slightest notions of rough proportionality" where the increase in traffic was only four-tenths of one percent. *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 391 (Ill. App. Ct. 1995), *cert. denied*, 667 N.E.2d 1055 (Ill. 1996), *cert. denied*, 117 S. Ct. 413 (1996).

144. See *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1430 (9th Cir. 1996).

145. *Id.*

146. *Id.* (quoting *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960)).

147. See generally Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. ILL. U. L. REV. 513, 513-14 (1995) (explaining that impact fees are one means of requiring developers to contribute money before they can proceed with development). Impact fees are "typically one-time fees imposed on a developer to offset a variety of potential impacts, on the theory that the cost of providing services for new developments can be determined in advance." *Id.* at 517.

161.55, *Florida Statutes*, authorizes the imposition of impact fees as a condition to coastal construction;<sup>148</sup> however, a municipality, pursuant to its local zoning code, could require the landowner to pay a fee to a specified fund for the preservation of local beach access.<sup>149</sup> Presently, the constitutionality of this type of exaction is also questionable under *Dolan*.<sup>150</sup>

While both *Nollan* and *Dolan* were land dedication cases, some courts have held that the *Dolan* test applies in impact fee situations.<sup>151</sup> Three days after the Supreme Court announced its decision in *Dolan*, the Court vacated a judgment of the California Court of Appeal in a case involving impact fees and ordered that court to reconsider its decision in light of *Dolan*.<sup>152</sup> In *Ehrlich v. Culver City*, the plaintiff challenged permit conditions requiring the payment of an art fee and a recreation fee.<sup>153</sup> Over the course of two years, the plaintiff acquired 2.4 acres of vacant land and received approval for the development of a tennis club and recreational facility.<sup>154</sup> Thereafter, the city amended its zoning plan, redesignating the parcel as a commercial zone.<sup>155</sup> The facility operated until 1988, at which time the plaintiff closed the facility and applied for a zoning change and plan amendment for the construction of a condominium complex.<sup>156</sup>

Initially, the city sought to buy the property to maintain the public recreational facilities but later was unable to make the purchase.<sup>157</sup> At the same time, the city denied the plaintiff's application for the condominium development because the city was concerned about the loss of recreational land uses.<sup>158</sup> Ultimately, the city approved the development plan but conditioned its approval upon plaintiff paying \$280,000 toward additional recreational facilities (the

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148. See generally FLA. Stat. § 161.053 (1995); FLA. STAT. § 161.55 (1995).

149. See, e.g., Fla. Stat. § 163.3202(1)(e) (1995) (providing for land development regulations to "ensure the protection of environmentally sensitive lands designated in the comprehensive plan"). Requiring payment of a fee for the preservation of local beach access may be one way to ensure such protection of environmentally sensitive lands.

150. See Cordes, *supra* note 147, at 515 (questioning *Dolan*'s reach beyond physical dedications of land to other exactions, such as impact fees).

151. See, e.g., *Ehrlich v. Culver City*, 512 U.S. 1231 (1994); *Trimen Dev. Co. v. King County*, 877 P.2d 187 (Wash. 1994).

152. See *Ehrlich*, 512 U.S. at 1231 (remanding *Ehrlich v. Culver City*, 19 Cal. Rptr. 2d 468 (Cal. Ct. App. 1993)); see also Cordes, *supra* note 147, at 541-42.

153. See *Ehrlich v. Culver City*, 911 P.2d 429, 435 (Cal. 1996), *rev'g* *Ehrlich v. Culver City*, 19 Cal. Rptr. 2d 468 (Cal. Ct. App. 1993) (on appeal after remand in *Ehrlich v. Culver City*, 512 U.S. 1231 (1994)), *cert. denied*, 117 S. Ct. 299 (1996).

154. See *id.* at 433.

155. See *id.* at 433-34.

156. See *id.* at 434.

157. See *id.*

158. See *id.*

recreational fee) located elsewhere in the city and \$33,200 toward the city's "Art in Public Places" program (the art fee).<sup>159</sup> The recreational fee was imposed in lieu of a condition requiring the placement of four tennis courts on the condominium property.<sup>160</sup>

The court of appeal upheld the recreation fee but found the art fee unconstitutional.<sup>161</sup> The United States Supreme Court vacated the decision and remanded back to the court of appeal, which subsequently reached the same conclusion.<sup>162</sup> Upon review of the latter decision, the California Supreme Court held that the art fee was a valid exercise of the police power as a "traditional" land use regulation and was not subject to the *Dolan* analysis.<sup>163</sup> However, the court found that the recreation fee was subject to *Dolan*'s heightened standard and remanded the case back to the trial court for further factual findings upon which to base the rough proportionality test.<sup>164</sup>

The California Supreme Court had little difficulty finding an essential nexus between the recreation fee and the state's legitimate state purpose of preserving and promoting the city's recreational resources.<sup>165</sup> As to the rough proportionality test, the court concluded that it did not have enough factual information to make a determination but commented extensively on what might constitute a roughly proportional fee and how the city should proceed with its individualized determination.<sup>166</sup> The city claimed that the loss of approximately \$800,000 of recreational facilities located on the plaintiff's property justified a \$280,000 recreational fee, but the court disagreed that the city should measure lost recreational benefits by the lost value of the plaintiff's health club.<sup>167</sup>

The court also held that the city could not justify the fee merely because four tennis courts would have been built on the property had the city insisted that a private recreational facility be constructed on the site.<sup>168</sup> The fee was not compensation for the loss of private facilities resulting from the zoning change since the costs of private courts would be funded through private means such as club

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159. *See id.* at 434-35.

160. *See id.*

161. *See id.* at 435-36.

162. *See id.* at 436.

163. *See id.* at 450.

164. *See id.* at 447.

165. *See id.* at 447-48.

166. *See id.* at 448-50.

167. *See id.* at 448.

168. *See id.* at 448-49.

membership dues.<sup>169</sup> Using the city's method, the court determined that:

Plaintiff is being asked to pay for something that should be paid for either by the public as a whole, or by a private entrepreneur in business for a profit. The city may not constitutionally measure the . . . recreational exaction, by the value of facilities it had no right to appropriate without payment.<sup>170</sup>

Nevertheless, the court stated that a recreational fee could be a valid exaction as long as the amount of the fee was more closely tied to the actual impact of the zoning change.<sup>171</sup> Further, the court offered suggestions on what type of expense the city could measure in its fee calculation. These alternatives included the administrative expenses incurred in the redesignation of other property in the city for recreational use or the greater expenses necessary to attract and induce entrepreneurs to develop private recreational facilities.<sup>172</sup> The court also stated that the city could require the plaintiff to transfer the restricted land use designation, which mandated a recreational land use, to a comparable parcel of property owned by the plaintiff in the city.<sup>173</sup> This transfer would return the city "to the status quo as it existed prior to approval of the condominium project, that is, with a similar parcel of vacant land reserved for recreational use as an inducement to the development of private recreational facilities."<sup>174</sup> If such a transfer would be impracticable:

[The city] may surely levy an in-lieu exaction to accomplish the same objective. Such a fee would serve the same purpose as all development fees: providing the city with a means of escaping the narrow choice between denying plaintiff his project permit altogether or subordinating legitimate public interests to plaintiff's development plans.<sup>175</sup>

The Washington Supreme Court also used the *Dolan* analysis to evaluate the validity of an impact fee for recreational land.<sup>176</sup> In *Trimen Development Co. v. King County*, the county required the developer to pay fees in lieu of dedication as a condition to the granting of two permit applications.<sup>177</sup> The fees were to be used for

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169. See *id.* at 449.

170. *Id.*

171. See *id.*

172. See *id.*

173. See *id.*

174. *Id.*

175. *Id.*

176. See *Trimen Dev. Co. v. King County*, 877 P.2d 187, 187 (Wash. 1994) (en banc).

177. See *id.* at 189.

the acquisition and development of open space, park sites, and recreational facilities within a "park service area."<sup>178</sup> Under a county ordinance, the county calculated the fee based upon the assessed value of an equivalent amount of land that the developer would have reserved or dedicated.<sup>179</sup>

Based on the ordinance's formula for land dedication, the county proposed that Trimen dedicate 1.08 acres of the twenty-one acres of its first development, Winchester I.<sup>180</sup> Trimen instead opted for the fee and successfully proposed a reduction of the figure suggested by the county.<sup>181</sup> Trimen ultimately paid \$52,349.37 for the fee and obtained final approval for the development.<sup>182</sup> Shortly thereafter, the county proposed a 1.016 acre dedication of the developer's 22-acre development, Winchester II.<sup>183</sup> Once again, Trimen paid an in-lieu fee, this one totaling \$34,979.38.<sup>184</sup>

The plaintiff in *Trimen Development Co.* did not attack the constitutionality of the permit condition but rather argued that the fee violated a state statute providing that no county could impose an impact fee unless it could establish that the fee was reasonably necessary because of the development.<sup>185</sup> The court examined the fee directly and analyzed the lawfulness of the city ordinance that was used to calculate the fee.<sup>186</sup>

In 1985, the county had conducted a comprehensive assessment of park needs and created the ordinance's formula based on its findings.<sup>187</sup> According to the county, it needed over 300 acres of additional park land by the year 2000 in light of projected population growth.<sup>188</sup> The county found that Trimen's proposed development would increase the population by approximately 336 people and would therefore create a need for an additional 2.52 acres of park land.<sup>189</sup> Under the ordinance, this impact would require the developer to dedicate 2.096 acres.<sup>190</sup> The county calculated the in-lieu fees based upon current zoning, projected population, and the assessed value of land that the developer would have been required to

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178. *Id.*

179. *See id.*

180. *See id.* at 190.

181. *See id.* at 189.

182. *See id.*

183. *See id.*

184. *See id.*

185. *See id.* at 193-94.

186. *See id.* at 194.

187. *See id.*

188. *See id.*

189. *See id.*

190. *See id.*

dedicate.<sup>191</sup> Without further explanation, the court concluded that the fees were reasonably necessary as a direct result of the proposed development, citing *Dolan's* rough proportionality test.<sup>192</sup> The court noted that the county did not conduct a site-specific study as to the actual individual impact of Trimen's development but asserted that the county's comprehensive impact assessment of 1985 was sufficient grounds upon which to base the fee calculation.<sup>193</sup>

Florida courts have not had the opportunity to address the application of *Dolan* with respect to impact fee exactions.<sup>194</sup> Although some courts have held that *Nollan* and *Dolan* pertain solely to land dedication cases,<sup>195</sup> Florida will likely follow the lead of the California and Washington supreme courts. Prior to *Dolan*, Florida courts evaluated impact fees using the reasonableness standard set forth by the Florida Supreme Court in *Contractors and Builders Ass'n of Pinellas County v. City of Dunedin*.<sup>196</sup> Thus, precedent indicates that courts will not likely have difficulty adopting the heightened scrutiny of *Dolan* in such situations.

In *Contractors and Builders Ass'n*, city ordinances required the payment of connection fees as a condition to the granting of a permit for water and sewer service.<sup>197</sup> The court found that the imposition of the fees was acceptable and did not constitute a tax but determined that the amount of the fees did not have a reasonable relationship to their intended purpose.<sup>198</sup>

According to the court, a municipality could raise money for capital improvements to its water and sewer system by charging connection rates that did not exceed a pro rata share of the costs of the improvements themselves and that were limited to meeting those improvement costs.<sup>199</sup> However, placing the entire burden of the costs of capital expenditures on individuals seeking to connect to the system after an arbitrarily chosen time was not just and equitable.<sup>200</sup> The court held that:

The cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent. When

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191. *See id.*

192. *See id.*

193. *See id.*

194. *See Stroud & Trevarthen, supra* note 81, at 821-22.

195. *See Cordes, supra* note 147, at 541.

196. 329 So. 2d 314 (Fla. 1976).

197. *See id.* at 317.

198. *See id.* at 321-22.

199. *See id.* at 320.

200. *See id.*

new facilities must be built in any event, looking only to new users for necessary capital gives old users a windfall at the expense of new users.<sup>201</sup>

Thus, by requiring new users to contribute toward the cost of replacing original facilities through the payment of connection fees, the city was arbitrarily and irrationally distinguishing between existing and new developments.<sup>202</sup>

The court did not find that the amount of fees was unreasonable but instead found that the failure of the ordinance to restrict use of the fees unduly burdened an arbitrary class of individuals.<sup>203</sup> Hence, the court struck down the ordinance that required the exactions.<sup>204</sup> At the same time, the court quoted an ordinance that properly restricted the use of connection fees.<sup>205</sup> That ordinance deposited money from the sewer connection charges into a sanitary sewer capital reserve fund to be expended only for the purpose of making major emergency repairs or constructing new additions to the treatment plant or sewer system.<sup>206</sup>

*Contractors and Builders Ass'n* would appear to meet *Dolan* standards because it implicitly requires an individualized determination as to the impact of a proposed development and the nature and extent of the exaction. Using a *Dolan* analysis, the court upheld the impact fees as having an essential nexus, finding that the city could legitimately raise expansion capital by setting connection charges where expansion was reasonably required.<sup>207</sup> However, the court struck down the ordinance under which the city could assess those fees because the fees were not, in effect, roughly proportional to the impact of a particular development.<sup>208</sup> As noted above, the court found that the "cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent."<sup>209</sup> Fees that burdened new developments with costs that should be shared by original developments and fees that required new developments to subsidize the costs of original facilities were not roughly proportional to the impact of the development.<sup>210</sup> Those fees required new users to pay for expenses that had little or

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201. *Id.* at 321.

202. *See id.*

203. *See id.*

204. *See id.* (striking FLA. ADMIN. CODE ANN. r. 25-71(c)).

205. *See id.* (quoting *Hayes v. City of Albany*, 490 P.2d 1018, 1020 (Or. Ct. App. 1971)).

206. *See id.* at 321.

207. *See id.* at 320.

208. *See id.* at 320-21.

209. *Id.* at 321.

210. *See id.*



nothing to do with the increased use or wear that their particular development would have on the city's water and sewer system.<sup>211</sup> One might say that the court was requiring the city to make a more individualized determination as to the extent of the exaction by limiting the use of fee money so that fees for new developments were more directly related to the specific impact of those new developments. Under this interpretation, a court specifically using the *Dolan* test would likely come to the same conclusion. This similarity suggests that Florida courts might be more inclined to analyze the validity of impact fees, as well as land dedication conditions, using the *Dolan* standard.

#### IV. THE EFFECT OF *DOLAN* ON PERMIT CONDITIONS FOR BEACH ACCESS AND ON STATE BEACH ACCESS LAWS

##### A. Land Dedication Permit Conditions

###### 1. Individualized Determinations and Quantifiable Data

According to Professor Funk's view, *Dolan* should not discourage local governments from preserving public beach access through permit exactions.<sup>212</sup> He believes *Dolan* creates "relatively easy hurdles" that may be overcome by "some study" showing "some relationship" to the impact.<sup>213</sup> Thus, a municipality would simply have to show that the development interfered with beach access and that the dedication of alternate beach access provided some proportionate remedy to this interference.

Current cases illustrate potential problems with Funk's reading of *Dolan*.<sup>214</sup> First, any study quantifying the relationship would not be sufficient to satisfy the requirement as Funk suggests. The permit conditions in both *Schultz* and *Amoco Oil Co.* were based on individualized determinations by the city.<sup>215</sup> The studies demonstrated that the increases in traffic were de minimis compared to the extent of the burdens imposed by the permit conditions.<sup>216</sup> Despite quantifiable findings by the cities, these courts found rough

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211. See *id.*

212. See Funk, *supra* note 81, at 139 (commenting generally that "*Dolan*'s rough proportionality test should not cause major problems for local government . . .").

213. *Id.*

214. See, e.g., *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. Ct. App. 1994); *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. App. Ct. 1995), *cert. denied*, 667 N.E.2d 1055 (Ill. 1996), *cert. denied*, 117 S. Ct. 413 (1996).

215. See *Amoco Oil Co.*, 661 N.E.2d at 391; *Schultz*, 884 P.2d at 573.

216. See *Amoco Oil Co.*, 661 N.E.2d at 391; *Schultz*, 884 P.2d at 573.

proportionality to be lacking.<sup>217</sup> Therefore, a finding of "some" relationship might not be enough; the relationship would have to be significant to justify a burden on individual property rights.

Furthermore, *Dolan* indicates that a mere attempt to quantify findings is not adequate to constitute an individualized determination. In *Dolan*, the City of Tigard engaged in some study with respect to the proposed development, finding that it would increase traffic by roughly 435 vehicle trips per day.<sup>218</sup> The City failed to quantify the need for the permit condition by studying whether the pathway would likely offset this traffic.<sup>219</sup> In trying to comply with *Dolan*, a city may now ask how it can empirically study whether and to what extent a proposed permit condition can offset the impact of a future development. In other words, finding that the condition *could* offset the impact is not the same as finding that it *will*. No courts have answered the question of how a city can procure such a speculative finding, even where a precise mathematical calculation is unnecessary.

This speculation creates the "insurmountable" obstacle discussed above.<sup>220</sup> One scholar, analyzing New York City's 1993 Waterfront Zoning Ordinance (Waterfront Ordinance), believes the Waterfront Ordinance to be unconstitutional due to the impossibility of quantifying a study on public access under the plan.<sup>221</sup> The Waterfront Ordinance creates special regulations for construction in waterfront areas of the city.<sup>222</sup> It is "designed to guide development along the City's waterfront and in so doing to promote and protect public health, safety and general welfare."<sup>223</sup> As a result, it requires developments on waterfront-zoned lots to provide waterfront public access.<sup>224</sup> This access includes public walkways, upland connections, supplemental public access areas, and visual corridors.<sup>225</sup> The public access dedication may occupy from fifteen to twenty percent of the total zoning lot area and must meet specific requirements.<sup>226</sup> For example, it must assure handicap accessibility, create pedestrian circulation, buffer, and transition zones, and provide unobstructed

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217. See *Amoco Oil Co.*, 661 N.E.2d at 391; *Schultz*, 884 P.2d at 573.

218. See *Dolan v. City of Tigard*, 512 U.S. 374, 395 (1994).

219. See *id.*

220. See *supra* notes 100-105 and accompanying text.

221. See *Inbar*, *supra* note 82, at 365-68.

222. See *id.* at 355.

223. *Id.* (quoting NEW YORK CITY ZONING RESOLUTION art. VI, ch. 2, § 62-00).

224. See *id.*

225. See *id.* at 355-56.

226. See *id.*

views.<sup>227</sup> The Waterfront Ordinance also sets forth specific design standards for width, seating, handicap access, lighting, signs, guard-rails, and landscaping and requires the walkways to be open to the public from sunrise to sunset.<sup>228</sup>

While a court could plausibly find an essential nexus between the requirements of the Waterfront Ordinance and the public purpose of providing physical and visual access to the waterfront, Inbar suggests that the Ordinance may fail to meet the test for rough proportionality.<sup>229</sup> She states:

According to the Court in *Dolan*, New York City has the burden to prove that it formulated an individualized assessment regarding whether the development would diminish physical and visual public access to the waterfront thereby justifying a demand for the upland and shoreline walkways to offset the detriment to public interests. This final test appears most problematic for New York City, since the regulations create a public benefit that the City, by its own admission, could not otherwise afford.<sup>230</sup>

Inbar further notes that the failure of the City of Tigard's statistical evidence demonstrates that New York City must prove with "extreme certainty" that "the development on the waterfront *would* actually *impede* the public's access to the waterfront," and that "the pathways *would alleviate* this harm."<sup>231</sup> Consequently, she believes that a court would probably find the Waterfront Ordinance unconstitutional under *Dolan* since the case is one in which the purpose of the ordinance seeks to ensure "quality of life interests that are difficult to quantify, such as those implicated by the public trust doctrine."<sup>232</sup>

Although New York City could undertake extensive empirical studies to determine how a proposed development would impact public access and could attempt to collect data on how walkways would offset the impact of each particular development, the evidence would probably not satisfy the strict standard of rough proportionality.<sup>233</sup> The failure would result from the difficulty of quantifying the type of public interest benefits produced by the Waterfront Ordinance.<sup>234</sup>

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227. *See id.*

228. *See id.*

229. *See id.* at 363-64.

230. *Id.*

231. *Id.* at 364 (emphasis in original).

232. *Id.* at 365.

233. *See id.* at 366-67.

234. *See id.* at 367.

The same difficulty arises with permit conditions for beach access dedications under relevant Florida statutes. How could a municipality quantify how much an alternate accessway would offset interference with existing access? Following the suggestions of the Court in *Dolan*,<sup>235</sup> the municipality could study the present uses of an accessway, totaling the amount of pedestrian traffic on the accessway over a certain period of time. Then, the municipality could make an assumption that an alternate accessway that is "comparable" under the requirements of the statute would bear the same amount of pedestrian traffic. Certainly, this assumption plays on the semantic games of the Supreme Court in *Dolan*, for no concrete difference exists between finding that such a pathway may, or will, alleviate the impact of the development. At the same time, such an assumption does not provide the quantification that might be required under a *Dolan* analysis. Unfortunately, no method seems to exist through which a municipality could avoid speculation.

Certain cases suggest that future courts can avoid this dilemma in their considerations.<sup>236</sup> The *Dolan* Court recognized that "it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere" had the proposed development "somehow encroached on existing greenway space in the city."<sup>237</sup> Thus, a permit condition that counters a development's impact by creating an exaction essentially equivalent to that interfered with or eliminated, makes further quantification unnecessary. Such was the case in *J.C. Reeves Corp.* where the dedication, which required the elimination of a spite strip that interfered with public access, was directly proportional to the impact on the development.<sup>238</sup> There the court determined that the condition was "an appropriate device for providing the adjacent property with the access that the proposed development would otherwise eliminate or impair."<sup>239</sup> The court found that the mere fact of the strip's presence threatened access and that no questions of level or intensity remained to be resolved.<sup>240</sup>

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235. See *Dolan v. City of Tigard*, 512 U.S. 374, 395 (1994); see also *supra* notes 77-80 and accompanying text.

236. See, e.g., *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. Ct. App. 1994); *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. App. Ct. 1995), *cert. denied*, 667 N.E.2d 1055 (Ill. 1996), *cert. denied*, 117 S. Ct. 413 (1996).

237. *Dolan*, 512 U.S. at 394.

238. See *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360, 365-66; see also *supra* notes 118-136 and accompanying text.

239. *J.C. Reeves Corp.*, 887 P.2d at 365.

240. See *id.* at 365-66.

Furthermore, the courts in *Schultz* and *Amoco Oil Co.* did not consider whether the exactions in question would alleviate future impacts. Instead of basing their analyses on a comparison of the impact of the proposed development with the need for the exaction, the courts weighed the impact of the development against the *extent* of the exaction.<sup>241</sup> Both courts found the permit conditions invalid because the conditions required such an extensive amount of land to alleviate such a small impact.<sup>242</sup> Such an analysis relies on readily quantifiable data regardless of the situation and does not require any speculation as to an unknowable future. A determination in this manner appears to be contemplated by *Dolan* where the Court stated that a required dedication had to be related "both in nature and extent" to the impact of a proposed development.<sup>243</sup> Thus, a condition requiring the dedication of an alternate beach accessway would not be a regulatory taking if the new accessway was comparable to the accessway with which the proposed development interfered.

Under this comparative analysis, courts would find it far easier to uphold conditions for beach access that simply shift the accessway from the center of a small tract to the lot line. The condition would provide a "one-to-one correspondence between the means used and the harm sought to be prevented."<sup>244</sup> The analysis might also be useful to municipalities in cases where a developer seeks to create alternate access at either end of a large tract covering several miles. Arguably, the elimination of perpendicular beach access at the center of a large tract could not be adequately remedied by a shift to the lot line. Relocating an accessway to the lot line would effectively preclude the public from using the beach located near the center of the tract since few members of the public would venture a mile or more by lateral access to reach the area. Accordingly, a municipality might deny a permit application unless the developer agreed to a condition creating access at various points along the length of the development. As long as those accessways were comparable in nature and did not burden an unreasonable amount of the developer's land in comparison to the amount of existing access interfered with by the proposed development, the permit conditions would most likely meet the rough proportionality test as suggested in *Schultz* and *Amoco Oil Co.*

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241. See *Amoco Oil Co.*, 661 N.E.2d at 391; see also *Schultz*, 884 P.2d at 573.

242. See *Amoco Oil Co.*, 661 N.E.2d at 391; see also *Schultz*, 884 P.2d at 573.

243. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

244. John Martinez, *A Framework for Addressing Takings Problems*, 9 UTAH B.J. 13, 15 (1996).

## 2. *The Effectiveness of Florida's Statutes*

Section 161.55(6) does much to ensure that an alternate accessway will be roughly equivalent to an existing accessway that has been established by prescription, prescriptive easement, or any other legal means.<sup>245</sup> It mandates that the new accessway be of "substantially similar quality and convenience to the public."<sup>246</sup> The accessway must also be approved by the local government and approved by DEP if the improvements are seaward of the coastal construction control line.<sup>247</sup> Finally, the new accessway must be consistent with the coastal management element of the local comprehensive plan.<sup>248</sup> Based on these standards, an alternate accessway is likely to have a significant relationship to the impact of the proposed development on an existing accessway.

Section 161.053, on the other hand, does less to guarantee that a new accessway will be roughly proportional to the accessway with which a proposed development interferes.<sup>249</sup> DEP, in its judgment, may impose the condition, and the alternate accessway cannot be wider than the accessway that will be obstructed by the proposed development.<sup>250</sup> While this requirement ensures that a greater area of an individual's property will not be burdened by the alternate accessway, it does not guarantee that the new accessway will be roughly equivalent and of substantially similar quality and convenience to the public. Section 161.053 focuses more on protecting the property rights of the individual landowner while section 161.55(6) places greater emphasis on the preservation of the public's right to beach access.<sup>251</sup>

Interestingly, both sections assume that an existing public accessway is obvious and its presence on the property is recognized by all, including the property owner and the municipality. However, universal recognition is unlikely. Thus, another difficulty arises in demonstrating rough proportionality: A municipality must prove that the beach access existed in the first place. As a result, a municipality would have to make an individualized determination as to each property to establish that the public had acquired an easement through prescription, custom or otherwise. The burden and cost of conducting this study for each permit condition the

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245. See FLA. STAT. § 161.55(6) (1995).

246. *Id.* § 161.55(6)(a).

247. See *id.* § 161.55(6)(b)-(c).

248. See *id.* § 161.55(6)(d).

249. See *id.* § 161.053.

250. See *id.* § 161.053(5)(e).

251. See *id.* § 161.053, 161.55(6).

municipality sought to impose would be extensive and would perhaps be equivalent to the compensation that it would have to pay for land it had taken.<sup>252</sup>

*B. Impact Fee Exactions as an Alternative to Permit Conditions*

*Ehrlich* and *Trimen Development Co.* suggest that finding quantifiable data and making an individualized determination may not be as difficult with respect to impact fees.<sup>253</sup> If a fee is imposed that requires the landowner to pay an amount equivalent to the amount necessary to obtain comparable beach access in another location, the condition would appear to have a practical one-on-one correspondence between the exaction and the development's impact. Furthermore, the fee would not be based on a nebulous, unquantifiable public benefit.<sup>254</sup> By basing the fee on the actual cost of obtaining comparable access, the fee could be specifically tailored to the impacts of a proposed development.<sup>255</sup> "[B]y their very nature impact fees lend themselves to the quantification and individualized assessment required by *Dolan* and as a general method would not appear to be at risk under *Dolan*."<sup>256</sup> Thus, local governments might wish to shift from land dedications to impact fees in order to meet the requirements of *Dolan* because impact fees may provide greater flexibility when establishing rough proportionality.<sup>257</sup>

This type of exaction would fall within the alternatives suggested by the California Supreme Court in *Ehrlich*.<sup>258</sup> Instead of dedicating a parcel which could be rezoned, the developer could pay a fee that would accomplish the same end.<sup>259</sup> *Ehrlich* also suggested that the impact fee could include the administrative costs of purchasing and designating the accessway.<sup>260</sup> Further, as stated by the court in *Trimen Development Co.*, an impact fee used for land purchase and development is valid if it is equivalent to the value of land that would have been dedicated.<sup>261</sup> Finally, an impact fee exaction would likely meet the requirements of *Contractors and*

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252. See generally *supra* notes 102-103 and accompanying text.

253. See *Ehrlich v. Culver*, 911 P.2d 429, 442-44 (Cal. 1996); *Trimen Dev. Co. v. King County*, 877 P.2d 187, 193-94 (Wash. 1994) (en banc); see also Cordes, *supra* note 147, at 553 (stating that impact fees would fare better under the *Dolan* analysis than physical dedications).

254. See Inbar, *supra* note 82, at 367; see also *supra* notes 100-105 and accompanying text.

255. See Cordes, *supra* note 147, at 553.

256. *Id.*

257. See *id.*

258. See *Ehrlich*, 911 P.2d at 449.

259. See *id.*

260. See *id.*

261. See *Trimen Dev. Co. v. King County*, 877 P.2d 187, 193-94 (Wash. 1994) (en banc).

*Builders Ass'n* as long as a municipality used the funds acquired from the fee to directly mitigate the impact of the proposed development.<sup>262</sup>

## V. MEASURES TO PRESERVE BEACH ACCESS

In its efforts to preserve public access to beaches, Florida could pursue several options. These options include adopting certain revisions to the statutes governing public access, initiating a formal program for the identification of current accessways, and providing citizens with the ability to protect public access in court through a citizen suit provision.

### A. Changing Chapter 161

No matter what effect *Dolan* ultimately has on Florida law, several changes can be made to chapter 161, *Florida Statutes*, to further protect and enhance beach access and to help ensure that permit conditions for beach access pass the heightened scrutiny of the Supreme Court's decision. First, the language of section 161.053 should mimic that of section 161.055.<sup>263</sup> Specifically, section 161.053 should not only contain language limiting the width of new access to that of the old but also should require the accessway to be of substantially similar quality. Like section 161.55(6), this requirement would be monitored by approval of the local government or DEP.<sup>264</sup> Such a change in the statutory language would help guarantee that future dedications requiring either lateral or perpendicular access are roughly proportional to the impact of coastal developments.<sup>265</sup> As modified, the statute would ensure that alternate accessways are equivalent by requiring them to be comparable in nature and convenience to existing accessways.<sup>266</sup> Further, both sections should contain some language alluding to the need for, or specifically requiring, some kind of individualized determination before the permit condition is imposed. Finally, both sections should authorize impact fees in lieu of dedication or grant authority to municipalities

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262. See *Contractors and Builders Ass'n v. City of Dunedin*, 329 So. 2d 314, 321 (Fla. 1976).

263. See FLA. STAT. § 161.053(5)(e) (1995) (stating that the width of alternate access cannot exceed the width of existing access with which a proposed development will interfere); see also FLA. STAT. § 161.55(6) (1995) (requiring that alternate accessways be of substantially similar quality and convenience to the public, be approved by the local government, be approved by DEP in certain situations, and be consistent with the coastal management element of the local comprehensive plan).

264. See FLA. STAT. § 161.55(6) (1995).

265. See *supra* notes 241-244 and accompanying text.

266. See FLA. STAT. § 161.55(6) (1995).



to make this choice. Because impact fees may be more flexible in meeting *Dolan* standards, the statutes should promote their use.<sup>267</sup>

### B. Platting Public Beach Access Points

If public accessways are identified and platted prior to the imposition of a permit condition, one difficulty in meeting the rough proportionality standard of *Dolan* is diminished. As discussed above, an existing accessway must be identified before a municipality can find that a proposed development will interfere with or eliminate that access.<sup>268</sup> The applicable Florida statutes governing local government comprehensive planning require that some municipalities include coastal management elements in their respective local comprehensive plan.<sup>269</sup> According to section 380.24,<sup>270</sup> these municipalities are those "[u]nits of local government abutting the Gulf of Mexico or the Atlantic Ocean, or which include or are contiguous to waters of the state where marine species of vegetation listed by rule as ratified in [section] 373.4211 constitute the dominant plant community."<sup>271</sup> Essentially, all coastal municipalities must include a coastal management element.

As stated previously, the coastal management element must be based upon "studies, surveys, and data" and must contain a map of public access routes to beach and shore resources and a shoreline component which identifies public access to beach and shoreline areas.<sup>272</sup> Under these statutes, it appears that a municipality should consistently identify and map existing beach access, eliminating one part of the individualized determination that the municipality must make when imposing a permit condition.

Rhode Island goes one step further in promoting beach access. Florida may wish to follow Rhode Island's lead in order to ensure that its permit exactions meet the constitutional standard. Rhode Island has developed a program for the discovery, maintenance, and management of public beach access.<sup>273</sup> In 1958, Rhode Island created an administrative agency known as the Commission on the Discovery and Utilization of Public Rights of Way, which had the

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267. See *supra* notes 257-261 and accompanying text.

268. See *supra* notes 241-244 and accompanying text.

269. See FLA. STAT. § 163.3177(g) (1995).

270. *Id.* § 380.24.

271. *Id.*

272. See *id.* § 163.3178(2).

273. See Michelle A. Ruberto & Kathleen A. Ryan, *The Public Trust Doctrine and Legislative Regulation in Rhode Island: A Legal Framework Providing Greater Access to Coastal Resources in the Ocean State*, 24 SUFFOLK U. L. REV. 353, 358 (1990).

authority to identify existing public easements.<sup>274</sup> Later, the Legislature created a Coastal Resources Management Council (CRMC) to replace that Commission.<sup>275</sup> The CRMC retains the sole authority to discover and designate all existing public accessways to the ocean.<sup>276</sup> By 1989, CRMC's Right-of-Way Subcommittee had identified 164 sites as public accessways, and at the time of its 1989 review, the Subcommittee had several hundred potential sites that remained to be evaluated.<sup>277</sup>

CRMC has several powers and duties with respect to public rights-of-way:

- (1) The council shall be responsible for the designation of all public rights-of-way to the tidal water areas of the state, and shall carry on a continuing discovery of appropriate public rights-of-way to the tidal water areas of the state.
- (2) The council shall maintain a complete file of all official documents relating to the legal status of all public rights-of-way to the tidal water areas of the state.
- (3) The council shall have the power to designate for acquisition and development, and posting, and all other functions of any other department for tidal rights-of-way and land for tidal rights-of-way, parking facilities, and other council related purposes.

Further, the council shall have the power to develop and prescribe a standard sign to be used by the cities and towns to mark designated rights-of-way.<sup>278</sup>

When CRMC designates public rights-of-way, it must give consideration to land evidence records, the exercise of domain over the parcel, the payment of taxes, the creation of a dedication, the public's use, and other public records or historical evidence, including maps and street indexes.<sup>279</sup> CRMC's determination that a right-of-way exists must be justified by substantial evidence.<sup>280</sup> Lastly, a municipality must notify CRMC when a public right-of-way is no longer useful to the public and should be abandoned.<sup>281</sup>

By creating a state agency to oversee the designation of beach access, Rhode Island has created a comprehensive program that may aid the state and its municipalities in overcoming regulatory takings

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274. *See id.*

275. *See id.*

276. *See id.*

277. *See id.*

278. R.I. GEN. LAWS § 46-23-6(E)(1)-(3) (1995).

279. *See id.* § 46-23-6(E)(6)(a)-(g).

280. *See id.* § 46-23-6(E)(7).

281. *See id.* § 46-23-6(E)(8).

challenges in the future.<sup>282</sup> Unfortunately, such a program also has its drawbacks. For instance, implementation of a similar program in Florida would require additional funding from the state government. Further, the state would have to be prepared for litigation brought by property owners seeking to contest the state's determination of a right-of-way on their land.

### C. Creating Citizen Standing

Since implementing a state program to determine beach access may be just as expensive as compensating property owners for their beach access dedications,<sup>283</sup> the Legislature could also adopt a statute providing for citizen standing to enforce the public's right to beach access. In this way, individuals could bring suit to establish by declaratory relief or to protect through injunctive relief their rights to existing accessways. Citizen suits would remove part of the financial burden from the government for the designation of public access points.

The issue of citizen suit standing was recently addressed by the United States Supreme Court in *Lujan v. Defenders of Wildlife*,<sup>284</sup> where the Court held that Congress could not create federal court standing for private citizens that have not suffered any concrete injury.<sup>285</sup> Under Article III of the United States Constitution, federal court jurisdiction is limited to an actual case or controversy.<sup>286</sup> In *Lujan*, members of a wildlife association brought suit against the United States Secretary of the Interior for failing to follow correct procedure when promulgating a regulation under the Endangered Species Act.<sup>287</sup> The Act provided that "any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter."<sup>288</sup> The Supreme Court rejected the view that the plaintiffs satisfied the injury-in-fact rule by Congress' conferral to all persons of an "abstract, self-contained, noninstrumental" right requiring the executive branch to observe procedures mandated by law.<sup>289</sup>

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282. See *supra* notes 241-247, 263 and accompanying text.

283. See *supra* notes 100-105, 247 and accompanying text.

284. 504 U.S. 555 (1992).

285. See *id.* at 577-78.

286. See *id.* at 559-60; see also U.S. CONST. art. III, § 1.

287. See *Lujan*, 504 U.S. at 558-59.

288. *Id.* at 571-72 (quoting 16 U.S.C. § 1540(g) (1988)).

289. *Id.* at 573.

According to the Court, a generalized, undifferentiated grievance was an inadequate basis upon which to grant standing, and Congress could not legislatively remedy the situation by awarding standing to any member of the public regardless of whether that person had suffered a concrete injury.<sup>290</sup> Nevertheless, Congress could enact statutes that created legal rights, the invasion of which would create standing.<sup>291</sup>

The result is similar with respect to Florida state courts. In *Florida Wildlife Federation v. Department of Environmental Protection*,<sup>292</sup> the Florida Supreme Court upheld the citizen suit provision of Florida's Environmental Protection Act (EPA) which allowed a Florida citizen to maintain an action for injunctive relief against "[a]ny governmental agency or authority charged by law with the duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations" or against "[a]ny person natural or corporate, governmental agency or authority to enjoin such persons, agencies, or authorities from violating any laws, rules or regulations for the protection of the air, water, and other natural resources of the state."<sup>293</sup> The court determined that the provision was not an impermissible incursion by the Legislature into the judiciary's power to adopt rules of practice and procedure under the Florida Constitution since it created substantive rights that were not previously possessed by individuals.<sup>294</sup> The statute did not seek to define proper parties to a suit but instead sought to create an entirely new cause of action.<sup>295</sup> It afforded citizens the ability to protect their rights to a clean environment, a right which was not available to Florida citizens prior to the statute's enactment.<sup>296</sup>

The citizen suit provision at issue in *Florida Wildlife Federation* differed from that struck down by the Florida Supreme Court in *Avila South Condominium Ass'n, Inc. v. Kappa Corp.*<sup>297</sup> The statutory provision in dispute in *Avila South* gave condominium associations the ability to contract, bring suit, and be sued with respect to the

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290. See *id.* at 575-78.

291. See *id.* at 578 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

292. 390 So. 2d 64 (Fla. 1980).

293. FLA. STAT. § 403.412(2)(a) (1977).

294. See *Florida Wildlife Fed'n*, 390 So. 2d at 66.

295. See *id.*

296. See *id.* at 67.

297. 347 So. 2d 599 (Fla. 1977).

exercise of an association's powers.<sup>298</sup> The provision also gave associations the capability to maintain a class action suit on behalf of its unit owners with respect to matters of common interest.<sup>299</sup> According to the court:

Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof . . . . [S]ubstantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property.<sup>300</sup>

Therefore, the court found that the statute in question constituted an impermissible incursion into the court's ability to adopt rules of practice and procedure since the statute sought to define proper parties in suits litigating substantive rights.<sup>301</sup>

Like federal standing, standing in Florida state courts generally requires a showing of a special injury.<sup>302</sup> The Florida Supreme Court originally adopted this rule to prevent a multiplicity of suits, but the court, as well as the Legislature, has created exceptions to the rule since its adoption.<sup>303</sup> Thus, in *Florida Wildlife Federation*, the court held that the Legislature did not have to require a showing of special injury when it created a new cause of action under the Florida EPA.<sup>304</sup> Instead, "the legislature chose to allow citizens to bring an action where an action already existed for those who had special injury."<sup>305</sup>

In *United States Steel Corp. v. Save Sand Key, Inc.*,<sup>306</sup> the Florida Supreme Court specifically addressed standing to sue for injunctive or declaratory relief to preserve or protect existing beach access.

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298. See FLA. STAT. § 711.12(2) (1975).

299. See *id.*

300. *Avila So. Condominium Ass'n*, 347 So. 2d at 608 (quoting *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972)).

301. See *id.*

302. See *Florida Wildlife Fed'n v. Department of Env'tl. Protection*, 390 So. 2d 64, 67 (Fla. 1980).

303. See *id.*

304. See *id.* Although the court held that plaintiffs did not have to show a special injury under the Florida EPA, it noted certain requirements that would have to be met in order to state the cause of action. See *id.* at 67-68. An alleged irreparable injury that was not sustained by the facts as alleged would not ordinarily warrant a grant of injunctive relief; the question raised would have to be real, not theoretical, and the plaintiff would have to show a direct and bona fide interest in the outcome. See *id.*

305. *Id.* at 67.

306. 303 So. 2d 9 (Fla. 1974).

Save Sand Key, Inc., a nonprofit organization created for the purpose of procuring as much of Sand Key as possible for public use, filed a complaint against United States Steel (U.S. Steel), seeking to enjoin U.S. Steel from interfering with the public's right to use lands acquired through prescription, implied dedication, or general or local custom.<sup>307</sup> Save Sand Key alleged that U.S. Steel began construction of high-rise condominiums and fenced portions around its construction sites that substantially interfered with the public's rights to full use and enjoyment of Sand Key.<sup>308</sup> As a result, Save Sand Key requested an injunction against any future acts that would interfere with, impair, or impede the public's exercise of their rights.<sup>309</sup> It also sought injunctive relief from the alleged public nuisance of a purpresture blocking of the enjoyment of those rights and declaratory relief impressing a public easement in the area for boating, bathing, navigation, fishing, and other public uses.<sup>310</sup> U.S. Steel moved to dismiss the complaint, claiming that Save Sand Key lacked standing since it did not allege a special injury different from an injury to the general public.<sup>311</sup>

The court looked to an earlier case with similar facts, *Sarasota County Anglers Club, Inc. v. Burns*,<sup>312</sup> and held that no statutory authority existed for a cause of action where Save Sand Key could assert property rights in the real estate owned by U.S. Steel and where no special injury was alleged.<sup>313</sup> The court further noted that the reliance of the lower court on several cases in which courts allowed an exception to the special injury rule was misguided.<sup>314</sup> The court viewed these exceptions as extremely narrow and not applicable to the case before it.<sup>315</sup>

Although the court was unwilling to allow citizen standing in *Save Sand Key, Inc.*, the case should not bar the Florida Legislature from statutorily creating a right of action for the general public. As discussed above, the Legislature could create a cause of action affording Florida citizens the ability to protect their rights to existing public easements absent a special injury based upon the reasoning of *Florida Wildlife Federation*. Because this cause of action does not

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307. See *id.* at 9-10.

308. See *id.* at 10.

309. See *id.* at 9-10.

310. See *id.*

311. See *id.*

312. 193 So. 2d 691 (Fla. 1st DCA 1967), *aff'd sub nom*, *Sarasota County Anglers Club, Inc. v. Kirk*, 200 So. 2d 178 (Fla. 1967).

313. See *Save Sand Key, Inc.*, 303 So. 2d at 12.

314. See *id.* at 12-13.

315. See *id.*

currently exist, the Legislature would not be simply defining proper parties.

Opponents of this legislation might argue that such a cause of action is in actuality an existing action for public nuisance, and therefore, the situation is not analogous to that of *Florida Wildlife Federation*. In the lower court decision in *Save Sand Key, Inc.*,<sup>316</sup> the Second District Court of Appeal gave a convincing justification for upholding *Save Sand Key's* cause of action, finding that the plaintiffs alleged a justiciable cause of action within the rationale of *City of Daytona Beach v. Tona-Rama, Inc.*<sup>317</sup> The Second District stated, "In [*Tona-Rama*] the court expressly recognized vested prescriptive rights in the public to a portion of the soft sand area of Daytona Beach. Under certain facts and circumstances, yet to be proven here of course, such rights may become absolute and enforceable."<sup>318</sup> However, when the Florida Supreme Court reversed the Second District's decision as to standing, it also overturned the decision as to the existence of a stated cause of action based on public nuisance.<sup>319</sup> The court agreed with *Sarasota County Anglers Club* that the statutes allowing citizens to sue for the abatement of public nuisances<sup>320</sup> did not apply to these cases.

Regardless of whether parties could use a public nuisance theory to protect their beach access rights, that cause of action in any context would require a showing of special injury.<sup>321</sup> Thus, a member of the public with a generalized grievance could not bring a valid suit for the enforcement of public beach access rights based on public nuisance. A legislatively-created cause of action affording citizens the ability to protect their rights to beach access might therefore be equivalent to the right afforded by the Florida EPA, where an individual's ability to enforce such rights *without special injury* had never existed before. As the court stated in *Florida Wildlife Federation*, "That the legislature chose to allow citizens to bring an action

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316. *Save Sand Key, Inc. v. United States Steel Corp.*, 281 So. 2d 572 (Fla. 2d DCA 1973).

317. 271 So. 2d 765 (Fla. 1st DCA 1973), *quashed by* 294 So. 2d 73 (Fla. 1974). The Second District Court of Appeal in *Save Sand Key, Inc.* relied on the lower court decision in *Tona-Rama, Inc.*, which was later *quashed* by the Florida Supreme Court. While the Florida Supreme Court in *Tona-Rama, Inc.* disagreed with the finding of the lower court that the public had gained a prescriptive easement, it recognized that the public had certain rights that could be obtained through prescription and custom in other cases. See *Tona-Rama, Inc.*, 294 So. 2d at 77-78.

318. *Save Sand Key, Inc.*, 281 So. 2d at 577.

319. See *United States Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9, 12 (Fla. 1974) ("[T]here is no statutory authority for this cause of action.").

320. See *id.* (discussing FLA. STAT. § 64.11 (current version at FLA. STAT. § 60.05 (1995)) and FLA. STAT. § 823.05).

321. See *Florida Wildlife Fed'n v. Department of Env'tl. Protection*, 390 So. 2d 64, 67 (Fla. 1980).

where an action already existed for those who had special injury persuades us that the legislature did not intend that the special injury rule carry over to suits brought under the EPA."<sup>322</sup> This statement suggests that a cause of action that requires no showing of special injury may constitute the creation of a *new* cause of action regardless of whether parties who suffered a special injury could previously maintain such an action.

## VI. CONCLUSION

One of the policies of the State of Florida is to preserve, protect, and enhance public access to the beaches, shorelines, and waters around the state.<sup>323</sup> In the past, permit conditions requiring the dedication of beach accessways have been one effective solution to furthering this policy. In demonstrating its commitment to upholding individual property rights, the United States Supreme Court may have undermined Florida's ability to provide access to a resource that belongs to all of us under the public trust doctrine. Because *Dolan's* rough proportionality standard has yet to be clearly defined, the possibility exists that some beach access conditions will no longer be constitutionally sound. Hopefully, courts will follow language in both *Nollan* and *Dolan* indicating that the creation of alternate access where existing access is impaired is not a regulatory taking. Those courts also should look to post-*Dolan* decisions, such as *Schultz*, *Amoco Oil Co.*, and *J.C. Reeves Corp.* which construes the rough proportionality standard with respect to permit conditions in such a way that local governments can meet the standard without unreasonable difficulty.

Moreover, the Florida Legislature should take additional measures to ensure that its policies can be legitimately effected. These measures include minor changes to chapter 161, *Florida Statutes*, as well as the implementation of a state program to identify existing beach access and the possible creation of a citizen standing provision to enforce current public rights.

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322. *Id.* (emphasis added).

323. See FLA. STAT. § 161.053 (1995).



