Exactions, Severability, and Takings: When Courts Should Sever Unconstitutional Conditions From Development Permits?

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EXACTIONS, SEVERABILITY AND TAKINGS:
WHEN COURTS SHOULD SEVER
UNCONSTITUTIONAL CONDITIONS
FROM DEVELOPMENT PERMITS

Michael T. Kersten*

Due to a variety of factors in the last half-century, local governments have increasingly relied upon exactions to finance new development projects. Developers and land owners have challenged these development conditions as abuses of the police power or as violations of the United States Constitution's Equal Protection, Due Process and Takings Clauses. Recently, the Supreme Court has departed from its long tradition of deference to municipalities by heightening judicial scrutiny of challenged exactions. If a court finds an exaction to be unconstitutional, the court typically severs the exaction from the permit and enforces the remaining permit as if it were whole. By thus enforcing permits minus their conditions, courts allow developers to proceed unhindered and prevent municipalities from mitigating the harmful externalities or recouping the public costs resulting from development. The inefficiencies and inequalities created by this heightened review could be mitigated by applying the severability doctrine established in contract and public law to the law of landuse exactions. Applying the severability analysis would restore an element of certainty to municipal regulators by reducing their incentive to over-regulate development, and benefit both developers and municipalities by allowing a more efficient and equitable method of permitting development.

INTRODUCTION

Landuse exactions, as an aspect of takings law, have become an increasingly debated and litigated topic in courtrooms and academic

* Articles Editor, 1999–2000, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW. The author wishes to thank Sarah Evans and Professor Zygmunt Plater for their help in framing the issues in this Note.
circles alike. Generally, exactions are concessions requiring the developer or landowner to pay for or provide public facilities or amenities as a condition to a municipality's approval of a development permit. The Supreme Court has found municipal discretion to grant or deny development permits to be presumptively constitutional since the 1926 decision of Village of Euclid v. Ambler Realty Co. If existing zoning regulations do not allow developers to build as of right, developers must seek municipal approval in order to proceed with construction.

Due to a variety of factors in the last half-century, including sprawling residential and commercial growth patterns and substantial deficits in municipal infrastructure funds, local governments have increasingly relied upon exactions to finance their response to new de-

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2 See Been, supra note 1, at 478–79. "Municipality" is used interchangeably with "local government" throughout this Note to refer to counties, cities, towns, and villages. See id. at 473 n.2. While state agencies may occasionally impose exactions, the vast majority of exactions are imposed by municipal governments. See id. This Note similarly focuses on professional developers rather than ordinary landowners because most development conditions are imposed upon developers. See David A. Dana, Land Use Regulation in an Age of Heightened Security, in 1998 ZONING AND PLANNING LAW HANDBOOK pt.4, ch. 8 at 10 n.20 (Christine Carpenter ed., 1998). The term "development permit" in this Note refers to any discretionary permit, variance, special exemption, or other governmental permission that a developer or landowner needs to change or expand the existing use of a property. See Douglas T. Kendall & James E. Ryan, Paying for the Change: Using Eminent Domain to Secure Exactions and Sidestep Nollan and Dolan, 81 VA. L. REV. 1801, 1802 n.4 (1995).

3 272 U.S. 365, 393, 395–97 (1926) (finding it constitutional not to question wisdom of municipal ordinances).

4 See Dana, supra note 2, at 11.
Landuse Exactions and Severability

Development projects. Municipalities' authority for imposing exactions stems from their police powers, although the manner of or extent to which municipalities may impose exactions are typically governed by each locality's enabling statutes. In response to municipalities shifting the cost of infrastructure from public funds to private parties, some developers and landowners have challenged these development conditions as abuses of the police power or as violations of the United States Constitution's Equal Protection, Due Process and Takings clauses. The persistent question inherent in any exaction challenge is "how far is too far?" For most of this century, the judiciary has been deferential to municipalities in answering that question, upholding the constitutionality of municipalities' regulation of land use.

However, beginning in the 1980s, the Supreme Court departed from this long tradition of deference and substantially limited municipalities' constitutional ability to impose development conditions in regulating land use. The Court's decisions in Nollan v. California Coastal Commission and Dolan v. City of Tigard created a heightened judicial scrutiny of development conditions that can be termed "nexus/rough proportionality review." In both cases, the Court

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7 See Dana, supra note 2, at 13-14. Local governments derive their police powers from the state through enabling legislation or the local government's comprehensive planning act. See Ledman, supra note 6, at 842-43. Local governments may not enact exaction ordinances without this derivative police power. See id. at 843; Keenan, supra note 5, at 853-55 (1992) (discussing successful challenges to landuse exactions based on lack of enabling authority).
8 See, e.g., Dolan v. City of Tigard, 512 U.S. 374, 382-84 & n.5 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825, 827 (1987); Ledman, supra note 6, at 847-53.
9 See Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985) (referring to regulation that "goes too far").
11 See, e.g., Dana, supra note 2, at 5; Rhoads, supra note 10, at 469-70.
12 See 483 U.S. at 825.
13 See 512 U.S. at 374.
14 Dana, supra note 2, at 5-7. The "nexus" test, created by the Supreme Court in Nollan, requires that the exaction bear a "nexus" or connection to the regulatory purpose that would have allowed the municipality to deny the development permit altogether. See 483 U.S. at 837. The "rough proportionality" test examines whether an exaction burdens the
struck down exactions as unconstitutional takings. Due to this heightened judicial scrutiny, municipalities take a risk in conditioning a development permit with exactions because if a court finds the condition to be unconstitutional, the court typically severs the exaction from the permit and enforces the remaining permit as if it were whole. By enforcing permits minus their conditions, courts allow developers to proceed unhindered and prevent municipalities from mitigating the harmful externalities or recouping the public costs resulting from development. Once the condition is severed from the permit, the municipality is not able to “return[] the city to the status quo as it existed prior to approval of the . . . project,” by retroactively denying the permit or tailoring the condition.

Severing conditioned permits puts municipalities faced with unchecked growth and its attendant consequences in an uncertain and troublesome situation when considering a proposed development. Placed between the rock of an infrastructure deficit and the hard place of a substantially limited police power, local governments may be more prone to refuse permission to develop altogether. Alternatively, municipalities may decline to impose any remotely questionable conditions, leaving them with unmitigated development, diminished resources, and increased infrastructure demands.

developer disproportionately more than it mitigates the development's harmful impacts. See Dolan, 512 U.S. at 390–91, 391 n.8.

17 See Dana, supra note 2, at 58–59 (noting that successful post-construction challenges to development conditions give developers the effect of unconditioned development and may cause municipal regulators to deny development permits altogether to avoid this loss).
18 Ehrlich v. City of Culver City, 911 P.2d 429, 449 (Cal. 1996) (speaking of returning municipality to status quo as objective after developer challenged exaction); see, e.g., Hetzel & Gough, supra note 1, at 220. Municipalities may deny development altogether rather than risk having exactions stricken and have the development proceed unmitigated. See Hetzel & Gough, supra note 1, at 220. This reasoning implies that municipalities lose the status quo when their development conditions are stricken and the development proceeds; municipalities must therefore deny development from the outset because they are unable to return to the status quo otherwise. See id.
19 See, e.g., Hetzel & Gough, supra note 1, at 220 (describing risk of losing “limited resources” for “misjudgments” in imposing exactions); Sam D. Starrit & John H. McClanahan, Land-Use Planning and Takings: The Viability of Conditional Exactions to Conserve Open Space in the Rocky Mountain West After Dolan v. City of Tigard, 114 S. Ct. 2309 (1994), 30 LAND & WATER L. REV. 415, 451 (1995) (noting the potential cost of imposing exactions is a “difficulty” which may cause municipalities to deny development permits outright).
20 See, e.g., Dana, supra note 2, at 10; Hetzel & Gough, supra note 1, at 220.
21 See Hetzel & Gough, supra note 1, at 220.
Municipal over-regulation of development benefits neither municipalities, which face fiscal stagnation without certain, controlled growth—and stunted growth without infrastructure funds—nor the development industry, which must negotiate with a more reluctant municipal body and potentially have development permits denied until the municipality completes the necessary infrastructure. By creating a heightened judicial scrutiny of development conditions, the Supreme Court discourages municipalities from engaging in the “weighing of private and public interests” that the Takings Clause seeks to promote. Put another way, by weakening municipalities’ ability to condition development permits, the Court effectively requires municipalities “to deny development permits altogether to await completion of necessary public facilities rather than . . . better accommodate commercial development projects by having each contribute a share to those planned facilities.”

The inefficiencies and inequalities created by nexus/rough proportionality review could be mitigated by applying the severability doctrine established in contract and public law to the law of landuse exactions. If a contract or statute contains an unconstitutional provision or illegal term, courts first determine the severability of the term or provision in order to decide whether the entire agreement should fail or the agreement should be enforced without the term or provision. If the term or provision is not essential to the agreement, the term or provision may be severed and the remaining agreement enforced. If the term or provision is essential to the agreement, it cannot be severed and the entire agreement fails. A term or provision is essential to the agreement if the negotiating parties would not have

24 Brief for Respondent at 19, Dolan (No. 93–518).
25 See Kendall & Ryan, supra note 2, at 1832–35 (discussing detrimental effects of nexus/rough proportionality review on efficiency and fairness of regulating land use with conditioned permits); Mark L. Movsesian, Severability in Statutes and Contracts, 30 GA. L. REV. 41, 43–44 (1995) (discussing use of severability doctrine in contract and statutory contexts). Kendall and Ryan’s reasoning implies that nexus/rough proportionality review is detrimental to municipalities because it leads to more challenged exactions, which leads to severed exactions and unmitigated development. See Kendall & Ryan, supra note 2, at 1832–35.
26 See Movsesian, supra note 25, at 43–44.
27 See id.
28 See id. at 48, 59.
Environmental Affairs

approved the agreement without the term or provision.\textsuperscript{29} To be consistent with established severability doctrine and to provide a more equitable outcome for municipalities struggling to regulate development, courts should apply the severability analysis to unconstitutional conditions in development permits.\textsuperscript{30} That is, when a municipality approves a development permit upon a condition essential to the permit, and that condition is deemed unconstitutional, the entire permit should then fail.\textsuperscript{31} If the court invalidates the entire development permit in this manner, the developer then has the option of reapplying to the municipality or attempting the development in another community.\textsuperscript{32} Applying severability analysis could restore an element of certainty to municipal regulators, reducing their incentive to over-regulate development by denying development permits outright, and benefiting both developers and municipalities with a more efficient and equitable method of permitting development.\textsuperscript{33}

This Note suggests that the doctrine of severability should be applied in the landuse context of conditioned development permits in the same way courts apply it in contract and statutory contexts. Section I examines the causes and evolution of exactions as landuse regulatory tools in the United States. Section II briefly discusses the Supreme Court cases that developed nexus/rough proportionality review. Section III looks at the effects of those exaction cases on current municipal regulatory efforts. Section IV examines the severability doctrine as applied to contracts and statutes, and Section V argues for the application of the severability doctrine to development conditions in landuse regulation.

\textsuperscript{29} See id. at 44.

\textsuperscript{30} See Ehrlich v. City of Culver City, 911 P.2d 429, 449 (Cal. 1996) (noting exactions accomplish municipalities' objective of "escaping the narrow choice between denying [developer] his project permit altogether or subordinating legitimate public interests to ... development plans"); Dana, supra note 2, at 10 (arguing municipalities over-regulate development due to fear exactions will be struck).

\textsuperscript{31} See Movsesian, supra note 25, at 43-44 (explaining courts do not enforce contracts or statutes containing illegal or unconstitutional term or provision essential to overall agreement).

\textsuperscript{32} See Been, supra note 1, at 476-78 (explaining that developers' choice of where to develop causes competition among municipalities for that business); Dana, supra note 2, at 63-64 (noting most developers transact repeatedly with the same few communities).

\textsuperscript{33} See, e.g., Brief for Respondent at 19, Dolan (No. 93-518) (noting municipalities' ability to condition development with exactions facilitates commercial development); Dana, supra note 2, at 56-59 (discussing how regulators may deny development permits outright due to the threat of a developer's suit challenging conditioned exactions).
I. THE EVOLUTION OF EXACTIONS

"Suburbanization and sprawl are as ingrained in our national myth as baseball and apple pie once were." 34

From World War I to the 1950s Interstate Highway System, the American residential landscape has sprawled further and further from urban centers to vast, low-density residential developments. 35 This growth began prior to the 1920s when municipal governments actively encouraged economic development and population growth by voluntarily providing infrastructure, such as streets and sewer lines, to outlying, undeveloped areas. 36 Affected by this pro-growth sentiment, developers began building subdivisions in undeveloped areas, confident that cities and towns would provide the required "on-site infrastructure." 37 The local governments did not always pull through. 38 As a result, many recorded subdivisions lacked the improvements necessary to utilize all the subdivided lots. 39 These underutilized lots impeded the efficient growth of municipalities and forced new residential developments to spread beyond the "dead land" to outlying undeveloped areas. 40 This inefficient expansion created chronic and widespread tax deficiencies, further hampering efficient municipal development. 41

A. Land Dedications and In-Lieu Fees

In response to these problems, the United States Department of Commerce promulgated a series of Standard City Planning and Zoning Enabling Acts, encouraging municipalities to require the necessary on-site infrastructure from developers through the adoption of state subdivision regulations. 42 By 1958, the development of on-site subdivision infrastructure became a necessary condition of subdivi-

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35 See id.
36 See Rhoads, supra note 10, at 472.
37 See id.
39 See id.
40 Id. at 5–6.
41 See id.
42 See Rhoads, supra note 10, at 472.
sion approval. Developers were initially required only to dedicate land, upon which the municipality would construct the required on-site infrastructure, such as streets, sidewalks, and sewer systems. Chronic lack of public funds, however, led to municipal demands that the developer also finance and construct the improvements. Courts generally upheld these requirements because the development created the need for the infrastructure; moreover, the improvements directly benefited the residents of the subdivision. As municipal governments gradually realized that new developments created a need for off-site public facilities, such as schools and parks, municipalities also began to impose fees in lieu of land dedication to mitigate some of these costs.

As the country’s suburbanization continued into the 1980s, multiple factors strained municipalities’ capacity to sustain such growth. Municipalities extended services further; federal grant programs to state and local governments began drying up; unbridled growth increased pollution, congestion, crime, and environmental degradation; and, the 1970s “taxpayer revolt” rejected general obligation bonds for capital improvements and severely restricted property tax revenue. The “taxpayer revolt,” caused by stagnating incomes and resentment of new development increasing infrastructure burdens, depressed municipal revenues created by property taxes. Federal subsidies for local public facilities decreased substantially. Compounding the

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43 See Smith, supra note 38, at 6.
45 See id.
46 See id.
47 See id.
48 See, e.g., Bauman & Ethier, supra note 1, at 51–52; Rhoads, supra note 10, at 473.
49 See, e.g., Bauman & Ethier, supra note 1, at 51–52; Rhoads, supra note 10, at 473. As an example, Florida’s population increased by 43.5% between 1970 and 1980, and as of 1987 the state had an estimated deficit of $53 billion for unmet infrastructure needs. See Taub, supra note 44, at 126 (citing The Final Report of the State Comprehensive Plan Committee to the State of Florida (Feb. 1987)).
50 See Nelson, supra note 22, at 88; Rhoads, supra note 10, at 473 & n.33. While property taxes comprised nearly 43% of municipalities’ general revenues nationwide in 1976, this percentage had fallen to 29.5% by 1986. See Rhoads, supra note 10, at 473 n.33.
51 See Nelson, supra note 22, at 87–88. While federal grants were about 15% of local own-source revenue in 1979, this dropped to five percent in 1989. See id. During the same time period, state grants fell from 53% to 44%. See id.
problem was the rising cost of infrastructure construction. No longer able to finance the growth ethic, municipalities acknowledged that new growth must pay its own way. Consequently, municipalities began shifting infrastructure costs onto developers through various exactions.

B. Impact Fees and Linkage Fee Programs

In addition to the aforementioned land dedications and in-lieu fees, exactions come in at least two other forms: impact fees and linkage fee programs. Impact fees, like in-lieu fees, require payment of money for capital improvements but are more versatile in that they are not predicated on dedication requirements and, therefore, can be used for a greater variety of off-site services and facilities that will be affected by the development. Linkage fee programs are an extension of impact fees in that while impact fees are used to mitigate development impacts on social infrastructure, linkage fee programs promote social concerns or policies. Municipalities have justified linkage fee programs based on the increased burdens development imposed on local facilities. Such burdens can include the consumption of land available for development, reduction of land available for public housing, and an increase in housing prices.

C. Exactions: Equitable/Efficient or Extortionate?

Developers, understandably, have responded to the evolution of exactions with some chagrin. Exactions, however, have enabled development to occur when public costs would otherwise prohibit municipalities from approving development permits. Exactions promote both efficiency and fairness by forcing developers (and their customers) to internalize or mitigate the harms that development causes, as well as by allowing municipalities to recoup some of the

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52 See Rhoads, supra note 10, at 474. While the cost of building one lane-mile of road in Florida in 1967 was $100,000, exclusive of right-of-way, that cost had tripled by 1986. See id.
53 See Bauman & Ethier, supra note 1, at 52.
54 See id.
55 See, e.g., Ledman, supra note 6, at 839–41; Taub, supra note 44, at 130–32.
56 See, e.g., Ledman, supra note 6, at 839–40; Taub, supra note 44, at 130.
57 See, e.g., Ledman, supra note 6, at 840–41; Taub, supra note 44 at 131–32.
58 See Ledman, supra note 6, at 841.
59 See, e.g., Ledman, supra note 6, at 840–41; Taub, supra note 44, at 132.
60 See Taub, supra note 44, at 125.
61 See Bauman & Ethier, supra note 1, at 52; Rhoads, supra note 10, at 473–74.
costs of development. Exactions, by forcing developers to consider all of the costs of development, encourage developers to build efficiently. The costs of development are often legion, ranging from infrastructure expenses to externalities such as noise, traffic congestion, and environmental degradation. Furthermore, in rapid growth areas where the municipality cannot provide sufficient public facilities due to cost or the high level of demand, exactions enable growth that otherwise might have been stalled or prohibited.

Exactions may also be imposed to help the community capture part of the profits created by the municipality’s permission to allow development. Some suspiciously view this rationale for exactions as wealth redistribution: the municipality is attempting to take the developer’s profit and redistribute it to the general community.

Historically, it has been the claim of many developers, and the suspicion of some judges, that municipal regulators use exactions not to mitigate harm as much as to extort the developer. Interestingly enough, Webster’s Dictionary defines “exaction” as follows: “1 a: the act or process of exacting . . . b: the levying or demanding of some benefit . . . that is not lawfully or properly due: EXTORTION.” Webster’s aside, this characterization of exactions has been called into doubt. First, exactions (in the form of impact fees) usually run less than five percent of the total sales price of a new house. This percentage hardly seems extortionate in light of the fact that real estate

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62 See Kendall & Ryan, supra note 2, at 1832; Been, supra note 1, at 482-83.
63 See, e.g., Been, supra note 1, at 482-83; Edward J. Kaiser & Raymond J. Burby, Exactions in Managing Growth: The Land-Use Planning Perspective, in PRIVATE SUPPLY OF PUBLIC SERVICES: EVALUATION OF REAL ESTATE EXACTIONS, LINKAGE, AND ALTERNATIVE LAND POLICIES 113, 116 (Rachelle Alterman ed., 1988); Kendall & Ryan, supra note 2, at 1832-34.
64 See, e.g., Been, supra note 1, at 482; Kaiser & Burby, supra note 63, at 116; Kendall & Ryan, supra note 2, at 1833-34.
65 See Been, supra note 1, at 483.
66 See, e.g., Been, supra note 1, at 483; Kendall & Ryan, supra note 2, at 1832.
67 See Kendall & Ryan, supra note 2, at 1832. This view considers the profit as the developer’s alone despite the fact that the municipality had helped to create the profit by allowing the development to proceed. See id.
69 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 790 (1986) (emphasis in original).
70 See Been, supra note 1, at 475-78 (fear of extortion is unfounded and the law generally supports judicial deference where market factors guide bargaining terms).
71 See Nelson, supra note 22, at 95.
professionals customarily charge seven percent of a new home's sales price for their fee.\textsuperscript{72} Second, impact fees typically cover only twenty-five percent of the infrastructure cost required by new development; the majority of the costs are paid by the municipality.\textsuperscript{73} For example, studies in Florida have shown that while impact fees average less than $3,000 per new home, the actual cost of providing infrastructure averages $20,000 per new home.\textsuperscript{74} Because competition between municipalities for development causes municipalities to deliberately undercharge developers for the cost of infrastructure, the exactions municipalities typically impose can hardly be considered extortionate.\textsuperscript{75}

In any event, the United States Supreme Court's perspective on the issue has been made clear. The Supreme Court responded to the fear that exactions are extortionate in its landmark landuse decision, \textit{Nollan v. California Coastal Commission}, calling the municipality's exaction condition "an out-and-out plan of extortion."\textsuperscript{76} And because the Court has the sole power to "say what the law is," exactions have become suspect as a matter of general principle.\textsuperscript{77}

\section*{II. THE \textit{NOLLAN} AND \textit{DOLAN} DECISIONS}

The Supreme Court's decisions in \textit{Nollan} and \textit{Dolan} examine the constitutionality of exactions imposed as conditions upon development permits.\textsuperscript{78} In \textit{Nollan}, the Nollans sought to tear down their small beachfront home and build a much larger beach house.\textsuperscript{79} In order to do so, they requested a development permit from the California Coastal Commission.\textsuperscript{80} The Commission approved the permit on the condition that the Nollans grant the public an easement to cross their property and access the public beach beyond it.\textsuperscript{81} The Commission stated that the easement was necessary because the larger home would obstruct the public's view of the beach, thus preventing the

\textsuperscript{72} See id.
\textsuperscript{73} See Been, \textit{supra} note 1, at 512; Nelson, \textit{supra} note 22, at 95.
\textsuperscript{74} See Been, \textit{supra} note 1, at 511.
\textsuperscript{75} See id. at 512.
\textsuperscript{77} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
\textsuperscript{79} See 483 U.S. at 827–28.
\textsuperscript{80} See id. at 828.
\textsuperscript{81} See id.
public from realizing they could access the public portion of the beach.\(^{82}\) Assuming the purpose to be constitutional, the Court had difficulty believing the actual location of the easement would accomplish its avowed purpose.\(^{83}\)

In deciding the case, the Court acknowledged that the Commission could have denied the permit outright as long as such a denial would not have "interfered so drastically with the Nollans' use of their property as to constitute a taking," and furthered a legitimate state interest.\(^{84}\) The Court stated, however, that the Commission could not have simply acquired an easement from the Nollans without committing a taking.\(^{85}\) The Court then considered whether the Commission could constitutionally condition the development permit with an easement when the easement, taken by itself, would violate the Takings Clause.\(^{86}\) The Court reasoned that there would not be a taking as long as the development condition furthered the same purpose as a development ban.\(^{87}\) This is because the power to prohibit development must include the lesser power to condition development in a manner serving the same end.\(^{88}\) However, the Court held that the exaction did not advance the same purpose as a development prohibition because the exaction's purpose lacked an "essential nexus" to the type of harm the development would cause, and therefore was "not a valid regulation of land use but 'an out-and-out plan of extortion.'"\(^{89}\)

Although it was never explicitly stated in the \textit{Nollan} opinion, the Supreme Court's doctrinal foundation for the nexus test is the unconstitutional conditions doctrine.\(^{90}\) "The doctrine of unconstitutional

\(^{82}\) See id. at 828–29, 835–39.
\(^{83}\) See id. at 835–36, 838. The Court stated: "We find that this case does not meet even the most tailored standards [of a test determining how close a nexus between the condition and the burden is required]." Id. at 838. The Court continued, "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." Id.
\(^{84}\) \textit{Nollan}, 483 U.S. at 836.
\(^{85}\) See id. at 831.
\(^{86}\) See id. at 834–37.
\(^{87}\) See id. at 836–37.
\(^{88}\) See id.
\(^{89}\) Id. at 837 (quoting J.E.D. Assoc. v. Atkinson, 432 A.2d 12, 14–15 (N.H. 1981)).
\(^{90}\) See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 598 n.18 (2d ed. 1988); Been, supra note 1, at 474–75; Kathleen M. Sullivan, \textit{Unconstitutional Conditions}, 102 HARYARD L. REV. 1413, 1463–64, 1505 (1989) (interpreting \textit{Nollan} as an unconstitutional conditions case). The Supreme Court made more explicit its reliance on the unconstitutional conditions doctrine in developing \textit{Nollan}'s nexus test when deciding \textit{Dolan v. City of Tigard}. See 512 U.S. at 385. "Under the well-settled doctrine of 'unconstitutional condi-
conditions holds that the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. The result was that the California Coastal Commission, and all other state and local government bodies, must establish an essential nexus when implementing exactions.

Having examined the nature of the relationship between the exaction and the development in *Nollan*, the Supreme Court refined its analysis in *Dolan v. City of Tigard* by examining the degree of the exaction in relation to the burden caused by the development. Ms. Dolan wished to expand her plumbing store and sought a permit to do so from the City of Tigard (City). According to the City's zoning code, the City granted Dolan a conditional permit to expand in exchange for Dolan granting a section of her land to the City. The City planned to use part of the land as a greenway for flood control and part of it for pedestrian and bicycle traffic. Dolan objected to the conditions, but when she then sought a variance from the zoning code, the City denied her request.

In its analysis, the Supreme Court applied its nexus test and determined that the purpose of the permit conditions fit squarely within the legitimate state interests of preventing increased traffic congestion and protecting against flooding, both interests that would have been served by denying the development permit. However, the Court added another step to the analysis. The Court said there must be a "rough proportionality" between the harm or costs the development would impose on the community and the cost imposed by the exaction on the developer. In a significant move, the Court shifted the burden for making this "individualized determination" from the

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91 Sullivan, *supra* note 90, at 1415.
92 See 483 U.S. at 836–37.
93 See *Dolan*, 512 U.S. at 374; Kendall & Ryan, *supra* note 2, at 1810.
94 See *Dolan*, 512 U.S. at 379.
96 See *id.* at 380.
97 See *id.* at 380–81.
98 See *id.* at 386–88.
99 See *id.* at 388–93.
100 *Dolan*, 512 U.S. at 391.
landowner to the municipality. While the City of Tigard's findings satisfied the nexus test, the Court said the findings were insufficient to show rough proportionality and therefore the permit conditions could not be sustained.

In both Nollan and Dolan, once the Supreme Court found that the local governments imposed unconstitutional conditions, the Court made no determinations regarding whether those conditions were severable from the permit. In Nollan, the severability of the exaction became moot: the Nollans had, without notifying the Commission, commenced and completed building their larger house while the Commission appealed the case to the California Court of Appeals. Thus, the outcome of the case determined only whether the Nollans would grant the easement: the Commission was unable to revoke the permit and prevent the development regardless of the exaction's severability or constitutionality.

In Dolan, however, the exactions' severability could have been decided. Ms. Dolan had not yet expanded her store, so it was possible for a severability determination to be made. After reversing the Oregon Supreme Court, the Court remanded the matter for proceedings consistent with the new rough proportionality test. The Oregon Supreme Court did not take the opportunity to explore the conditions' severability.

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101 Id. The majority suggested in a footnote that the burden lies with the municipality in this case because the city's decision was adjudicative rather than legislative. See id. at 391 n.8. For a discussion of the practical impact of shifting the burden of proof, see Julian R. Kossow, Dolan v. City of Tigard, Takings Law, and the Supreme Court: Throwing the Baby out with the Floodwater, 14 STAN. ENVTL. LJ. 215, 237-41 (1995).

102 See Dolan, 512 U.S. at 386-87, 394-96.

103 See id. at 395-96 (finding development condition unconstitutional and concluding opinion without mention of severability analysis); Nollan, 483 U.S. at 841 (concluding opinion without severability analysis after finding development condition unconstitutional).

104 See Nollan, 483 U.S. at 829-30.

105 See id.

106 See Dolan, 512 U.S. at 396; Brief for Respondent at 2, Dolan (No. 93-518) (describing Ms. Dolan's plans to expand in the future tense).

107 See Dolan, 512 U.S. at 396.

108 See 877 P.2d 1201, 1201 (1994) (remanding to the City of Tigard without further analysis).
III. The Effects of Nollan and Dolan on Municipal Regulatory Practices

Through the Nollan and Dolan decisions, the Supreme Court has forced municipalities to carry a dual burden: first, a municipality must prove that an exaction’s purpose has an essential nexus to the type of harm that the development will cause; second, rough proportionality must exist between the exaction and the development’s projected costs.\(^\text{109}\) By establishing a heightened judicial scrutiny of local governments’ development conditions, the Supreme Court has significantly diminished municipalities’ ability to use exactions as conditions to development permits.\(^\text{110}\)

Where a municipality could simply deny a development permit without running afoul of the Takings Clause, the nexus/rough proportionality review will “have the unfortunate effect” of leading municipalities to adopt “regressive and inefficient” alternatives to exactions such as stricter growth controls or outright development prohibitions.\(^\text{111}\) Municipalities may over-regulate because when they grant conditioned permits, heightened judicial review increases the chance the conditions will be challenged, held unconstitutional, and severed from the permit, leaving development to proceed unmitigated.\(^\text{112}\) One study has shown that in Virginia, heightened judicial scrutiny of landuse regulation has had a notable “chilling effect” on landuse regulation because local officials fear the increased likelihood of litigation.\(^\text{113}\) “At the very least,” cases like Nollan “will make state and local officials reluctant to pursue even legitimate landuse plans.”\(^\text{114}\)

As difficult a task as municipalities faced in conditioning permits after Nollan, municipalities in the post-Dolan era face even choppier


\(^{110}\) See Been, supra note 1, at 545; Kendall & Ryan, supra note 2, at 1815.

\(^{111}\) Laurie Reynolds, Living With Land Use Exactions, 11 Yale J. on Reg. 507, 514 (1994) (book review); see also Been, supra note 1, at 545; Kendall & Ryan, supra note 2, at 1815.

\(^{112}\) See Dana, supra note 2, at 58–59 (describing how post-construction challenges to development permits affect unconditional development and may cause municipalities to avoid this by denying development permits altogether). As long as courts sever unconstitutional conditions from permits, leaving developers with unconditioned permits, unconstitutional development results whether or not developers challenge the exaction before, during or after construction. See id.


\(^{114}\) Id. at 838.
regulatory waters when deciding how best to regulate land use in their communities.\textsuperscript{115} \textit{Dolan} adds uncertainty to land use regulation by significantly shifting caselaw to benefit property developers, thereby increasing the likelihood of costly litigation as well as the costs externalized when an exaction is reversed.\textsuperscript{116} \textit{Dolan} also requires municipalities to incur additional costs by requiring additional studies and data collection validating the exactions.\textsuperscript{117} A further disincentive stems from the proposed development's infrastructure costs and the fact that the municipality may be forced to use its condemnation power to compensate the owner.\textsuperscript{118} Additionally, there is the potentially unmitigated and unsubsidized increase in noise, congestion, and pollution that results from development.\textsuperscript{119} The foregoing is indeed enough to produce over-regulation of new development by encouraging municipalities to deny development rather than excessively, or even legitimately, condition the permit.\textsuperscript{120}

The uncertainty created by the nexus/rough proportionality review has in part led municipalities to consider other, seemingly safer, alternatives to exactions.\textsuperscript{121} For instance, one of the fastest growing techniques is the development agreement.\textsuperscript{122} The development agreement is "a contract between a local government and a developer setting out the terms by which development will be regulated and allocating the responsibility for providing public services and infrastructure."\textsuperscript{123} California was the first state to pass enabling legislation

\textsuperscript{115} While \textit{Nollan} was decided in 1987, and the Virginia study was reported in 1990, the 1994 \textit{Dolan} decision increased \textit{Nollan}'s judicial scrutiny by adding the rough proportionality requirement. \textit{See Dolan}, 512 U.S. at 391.

\textsuperscript{116} \textit{See Butler}, supra note 113, at 830–34; \textit{Hetzel} & \textit{Gough}, supra note 1, at 243.

\textsuperscript{117} \textit{See} 512 U.S. at 391 n.8; \textit{see also} \textit{Hetzel} & \textit{Gough}, supra note 1, at 243; \textit{Kossow}, supra note 101, at 238–41.

\textsuperscript{118} \textit{See} \textit{Hetzel} & \textit{Gough}, supra note 1, at 243.

\textsuperscript{119} \textit{See Agins v. City of Tiburon}, 447 U.S. 255, 261 n.8 (1980) (discussing the "ill effects of urbanization," including "air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards to geology, fire and flood, and other demonstrated consequences of urban sprawl").

\textsuperscript{120} \textit{See}, e.g., \textit{Dana}, supra note 2, at 10; \textit{Hetzel} & \textit{Gough}, supra note 1, at 220, 243.


\textsuperscript{122} \textit{See} \textit{Cowart}, supra note 121, at 219.

\textsuperscript{123} \textit{Id.}
Landuse Exactions and Severability

authorizing municipalities to enter into development agreements. By 1994, at least eight other states had enacted similar legislation.

Development agreements have become an increasingly popular landuse regulatory tool for some of the same reasons exactions have, such as the shortage of public funding and the increasingly anti-growth sentiment of many communities. The uncertainty surrounding exactions created by the nexus/rough proportionality review has spurred the use of these private contracts between municipalities and developers. The popularity of development agreements stems from the fact that they are arguably more flexible and legally secure than exactions. Development agreements add flexibility by allowing the parties to negotiate for exactions tailored to their specific needs.

In addition, development agreements are more legally secure than exactions for two possible reasons. First, development agreements may provide security for developers if enabling statutes provide that such agreements are enforceable against municipalities. While no substantial case law has developed this point, it is important to note that in some states subsequent legislation may void the agreement where required by public health or safety, or where conditions substantially change. Second, development agreements provide legal security for municipalities by binding the developer to the agreement due to the agreement’s voluntary nature. The following two cases illustrate this point.

A. Leroy Land Development v. Tahoe Regional Planning Agency

In this case, the developer wanted to rescind a pre-Nollan settlement agreement with the local planning agency that required off-site

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124 See Rhoads, supra note 10, at 506-07.
125 See id. at 507. These states are Arizona, Colorado, Florida, Hawaii, Louisiana, Minnesota, Nevada, New Jersey, and Washington. See id.
126 See id. at 506.
127 See id.
128 See Cowart, supra note 121, at 219-20.
129 See id. In this way the parties are not limited by municipal ordinances that would apply to all similarly situated applicants. See id.
130 See id. at 220.
131 See id.
133 See id. at 392-93; Rhoads, supra note 10, at 509.
134 939 F.2d 696 (9th Cir. 1991).
mitigation.\textsuperscript{135} The developer said the settlement terms violated \textit{Nollan}'s essential nexus standard and therefore constituted a taking.\textsuperscript{136} The court disagreed, holding that the agreement “cannot result in a ‘taking’ because the promise was entered into voluntarily, in good faith and was supported by consideration.”\textsuperscript{137}

B. Meredith v. Talbot County\textsuperscript{138}

In this case, the developer proposed entering into a development agreement when it appeared that the planning officer would deny full approval of the development permit.\textsuperscript{139} The development agreement was executed and prohibited the development of five lots of the twenty-eight-lot subdivision plat in order to protect the habitat of a pair of bald eagles and another endangered species.\textsuperscript{140} In return, the developer received immediate approval of the subdivision plat.\textsuperscript{141} Several months after recording the plat, the developer applied for building permits to build houses on the restricted lots.\textsuperscript{142} When the planning officer denied the request, the developer sued, claiming the agreement was made under duress and the denied permit constituted a taking of the developer’s property.\textsuperscript{143} The court granted summary judgment in favor of the county, stating that the agreement was “an informed business decision” initiated voluntarily by the developer, and resulted in both parties receiving certain benefits.\textsuperscript{144}

C. The Outlook Remains Unclear

While other cases have found similar agreements enforceable,\textsuperscript{145} the law surrounding development agreements is not concrete; some commentators suggest development agreements should be subject to

\textsuperscript{135} See id. at 697–98.
\textsuperscript{136} See id. at 698.
\textsuperscript{137} Id.
\textsuperscript{138} 560 A.2d 599 (Md. 1989).
\textsuperscript{139} See id. at 600–01.
\textsuperscript{140} See id. at 601–02.
\textsuperscript{141} See id.
\textsuperscript{142} See id. at 602.
\textsuperscript{143} See id.
\textsuperscript{144} Meredith, 560 A.2d at 604.
\textsuperscript{145} See, e.g., Blagden Alley Ass’n v. District of Columbia Zoning Comm’n, 590 A.2d 139 (D.C. 1991) (holding duress is not a defense to enforcing development agreement); Sylvan­nia Elec. Prods. v. City of Newton, 183 N.E.2d 118 (Mass. 1962) (denying claims of improper conditional zoning where applicant’s agreement to specific use limitations was considered to be voluntary action).
the same scrutiny as are development exactions. Those suspicious of development agreements see, among other issues, the potential for abuse by the municipality due to the potential for buying and selling development approval. Therefore, it is prudent to examine alternative approaches to development exactions.

IV. SEVERABILITY

As previously discussed, the difficulty facing municipalities is not the heightened nexus/rough proportionality review itself, but the fact that when the imposed exaction is stricken as unconstitutional, the exaction is severed from the permit. Severability as a concept and a doctrine is grounded in both law and logic.

In logic, when dealing with a conditional statement (if X then Y), where the consequent statement (X being analogous to the exaction) is false (unconstitutional), the antecedent statement (Y being analogous to the permit) is also false (fails). A permit (antecedent) is granted upon a condition (consequent). Where the condition is negated (ruled unconstitutional), the permit (the antecedent) is also negated. In sum, where the permit is conditioned upon an exaction, and the exaction fails, the rules of basic logic demand that the permit also fails.

The doctrine of severability is well established in both contract and public law. Courts will sever an illegal provision in an otherwise valid contract and enforce the remaining contract if the illegal provision is not essential to the deal as a whole. Likewise, courts will sever an unconstitutional provision in a statute and enforce the remainder of the statute if the unconstitutional provision is not essential to the overall statute. To see how severability can apply to unconsti-
tutional conditions in development permits, it is important to understand the doctrine's reasoning and application in both contract and public law.\textsuperscript{157}

A. Severability in Contracts

While courts generally do not concern themselves with the subject matter of contracts, a court may void contractual provisions that are illegal or contrary to public policy.\textsuperscript{158} When a contract contains an illegal provision among several acceptable provisions, the court may choose one of three courses of action: (1) rewrite the contract to make the terms comply with public policy (the blue-pencil rule); (2) hold the entire contract unenforceable; or (3) sever the illegal provision(s) and enforce the remaining contract.\textsuperscript{159} Because the blue-pencil rule is generally limited to restrictive covenants and is subject to abuse,\textsuperscript{160} and because courts favor enforcing contracts as a matter of protecting parties' justified expectations,\textsuperscript{161} the third option, severing the illegal provision, has become the courts' favored course.\textsuperscript{162}

However, in order for the court to be able to sever the illegal provision, it must determine that the illegal provision is not essential to the overall agreement.\textsuperscript{163} To determine whether the provision is essential, the court looks at the intent of the negotiating parties.\textsuperscript{164} If the parties would have made the agreement without the illegal provision, the provision is not essential to the contract.\textsuperscript{165} In this case the term can be severed and the remaining contract enforced.\textsuperscript{166} If the court determines that the parties would not have made the agreement without the provision, then the provision is essential and will not be

\textsuperscript{157} For a more detailed discussion of the severability doctrine, see Mark L. Movsesian's article, \textit{supra} note 25, at 41–73.

\textsuperscript{158} See Farnsworth, \textit{Contracts} § 5.1, at 345–48 (2d ed. 1990).

\textsuperscript{159} See Movsesian, \textit{supra} note 25, at 47.

\textsuperscript{160} See Farnsworth, \textit{supra} note 158, at 384–85.

\textsuperscript{161} See id. at 348–50.

\textsuperscript{162} See Movsesian, \textit{supra} note 25, at 47.

\textsuperscript{163} See Restatement (Second) of Contracts § 184(1) (1981).


\textsuperscript{165} See, e.g., Panasonic Co. v. Zinn, 903 F.2d 1039, 1041 (5th Cir. 1990); John D. Calamari & Joseph M. Perillo, \textit{The Law of Contracts} § 22–4(d), at 784 (2d ed. 1977).

\textsuperscript{166} See, e.g., Zinn, 903 F.2d at 1041–42; Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima, 858 P.2d 245, 259 (Wash. 1993).
severed from the rest of the contract. In this case the entire contract fails and is unenforceable.

In determining the intent of the parties, the court looks at the language of the contract. However, even where the contract specifically provides a severability clause or describes certain terms as essential, the language alone is not necessarily dispositive. Rather, the court will look to extrinsic evidence, such as a contract's negotiating history, to discern the intent of the parties. Such extrinsic evidence can overcome even the express language of a severability clause.

B. Severability in Statutes

Courts use the same analysis in determining the severability of unconstitutional statutory provisions as they do in contract law. In the mid-nineteenth century, as legislation became an increasingly prominent form of law, courts applied contract law's severability doctrine to unconstitutional provisions in statutes. Just as with contracts, the severability of an unconstitutional statutory provision depends on the intent of the parties. In the legislative context, the court views the legislators as the parties, and treats the statute as a "legislative bargain" between those parties.

To determine the intent of the parties as to the importance of the unconstitutional provision, the courts examine both the statute's

168 See, e.g., National Iranian Oil, 817 F.2d at 333–34; Zerbets, 708 P.2d at 1282–83.
169 See Movsesian, supra note 25, at 48.
170 See id.
171 See, e.g., Eckles v. Sharman, 548 F.2d 905, 909 (10th Cir. 1977); Toledo Police Patrolmen’s Ass’n, Local 10 v. City of Toledo, 641 N.E.2d 799, 803 (Ohio Ct. App. 1994), appeal denied, 659 N.E.2d 795 (Ohio 1994) (severing unenforceable term where contract contained severability clause and history of term’s negotiation failed to show that term was consideration for other, enforceable, term).
172 See Eckles, 548 F.2d at 907–09 (holding severability clause facilitates interpretation but is insufficient to direct a verdict where evidence of negotiation history calls intent of parties into question).
173 See Movsesian, supra note 25, at 43.
174 See, e.g., State ex. rel. Huston v. Commissioners of Perry County, 5 Ohio St. (1 Critch.) 497, 507 (1856); Warren v. Mayor of Charlestown, 68 Mass. (2 Gray) 84, 90–91 (1854); see also Movsesian, supra note 25, at 42–43.
175 See Movsesian, supra note 25, at 58–59.
176 Alaska Airlines, 480 U.S. at 685; see also Movsesian, supra note 25, at 58–60.
text and its legislative history. As with contracts, while a statute's severability clause may create a presumption of severability, the United States Supreme Court has stated that "the ultimate determination of severability will rarely turn on the presence or absence" of a severability clause. In fact, the Supreme Court has stated that even the explicit language of a severability clause cannot overcome a legislative history containing strong evidence that the legislature intended otherwise.

If an examination of a statute's text and legislative history convince a reviewing court that the unconstitutional provision was essential to the legislative bargain that made the statute possible, and the legislature would not have passed the statute without the provision, the court will declare the provision inseverable, and the statute then becomes unenforceable in its entirety. If, on the other hand, the court finds the unconstitutional provision inessential to the overall statute—that the legislature would have passed the statute regardless of the debated provision's inclusion—the court will sever the unconstitutional provision and enforce the statute's remaining provisions.

V. SEVERABILITY IN CONDITIONED DEVELOPMENT PERMITS

By routinely severing unconstitutional exactions from development permits and enforcing the remaining permits, courts allow development to progress without mitigating the resulting costs suffered

177 See Movsesian, supra note 25, at 59–60. As an example, in Alaska Airlines the Supreme Court determined Congress' intent concerning the severability of a statutory provision by examining both the text and the legislative history of the statute. See 480 U.S. at 686–87.

178 See Alaska Airlines, 480 U.S. at 686.

179 United States v. Jackson, 390 U.S. 570, 585 n.27 (1968); see also Dorsey v. Kansas, 264 U.S. 286, 290 (1924) (describing severability clause as "merely" an "aid" in determining legislative intent, "not an inexorable command").

180 See Alaska Airlines, 480 U.S. at 686.

181 See id. at 685. "[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." Id.; see, e.g., Carter v. Carter Coal Co., 298 U.S. 238, 313–16 (1936); Retirement Bd. v. Alton R.R., 295 U.S. 330, 362 (1935).

182 See, e.g., New York v. United States, 505 U.S. 144, 186–87 (1992); Alaska Airlines, 480 U.S. at 697; INS v. Chada, 462 U.S. 919, 932 (1983). Whereas the contract context provides the court (on occasion) with the option to rewrite the offending term, the blue-pencil rule does not apply in the legislative context due to the separation of powers doctrine. See Movsesian, supra note 25, at 57–58. "A court has no constitutional authority to rewrite legislation." See id.
by the communities.\textsuperscript{185} The local government is then left in a worse position than it was before the developer applied for the permit.\textsuperscript{184} Assuming the municipality could have constitutionally denied the development permit altogether, a more equitable outcome would return the municipality "to the status quo as it existed prior to approval of the... project."\textsuperscript{185}

Therefore, in determining whether an unconstitutional condition should be severed from a development permit or the entire permit should be unenforced, courts should follow the same severability analysis established in contract and public law.\textsuperscript{186} That is, if a condition is an essential element of a permit and is ruled unconstitutional, the condition is inseverable from the permit, and the entire permit should fail.\textsuperscript{187}

For purposes of a severability analysis, landuse exactions are substantially similar to agreements in contractual and statutory contexts. As in those contexts, the parties involved in the landuse permitting context—the municipality and the developer—negotiate "bargains" for the betterment of both parties.\textsuperscript{188} In \textit{Ehrlich v. City of Culver City}, the Supreme Court of California described the permits in \textit{Nollan} and \textit{Dolan} as "land use 'bargains' between property owners and regulatory bodies... It is in this paradigmatic permit context—where the individual property owner-developer \textit{seeks to negotiate} approval of a

\textsuperscript{185} See Hetzel & Gough, \textit{supra} note 1, at 220. When exactions are stricken, municipalities are forced to expend "limited resources to compensate for misjudgments in what was presumed to be a valid means of obtaining public cost contributions from private landowners...." \textit{Id.}

\textsuperscript{184} See \textit{Ehrlich v. City of Culver City}, 911 P.2d 429, 449 (Cal. 1996) (speaking of returning municipality to status quo as objective after developer challenged exaction); see, e.g., Hetzel & Gough, \textit{supra} note 1, at 220. Municipalities may deny development altogether rather than risk having exactions stricken and the development proceed unmitigated. See Hetzel & Gough, \textit{supra} note 1, at 220. This reasoning implies that municipalities lose the status quo when their development conditions are stricken and the development proceeds.

\textsuperscript{185} \textit{Ehrlich}, 911 P.2d at 449.

\textsuperscript{186} See Kendall & Ryan, \textit{supra} note 2, at 1832–35 (discussing detrimental effects of nexus/rough proportionality review on efficiency and fairness of regulating land use with conditioned permits); Movsesian, \textit{supra} note 25, at 43–44 (discussing use of severability doctrine in contract and statutory contexts). Kendall and Ryan's reasoning implies that nexus/rough proportionality review is detrimental to municipalities because it leads to more challenged exactions, which leads to severed exactions and unmitigated development. See Kendall & Ryan, \textit{supra} note 2, at 1032–35.

\textsuperscript{187} See Movsesian, \textit{supra} note 25, at 43–44 (discussing use of severability doctrine in contract and statutory contexts).

\textsuperscript{188} See \textit{Ehrlich}, 911 P.2d at 438.
planned development—that the combined *Nollan* and *Dolan* test quintessentially applies."

However, unlike the contract and legislative contexts, courts deciding development permit cases have not inquired into the intent of the bargaining parties to determine whether the unconstitutional condition is essential to the grant of the permit.\(^{190}\) By severing a condition that the municipality could have deemed essential to the permit, courts grant developers the benefit of building projects without the burden of contributing toward mitigation of the impacts such projects cause.\(^{191}\) As a result, the municipality receives the burden of a new development without the benefit of mitigating compensation.\(^{192}\)

In the contract context, where a party has received a benefit at the expense of another, the burdened party may sue for unjust enrichment.\(^{193}\) In the development permit context, the burdened municipality is left without protection or recourse.\(^{194}\) To protect municipalities, courts should apply the full severability doctrine in the landuse/development permit context.

In applying the severability test, courts should determine whether the unconstitutional condition is essential to the granting of the permit by looking at the intent of the parties involved.\(^{195}\) If the permit’s language or negotiating history suggests that the municipality would not have granted the permit without the condition, then the condition is essential to the agreement and is inseverable; thus, the entire permit should fail.\(^{196}\) A reviewing court should sever a condition only where the parties’ intent can be fulfilled without the unconstitutional

\(^{189}\) *Id.* at 438 (emphasis added).

\(^{190}\) See, e.g., *Dolan* v. City of Tigard, 512 U.S. 374 (1994) (nowhere discussing the parties’ intent as to the condition’s importance to the permit); *Nollan* v. California Coastal Comm’n, 483 U.S. 825 (1987) (nowhere discussing the parties’ intent as to the condition’s importance to the permit).

\(^{191}\) See, e.g., *Dolan*, 512 U.S. at 387, 393–96 (discussing the valid mitigatory purposes of the conditions, but striking them as unconstitutional); *Nollan*, 483 U.S. at 829–30, 841–42 (mentioning that the Nollans completed building the new house and striking the mitigatory condition).

\(^{192}\) See Rhoads, *supra* note 10, at 469–70 (describing burden development places on municipalities’ infrastructure and natural resources).

\(^{193}\) See *Farnsworth*, *supra* note 158, § 2.20.

\(^{194}\) See, e.g., *Nollan*, 512 U.S. at 829–30, 841–42 (striking exaction when the Nollans had already completed construction).

\(^{195}\) See, e.g., *Restatement (Second) of Contracts* § 184(1) (1981); *Movsesian*, *supra* note 25, at 43–44 (discussing judicial tradition of determining severability of conditions or terms in contracts and statutes by examining intent of parties).

\(^{196}\) See *Movsesian*, *supra* note 25, at 43–44 (determining whether conditions are essential in contracts and statutes).
provision(s). It follows that where the intent of a municipality is to allow development only if the developer mitigates the development's impact via an exaction, the condition is essential to the permit. On the other hand, when the permit's language or negotiating history suggests that the municipality would have granted the permit without the condition, the condition is inessential to, and should be severed from, the permit. Then the resulting unconditioned permit should be granted to the developer.

A. Potential Objections to Severability of Development Conditions

What concerns might the severability doctrine cause in the development permit context? If courts were to examine the severability of development permits, as this Note suggests, developers may understandably raise the objection that severability will encourage the municipalities to overreach in imposing conditions on the development permits. The reasoning might go as follows: If a municipality imposes an unconstitutional condition, the developer can either accept the conditioned permit or challenge the condition in court. If the developer accepts the condition, the municipality arguably gets away with extortion. If the developer challenges the condition and loses at trial, she must accept the conditioned permit; if the developer wins at trial, the "essential" condition is inseverable and the entire permit fails. Such an application of the severability doctrine leaves the municipality in the same position as before it approved the permit. The developer, however, has spent valuable time and money, and forgone other opportunities in the negotiation and litigation of the permit. What then provides the municipality with a disincentive for overreaching?

The developer's objection to applying the severability analysis lacks merit because it relies on a false dilemma: the developer is not limited to choosing between accepting the conditioned permit or

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197 See, e.g., St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635, 640 (Fla. 1991) (severing unconstitutional section of ordinance when intent of ordinance will be unaffected); Eastern Air Lines, Inc. v. Department of Revenue, 455 So. 2d 311, 317 (Fla. 1984), appeal dismissed, 474 U.S. 892 (1985) (noting severance appropriate if legislative intent is fulfilled and remainder of law is not rendered incomplete by severance).

198 See Movsesian, supra note 25, at 43-44 (discussing the judicial tradition of determining severability in contracts and statutes by examining intent of the parties).

199 See id. (noting courts will sever illegal contractual term or unconstitutional statutory provision where term or provision is unessential to agreement).

200 See id. (explaining courts enforce remaining contract or statute after severing unconstitutional term or provision).
challenging the condition in court.\textsuperscript{201} The developer has the third option of refusing the conditioned permit and building the development elsewhere.\textsuperscript{202} This option is effective because in conditioning development permits with exactions, municipalities do not have a monopoly on development opportunities.\textsuperscript{203} Rather, municipalities operate in a development market sufficiently competitive to constrain them from overreaching through exactions.\textsuperscript{204} As discussed previously, competition in the development market forces municipalities to impose exactions that recover only a fraction of the cost imposed by the development.\textsuperscript{205} In this competitive environment it is unlikely that a municipality will risk the opportunity for controlled development and the cost of potential litigation by intentionally imposing overreaching conditions on development permits.\textsuperscript{206}

Furthermore, the severability doctrine itself may serve to protect developers by potentially demonstrating when a municipality imposes an exaction for an illegitimate purpose.\textsuperscript{207} If a municipality would have granted a permit without a condition, then the imposed condition is probably the municipality’s attempt to get something for nothing—exactly the type of “extortion” with which the Supreme Court was concerned in \textit{Nollan}.\textsuperscript{208} Severability analysis will prove this exaction to be inessential to the permit, in which case the courts will sever the exaction and enforce the resulting permit.\textsuperscript{209}

\textbf{B. Severability Applied}

An example of the severability doctrine as it could be applied will facilitate understanding of its effect in specific circumstances. Recall that in \textit{Nollan}, the Nollans applied for a development permit from the

\textsuperscript{201} See \textit{Been}, supra note 1, at 476, 543–45.

\textsuperscript{202} See \textit{id.} (arguing that \textit{Nollan}'s heightened judicial scrutiny is unnecessary, and even harmful, where market forces sufficiently constrain municipal overreaching through exactions).

\textsuperscript{203} See \textit{id.} at 476–78, 511–28.

\textsuperscript{204} See \textit{id.} at 528–45.

\textsuperscript{205} See \textit{Been}, supra note 1, at 511–12; \textit{Nelson}, supra note 22, at 95.

\textsuperscript{206} See \textit{Been}, \textit{supra} note 1, at 511–12 (stating competition prevents municipalities from overreaching).


\textsuperscript{208} See \textit{id.}

\textsuperscript{209} See \textit{Movsesian}, \textit{supra} note 25, at 43–44 (explaining courts sever unconstitutional provisions and illegal terms from statutes and contracts when provisions and terms are nonessential to the agreement).
California Coastal Commission to build a larger beach house.\textsuperscript{210} After a full public hearing, the Coastal Commission approved the permit with the condition requiring lateral public access to the beach beyond the Nollans' property.\textsuperscript{211} The Nollans filed a supplemental writ of mandamus requesting that the access condition be invalidated but the permit be issued without the condition.\textsuperscript{212} The Nollans made the required dedication on the condition they could reserve the right to challenge the condition in court.\textsuperscript{213} The Commission rejected this conditional acceptance, presumably because the Commission would deny the permit outright before approving a conditional permit where the landowner sought to have the condition removed.\textsuperscript{214} However, the California Superior Court found for the Nollans, severing the condition from the permit and allowing the Nollans to build.\textsuperscript{215}

Before the case could be heard by the state's Court of Appeal, the Nollans began and completed construction of their new house.\textsuperscript{216} In examining the intent of these two parties, the resulting permit can hardly be characterized as an agreement. The Nollans intended to accept only an unconditioned permit (or a conditioned permit reserving a right to later legal challenge) and demonstrated this intent both by rejecting the conditioned permit and by building their house prior to the case's appellate resolution.\textsuperscript{217} The Commission intended to accept only a conditioned permit (without a reservation for legal challenge) and demonstrated this intent by rejecting the Nollans' reservation offer and insisting the condition remain part of the permit.\textsuperscript{218} Hence, because the permit would not have been granted without the condition, the condition, or lack thereof, was an essential

\textsuperscript{210} See Nollan, 483 U.S. at 828. Because the Nollans completed construction of their house prior to the litigation's outcome, an application of the severability doctrine would not have stopped them from building. See id. Nonetheless, the case is still helpful in determining how the Court could apply severability analysis. See id.

\textsuperscript{211} See id. at 828; Appellee's Motion to Dismiss at 5, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (No. 86–133).

\textsuperscript{212} See Appellee's Motion to Dismiss at 5, Nollan (No. 86–133).

\textsuperscript{213} See Brief for Appellants at 5, Nollan (No. 86–133).

\textsuperscript{214} See id.

\textsuperscript{215} See Nollan, 483 U.S. 825, 829; Brief for Appellants at 10–11, Nollan (No. 86–133).

\textsuperscript{216} See Nollan, 483 U.S. at 829–30.

\textsuperscript{217} See id.; Brief for Appellants at 5, Nollan (No. 86–133).

\textsuperscript{218} See Brief for Appellants at 5, Nollan (No. 86–133).
element in the permit, and when the condition was deemed unconstitutional, the entire permit should have failed.219

CONCLUSION

Due to the synergistic combination of increased urban sprawl, infrastructure deficits, limited natural resources, and an increasingly limited police power, municipalities need an element of certainty in deciding whether to grant and condition development permits.220 Likewise, developers seeking to work in a fluctuating and highly competitive market would benefit from an added measure of certainty when negotiating with increasingly wary municipalities.221 Courts can deliver this certainty by applying the severability analysis suggested by this Note to unconstitutional conditions in the development permit context. Then, when a nonessential condition is held unconstitutional, the condition should be severed; if the condition is essential to the permit, the entire permit should fail.

219 See Movsesian, supra note 25, at 47–50, 58–60 (noting courts do not sever essential unconstitutional provisions or illegal terms from statutes and contracts, but rather hold the entire agreement unenforceable).

220 See, e.g., Dana, supra note 2, at 10; Hetzel & Gough, supra note 1, at 220; Kendall & Ryan, supra note 2, at 1813–15.

221 See Brief for Respondent at 19, Dolan (No. 93–518).