

5-1-1989

## Temporary Regulatory Taking Under the Florida Local Government Comprehensive Planning and Land Development Regulation Act

Dennis Mele

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [State and Local Government Law Commons](#)

---

### Recommended Citation

Dennis Mele, *Temporary Regulatory Taking Under the Florida Local Government Comprehensive Planning and Land Development Regulation Act*, 43 U. Miami L. Rev. 1203 (1989)

Available at: <https://repository.law.miami.edu/umlr/vol43/iss5/8>

This Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# Temporary Regulatory Taking Under the Florida Local Government Comprehensive Planning and Land Development Regulation Act

I. INTRODUCTION .....	1203
II. THE LOCAL GOVERNMENT COMPREHENSIVE PLANNING AND LAND DEVELOPMENT REGULATION ACT .....	1204
III. REGULATORY TAKING CASES.....	1206
A. Golden v. Planning Board of Ramapo.....	1206
B. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles .....	1208
C. Nollan v. California Coastal Commission .....	1209
IV. HYPOTHETICAL TAKINGS DISPUTES UNDER THE ACT .....	1211
A. <i>First Hypothetical</i> .....	1212
B. <i>Second Hypothetical</i> .....	1218
C. <i>Third Hypothetical</i> .....	1222
V. CONCLUSION .....	1226

## I. INTRODUCTION

Florida's most recent growth-management legislation mandates that government construction of public facilities keep pace with private construction of new homes, offices, shopping centers, and industrial parks. This innovative comprehensive planning law requires cities and counties to adopt regulations prohibiting private construction projects, if public facilities do not have sufficient capacity to serve proposed projects and the existing population. Municipalities denying development proposals due to government's failure to keep pace with the demand for public services may face exposure to damages from developers who claim that such regulations are an invalid exercise of the police power.

Section II of this Comment examines Florida's new growth-management legislation, and Section III examines judicial decisions, which will affect the ability of local governments to implement this legislation. In addition, Section IV analyzes the types of fact patterns which may arise when municipalities deny development proposals due to inadequate public facilities. This analysis describes the takings arguments that developers may use to convince Florida courts to award damages or to invalidate regulations prohibiting private development due to the lack of adequate public facilities. Furthermore, Section IV examines government counterarguments and modifications

to regulations that prevent takings problems. Finally, Section V concludes with recommendations to local governments for drafting and administering land development regulations which both comply with the new legislation and avoid takings claims.

## II. THE LOCAL GOVERNMENT COMPREHENSIVE PLANNING AND LAND DEVELOPMENT REGULATION ACT

In 1985, the Florida Legislature repealed the Local Government Comprehensive Planning Act of 1975<sup>1</sup> and enacted expanded planning legislation entitled the Local Government Comprehensive Planning and Land Development Regulation Act (the Act).<sup>2</sup> The Act imposed two new significant requirements on local government.<sup>3</sup> First, the Act requires each local government to adopt a capital improvements element (CIE) of its comprehensive plan.<sup>4</sup> The CIE must assess existing deficiencies in public facilities and the need for new facilities for at least the next five years.<sup>5</sup> The local government must identify funding sources and estimate the cost of planned facilities.<sup>6</sup> Additionally, the local government must adopt standards to ensure acceptable levels of service for each type of public facility.<sup>7</sup>

Second, the Act requires each local government to adopt and enforce land development regulations that conform to its comprehen-

---

1. FLA. STAT. § 163.3161(8) (1987).

2. 1987 FLA. LAWS ch. 85.55, §§ 1-20 (codified at FLA. STAT. §§ 163.3161-.3215 (1987)).

3. The head of the governor's planning staff described the capital improvements and service standards elements of the Act as "[t]he most significant addition" to local comprehensive planning in Florida. O'Connel, *New Directions in State Legislation: The Florida Growth Management Act and State Comprehensive Plan*, 1986 INST. ON PLAN. ZONING & EMINENT DOMAIN 6-1, 6-22 to 6-23.

4. FLA. STAT. § 163.3177(3) (1987). The Act also requires the eight comprehensive plan elements mandated by the 1975 Act: (a) future land use element; (b) traffic circulation element; (c) general sanitary sewer, solid waste, drainage, potable water and aquifer recharge protection element; (d) conservation element; (e) recreation and open space element; (f) housing element; (g) coastal management element; and (h) intergovernmental coordination element. *Id.* § 163.3177(6). Additionally, the Act lists ten optional plan elements: (a) mass transit element; (b) port, aviation, and related facilities element; (c) recreational traffic circulation element; (d) offstreet parking facilities element; (e) public buildings and related facilities element; (f) recommended community design element; (g) general area redevelopment element; (h) safety element; (i) historic and scenic preservation element; (j) economic element; (k) and any other necessary element. *Id.* § 163.3177(3)(b). These optional elements are required if the local governmental unit has a population greater than 50,000, as determined under *id.* § 186.901 (the statute erroneously cites to *id.* § 186.091).

5. *Id.* § 163.3177(3)(a). The five-year CIE must be reviewed annually and amended as necessary. *Id.* § 163.3177(3)(b).

6. *Id.* § 163.3177(3)(a)(2).

7. *Id.* § 163.3177(3)(a)(3). Public facilities include transportation, sanitary sewer, solid waste, drainage, potable water, education, and health facilities. *Id.* § 163.3164(23).

sive plan.<sup>8</sup> Land development regulations must provide necessary public facilities for proposed development, at or in excess of, the standards adopted in the CIE.<sup>9</sup> Furthermore, local regulations must condition approval of development permits<sup>10</sup> on the availability of public facilities necessary to serve proposed projects.<sup>11</sup> Finally, local governments must deny any development permit "which results in a reduction in the level of services for the affected public facilities below the level of services provided in the [capital improvement element of the] comprehensive plan of the local government."<sup>12</sup>

These two requirements mandate that cities and counties deny development approval to any project that, for example, results in additional traffic on an already congested roadway, or causes a roadway to exceed its capacity as defined by the local CIE.<sup>13</sup> If a public facility is already operating below the service standard and the proposed development results in a further reduction in service, project approval must be denied.<sup>14</sup> Additionally, if the public facility meets or exceeds the service standard, but the proposed development results in a reduction in service below the standard, the local government cannot approve the project.<sup>15</sup> Finally, if a project results in a reduction in services below the standard established in the CIE, the developer can wait until the local government builds an improved facility, or the developer can agree to construct the improvement to meet the municipality's standards as a condition of project approval.<sup>16</sup> The developer can also build its project and the necessary public facilities in phases to ensure that governmental facilities are available concurrent with the impacts of development.<sup>17</sup>

---

8. *Id.* § 163.3202(1).

9. *Id.* FLA. STAT. § 163.3202(2)(g).

10. *Id.* Development permits are broadly defined in FLA. STAT. § 163.3164(7).

11. *Id.* § 163.3202(2)(g).

12. *Id.*

13. The Act also requires denial of development permits for projects that would overburden sewer, solid waste, drainage, water, education and health facilities. *See supra* note 7.

14. Although the actual language of FLA. STAT. § 163.3202(2)(g) arguably can be limited to situations in which the facility is operating at or above the service standard before the proposed project is built, at least one local government implementing the Act has not so limited this language. *See* PALM BEACH COUNTY, FLA., ORDINANCE 87-18, art. V, §§ 1-2 (Sept. 22, 1987).

15. FLA. STAT. § 163.3202(2)(g) (1987).

16. *Id.* §§ 163.3177(10)(h), 163.3202(g).

17. *Id.* § 163.3177(10)(h).

## III. REGULATORY TAKING CASES

A. *Golden v. Planning Board of Ramapo*

In *Golden v. Planning Board of Ramapo*,<sup>18</sup> the New York Court of Appeals upheld a plan similar to the Act, which linked development approvals to the provision of adequate public facilities.<sup>19</sup> In response to rapid population growth and problems in providing adequate service, Ramapo, New York, adopted a new master plan, an eighteen-year capital improvement program, and amended its zoning code to require special permits for all new subdivisions.<sup>20</sup> Ramapo conditioned special permit approval upon the availability of adequate sewers, drainage, parks, roads, and fire protection services for the proposed development project.<sup>21</sup> If adequate services were not available when the prospective developer applied for plat approval, the town would deny the application but could grant "a present right to proceed with residential development in such year as the development meets the required point minimum, but in no event later than the final year of the 18 year capital plan."<sup>22</sup> The applicant could wait up to eighteen years to subdivide his property or could advance the date of plat approval by agreeing to construct or to provide the municipal facilities and services required to generate sufficient points for project approval.<sup>23</sup>

The New York Court of Appeals held that the ordinance was not confiscatory because Ramapo's zoning ordinance was only a temporary restriction "designed to operate for a maximum period of 18 years."<sup>24</sup> The court stated:

An ordinance which seeks to permanently restrict the use of property so that it may not be used for any reasonable purpose

---

18. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1972).

19. *Id.* at 369, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

20. *Id.* at 367-68, 285 N.E.2d at 294-95, 334 N.Y.S.2d at 143-44.

21. *Id.* at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 143-44. Each proposed plat received points based on the availability of the five municipal services listed in the ordinance. *Id.* A minimum score of 15 points was required for approval of a special permit. *Id.*

22. *Id.* at 368, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

23. *Id.* at 368-69, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

24. *Id.* at 382, 285 N.E.2d at 303, 334 N.Y.S.2d at 155. The court also rejected the property owners' claims that linking development approvals to the provision of adequate public facilities exceeded the town's delegated authority under New York's zoning enabling act. *Id.* at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150.

Judges Breitel and Jason dissented on the grounds that Ramapo had no delegated authority under New York law to postpone growth in this manner. *Id.* at 386, 285 N.E.2d at 306, 334 N.Y.S.2d at 158. Judge Breitel's dissent did not address the takings issue because, in his opinion, "the Ramapo ordinance is destroyed at the threshold" due to lack of statutory authority. *Id.* at 389, 285 N.E.2d at 309, 334 N.Y.S.2d at 162.

must be recognized as a taking: . . . . An appreciably different situation obtains where the restriction constitutes a *temporary* restriction, providing that the property may be put to a profitable use within a reasonable time.<sup>25</sup>

The property owners challenging the ordinance argued that this temporary program severely diminished the value of their land, precluding all economically beneficial use of the property.<sup>26</sup> The court reasoned that, although the value of undeveloped property would be substantially diminished, the ordinance would not effect a taking "unless it can be shown that the measure is either unreasonable in terms of necessity or the diminution in value is such as to be tantamount to a confiscation."<sup>27</sup>

The New York Court of Appeals determined that the Ramapo ordinance satisfied both prongs of this test. First, Ramapo's growth management program did not diminish property value to such an extent "to be tantamount to a confiscation" because the zoning restrictions, although "substantial in nature and duration," were not "absolute."<sup>28</sup> The restrictions were not absolute and did not result in a taking because they were only temporary regulations, due to expire in eighteen years.<sup>29</sup>

Second, the ordinance was not "unreasonable in terms of necessity" because it imposed "restrictions of a certain duration,"<sup>30</sup> based on a substantiated need for improved public facilities to serve the town's rapidly growing population.<sup>31</sup> Additionally, under the Ramapo ordinance, property could be developed within a reasonable time and at an appreciated value, due to the town's investment in public services.<sup>32</sup> Moreover, taxable property values were reduced in the interim to compensate for the effect of the development ban.<sup>33</sup> Therefore, the court concluded that the Ramapo plan did not result in an unconstitutional taking.<sup>34</sup> Because the Town of Ramapo lacked resources to construct public facilities to keep pace with its growth, the Town Board had a rational basis for enacting its phased-growth zoning

---

25. *Id.* at 380, 285 N.E.2d at 303, 334 N.Y.S.2d at 154 (emphasis in original).

26. *Id.* at 381, 285 N.E.2d at 303, 334 N.Y.S.2d at 154.

27. *Id.* at 381, 285 N.E.2d at 304, 334 N.Y.S.2d at 155.

28. *Id.* at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 155.

29. *Id.* The court also noted that property owners could accelerate development approval by constructing public improvements at their own expense. *Id.*

30. *Id.*

31. *Id.* Ramapo conducted extensive studies prior to adopting the zoning ordinance and capital improvement plan. *Id.* at 366, 285 N.E.2d at 294, 334 N.Y.S.2d at 142.

32. *Id.* at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 156.

33. *Id.*

34. *Id.*

program.<sup>35</sup>

B. First English Evangelical Lutheran Church of Glendale v.  
County of Los Angeles

The United States Supreme Court apparently rejected the reasoning of *Golden* in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.<sup>36</sup> In *First English*, Los Angeles County adopted an interim flood protection ordinance, prohibiting any construction within the flood prone area described in the ordinance.<sup>37</sup> A church's recreational camp, which had been destroyed by a flood a year before Los Angeles County adopted the ordinance, was within the flood zone area protected by the ordinance.<sup>38</sup> A month after Los Angeles County adopted the interim flood protection ordinance, the church filed an action for damages, alleging, *inter alia*, that the ordinance denied the church all use of its property.<sup>39</sup>

The Supreme Court did not determine whether a taking occurred,<sup>40</sup> or whether the ordinance was justified as a valid public safety measure.<sup>41</sup> Chief Justice Rehnquist directed that those issues be determined on remand.<sup>42</sup> Instead the Court decided the only

---

35. *Id.* at 383, 285 N.E.2d at 304-05, 334 N.Y.S.2d at 156.

36. 107 S. Ct. 2378 (1987).

37. *Id.* at 2381.

38. *Id.*

39. *Id.* at 2382. The trial court dismissed the church's takings claim, and the appeals court affirmed, based on the California Supreme Court precedent that damages are not available to remedy a regulatory taking. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 275-77, 598 P.2d 25, 29-31, 157 Cal. Rptr. 372, 376-78 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

40. *First English*, 107 S. Ct. at 2384. The Court did not determine whether a taking occurred because the lower court did not consider the issue. *Id.* Because the lower courts assumed that, even if the church's takings allegations were true, no damage remedy was available for a temporary regulatory taking, a majority of the Supreme Court found a ripe constitutional issue and avoided the procedural obstacles that prevented a decision in four earlier cases. *Id.* at 2383-84. See *McDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986) (The Court could not determine whether a taking occurred when the county denied subdivision approval because the county made no final and authoritative decision on the application of the challenged regulations to the plaintiff's property.); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (The bank's claim was not ripe for determination because it failed to seek variances of the zoning regulations.); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981) (dismissing appeal for lack of jurisdiction and not deciding whether a taking occurred, although the lower court decided damages were not an appropriate remedy); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (The zoning ordinance did not facially take the plaintiff's property, and the Court could not determine whether the ordinance was confiscatory, as applied to the plaintiff's property, because the plaintiff failed to submit a development plan.).

41. *First English*, 107 S. Ct. at 2384-85.

42. "These questions, [whether the ordinance denied the church all use of its property, and whether 'the denial of all use was insulated as a part of the State's authority to enact safety regulations'] of course, remain open for decision on . . . remand." *Id.* at 2385.

remaining issue: "whether the Just Compensation Clause requires the government to pay for 'temporary' regulatory takings."<sup>43</sup> Chief Justice Rehnquist wrote that "'temporary' takings which . . . deny a landowner use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."<sup>44</sup> Based on this reasoning, the Court held that, if a government regulation effects a taking of the claimant's property, the claimant is entitled to damages for the period of time the regulation prevented all use of the property.<sup>45</sup>

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

In *Nollan v. California Coastal Commission*,<sup>46</sup> the Supreme Court held that the commission could not constitutionally condition approval of a building permit upon the property owner's grant of a public access easement across his property.<sup>47</sup> The Nollans had an option to purchase a beachfront lot on the condition that they demolish the dilapidated bungalow situated on the property and build a new house.<sup>48</sup> The California Coastal Commission granted permit approval for the proposed house on the condition that the Nollans grant a public access easement across their property.<sup>49</sup> The Nollans sought review of the commission's order and prevailed in the Superior Court.<sup>50</sup> While the commission's appeal was pending, the Nollans constructed the new house without a permit and purchased the property.<sup>51</sup>

---

43. *Id.*

44. *Id.* at 2388.

45. *Id.* at 2389.

46. 107 S. Ct. 3141 (1987).

47. *Id.* at 3150.

48. *Id.* at 3143.

49. *Id.* The Nollans' lot was located between two public beaches. *Id.* The proposed access easement would have improved the public's ability to walk between the two public beaches. *Id.*

50. The Superior Court granted the Nollans' motion for a writ of administrative mandamus, invalidating the access requirement, on the basis that the commission did not show that the proposed construction "would have a direct adverse impact on public access to the beach." *Id.* On remand, the commission reaffirmed the permit condition on the grounds that the proposed house and other construction in the area would cumulatively and adversely impact public access along the beach. *Id.* at 3143-44. The Nollans filed a supplemental petition claiming that the permit condition violated the fifth amendment just compensation clause. *Id.* at 3144. The Superior Court granted the supplemental writ on statutory grounds. *Id.*

51. *Id.* at 3144. The California Court of Appeal reversed the Superior Court, finding that the California Coastal Act of 1976 authorized the commission to impose the permit condition. *Id.* The court also ruled against the Nollans' takings claim "because, although the condition diminished the value of the Nollans' lot, it did not deprive them of all reasonable use of their property." *Id.* (citing *California Coastal Comm'n v. Nollan*, 177 Cal. App. 3d 719, 722-23,



Writing for the majority, Justice Scalia observed that, if the state required a property owner to convey a public access easement outright, rather than as a condition of permit approval, there undoubtedly would be a taking.<sup>52</sup> Scalia stated that a public access easement is a " 'permanent physical occupation' " <sup>53</sup> of private property by government and is therefore a taking " 'without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.' " <sup>54</sup> Once the Court concluded that requiring the conveyance of a public access easement was a taking, "the question [became] whether requiring it to be conveyed as a condition for issuing a land use permit alters the outcome." <sup>55</sup>

The Court's test to determine if the easement dedication was a valid condition of permit approval was whether the regulatory condition " 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " <sup>56</sup> Applying this test to the facts in *Nollan*, the Court found that, even if the state could constitutionally prohibit the Nollans' construction project "in order to protect the public's view of the beach," <sup>57</sup> granting permit approval conditioned on conveyance of a public access easement violated the just compensation clause.<sup>58</sup>

Although prohibiting construction of a new house on the Nollans' lot may be a valid exercise of the police power, "if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition," the condition is a taking.<sup>59</sup> Lack of the necessary nexus between the legitimate state interest served by the construction prohibition and the restriction substituted for the prohibition converts the legitimate state interest into a taking of private property for public use without just compensation.<sup>60</sup>

---

223 Cal. Rptr. 28, 30-31 (Ct. App. 1986)). The Nollans then appealed the Court of Appeal's decision concerning the takings claim to the United States Supreme Court. *Id.* at 3145 (1987).

52. 107 S. Ct. at 3145 ("[A]ppropriation of a public easement across a landowner's premises . . . constitute[s] the taking of a property interest.")

53. *Id.* (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982)).

54. *Id.*

55. *Id.* at 3146.

56. *Id.* (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). Justice Scalia rejected the rational basis test as applied to due process or equal protection claims in takings cases. *Id.* at 3147 n.3. He stated that "[w]e have required that the regulation [in takings cases] 'substantially advance' the 'legitimate state interest' sought to be achieved." *Id.* (quoting *Agins*, 447 U.S. at 260).

57. *Id.* at 3148.

58. *Id.*

59. *Id.*

60. *Id.* "[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-

The Court, however, did not determine "how close a 'fit' between the condition and the burden" was required for the condition to advance substantially a legitimate state interest,<sup>61</sup> for it concluded that the permit condition was a taking, even under California's untailored reasonable relationship standard.<sup>62</sup> But the Court did note that it was particularly concerned about the extent to which a land use restriction advances the state interest "where the actual conveyance of property is made a condition to the lifting of a land use restriction."<sup>63</sup>

#### IV. HYPOTHETICAL TAKINGS DISPUTES UNDER THE ACT

*First English* and *Nollan* establish that a temporary land use regulation that does not advance substantially a legitimate state interest, can result in a taking of private property for public use without just compensation.<sup>64</sup> Consequently, local governments implementing the Act<sup>65</sup> must now be concerned with exposure to claims arising from regulations that temporarily prohibit landowners from developing their property<sup>66</sup> and must ensure that land development regulations further a valid police power concern, which is the basis for the regulation.<sup>67</sup> The three hypothetical situations discussed below highlight these issues.

All three hypotheticals are based on the following circumstances. A developer, ABC Trust, owns 105 acres of land located in City A, Florida. Five acres are designated commercial, and the remaining 100 acres are designated residential—three units per acre—on City A's land use plan. ABC's property is zoned A-1 Agricultural. A site plan has not been approved, and building permits have not been issued for ABC's property. If ABC's property is developed, the level of service of all facilities, with the exception of roads, will not be

---

out plan of extortion.'" *Id.* (quoting *J.E.D. Assocs. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)).

61. *Nollan*, 107 S. Ct. at 3148.

62. The commission argued that its permit condition was "*reasonably related* to the public need or burden that the *Nollan*'s new house creates or to which it contributes." *Id.* (emphasis added). The court responded: "We can accept, for purposes of discussion, the Commission's [reasonably related] test as to how close a 'fit' between the condition and the burden is required, because we find that this case does not meet even the most untailored standards." *Id.*

63. *Id.* at 3150. The Court's heightened scrutiny of land use regulations requiring conveyance of property is based on the increased risk that the regulation is designed to avoid the just compensation requirement rather than to further a valid objective of the police power. *Id.*

64. *Nollan*, 107 S. Ct. at 3150; *First English*, 107 S. Ct. at 2388.

65. FLA. STAT. §§ 163.3161-.3215 (1987).

66. *First English*, 107 S. Ct. at 2388-89.

67. *Nollan*, 107 S. Ct. at 3148-50.

reduced below the service standard adopted by City *A* as required by the Act.<sup>68</sup> City *A* has adopted a Traffic Code,<sup>69</sup> setting standards to assess the impact of proposed land development projects on roads in City *A* pursuant to the Act. The Traffic Code adopts level of service *C* (LOS *C*)<sup>70</sup> for major thoroughfares in the city and provides that the City Council shall deny any development permit<sup>71</sup> that would result in a reduction in the level of service for a major thoroughfare below LOS *C*.<sup>72</sup>

### A. *First Hypothetical*

ABC Trust applies to rezone its property from A-1, Agricultural to B-1, Neighborhood Shopping District, for the five acres designated commercial on the land use plan, and to RS-3, Residential Single Family District, for the 100 acres designated residential on the land use plan. City *A* determines that ABC's proposed project would comply with the city code and would not have a negative impact on the city's public facilities, with one exception. A two-mile long section of Fourth Avenue, a four-lane divided street which provides the only means of ingress and egress to the ABC Trust property, currently carries an average of 29,550 trips per day. If the ABC project is built, Fourth Avenue would carry 35,150 average daily trips. The additional 5,600 trips attributable to ABC's project<sup>73</sup> would decrease the level of service on Fourth Avenue from LOS *C* to LOS *D*, in violation

---

68. I assume that sufficient right-of-way exists to construct the required road improvements and that the levels of service for the other seven types of public facilities defined in FLA. STAT. § 163.3164(23) are not reduced below the city's standards.

69. This hypothetical traffic code is based on the Traffic Performance Code of Palm Beach County, Florida, adopted by the Palm Beach County Board of County Commissioners, effective September 25, 1987. This Code was adopted pursuant to the Act. PALM BEACH COUNTY, FLA., ORDINANCE 87-18, fifth Whereas clause, at 1 (Sept. 22, 1987).

70. LOS *C* is characterized by "average travel speeds of about 50 percent of the average free flow speed" of the roadway. TRANSP. RESEARCH BD., NAT'L RESEARCH COUNCIL, HIGHWAY CAPACITY MANUAL 11-4 (1985). "The average free flow speed should approximate the *desired* speeds of the motorists for the given facility and its use." *Id.* at 11-6 (emphasis in original). See also PALM BEACH COUNTY, FLA., ORDINANCE 87-18, art. V, § 2(A)(3) table 1 (Sept. 22, 1987) (the table shows the point at which LOS *C* crosses to LOS *D* for each roadway type).

71. The Traffic Code adopts by reference the definition of development permit in FLA. STAT. § 163.3164(7).

72. See FLA. STAT. § 163.3202(2)(g) (1987). The Traffic Code mandates permit denial for projects that would generate traffic that would reduce the LOS of a road operating at or below LOS *C* to a traffic count that exceeds LOS *C*. The ordinance also requires permit denial for proposed projects that would generate additional traffic on roads already operating above LOS *C*, when the city is reviewing the development permit application. See PALM BEACH COUNTY, FLA., ORDINANCE 87-18, art. V, § 2(A)(1) (Sept. 22, 1987).

73. ABC Trust plans to build a shopping center on its commercial parcel and 300 single-

of the Traffic Code.<sup>74</sup>

City *A* informs ABC Trust that, according to the city's capital improvement program, Fourth Avenue will be expanded to six lanes in five years.<sup>75</sup> Given the circumstances the city tells ABC that, unless it agrees to construct the road improvement sooner, as a condition of rezoning approval,<sup>76</sup> the city will be unable to approve ABC's rezoning request for four years.<sup>77</sup>

City *A*, however, offers to rezone fifteen acres of ABC's residential land from A-1 to RS-3 to allow ABC to proceed with plans to

family homes on its residential land. The Traffic Code calculates the traffic generated by ABC's proposal as follows:

- 1) A 40,000 square foot retail center can be built on the five acre commercial parcel.
- 2) The trip generation rate is 100 trips/1,000 square feet of leasable area. Therefore, the retail center would generate 4,000 trips per day. Kimley-Horn & Assocs., Inc., Palm Beach County Trip Generation Rates (consultants' report).
- 3) The total number of trips is reduced by the 35% capture rate, which applies to retail centers of less than 100,000 square feet. See PALM BEACH COUNTY, FLA., ORDINANCE 87-18, art. VI, § 2(7) table 4 (Sept. 22, 1987). The ordinance defines "captured trips" as "[t]rips generated by a PROPOSED PROJECT which are passing trips already on the road LINK on which the PROPOSED PROJECT is located." *Id.* at art. III. The 4,000 trips generated per day would result in 1,400 captured trips per day (35% of 4,000). By deducting the captured trips per day (1,400) from the total trips generated per day (4,000) the total daily trips attributable to a five acre retail center can be determined—2,600.
- 4)  $100 \text{ acres} \times 3 \text{ dwelling units per acre} = 300 \text{ dwelling units}$ .
- 5)  $300 \text{ dwelling units} \times 10 \text{ trips/day/dwelling unit} = 3,000 \text{ trips per day}$  attributable to 300 single-family homes. Kimley-Horn & Assocs., Inc., Palm Beach County Trip Generation Rates (consultants' report).
- 6) Total trips:  $2,600 + 3,000 = 5,600$  average daily trips.

74. The threshold of LOS D on a four-lane divided roadway is 30,000 average daily trips. PALM BEACH COUNTY, FLA., ORDINANCE 87-18, art. V, § 2(A)(3) table 1 (Sept. 22, 1987).

75. The road project is included in the fifth year of the city's CIE. The Act states that each local government capital plan "shall cover at least a 5-year period." FLA. STAT. § 163.3177(3)(a)(1) (1987).

76. Alternatively, the city could require ABC to pay an impact fee equal to the cost of the road construction project. Most transportation impact fee systems require developers either to construct the required improvements or to pay a fee in lieu of building the improvement. *E.g.* BROWARD COUNTY, FLA., ORDINANCE 81-16, § 5-198(a)(5)(a)-(b) (Mar. 19, 1981); BROWARD COUNTY, FLA., RESOLUTION 84-2178, § 4 policy 9(a), (e) (Sept. 18, 1984). Because the cost of expanding Fourth Avenue exceeds the impact of ABC's project on the road, the city must, however, refund any amounts ABC pays in excess of its impact. See *infra* note 92.

77. The City could approve the rezoning in four years—two years prior to completion of the road improvement, assuming the road construction project is scheduled to commence in five years and will take one year to build—because the city determined that ABC's project would not be approved, built, in operation, and generating traffic for approximately two years after a zoning amendment is approved. The City *A* Traffic Code and the Act require that public facilities be available concurrent with the impacts of the proposed development, and ABC's development would have no traffic impact (other than temporary construction traffic) until it is built. See PALM BEACH COUNTY, FLA., ORDINANCE 87-18, art. III and art. V, § 2(A)(1) (Sept. 22, 1987); see also FLA. STAT. § 163.3177(10)(h) (1987).

build forty-five single family homes.<sup>78</sup> ABC refuses to amend its rezoning application to cover only fifteen acres. ABC also refuses to agree to spend \$1,200,000 to expand Fourth Avenue<sup>79</sup> because it believes the project's impact is insufficient to warrant this large an expense.<sup>80</sup> The city responds by denying ABC's rezoning application.

ABC brings an action for an injunction and for damages,<sup>81</sup> alleging that City A's refusal to rezone ABC's property, constitutes a tak-

---

78. The current volume of traffic on Fourth Avenue is 29,550 trips per day, 450 trips short of the LOS D threshold. Therefore, the city could agree to rezoning approval for forty-five homes, without exceeding the LOS D threshold (15 acres  $\times$  3 units/acre  $\times$  10 trips/home). See *supra* note 74.

By offering an alternative to ABC's application, City A is indicating that, if ABC amends its application, the city will approve a request to rezone fifteen acres from A-1 to RS-3, but that the city will not approve any rezoning request allowing ABC to build more than forty-five homes. This should eliminate ABC's need to exhaust its administrative remedies as a prerequisite to challenging City A's ordinance in court as a regulatory taking of ABC's property. See *McDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); see also *supra* note 40.

The city's offer to approve an amended rezoning application may defeat ABC's takings claim on the merits because the city's action (denying a 105 acre rezoning but agreeing to rezone 15 acres) may not "preclude[] all economically reasonable use of the property." *Graham v. Estuary Properties*, 399 So. 2d 1374, 1380 (Fla. 1981). I will assume for the purposes of this hypothetical that ABC's claim is ripe and that the diminution in value is severe enough to support a takings claim because my objective is to analyze the relationship between the permit condition and the police power under *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987).

79. In 1986 the average construction cost of a one-lane mile of road was \$300,000, exclusive of right-of-way. Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, 50 LAW & CONTEMP. PROBS. 85, 90 (1987). The affected link of Fourth Avenue is two-miles long and is proposed for expansion from four lanes to six lanes.

80. A six-lane divided road can carry 16,400 more cars per day than a four-lane divided road at the LOS D minimum threshold. PALM BEACH COUNTY, FLA., ORDINANCE 87-18 art. V, § 2(A)(3) table 1 (Sept. 22, 1987). ABC's project only generates 5,600 cars per day on Fourth Avenue; therefore, ABC should not pay more than one-third of the cost of expanding Fourth Avenue.

81. The Florida Supreme Court has maintained, that "[i]f a zoning ordinance is confiscatory, the relief available is a judicial determination that the ordinance is unenforceable and must be stricken." *Dade County v. National Bulk Carriers*, 450 So. 2d 213, 216 (Fla. 1984). Although a property owner could bring an inverse condemnation action under Florida law if the government denied a permit application, an action for damages was not necessary when the denial of a rezoning application resulted in a taking. *Id.*

This distinction no longer appears to be valid. In *First English*, the Supreme Court announced that "[i]nvalidation of the ordinance . . . is not a sufficient remedy to meet the demands of the Just Compensation Clause." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378, 2388 (1987). The Court held that, if land use regulation is invalidated because it violates the just compensation clause, even if the government amends or withdraws the unconstitutional provision, this "subsequent action by the government [will not] relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 2389. The *First English* Court made no distinction between the "permit class" and the "zoning class" of unconstitutional land use regulations.

ing of the property for public use without just compensation.<sup>82</sup> ABC alleges that requiring it to pay a fee or construct a road improvement exceeding its traffic impact by 200%, is an unreasonable "subdivision exaction[ ] which [is] so formidable as to deny the property owner of all reasonable use of the property."<sup>83</sup> Finally, ABC argues that ordering ABC to construct a road improvement providing capacity for three times as many trips as its project would generate may violate Florida's dual rational nexus test for land dedication or for impact fee payments exacted as a condition of development approval.<sup>84</sup>

The Supreme Court cited the rational nexus test with approval in *Nollan*. The Court noted that the application of the dual rational nexus test by the Second District Court of Appeal of Florida, in *Town of Longboat Key v. Land's End, Ltd.*,<sup>85</sup> was consistent with the approach the Court used to reject the permit condition in *Nollan*.<sup>86</sup> The Supreme Court found that the California Coastal Commission's conditioning permit approval upon the Nollans' granting a lateral access easement was completely unrelated to any "visual access"

82. For the assumption that ABC's takings claim is ripe and that the diminution in value is sufficient to support ABC's takings allegations, see *supra* note 78.

83. *Hollywood, Inc. v. Broward County*, 431 So. 2d 606, 611 n.6 (Fla. 3d DCA 1983).

84. "Reasonable dedication or impact fee requirements are permissible so long as they offset needs sufficiently attributable to the subdivision and so long as the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents." *Hollywood, Inc.*, 431 So. 2d at 611; see also *Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976) (Municipalities can impose impact fees that do not exceed a proportionate share of the anticipated costs of public improvements required to serve new development.); *Town of Longboat Key v. Land's End, Ltd.*, 433 So. 2d 574 (Fla. 2d DCA 1983) (adopting the *Hollywood, Inc.* dual rational nexus test); *Wald Corp. v. Metropolitan Dade County*, 338 So. 2d 863 (Fla. 3d DCA 1976) (requiring a rational nexus between the subdivision exaction and the proposed project's impact on the health, safety, and welfare of the community), *cert. denied*, 348 So. 2d 955 (Fla. 1977). In 1985, the Florida Legislature codified the rational nexus test and made it applicable to all local government land dedication and impact fee ordinances. FLA. STAT. § 380.06(15)(e)1 (1987).

In *Hollywood, Inc.*, the court allocated the burden of proving both elements of the dual rational nexus test to the government:

[T]he local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision.

*Hollywood, Inc. v. Broward County*, 431 So. 2d at 611-12.

85. 433 So. 2d 574 (Fla. 2d DCA 1983).

86. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3149 (1987). *Longboat Key* adopted an ordinance requiring developers to dedicate land for city parks, or pay a fee in lieu of dedication, as a condition of permit approval. *Town of Longboat Key*, 433 So. 2d at 575. The court held the ordinance invalid under the dual rational nexus test because the ordinance lacked "clear and adequate restrictions on the fees collected," and because the town failed to show that "a proper nexus exist[ed] between the amount of land or money to be set aside and the stated residential population requirements." *Id.* at 576.

burden created by the proposed construction project.<sup>87</sup> Specifically, "a requirement that people already on the public beaches be able to walk across the Nollans' property [does not reduce] any obstacles to viewing the beach created by the new house."<sup>88</sup> Justice Scalia rejected the approach of California courts in evaluating permit conditions<sup>89</sup> and cited twenty-one state court and two federal appellate court decisions as consistent with the rationale nexus test used to invalidate the permit condition in *Nollan*.<sup>90</sup>

---

87. *Nollan*, 107 S. Ct. at 3149.

88. *Id.*

89. California courts adhere to the "reasonable relationship test," initially proposed by the California Supreme Court in *Ayres v. City Council*, 34 Cal. 2d 31, 207 P.2d 1 (1949). The "reasonable relationship test considers whether the proposed development will contribute to the problem sought to be alleviated by imposition of the regulation." Delaney, Gordon & Hess, *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 LAW & CONTEMP. PROBS. 139, 148 (1987). Courts using the reasonable relationship test defer to the legislature's judgment that the land dedication, or fee in lieu of dedication, is required to protect the health, safety, and welfare of existing residents and of the prospective residents of the proposed development. The Florida Third District Court of Appeal stated: "The *Ayres* standard of 'reasonable relation' puts a heavy burden on the developer to show that the required dedication bears no relation to the general health, safety and welfare." *Wald Corp. v. Metropolitan Dade County*, 338 So. 2d 863, 866 (Fla. 3d DCA 1976).

When Justice Scalia alluded to the California approach, he was referring to the reasoning in *Grupe v. California Coastal Comm'n*, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (Ct. App. 1985), in which the appellate court relied on *Nollan v. California Coastal Comm'n*, 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (Ct. App. 1986). See *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3144 (1987). Justice Scalia characterized the *Grupe* decision as follows:

In [*Grupe*], the court had found that so long as a project contributed to the need for public access, even if the project standing alone had not created the need for access, and even if there was only an indirect relationship between the access exacted and the need to which the project contributed, imposition of an access condition on a development permit was sufficiently related to burdens created by the project to be constitutional.

*Id.* at 3144.

90. *Id.* at 3149. Justice Scalia claimed: "Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." *Id.* He then cited twenty-three cases in support of this statement, including *Town of Longboat Key v. Land's End, Ltd.*, 433 So. 2d 574 (Fla. 2d DCA 1983).

Although Justice Scalia stated that all twenty-three cases he cited adopted an approach different than California's, several of the opinions used California's "reasonable relationship" test. *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668, 673 (Colo. 1981); *Lampton v. Pinaire*, 610 S.W.2d 915, 919 (Ky. Ct. App. 1980); *Howard County v. JJM, Inc.*, 301 Md. 256, 282, 482 A.2d 908, 921 (1984); *State ex rel. Noland v. St. Louis County*, 478 S.W.2d 363, 367 (Mo. 1972); *Mackall v. White*, 85 A.D.2d 696, 445 N.Y.S.2d 486, 487 (1981), *appeal denied*, 56 N.Y.2d 503, 435 N.E.2d 1100, 450 N.Y.S.2d 1025 (1982); *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 806-07 (Tex. 1984); *Call v. City of W. Jordan*, 614 P.2d 1257, 1259 (Utah 1980).

Two of the decisions cited by Justice Scalia "adopted a test that is even more generous than the reasonable relationship test as applied in California. This judicial deference test . . . establishes 'a virtually irrefutable presumption in favor of the exaction.'" Delaney, Gordon &

City A's permit requirement will not constitute a taking under the dual nexus test, as adopted in Florida and approved in *Nollan*,<sup>91</sup> if ABC Trust only pays its proportionate share of the cost of expanding Fourth Avenue. The city should agree to reimburse ABC Trust for two-thirds of ABC's cost to construct Fourth Avenue because the two additional traffic lanes that ABC would build would carry three times the amount of traffic generated by ABC's proposed project.<sup>92</sup> Under these circumstances the city should be able to demonstrate its compliance with the dual rational nexus test.<sup>93</sup> First, the city can prove a rational nexus between the need to expand Fourth Avenue and the additional traffic generated by ABC's proposed project. Second, if

---

Hess, *supra* note 89, at 154 (quoting Gordon, *Subdivision Exactions Draw Challenges from Developers*, Legal Times of Wash., Sept. 2, 1985, at A14, col. 4). The test created in *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 36, 394 P.2d 182, 188 (1964), and applied in *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966), "provides for the automatic acceptance of a legislative determination in favor of an exaction unless the developer produces evidence demonstrating that the exaction is unreasonable." Delaney, Gordon & Hess, *supra* note 89, at 154. Alternatively, "this test requires a showing [by the government] only that the statute is substantially related to the state's police powers. It does not require that the legislation be reasonably related to the particular subdivision." *Id.* at 155.

Six other courts applied the "rational nexus" test. *Parks v. Watson*, 716 F.2d 646, 653 (9th Cir. 1983); *Town of Longboat Key v. Land's End, Ltd.*, 433 So. 2d 574, 576 (Fla. 2d DCA 1983); *Collis v. City of Bloomington*, 310 Minn. 5, 12-13, 246 N.W.2d 19, 23 (1976); *Simpson v. City of N. Platte*, 206 Neb. 240, 245, 292 N.W.2d 297, 301 (1980); *Longridge Builders, Inc. v. Planning Bd.*, 52 N.J. 348, 350, 245 A.2d 336, 337 (1968); *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 617, 137 N.W.2d 442, 447 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

The remaining decisions cited by Justice Scalia either reasoned that an exaction is invalid unless the burden placed on the landowner is "specifically and uniquely attributable" to the proposed development project, *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 160 Conn. 109, 117-18, 273 A.2d 880, 885 (1970); *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961); *Frank Ansuini, Inc. v. City of Cranston*, 107 R.I. 63, 68-69, 264 A.2d 910, 913-14 (1970), or did not rely on a specific test as the basis for their decision. *Schwing v. City of Baton Rouge*, 249 So. 2d 304 (La. Ct. App. 1971), *application denied*, 259 La. 770, 252 So. 2d 667 (1971); *Briar W., Inc. v. City of Lincoln*, 206 Neb. 172, 291 N.W.2d 730 (1980); *J.E.D. Assocs. v. Atkinson*, 121 N.H. 581, 432 A.2d 12 (1981); *Board of Supervisors v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975). See also *Littlefield v. Afton*, 785 F.2d 596, 606-07 (8th Cir. 1986) (a federal civil rights action in which the court cited with approval the "rational nexus" test as applied in *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983)); Delaney, Gordon & Hess, *supra* note 89, at 147-56 (the authors describe each test and cite several of the cases shown above as applying the tests).

91. See *supra* notes 85, 86 & 90.

92. This procedure, known as a "refundable advance," is used when a developer constructs an indivisible public improvement, even though the impact of the developer's project would not require the full capacity of the improvement. The portion of the facility's cost paid by the developer but not attributable to the developer's project is refunded to the developer as other property owners begin using the facility, or as the government collects sufficient impact fees or other revenues. See, e.g., BROWARD COUNTY, FLA., ORDINANCE 81-16, § 5-198(a)(5a) (Mar. 19, 1981); BROWARD COUNTY, FLA., RESOLUTION 84-2178, § 4, policy 9(a)(4), (e)(1) (Sept. 18, 1984).

93. See *supra* note 84.



ABC constructs the Fourth Avenue improvement and the city agrees to refund ABC's excess costs in the fifth year of the city's capital improvement program (or sooner if another project impacting Fourth Avenue is approved before the fifth year),<sup>94</sup> the city will show the required nexus between the burden of the exaction and the benefits accruing to the property owner.<sup>95</sup>

### B. *Second Hypothetical*

The facts are the same as in the first hypothetical situation, except that Fourth Avenue averages 30,100 trips per day prior to ABC's proposal. Therefore, this four-lane divided street is operating at LOS D,<sup>96</sup> in excess of the service standard adopted in the City Traffic Code,<sup>97</sup> even before the addition of 5,600 trips on Fourth Avenue attributable to ABC's proposed project.<sup>98</sup> Accordingly, the city notifies ABC that ABC must agree to build the road improvement or wait four years for rezoning approval. The city does not offer to rezone any portion of ABC's property.<sup>99</sup> When ABC refuses to build the road, the city denies ABC's rezoning request.

ABC brings an action for damages and for an injunction to declare the City Traffic Code unconstitutional under the just compensation clause.<sup>100</sup> ABC claims that, because it cannot rezone any of its property, "the regulation precludes all economically reasonable use of

---

94. If the city approves another project impacting Fourth Avenue, it should collect impact fees from the owner of that project and reimburse ABC Trust. *See supra* notes 76 & 92.

95. If the City succeeds in proving both prongs of the dual rational nexus test, the Traffic Code should not be declared invalid as applied to ABC Trust. In *Nollan*, the Supreme Court cited Florida's rational nexus test with apparent approval. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3149 (1987). Therefore, if the city satisfies its burden of proof under this test, its ordinance does not result in a taking of ABC's property. *See supra* notes 85, 86 & 90. Obviously, ABC should not receive damages under these circumstances either because the Supreme Court in *First English* held that damages were only available if a court determined that a regulation temporarily "worked a taking of all use of property." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378, 2389 (1987).

96. *See supra* note 74.

97. *See supra* note 70 and accompanying text.

98. For the calculation of average daily trips attributable to ABC's proposed project, see *supra* note 73.

99. *See supra* note 78 and accompanying text. Because the road already exceeds the LOS D threshold, any partial rezoning would violate the provisions of the City Traffic Code. Under these circumstances, ABC can claim that it is deprived of all reasonable use of its property for at least four years. The ripeness question is also satisfied because practically all development proposals will generate traffic, and any proposal that generates traffic must be denied. For a discussion of the ripeness issue and the requirement that the property owner "exhaust all administrative remedies" prior to filing an action for inverse condemnation, see *supra* notes 40 & 78.

100. *See supra* notes 78 & 81.

the property”<sup>101</sup> for at least four years. Second, ABC argues that no rational nexus exists between the need to widen Fourth Avenue and the traffic ABC’s proposed development will generate because the street needs to be enlarged according to the city’s own standards,<sup>102</sup> even if ABC does not develop its property.

Prior to *First English*, a court could have found that because the property value would only be diminished temporarily, the regulation would not preclude all economically reasonable use of the property. The New York Court of Appeals embraced this argument in *Golden*. The *Golden* court held that because property owners were assured of the right to build within eighteen years and could accelerate development by constructing the needed public improvements earlier, the town ordinance authorizing denial of subdivision applications if adequate public facilities were not available, did not violate the just compensation clause.<sup>103</sup>

Justice Stevens advanced a similar argument in his dissent in *First English*. Justice Stevens compared a land use restriction that postponed development for a small fraction of the property’s useful life to a permanent restriction that reduced the property’s value by an equally small fraction.<sup>104</sup> He reasoned that, just as a permanent regulation must severely diminish property value to constitute a taking, a severe temporary restriction must “remain in effect for a significant percentage of the property’s useful life.”<sup>105</sup>

The *First English* majority agreed that temporary restrictions must cause a substantial diminution in property value in order to constitute a taking;<sup>106</sup> however, it did not specify any duration requirement.<sup>107</sup> The majority held that, if a regulation adopted by a

---

101. *Graham v. Estuary Properties*, 399 So. 2d 1374, 1380 (Fla. 1981). In *Graham*, the Florida Supreme Court stated that, even if a regulation is a valid exercise of the police power—the regulation: (1) “promotes the health, safety, welfare or morals of the public,” (2) is not “arbitrarily or capriciously applied,” and (3) “prevents a public harm” and does not “confer[] a public benefit”—it may result in a taking, if the affected property is rendered “virtually worthless.” *Id.* at 1381.

102. The City Traffic Code is based on the finding that roads operating in excess of LOS C are safety hazards and should be improved within five years. *See, e.g.*, PALM BEACH COUNTY, FLA., ORDINANCE 87-18, art. II (Sept. 22, 1987).

103. *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 382, 285 N.E.2d 291, 304, 334 N.Y.S.2d 138, 155 (1972), *appeal dismissed*, 409 U.S. 1003 (1972).

104. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378, 2395 (1987) (Stevens, J., dissenting).

105. *Id.* at 2394.

106. *Id.* at 2388.

107. Although the majority announced no time constraints, it did limit its holding to the facts. *Id.* at 2389. The Court excluded “normal delays in obtaining building permits, changes in zoning ordinances, variances and the like.” *Id.* It is unlikely that such normal delays would postpone development for a significant portion of the property’s useful life.

government for an indefinite period<sup>108</sup> is subsequently determined to be an invalid exercise of the police power, the restriction is a compensable taking, even though it only temporarily deprives a landowner of the use of his property.<sup>109</sup> On the other hand, in this hypothetical the property owner is only precluded from using his property for four years, according to the terms of the restriction. From the time of its adoption, the restriction in this hypothetical is intended to expire in four years, unlike the regulation in *First English* which could have remained in effect indefinitely.

The *First English* opinion therefore provides little guidance if a regulation has a fixed period of application from the outset. The opinion, however, does not appear to create an exception for a regulation that temporarily deprives owners of using their property by postponing approval of development permits.<sup>110</sup> Under Justice Stevens' reasoning, this hypothetical dispute would be easily resolved.<sup>111</sup> A regulation that postpones rezoning approval for four years certainly does not preclude all reasonable use of the property "for a significant percentage of the property's useful life."<sup>112</sup>

The Traffic Code can be upheld under the reasoning of the *First English* majority, if the city "establish[es] that the denial of all use was insulated as a part of the State's authority to enact safety regulations."<sup>113</sup> Additionally, under *Nollan*, protecting the safety of motorists and pedestrians by limiting new traffic on overcrowded roads is a legitimate state interest.<sup>114</sup> The city, however, must demonstrate further that the state interest in alleviating traffic congestion is substantially advanced by conditioning approval of ABC's rezoning

---

108. Although the Los Angeles County flood protection ordinance was an interim measure, it was not scheduled to expire on a specific date. *Id.* at 2381-82.

109. *Id.* at 2388-89.

110. The normal permit delay exception would probably not apply to a four-year delay in approving a rezoning application. *See supra* note 107.

111. *See supra* notes 104-05 and accompanying text.

112. *First English*, 107 S. Ct. at 2394 (Stevens, J., dissenting).

113. *Id.* at 2385. *See supra* notes 41-42 and accompanying text.

114. The Palm Beach County Board of County Commissioners cited the following safety concerns, in order to establish that the Palm Beach County Traffic Performance Code is a valid exercise of the police power.

(a) the requirements and standards of this Code are necessary for the safety of the travelling public and are substantially related to furthering the public benefit of safe travel,

(b) the accident rate resulting in property damage and injury increases as the congestion increases on MAJOR THOROUGHFARES,

(c) fire, rescue, and law enforcement response times increase as congestion increases on MAJOR THOROUGHFARES.

PALM BEACH COUNTY, FLA., ORDINANCE 87-18, 16th Whereas clause, at 3 (Sept. 22, 1987).

application upon ABC's agreement to expand Fourth Avenue.<sup>115</sup>

In *Nollan*, the Court held that the California Coastal Commission's requirement that the Nollans' dedicate a public access easement along the beach in order to receive a building permit was completely unrelated to the legitimate state interest in preventing a solid wall of houses from obstructing views of the beach from the road.<sup>116</sup> On the other hand, in this hypothetical situation, the city's requirement that ABC widen the road as a condition of rezoning approval is certainly related to the legitimate government interest in reducing traffic congestion.<sup>117</sup> The issue in this hypothetical case is not whether requiring ABC Trust to construct the road as a condition of permit approval substantially advances the legitimate state interest in reducing traffic congestion.<sup>118</sup> Rather, the issue is whether the city can impose a condition which the applicant admits substantially advances a legitimate state interest, but contends is "so formidable as to deny the property owner of all reasonable use of the property."<sup>119</sup>

In order to establish that the exaction does not constitute a taking of ABC's property under Florida law, the city must demonstrate a rational nexus between (1) the need for two additional traffic lanes and the number of trips generated by ABC's proposed project, and (2) ABC's cost to expand the road and the benefits accruing to ABC's project.<sup>120</sup> The city can satisfy the first prong of the dual rational nexus test by showing the connection between the need to expand Fourth Avenue and the additional traffic congestion generated by ABC's project.

The city, however, must revise its permit conditions in order to satisfy the second prong of the dual rational nexus test because the existing traffic congestion above the LOS C standard is not attributable to ABC's project,<sup>121</sup> and ABC's impact alone is insufficient to war-

115. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3146-47 (1987).

116. *Id.* at 3148-49.

117. Table One of the Palm Beach Traffic Performance Code shows that at LOS D the capacity of a six-lane divided road exceeds the capacity of a four-lane divided road by 16,400 trips per day. PALM BEACH COUNTY, FLA., ORDINANCE 87-18, art. V, § 2(A)(3) table 1 (Sept. 22, 1987). When the volume/capacity ratio of a road declines, the number of accidents and the response times for emergency services decrease. *See supra* note 114.

118. *See Nollan*, 107 S. Ct. at 3149.

119. *Hollywood, Inc. v. Broward County*, 431 So. 2d 606, 611 n.6 (Fla. 4th DCA 1983). A valid exercise of the police power may result in a taking, if it renders affected property "virtually worthless." *Graham v. Estuary Properties*, 399 So. 2d 1374, 1381 (Fla. 1981). *See supra* note 101.

120. *Hollywood, Inc.*, 431 So. 2d at 611-12; *see also* FLA. STAT. § 380.06(15)(e) (1987).

121. Fourth Avenue currently carries 30,100 trips per day. This exceeds LOS C by 100 trips. *See supra* note 74.

rant the construction of two additional traffic lanes.<sup>122</sup> The city can satisfy this burden by refunding the portion of ABC's construction cost not attributable to and not benefitting ABC's project.<sup>123</sup> Specifically, if the cost of building a two-mile, two-lane project roadway is \$1,200,000,<sup>124</sup> and if ABC constructs the improvement at its own expense, the city should repay ABC \$790,244.<sup>125</sup> The city should repay the cost attributable to the existing congestion immediately.<sup>126</sup> Further, the city should repay the cost attributable to future developments as the developments are approved, but no later than the fifth year of the city's capital improvement program when the city had planned to widen Fourth Avenue.<sup>127</sup>

### C. Third Hypothetical

The first two hypotheticals assume ABC Trust will sue City A upon denial of ABC's rezoning application. In hypothetical three, the city denies ABC's rezoning application due to traffic problems on Fourth Avenue.<sup>128</sup> ABC waits four years and reapplies for rezoning approval. The city denies this second rezoning application because the city has not complied with its own capital improvement plan, and because the city has not scheduled Fourth Avenue to be expanded for another five years.<sup>129</sup> The city instructs ABC that ABC either can

122. See *supra* note 80.

123. See *supra* note 92.

124. See *supra* note 79.

125. When the total construction cost of \$1,200,000 is divided by 16,400 trips—the difference in capacity between a four-lane divided road and a six-lane divided road at LOS D—the cost per trip equals \$73.17. The cost allocation (rounded to total 100%) is as follows:

Cost attributable to ABC's project	= 5,600 trips × \$73.17	= \$ 409,756
Cost attributable to existing congestion	= 100 trips × \$73.17	= \$ 7,317
Cost attributable to future development	= 10,700 trips × \$7.317	= \$ 782,972
TOTAL COST	= 16,400 trips × \$73.17	= \$1,200,000

126. This amount cannot be charged to ABC or to future development under the second prong of the dual rational nexus test. *Hollywood, Inc. v. Broward County*, 431 So. 2d 606, 611-12 (Fla. 4th DCA 1983); see also, BROWARD COUNTY, FLA., RESOLUTION 84-2178, § 3, policy 5, § 4, policy 9(e)(2) (Sept. 18, 1984).

127. See *supra* note 94.

128. For the purposes of this hypothetical, it does not matter whether Fourth Avenue was operating at LOS C or LOS D when ABC requested rezoning approval.

129. This hypothetical differs from the Palm Beach County Ordinance. The Palm Beach Traffic Performance Code provides "that the County's failure to maintain its commitment to adhere to and implement the Palm Beach County Five-Year Road Program Ordinance shall result in a suspension of the standards contained in this Code." PALM BEACH COUNTY, FLA., ORDINANCE 87-18, art. II (Sept. 22, 1987). However, the Act does not provide for suspension of capital facility performance standards merely because a local government fails to construct capital facilities as scheduled in its capital improvement element. FLA. STAT. §§ 163.3177(3)(b), -3177(10)(h), -3202(2)(a) (Supp. 1986). Therefore, the Palm Beach County Traffic Code suspension provision may violate the Act.

wait an additional four years<sup>130</sup> or agree to construct the road improvement as a condition of rezoning approval. When ABC refuses to build the road, the city denies ABC's zoning request.

ABC files an action for an injunction and for damages on the grounds that the Traffic Code is invalid as applied to ABC's property. ABC argues that, under the *First English* decision, it is entitled to compensation for the period during which the city has denied ABC all reasonable use of its property.<sup>131</sup> ABC also notes that the New York Court of Appeals, in *Golden*, had stated that the Ramapo ordinance would have violated the just compensation clause, if the town had failed to comply with its capital improvement program.<sup>132</sup>

This third hypothetical situation differs from the first two primarily because the city's actions deprive ABC Trust of the use of its property for at least eight years, even though the city advised ABC that it would be precluded from rezoning for only four years. According to ABC, the city's actions in further postponing development on ABC's property interfere with ABC's investment-backed expectations, "[a]nother factor which may be considered in determining the reasonableness of an exercise of the police power."<sup>133</sup> ABC argues that it planned to rezone its property four years after the city initially denied the rezoning application. Furthermore, ABC argues that the city's failure to comply with its own capital improvement program will result in postponing development on ABC's property for at least eight years. Therefore, by initially advising ABC that its property could be rezoned in year four, and then denying ABC's second rezoning request until year eight, the city "so frustrate[s] distinct investment-backed expectations as to amount to a 'taking.'"<sup>134</sup> ABC

---

130. See *supra* note 77.

131. *First English Evangelical Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378, 2389 (1987).

132. *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 373 n.7, 285 N.E.2d 291, 299 n.7, 334 N.Y.S.2d 138, 148 n.7 (1972), *appeal dismissed*, 409 U.S. 1003 (1972). The New York Court of Appeals upheld Ramapo's zoning ordinance on "the assumption that the program will be fully and timely implemented." *Id.* at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 155. The court, however, stated that, if the city did not comply with its capital improvement program schedule, "the aggrieved landowner can seek relief . . . declaring the ordinance unconstitutional as applied to his property." *Id.* at 373 n.7, 285 N.E.2d at 299 n.7, 334 N.Y.S.2d at 148 n.7. The court went on to explain that "should it arise at some future point in time that the Town must fail in its enterprise, an action for a declaratory judgment will indeed prove the most effective vehicle for relieving property owners of what would constitute absolute prohibitions." *Id.*

133. *Graham v. Estuary Properties*, 399 So. 2d 1374, 1383 (Fla. 1981). The United States Supreme Court stated that one of three factors of "particular significance" in identifying a taking "is the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

134. *Penn Central*, 438 U.S. at 127.

concludes by demanding the rezoning be granted and that it receive damages for the period of time that the city denied all reasonable use of ABC's property.<sup>135</sup>

The investment-backed expectations test does not require ABC to prove that the city is estopped from denying its rezoning application.<sup>136</sup> Furthermore, the test does not require ABC Trust to show that it has a vested right to a rezoning in year four.<sup>137</sup> The Florida Supreme Court has treated this test as if it required the property owner to prove the equivalent of a vested rights or estoppel claim.<sup>138</sup>

---

135. See *First English Evangelical Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378, 2389 (1987).

136. Professor Mandelker attributes the addition of the investment-backed expectations factor to the judicial lexicon of the takings clause, to Justice Brennan's opinion in *Penn Central*. Mandelker, *Investment Backed Expectations: Is There a Taking?*, 31 J. URB. & CONTEMP. L. 3, 4 (1987). He questions whether Justice Brennan's failure to "mention either the estoppel or vested rights doctrines in *Penn Central* . . . may indicate that investment in backed expectations must be considered even when they do not create an estoppel or a vested right." *Id.* at 5-6. See also *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In *Kaiser Aetna*, government officials initially notified property owners that they could construct an improvement without a permit. *Id.* at 167. Government officials subsequently required permits and conditioned permit approval on the grant of an easement. *Id.* at 167-68. The Court found that the government was not estopped from enforcing the permit requirements, but the change in regulations did interfere with the property owners' reasonable investment-backed expectations to such an extent as to constitute a taking of the easement. *Id.* at 179.

In *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10 (Fla. 1976), the Florida Supreme Court held that a government may be estopped from changing its regulations if "a property owner (1) in good faith (2) upon some act or omission of government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired." *Id.* at 15-16.

137. A property owner must demonstrate that he has performed substantial work and incurred substantial liability in reliance on a governmental permit approval, in order to establish a vested right to complete construction in accordance with the approved permit. F. SCHNIDMAN, S. ABRAMS & J. DELANEY, *HANDLING THE LAND USE CASE* 544 (1984).

138. See *Graham v. Estuary Properties*, 399 So. 2d 1374 (Fla. 1981). In *Estuary Properties*, the Florida Supreme Court distinguished *Zabel v. Pinellas County Water and Navigation Control Auth.*, 171 So. 2d 376 (Fla. 1965), and *Askew v. Gables-By-The-Sea, Inc.*, 333 So. 2d 56 (Fla. 1st DCA 1976), *cert. denied*, 345 So. 2d 420 (Fla. 1977), in which the state's denial of dredge and fill permits constituted takings, *inter alia*, because permit denial interfered with the property owners' reasonable expectations that they would be permitted to fill their property. *Estuary Properties*, 399 So. 2d at 1383. In *Zabel* and *Gables-By-The-Sea*, the state sold the property owners submerged land, knowing that the "lands were totally useless without the right to fill them." 399 So. 2d at 1381. The property owner's "expectation was further supported in *Zabel* by a statutory right to fill which existed when the property was purchased. *Estuary Properties*, on the other hand, had only its own subjective expectation that the land could be developed in the manner it now proposes." *Id.* at 1383.

One commentator argued that, by distinguishing *Estuary Properties* from *Zabel* and *Gables-By-The-Sea*, the Florida Supreme Court "equat[ed] investment-backed expectations with vested rights, a position clearly in conflict with *Penn Central*." Bricklemeyer, *The Florida Test for Taking A Critical Analysis of Graham v. Estuary Properties, Inc.*, FLA. B.J., Feb. 1983, at 87, 89. Bricklemeyer argued that although the issue was "whether the regulation denied the

In order to satisfy its burden of proof under Florida's version of the investment-backed expectations test,<sup>139</sup> ABC must show (1) a specific city act that authorized ABC to undertake a particular development plan, (2) substantial reliance on the city's act, (3) good faith, and (4) that the rights ABC would lose if the city is allowed to postpone development approval "are substantial enough to make it fundamentally unfair to eliminate those rights."<sup>140</sup>

ABC may have difficulty establishing that the city's adoption of the capital improvement element of its comprehensive plan, including a construction schedule showing that Fourth Avenue would be completed during the fourth year of the plan, was a specific act authorizing ABC to undertake a particular type of development. Generally, a developer must show that the municipality has issued a building permit.<sup>141</sup> A city's failure to rezone property, even if it had previously adopted a plan indicating its intent to rezone, is not a specific governmental act authorizing a developer to undertake a particular development plan.<sup>142</sup> Furthermore, ABC may be unable to demonstrate its substantial reliance on the city's capital improvement program schedule. In order to demonstrate substantial reliance, ABC must show that it has spent sufficient funds to render the city's inaction "highly inequitable and unjust."<sup>143</sup>

In *Kaiser Aetna v. United States*,<sup>144</sup> the Supreme Court stated that changes in governmental regulations that frustrate reasonable investment-backed expectations may effect a taking of property, even in the absence of a vested right or an estoppel.<sup>145</sup> Nevertheless, many courts, including Florida's, require that developers demonstrate the elements of an estoppel or vested rights claim to establish that governmental action has unduly interfered with their investment-backed

---

owner a reasonably expected return on his investment," the court "focused on the estoppel aspect of the expectations issue." *Id.* at 91 n.51.

139. Other courts have also equated investment-backed expectations with the estoppel or vested rights doctrines. See Mandelker, *supra* note 136, at 37-40.

140. F. SCHNIDMAN, S. ABRAMS & J. DELANEY, *supra* note 137, at 545.

141. *Id.* at 545, 547, 549. In Florida, a developer's rights can vest on the issuance of a special or conditional-use permit. See *City of Miami v. 20th Century Club, Inc.*, 313 So. 2d 448 (Fla. 3d DCA 1975); *City of North Miami v. Marguilis*, 289 So. 2d 424 (Fla. 3d DCA 1974).

142. Mandelker, *supra* note 136, at 31-32, 37-38. See also *Pasco County v. Tampa Dev. Corp.*, 364 So. 2d 850 (Fla. 2d DCA 1978).

143. *City of Fort Pierce v. Davis*, 400 So. 2d 1242, 1244 (Fla. 4th DCA 1981). See also Mandelker, *supra* note 136, at 37.

144. 444 U.S. 164 (1979).

145. *Id.* at 179. But see Mandelker, *supra* note 136, at 37-43 (a persuasive argument that the investment-backed expectations factor would have a more meaningful role if it incorporated vested rights doctrine into takings law).



expectations.<sup>146</sup> It is doubtful that ABC can prove it has a vested right to rezone its property in year four, or that the city is estopped from denying its zoning request.<sup>147</sup> If ABC cannot argue successfully that the city's valid regulation is actually a temporary regulatory taking which interferes with ABC's investment backed expectations, the result in hypothetical three will be the same as the first two hypothetical situations. ABC must establish that the city's regulation constitutes a temporary regulatory taking because the city failed to widen Fourth Avenue in accordance with its original capital improvement program.

## V. CONCLUSION

*Nollan v. California Coastal Commission*<sup>148</sup> should not affect local government implementation of development exaction and impact fee systems or judicial evaluation of these systems in Florida. Despite some commentators' hopes,<sup>149</sup> the Supreme Court did not adopt a uniform federal test for evaluating development exactions and impact fees.<sup>150</sup> The Court's failure to distinguish among the three major tests used to evaluate exactions left Florida's dual rational nexus test intact.<sup>151</sup> Consequently, municipalities that condition development permit approval upon fee payments or improvement construction by developers will continue to measure their programs against precedents developed by Florida courts and codified by the Florida Legislature. Specifically, local governments implementing the Act must ensure that they can defend their development regulations under the dual rational nexus test.<sup>152</sup>

*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*<sup>153</sup> changes the Florida rule denying damages for confiscatory zoning regulations, but permits compensation as a remedy for unreasonable permit denials.<sup>154</sup> *First English* also rejects the local government argument that a land use regulation that temporarily precludes all use of private property *never* takes property if the owner will eventually be permitted to use the property.<sup>155</sup> Government regu-

---

146. See *supra* notes 138-39 and accompanying text.

147. See *supra* notes 141-43 and accompanying text.

148. 107 S. Ct. 3141 (1987).

149. Delaney, Gordon & Hess, *supra* note 89, at 145 n.44.

150. See *supra* notes 61-62 and accompanying text.

151. See *supra* notes 85-86 & 90 and accompanying text.

152. See *supra* note 84.

153. 107 S. Ct. 2378 (1987).

154. See *supra* note 81.

155. See *supra* notes 103-110 and accompanying text.

lators, however, can continue to argue that the regulation is necessary to preserve the public safety.<sup>156</sup>

Local governments can comply with the Act but avoid takings claims by carefully drafting and administering land development regulations. Impact fee and development exaction regulations should be based on the extensive capital facilities studies suggested by the state.<sup>157</sup> Exactions should be administered to ensure that developers who construct required capital improvements do not pay more than their fair share.<sup>158</sup> Finally, governments must adequately fund capital improvement programs and tailor construction schedules to avoid denying property owners all use of their property for extended periods of time.

DENNIS MELE

---

156. See *supra* notes 41-42 & 113-14 and accompanying text.

157. FLA. ADMIN. CODE ANN. r. 9J -5.016(1), (2) (1986).

158. See, e.g., *supra* note 92 and accompanying text.