

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: FLORENCE DOLAN, Petitioner v. CITY OF TIGARD

CASE NO: No. 93-518

PLACE: Washington, D.C.

DATE: Wednesday, March 23, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

FLORENCE DOLAN,

•

Petitioner

2

V.

: No. 93-518

CITY OF TIGARD

8

Washington, D.C.

Wednesday, March 23, 1994

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 10:04 a.m.

13 APPEARANCES:

14 DAVID B. SMITH, ESQ., Tigard, Oregon; on

15 behalf of the Petitioner.

16 TIMOTHY V. RAMIS, ESQ., City Attorney for Tigard,

18 EDWIN S. KNEEDLER, Deputy Solicitor General, Department of  
19 Justice, Washington, D.C.; as amicus curiae,  
20 supporting the Respondent.

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	C O N T E N T S	
		PAGE
2	ORAL ARGUMENT OF	
3	DAVID B. SMITH, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	TIMOTHY V. RAMIS, ESQ.	
7	On behalf of the Respondent	23
8	ORAL ARGUMENT OF	
9	EDWIN S. KNEEDLER, ESQ.	
10	On behalf of the United States, as amicus curiae,	
11	supporting the Respondent	41
12	REBUTTAL ARGUMENT OF	
13	DAVID B. SMITH, ESQ.	
14	On behalf of the Petitioner	50
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

## PROCEEDINGS

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument

first this morning in Number 93-518, Florence Dolan v. the City of Tigard.

Mr. Smith.

ORAL ARGUMENT OF DAVID B. SMITH

ON BEHALF OF THE PETITIONER

MR. SMITH: Mr. Chief Justice and may it please

10 the Court:

The question before this Court is whether

12 Government may demand the dedication of real property as a  
13 condition of development approval, without showing that  
14 there is a reasonably proportional relationship between  
15 the dedication and the actual adverse impacts of the  
16 development.

17                   In the case that we have today, the City of  
18 Tigard demanded that Mrs. Dolan dedicate 10 percent of her  
19 real property, and the City did that without showing any  
20 proportional relationship whatsoever. We submit that the  
21 failure of the City in requiring that dedication to show  
22 the proportional relationship violates the Fifth and  
23 Fourteenth Amendments, because it takes private property  
24 from her for public use, without payment of just  
25 compensation.

1                   QUESTION: Mr. Smith, are you going to comment  
2       on the question of whether the City would have been within  
3       its rights to deny the building permit entirely?

4                   MR. SMITH: Yes, Your Honor. And we would agree  
5       that the City would have been within its authority to deny  
6       the permit outright. However, that -- that of course  
7       might raise a different takings question that's outside  
8       the realm of dedications and municipal exactions, and not  
9       only that, that -- no, Your Honor, we are not.

10                  QUESTION: We -- we take the case on the  
11      assumption that the City could have denied it?

12                  MR. SMITH: Yes, Your Honor, that is correct.

13                  And one of the problems that we have is if -- if  
14      all that is required in a threshold inquiry for dedication  
15      to meet constitutional muster is that the -- the  
16      Government could have denied the permit outright, and  
17      never reach the question of whether there is the essential  
18      nexus or the requisite proportionality, then there is  
19      really no textual meaning that I believe is given to this  
20      Court's opinion in Nollan, and there is no fulfillment of  
21      the -- the mandate in Armstrong v. United States, that  
22      individuals should not be singled out to bear public  
23      burdens that, in all fairness and justice, should be borne  
24      by the public as a whole.

25                  The -- the City really demanded Mrs. Dolan's

1 land because it wanted it for free, to fulfill its  
2 longstanding plans for park -- for a park and for a  
3 pedestrian and bicycle pathway. And it did that without  
4 any regard to the actual impacts of her new store.

5 The City's so-called findings in this case were  
6 made up after the fact, and were mere speculation and  
7 conjecture. And the City --

8 QUESTION: Well, so far as the finding about the  
9 flood plain is concerned, there was a finding that if you  
10 pave over with asphalt things that have been previously  
11 green or growing in some way, you're going to have a more  
12 rapid runoff. Now, that -- that doesn't seem very  
13 speculative to me.

14 MR. SMITH: Mr. Chief Justice, there is indeed  
15 common sense to tell us that if one increases the amount  
16 of a per -- impervious surface on a piece of property,  
17 that there will indeed be more runoff. We would certainly  
18 agree with that. However, the problem is -- and I think  
19 this was well pointed out by Justice Peterson of the  
20 Oregon Supreme Court in his dissenting opinion below --  
21 that there was never a quantification of exactly how much  
22 water would run off.

23 And as Justice Peterson characterized it in his  
24 dissent, how much, a thimble full?

25 In the absence of any quantification of the

1 amount of water that would actually run off of a site, and  
2 comparing that to the overall amount of water that could  
3 run off from other structures throughout the City that  
4 increased impervious surface, there is really no way for  
5 the -- the City to come up with a fair apportionment of  
6 the -- of the cost that should be imposed on Mrs. Dolan.

7           QUESTION: So, you say the City has to -- has to  
8 quantify something like that, do some sort of empirical  
9 studies that would show the portion for which this  
10 increase in her usage -- or her increased pavement is  
11 responsible?

12           MR. SMITH: Yes, Mr. Chief Justice.

13           In fact, I believe that the City itself  
14 recognized that that was the way to go. That, in the  
15 record that's before this Court, at Docket Number F, at  
16 pages 810 and -- and 811, it shows that the City, in the  
17 detailed study it did of storm water runoff, that its  
18 consultant commended to the City and urged the City to do  
19 a calculation on the total amount of impervious surface  
20 that would occur within the City at buildout, and as the  
21 people proposed development, they should calculate the  
22 specific development's contributions to that impervious  
23 surface and to use that relative fraction to apportion  
24 cost.

25           QUESTION: Is there any reason to believe that

1 creating impervious surface closer to the flood plain  
2 causes more of a problem than creating impervious surface  
3 further away from the flood plain?

4 MR. SMITH: No, Justice Scalia, there is not.

5 QUESTION: And yet, people who did that further  
6 away would not have to dedicate any of their land to the  
7 public use?

8 MR. SMITH: That is correct, Your Honor. That,  
9 in fact, there are a number of properties that are not  
10 located on Fanno Creek itself in the City of Tigard that  
11 in fact may generate more storm water runoff than  
12 Mrs. Dolan's proposed new store. But, in fact --

13 QUESTION: But isn't there -- excuse me -- isn't  
14 there some sort of attenuation? I mean, if you're three  
15 miles from Fanno Creek and pave over 2,000 square feet,  
16 surely it's a lesser immediate effect on the creek than if  
17 you are right along the creek and pave over 2,000 square  
18 feet?

19 MR. SMITH: Yes, Your Honor, we would agree with  
20 that.

21 QUESTION: Assume that the additional runoff  
22 would require that some vegetation remain alongside of the  
23 creek. Is it your position that the demands of the City  
24 are nevertheless excessive?

25 MR. SMITH: Yes, Your Honor, it is.

1                   And the reason is, is that the City has already  
2 established regulatory restrictions on what can go on  
3 inside that 100-year flood plain. And the Dolans are  
4 already prohibited from engaging in developmental uses of  
5 that 100-year flood plain. And considering the geography  
6 in question, it is highly unlikely that -- that anything  
7 could go on either. It's a very, very steep bank.

8                   So, the fact of the matter remains is there is  
9 no development that's going to go on within the 100-year  
10 flood plain. It couldn't go on within the 100-year flood  
11 plain.

12                  QUESTION: When we hear about the greenway, is  
13 that simply part of the bike path, or is that also part of  
14 the flood plain?

15                  MR. SMITH: Your Honor, that is part of the --  
16 the flood plain. What the City required was the  
17 dedication of all land within the 100-year flood plain for  
18 a greenway to fulfill its plan to link up a network of  
19 parks, both upstream and downstream.

20                  In addition, they required the dedication of a  
21 15-foot wide strip immediately adjacent and east of the  
22 boundary of the flood plain for construction of a  
23 pedestrian and bicycle pathway. Which, incidentally,  
24 would increase impervious surface in and of itself. And  
25 also, for the site of a -- the construction of a future

1        storm drain that the City contemplated establishing in the  
2        future.

3                QUESTION: Well, would it be your position that  
4        if vegetation must be there, assuming there is some  
5        additional runoff and there is a relation between that,  
6        that you're entitled to keep vegetation that's other than  
7        what would be in the greenway? I mean, is this an  
8        excessive demand, so far as the City is concerned?

9                MR. SMITH: Your Honor --

10              QUESTION: If all they ask is grass.

11              MR. SMITH: I don't believe that the regulatory  
12        impositions that were imposed on Mrs. Dolan for  
13        maintaining open space and vegetated area on her property  
14        were unreasonable. And we in fact did not challenge those  
15        below and do not do so before this Court today.

16              QUESTION: Well, what -- what -- what could she  
17        do then that she cannot do now?

18              MR. SMITH: Your Honor, what has occurred now is  
19        that she may not construct her larger store and demolish  
20        her old store until such --

21              QUESTION: No, no. My question was imprecise.  
22        I'm sorry.

23              On the -- on the -- the greenway area, the flood  
24        plain, which is subject to the easement, she couldn't  
25        develop it before -- what is it that she wanted to do that

1       she cannot do now?

2                    MR. SMITH: Your Honor, there are a number of  
3       non-developmental uses to which she could have put the  
4       land in the greenway, which might have added value and  
5       amenity to -- to her larger store. She could have, for  
6       example, put in landscaping within the greenway that would  
7       have made her site more attractive, without violating the  
8       restrictions that the City had already placed upon her  
9       regarding development of that land.

10                  QUESTION: Doesn't the -- fill me in -- doesn't  
11       the public have access to the greenway? I thought the  
12       purpose of the greenway was for a park. That's not so?

13                  MR. SMITH: Your Honor, the public does not have  
14       access to the lan -- to Mrs. Dolan's land at this time,  
15       with the exception of the access for her business.

16                  QUESTION: No, I mean after -- after she  
17       complied with the condition for the -- for the permit,  
18       would the public have had access to the greenway?

19                  MR. SMITH: Yes, Your Honor.

20                  QUESTION: Well, that's -- that's one thing she  
21       couldn't -- she could do now and couldn't do afterwards,  
22       which is keep other people out.

23                  MR. SMITH: That is absolutely correct.

24                  QUESTION: Which is pretty important.

25                  MR. SMITH: Yes, Your Honor, it is.

1           QUESTION: Did the City require an easement or  
2 the fee to this area?

3           MR. SMITH: Your Honor, the -- the City in its  
4 actual findings required the dedication of a fee. The  
5 City has represented in its brief that what it was really  
6 going to ask for was merely an easement. That is not  
7 contained in their explicit findings. And as we noted in  
8 our reply brief, that even if they were to only require an  
9 easement, there would still be an undue burden upon her.  
10 Because as was noted by Justice Scalia, she would still  
11 have the burden of having the public -- the uninvited  
12 public, pass to and fro.

13           QUESTION: Right. But you say the record as it  
14 comes to us shows the requirement of dedication of the fee  
15 title to this property?

16           MR. SMITH: Yes, Your Honor, that's correct.  
17 The City's findings require dedication.

18           QUESTION: All right. Did the City also require  
19 Mrs. Dolan to construct the bike path at her expense?

20           MR. SMITH: Your Honor, the City's findings at  
21 the petition for cert at appendix G -- at page G-28,  
22 specifically require the construction. However, the City  
23 has noted and has in fact submitted additional materials  
24 to this Court that would show, when Mrs. Dolan made her  
25 first application -- and this appeal is brought from a

1 second application -- that the City had in fact decided  
2 not to require her to construct the pathway.

3 However, when the findings came out with regard  
4 to the second application, the findings had it back in  
5 there again.

6 So, as the record is before this Court today,  
7 there was a requirement to construct the bike path.

8 QUESTION: Well, do you rest your case on the  
9 difference between whether an easement had been given or  
10 whether she had to convey the -- didn't -- Nollan involved  
11 an easement, as I recall, rather than an outright  
12 conveyance, didn't it?

13 MR. SMITH: That is correct, Your Honor. Nollan  
14 was merely the conveyance of an easement. And we do not  
15 rest our case on the distinction between dedication of fee  
16 and easement.

17 QUESTION: And an easement is -- is a right in  
18 property, isn't it? It's a conveyance of property?

19 MR. SMITH: Yes, Your Honor, it is, well  
20 recognized in law.

21 QUESTION: Would the case be the same if it had  
22 been a license rather than an easement?

23 MR. SMITH: Your Honor, I believe that if the --  
24 the requirement had been that that license mandated the  
25 continuous passage of the public, it would have been just

1 as burdensome an imposition upon Mrs. Dolan as was the  
2 beach easement was on Mr. and Mrs. --

3           QUESTION: In other words, your answer is yes?

4           MR. SMITH: Yes, Your Honor.

5           (Laughter.)

6           QUESTION: I in fact thought that a license to  
7 -- to use land is the definition of an easement. I'm not  
8 -- can you create a license to use land that is not an  
9 easement? Can you?

10          MR. SMITH: I believe that Justice Stevens says  
11 the answer to that question is yes, and I would defer to  
12 his judgment.

13          (Laughter.)

14          QUESTION: At least it was in my first year  
15 property course, which was some years ago.

16          (Laughter.)

17          MR. SMITH: If I could turn again -- once again  
18 to the issue of proportionality, I think that one of the  
19 important points to be noted in this case is that if there  
20 had been a -- a clear understanding on the part of the --  
21 of the Oregon Supreme Court and the City of Tigard that  
22 there was a requirement for proportionality embedded  
23 within this Court's 1987 decision in *Nollan v. California*  
24 Coastal Commission, that the outcome of the case might  
25 have been significantly different.

1               This Court, within Nollan, used words like  
2        "specific connection," "precise fit" was used in the  
3        dissent, "essential nexus." And the Oregon Supreme Court  
4        construed those to mean that there really only needed to  
5        be some sort of rational relationship between the  
6        dedications and the adverse impacts. And, therefore,  
7        hypothetical impacts -- and I would stress that -- that  
8        the impacts that were found by the City in this case were  
9        really very, very speculative -- that that was sufficient  
10      to satisfy the City of Tigard, and in fact satisfy the  
11      majority of the Oregon Supreme Court.

12               I don't believe that -- that proportionality, as  
13        it has been characterized by the City in its brief, is  
14        indeed a revolutionary concept. In fact, the emerging  
15        weight of authority across the United States in the  
16        various States recognizes that a proportionality test is  
17        in fact the one that should be used in looking at the  
18        relationship between dedications.

19               QUESTION: Assuming that there is some degree of  
20        proportionality, do you insist on, you know, actual  
21        empirical demonstration of adverse effects?

22               MR. SMITH: No, Your Honor, we do not. I  
23        believe that would be unreasonable. And the emerging  
24        weight of authority among the States is adopting a similar  
25        position there.

1                   As you know, and as is well laid out in the  
2 Washington Legal Foundation's amicus brief to this Court,  
3 they discussed the old Illinois test, which was  
4 specifically and uniquely attributable. And in fact, the  
5 weight of authority has moved away from that and is  
6 requiring some sort of rough proportionality based on  
7 actual impacts, with some sort of temporally present,  
8 contemporaneous relationship that's substantially and  
9 demonstrably clear.

10                  And I believe that that test, far being from  
11 revolutionary, is the one that is coming out. It's in the  
12 so-called New Jersey test that was established in Longwood  
13 in 1968. It's in the Wisconsin test that was established  
14 in --

15                  QUESTION: How would you articulate such a test  
16 in -- in simple terms? What would you say the test is  
17 that you think this Court has or should impose?

18                  MR. SMITH: Justice O'Connor, it's difficult to  
19 articulate the test in simple terms, mostly because the --  
20 the courts across the country -- the State courts -- have  
21 not chosen to use simple terms.

22                  QUESTION: But if you can't do it, how do you  
23 expect us to?

24                  (Laughter.)

25                  MR. SMITH: I would submit that to find

1 proportionality, that there are about three things that  
2 need to be done. First of all, there needs to be some  
3 sort of actual, specific quantification of impacts and of  
4 public needs, much as was described in the City of  
5 Tigard's record and how their consultant thought that they  
6 ought to approach storm water runoff.

7 After that quantification is done, I believe  
8 that there -- there has to be some sort of proportional  
9 relationship that establishes the contribution of an  
10 individual development project to the overall need.

11 And, finally, where a dedication of real  
12 property is required, I think that needs to be quantified  
13 and compared against that -- that fraction or that  
14 relationship.

15 QUESTION: Well, specifically in this case, what  
16 should the City of Tigard have done that it didn't do in  
17 order to justify the demands it made on your client for  
18 her property?

19 MR. SMITH: Mr. Chief Justice, in the -- the  
20 first instance, what the City should have done is they  
21 should have quantified the actual storm water runoffs that  
22 had -- were going to occur from the 17,600-square-foot  
23 building. That they never did.

24 There is quantification of the overall increase  
25 in impervious surface, the overall demand citywide when it

1 goes to buildout, but no specific assessment of what this  
2 project would do.

3                   QUESTION: May I -- may I raise the question  
4 that troubles me about just really the whole case. The  
5 requirement of quantification, it seems to me, it would be  
6 awfully difficult to meet in cases in which a municipality  
7 might perceive a danger that it really couldn't evaluate,  
8 but feels it doesn't want to take the risk.

9                   Say out in California you worry about  
10 earthquakes. You don't know when it's going to happen or  
11 how serious it'll be, but you know it's a possibility.

12                  How do you quantify against a reasonable risk  
13 that you just aren't quite sure what'll happen, but you  
14 just don't want to take any chances?

15                  MR. SMITH: Justice Stevens, in that instance, I  
16 believe that what would occur would not be a dedication of  
17 real property as some sort of permit condition, but in  
18 fact would be a regulatory restriction upon development as  
19 regularly happens within 100-year flood plains, geologic  
20 hazard areas. And based on this Court's Lucas decision --

21                  QUESTION: Well, but you've acknowledged they  
22 could deny the permit outright if they were concerned in  
23 sort of -- they just think there's a danger there, but  
24 they're not sure they're able to quantify it. I think  
25 you've acknowledged they could deny the permit outright?

1 MR. SMITH: Yes, Your Honor, we have.

2 QUESTION: But you say they can't say, well, if  
3 you want to go ahead and build, because we're unsure about  
4 what's happened, we're going to insist that you make these  
5 perhaps exaggerated precautions? You're saying they can't  
6 do that?

7 MR. SMITH: Your Honor, if the exaggerated  
8 precautions involve the dedication of an interest in real  
9 property, I believe that it is incumbent on the  
10 Government, in order to fulfill this Court's requirements  
11 laid down in 1960 in Armstrong, that it do more than  
12 merely speculate or hypothesize. I think they need to  
13 look at the -- the real impacts and come up with a  
14 quantification. Otherwise, the alternative is to prohibit  
15 it outright.

16 Then we have a -- a Lucas v. the South Carolina  
17 Coastal Council question that arises, as to whether it is  
18 in fact a common law nuisance.

19 QUESTION: Mr. Smith, I -- I assume you don't  
20 concede that a proportionality requirement is necessarily  
21 in addition to a rational basis requirement? I mean, I --  
22 I assume that -- that you -- you would acknowledge the  
23 possibility that something does not have a rational basis  
24 if it is wildly disproportionate?

25 MR. SMITH: Your Honor, we would -- we believe

1       that -- that the rational basis -- or rational  
2       relationship test, if we should call it that, as it was  
3       applied by the Oregon Supreme Court and was applied by the  
4       City of Tigard, is in fact no test at all. And that in  
5       fact proportionality is essentially the antithesis of that  
6       test.

7                  I believe rational -- rational basis is much  
8       more akin to the sort of rational basis review that goes  
9       on in due process and equal protection context, and in  
10      fact is willing to rely upon even the most remote and  
11      hypothetical of State interests.

12                QUESTION: In 1971, the Supreme Court decided  
13       that you couldn't make arbitrary distinctions between men  
14       and women because that violated the rational basis test.

15                MR. SMITH: Yes, Your Honor.

16                QUESTION: You said it was no test at all; it  
17       seemed to be a pretty significant test in the case of Reed  
18       v. Reed.

19                MR. SMITH: I would agree, Your Honor. And I  
20       would believe that within the -- the context of the review  
21       of legislation, that the rational basis review, as it has  
22       been applied by this Court, in fact is -- works quite well  
23       within the equal protection and due process context.  
24       However, I believe as this Court observed in Nollan, that  
25       when one is involved with the dedication of interests in

1       property, that something more than the rational basis  
2       review necessarily needs to be applied.

3            QUESTION: How do you formulate that? I think  
4       it was what Justice O'Connor was asking you earlier. How  
5       do you formulate the something more?

6            MR. SMITH: Justice Ginsburg, I believe that, as  
7       this Court set forth in Nollan, that it said that what was  
8       required was a substantial advancement of legitimate State  
9       interests; that that substantial advancement test is in  
10      fact given context and given substance by virtue of a  
11      requirement for proportionality.

12            QUESTION: That's kind of a submiddle tier,  
13       because the stock formula, equal protection/due process,  
14       is substantial relationship to an important Government  
15       interest. This is one notch down, a legitimate Government  
16       interest. It's not quite as heavyweight as an important  
17       Government interest, is it?

18            MR. SMITH: Yes, Your Honor, that's correct.

19            QUESTION: Mr. Smith, is there any difference,  
20       do you think, in the justification the City can offer for  
21       the flood control problem and the justification for the  
22       bike path, insofar as Mrs. Dolan's property is concerned?

23            MR. SMITH: Yes, Your Honor. With regard to  
24       flood control, the City did, and it is in the record  
25       before this Court, an extensive study that documented what

1 would be the storm water runoff when all of the vacant  
2 land in the City had been built up and had the maximum  
3 amount of impervious surface.

4 With regard to transportation -- but that's all  
5 they did. Okay.

6 With regard to transportation, the City relied  
7 upon its parent county traffic impact ordinance. And that  
8 traffic impact ordinance quantifies not only the overall  
9 needs of the community, but quantified the specific  
10 impacts that would be generated out of this -- this larger  
11 site, with the increased number of parking spaces and  
12 trips per day.

13 QUESTION: Is Tigard in Multnomah County?

14 MR. SMITH: No, Mr. Chief Justice. Tigard is in  
15 Washington County, which is right next to Multnomah  
16 County.

17 QUESTION: Mr. Smith, I don't want to be picky;  
18 I think I'm going to sound that way, though. I don't -- I  
19 still do not grasp your -- your -- your substantial  
20 relationship as a basis for your proportionality test.

21 Are you saying, in effect, that you basically  
22 make a fraction -- let's say on the runoff problem -- that  
23 you make a fraction of the amount of runoff that's going  
24 to be created by this change in use of the property, with  
25 that created by the change of use in the property as your

1        numerator and all the other unnatural runoff that is going  
2        to hit this creek as your denominator, to start with?

3              And then, you, in effect, say that fraction  
4        governs the -- the portion of the cost of improving the  
5        creek that can be borne by this landowner?

6              MR. SMITH: Yes, Your Honor.

7              And in fact, with regard to the traffic impact  
8        fee that was assessed on Mrs. Dolan, 14,000-and-some-odd  
9        dollars, that's exactly what the City did.

10             QUESTION: How do you go -- how do you -- how do  
11        you determine what your denominator is? Do you go back to  
12        the point where -- before the land was settled, and you  
13        figure all of the runoff that is now taking place that  
14        wouldn't have taken place if this were just grassland or  
15        woodland or whatever it would have been? Or do you -- do  
16        you start with some baseline, the year 1990, and you  
17        measure incremental runoff from that point on?

18             How -- how, in practice, does it work?

19             MR. SMITH: In the City of Tigard, Your Honor,  
20        the -- the snapshot was taken in 1983, when the City's  
21        comprehensive plan was adopted. And that snapshot  
22        evaluated the amount of impervious surface that was within  
23        the Fanno Creek watershed at that time. And it then  
24        looked at the allowable zoning that was provided for  
25        within the Fanno Creek basin, and looked at how much

1       impervious surface could increase after that, until the  
2       basin got to buildout.

3            QUESTION: So, it would be the amount of  
4       legitimate increase that could be projected from '83, as  
5       the denominator, and the portion of that attributable to  
6       this change in use as the numerator?

7            MR. SMITH: Yes, Your Honor, that is correct.

8            Mr. Chief Justice, with the permission of the  
9       Court, I --

10          QUESTION: I assume the time you take the  
11       snapshot ought to depend on the time when the restriction  
12       for which this is the exaction was imposed -- that is, the  
13       time the zoning requirement, which this exaction is -- is  
14       meant to justify a waiver from, was imposed -- that is  
15       when you'd take the snapshot, I assume?

16          MR. SMITH: Yes, Justice Scalia. And that was  
17       1983 in this case.

18          QUESTION: Very well, Mr. Smith.

19          MR. SMITH: Thank you, sir.

20          Mr. Ramis, we'll hear from you.

21            ORAL ARGUMENT OF TIMOTHY V. RAMIS

22            ON BEHALF OF THE RESPONDENT

23          MR. RAMIS: Mr. Chief Justice, and may it please  
24       the Court:

25          In this case, the City of Tigard avoided denying

1       the application and, instead, granted conditional -- the  
2       conditional approval based upon mitigation for a project  
3       which the record shows would add hundreds of additional  
4       automobile trips to already congested streets in the City,  
5       and which would place a building of several thousand  
6       square feet directly in the path of -- of expected  
7       flooding.

8                   QUESTION: This property owner had to pay some  
9       money for the increased congestion; wasn't there an  
10      assessment, the \$14,000, that was mentioned?

11          MR. RAMIS: Yes, there was a payment made --

12          QUESTION: And this is in addition to that?

13          MR. RAMIS: Made for -- it is, Your Honor.

14          The traffic impact fee, however, is not a  
15       complete offset for the impacts of this project. That  
16       issue appears for the first time in the briefs at this  
17       level of review, and so the -- the ordinance was not in  
18       the record. We have lodged it with the Court. There are  
19       three points on the face of that ordinance that  
20       demonstrate that it is not a complete setoff.

21          First, the adoption of the ordinance, ordinance  
22       379, section 2, says specifically it is not intended as a  
23       complete setoff. It's intended only as a partial solution  
24       to be used along with other mechanisms in a multifaceted  
25       way to pay for transportation improvements.

1                   In addition, the supporting documentation,  
2 adopted at the same time, has a calculation which shows  
3 only 21 percent of the costs expected for improving  
4 streets and roads, based upon impact, is covered.

5                   QUESTION: What would happen if somebody two  
6 lots back from this property, two lots further away from  
7 the flood plain, who increased business to the same extent  
8 by -- by an expansion of the building, and who paid  
9 \$14,000 similarly, but didn't have any flood plain land to  
10 contribute to a bike -- to a bike path? What -- what  
11 would happen to that person?

12                  MR. RAMIS: That property owner would also be  
13 expected to make a contribution or to demonstrate, in the  
14 language of our comprehensive plan, that there are  
15 adequate public facilities and services available. Every  
16 property owner in the City, not just those along the flood  
17 plain -- not just those along the bike path, must satisfy  
18 the standards of 7.1.2.

19                  QUESTION: And this property, there is something  
20 peculiar about this property, by being next to the flood  
21 plain, adequate services are not available, so that you  
22 have to contribute a bike -- a bike path?

23                  MR. RAMIS: It's not --

24                  QUESTION: But if you're further away, what --  
25 what would be done to a property further away?

1                   MR. RAMIS: Another property might reconstruct  
2       the sidewalk. Another property might contribute to the  
3       synchronization of street lights in order to provide more  
4       capacity on the streets.

5                   The problem the City was facing in this case was  
6       not bringing people to the property on bikes. The problem  
7       was that this expansion -- major expansion, over -- close  
8       to double the size, would add hundreds of additional car  
9       trips to -- to streets that were already so congested that  
10      fire vehicles --

11                  QUESTION: And the solution to that was a bike  
12      path?

13                  MR. RAMIS: The solution was to offset those car  
14      trips by an alternative system of transportation.

15                  QUESTION: People are going to go to the  
16      hardware store on their bike?

17                  MR. RAMIS: No, Your Honor. That's not the  
18      basis of our decision.

19                  QUESTION: That isn't even contended by the  
20      City, is it? So, there is no relationship between the  
21      increased traffic volume and the bike path?

22                  MR. RAMIS: Your Honor, the relationship is that  
23      this project is a retail project that puts additional cars  
24      on the road. The bike path is mitigation device that  
25      takes trips off the road. They don't have to be the same

1 people.

2                   QUESTION: I see, people who would otherwise be  
3 driving their cars for recreation will instead ride  
4 bicycles for recreation; is that the --

5                   MR. RAMIS: No, Your Honor.

6                   QUESTION: Is that the notion?

7                   MR. RAMIS: No, Your Honor. The -- the concept  
8 is that the City is trying to encourage people to go to  
9 other places to do their shopping by means of bicycle  
10 rather than car. If they can achieve that, then we will  
11 free up spaces on the streets for those people who are  
12 coming in the car to this business.

13                  This is not a radical notion or a particularly  
14 innovative notion. It is an idea that Congress has  
15 legislated. Dollars that --

16                  QUESTION: There are a lot of bike paths around  
17 Washington, and I've never seen people carrying shopping  
18 bags on their bikes.

19                  MR. RAMIS: The record --

20                  QUESTION: Perhaps city planners, I guess they  
21 --

22                  QUESTION: Mr. Ramis --

23                  QUESTION: Are you judging the -- the obligation  
24 of the littoral property owners and the nonlittoral owners  
25 by contradictory standards? Because you're saying that --

1 excuse me -- in answer to an earlier question, that the --  
2 the owner of property two blocks away from the creek would  
3 be judged by -- by asking whether the -- the public  
4 facilities that would be burdened by the -- by the  
5 building were already adequate; whereas you have made, as  
6 I understand it, a definitive determination with respect  
7 to the littoral property owners that they're not adequate.

8 You're saying we've got to have a bike path  
9 because there's too much traffic. We've got to improve  
10 the -- or set aside more land for creek overflow because  
11 there's going to be a quicker runoff.

12 It seems to me that you've made kind of a  
13 conclusive determination with respect to -- to the  
14 Petitioner here, but you haven't made any determination on  
15 -- on your theory with respect to the nonlittoral owners.

16 MR. RAMIS: There are two features of the City's  
17 code which I'd like to describe, which I believe address  
18 -- address your question. First, every property owner in  
19 the City is required to address the standard of providing  
20 adequate facilities and services, and that standard is  
21 described at 827 in the appendix. And to paraphrase it --

22 QUESTION: Well, but is -- correct me if I'm  
23 wrong, as I understand it, the Petitioner here would not  
24 have been allowed by the City to come in and say there's  
25 -- there's plenty of room for the creek to flow and

1       there's -- there's plenty of capacity in the streets and  
2       sidewalks. You've already determined that the answer to  
3       -- in each case, is that there is not sufficient capacity.

4                    MR. RAMIS: That's not the case, Your Honor.

5                    QUESTION: Okay.

6                    MR. RAMIS: And that's the second point I wanted  
7       to make about the operation of the code.

8                    This code has several openings for property  
9       owners to come in and ask for adjustments. And the key  
10      one is the variance procedure, which says specifically you  
11      may have a variance if you can demonstrate there's no  
12      adverse effect on drainage or on transportation.

13                  QUESTION: Okay. But does -- does the property  
14      owner two blocks away have to ask for a variance?

15                  MR. RAMIS: Well, Your Honor, if they cannot  
16      prove that there are adequate public facilities and  
17      services, they would be conditioned to provide them, and  
18      then they would have to ask for a variance.

19                  QUESTION: Okay. But in this case, as I  
20      understand it, the proof, so called, has already been  
21      made. And the way for the littoral property owner, the  
22      Petitioner here, to alleviate the burden is to ask for a  
23      variance. Those -- those, at least, are procedurally  
24      different mechanisms, aren't they?

25                  QUESTION: Yes -- go ahead.

1                   MR. RAMIS: Your Honor, the -- the upstream  
2       property owner, the uphill property owner, would also have  
3       -- have to ask for a variance in the event that the staff  
4       sought to impose, for example, a bus pullout to address  
5       traffic problems. They would have --

6                   QUESTION: But supposing that the upstream  
7       property owner or the uphill property owner, the one out  
8       of the flood plain or littoral, he wants -- he wants to  
9       enlarge his business the same way that Mrs. Dolan did,  
10      would the City demand of him something in the way of an  
11      easement -- something corresponding to the flood plain  
12      easement which they asked of Mrs. Dolan?

13                  MR. RAMIS: Yes, Your Honor.

14                  QUESTION: What something is it?

15                  MR. RAMIS: That is a water storage facility.  
16      At page four of our brief, at footnote four, it describes  
17      that you'd have to do a study of the drainage. And as a  
18      result of that study of the drainage, you would be  
19      required to build a storage facility for the runoff.

20                  So, the way the system works is that those who  
21      are next to the creek handle the problem by dedication,  
22      and then the City comes in and spends the money to build  
23      the storage capacity. The balance is those that are  
24      upstream do not suffer a physical invasion, but in that  
25      case, they have to build on their own land the storage

1 facility with their own money -- that's the balance.

2           QUESTION: Suppose -- suppose Mrs. Dolan said  
3 that she was willing to build a storage facility?

4           MR. RAMIS: Then she would not have to dedicate  
5 the land for the greenway.

6           QUESTION: Was she given that -- was -- did she  
7 have that option?

8           MR. RAMIS: She did have that option and did not  
9 choose to seek it. If you would look in the record, Your  
10 Honor, at page E-4 of our appendix, you have the -- a copy  
11 of the statement of justification for variance filed by  
12 the attorney -- the then-attorney for the Dolans, not my  
13 friend, Mr. Smith, another attorney. And there you can  
14 see that they made no serious effort at all to try to say  
15 either that they were going to provide storage facilities  
16 or that there wasn't an impact from this project. They  
17 simply didn't take advantage of the system. They could  
18 have.

19           They could have come in with a design that  
20 showed a -- a large catch basin under their parking lot.

21           QUESTION: Of course, in all events, it seems to  
22 me that it's unnecessary for the drainage that the  
23 property owner lose the right to exclude the public from  
24 access to it. I see no relation between those two.

25           MR. RAMIS: Your Honor, that's not the purpose

1 of the regulation, as can be seen by the fact that if you  
2 don't create a drainage impact you would not have to  
3 dedicate.

4           QUESTION: Mr. Ramis, could I -- could I come  
5 back to your footnote four -- footnote six on page four?  
6 I don't see that that says what you've described. What  
7 that says is that natural drainage ways must be maintained  
8 unless submitted studies show that alternative drainage  
9 solutions can solve onsite drainage problems. That -- it  
10 seems to me that regulation is meant to cover the  
11 situation where someone is -- is constructing an  
12 improvement in such a way that it blocks runoff which  
13 would normally occur, not that it -- that it makes land  
14 more impervious.

15           Of course -- I mean, all communities require you  
16 to put -- put some sort of a catch basin or something when  
17 you're -- you've interrupted the natural drainage flow.  
18 But if somebody makes an improvement that does not  
19 interrupt the natural drainage flow, I don't see any --  
20 any -- any requirement that either one of these  
21 regulations imposes on them.

22           MR. RAMIS: Your Honor, there are two steps in  
23 this process. The first is triggered by the requirement  
24 that is a precondition to development. You do a site  
25 development study that would analyze the impact to the

1 drainage.

2 QUESTION: Fine.

3 MR. RAMIS: Step two is at page B-63 of our  
4 appendix. And that is subsection (d) of section 18.160 --

5 QUESTION: B as in buzz?

6 MR. RAMIS: D as in dog.

7 QUESTION: D as in dog.

8 MR. RAMIS: At B-63.

9 And here, if you're study shows that --

10 QUESTION: Excuse me, I can't find what you're  
11 talking about. Is that something in the red brief?

12 MR. RAMIS: Yes, in the red brief, Your Honor.

13 In the back, there's an appendix.

14 QUESTION: Yes.

15 MR. RAMIS: And at page B as in boy --

16 QUESTION: B as in boy?

17 MR. RAMIS: Boy, 63.

18 QUESTION: B-63.

19 QUESTION: Thank you.

20 MR. RAMIS: Yes.

21 There is a code provision, D, effect on  
22 downstream drainage. And what this provision says is if  
23 you are going to create additional runoff that will  
24 overload the existing drainage facility, then among your  
25 options is to provide for storage of additional runoff.

1       That's the storage facility.

2           QUESTION: Sure, I think what that means is if  
3       the pipe that's going into the municipal conduit that goes  
4       down to this stream would be overloaded, so that there's  
5       not -- not enough capacity in that pipe to carry it off,  
6       you have to store it and then let it out at another time.  
7       But that has nothing to do with -- so long as you can get  
8       it into the municipal conduit, you're allowed to do it. I  
9       don't read this as having anything to do with the capacity  
10      of the flood plain.

11          MR. RAMIS: The reason that -- that it wouldn't  
12       work for an applicant to come in and say, I can get a pipe  
13       to the municipal system, is that you wouldn't be able to  
14       comply with -- with policy 7.1.2, which says you must  
15       provide adequate public facilities. If there's not  
16       capacity that's sufficient in that public drainage system  
17       when you get to the pipe to it, then you've overloaded it.  
18       And if you've overloaded it, you've caused a harm and you  
19       are required to provide additional capacity.

20          QUESTION: But if you haven't overloaded it,  
21       then there's no such problem or requirement, right?

22          MR. RAMIS: That's exactly right.

23          QUESTION: And that's a possibility?

24          MR. RAMIS: Yes.

25          QUESTION: But it isn't a possibility for

1       Mrs. Dolan?

2                   MR. RAMIS: It is, Your Honor, because under the  
3       -- the policy at page four, Mrs. Dolan was required to  
4       come in with a drainage analysis. She didn't do that. If  
5       she had provided a drainage analysis that said we're going  
6       to build a large catch basin under our parking lot and it  
7       will meter the water out slowly at the same rate that it  
8       would have gone out if there was no building, then there  
9       would have been no exaction. She would have gotten --

10                  QUESTION: Well, let me ask you this. What  
11       about the bike path? Did she have an option there?

12                  MR. RAMIS: Yes. The findings discuss the fact  
13       -- actually discuss one of the other options. One of the  
14       options would have been to handle the traffic impact by  
15       reconstructing the sidewalk in front. There's a  
16       discussion saying that if she reconstructed the sidewalk  
17       and the street that that would be a possible offset.

18                  QUESTION: Then no bike path?

19                  MR. RAMIS: Yes. But --

20                  QUESTION: Now, how about other property owners  
21       that are not adjacent to the creek, are they required to  
22       build a bike path?

23                  MR. RAMIS: No. They're required to make other  
24       contributions to the transportation system.

25                  QUESTION: But never a bike path?

1                   MR. RAMIS: Not unless the bike path goes by  
2 their property. They might contribute by building a  
3 sidewalk. And of course we see the bike path and the  
4 sidewalk system as one integrated system. And so --

5                   QUESTION: Is it your representation to us that  
6 Mrs. Dolan had all of the options of an uphill property  
7 owner?

8                   MR. RAMIS: Yes. She --

9                   QUESTION: The -- go ahead.

10                  MR. RAMIS: There are three different variance  
11 procedures, all of which she could have taken advantage  
12 of.

13                  QUESTION: The Supreme Court of Oregon didn't  
14 rely on those in the majority opinion, did it?

15                  MR. RAMIS: On the variance procedures, Your  
16 Honor?

17                  QUESTION: Yes.

18                  MR. RAMIS: I don't believe the opinion mentions  
19 them. Your --

20                  QUESTION: Did you mention them in your argument  
21 to the Oregon Supreme Court?

22                  MR. RAMIS: The -- the argument there was  
23 focused on the test. And -- and so that issue did not  
24 arise.

25                  Your Honor, the three procedures that are

1 available are, first, at the time of application, you can  
2 come into the process and say there's been a change or a  
3 mistake in the process, or there are special attributes to  
4 my property. And that would justify a change in the -- in  
5 the regulations as they're applied.

6 The second provision allows that the City  
7 engineer can adjust the regulations based upon a showing  
8 that there are sound engineering principles allowing it.  
9 That would be the case, for example, of the catch basin as  
10 an alternative to storage capacity in the creek.

11 And then, finally, there's the formal variance  
12 process. So -- and the variance process would allow  
13 variance if you were able to show that there's no adverse  
14 effect.

15 So, all three of these processes are available  
16 to adjust the conditions.

17 QUESTION: Is it -- is it your representation to  
18 this Court, Mr. Ramis, that -- that -- that Mrs. Dolan  
19 could have avoided both the bike path dedication and the  
20 flood plain dedication -- she could have avoided both by  
21 simply agreeing to do what some uphill owners would do?

22 MR. RAMIS: Yes, Your Honor. She could have  
23 come in with alternative solutions to the traffic impact  
24 she was creating and to the runoff impact. Unfortunately,  
25 the design that they have doesn't do that.

1                   QUESTION: Alternative -- an alternative to the  
2 bike path?

3                   MR. RAMIS: Yes.

4                   QUESTION: Something that would solve the  
5 traffic problem better than the bike path would?

6                   MR. RAMIS: Or as adequately. In other words --

7                   QUESTION: Well, that's zero as far as I can  
8 tell. So, what would she come in to?

9                   MR. RAMIS: Well, Your Honor, the record would  
10 show that bike paths are effective as mitigation. Because  
11 they draw people off of the highways.

12                  QUESTION: But you said she could have an  
13 alternative by providing a sidewalk. Now, that wouldn't  
14 provide bike space at all. That's for people to walk on  
15 --

16                  MR. RAMIS: Well, the bike path is actually a  
17 bike and pedestrian path. It's designed for nonautomobile  
18 transportation, both for pedestrians and for people on  
19 bicycles.

20                  QUESTION: If -- if she had an alternative that  
21 was equally mitigating to the bike path, would your City  
22 have the right to insist on the bike path because it  
23 preferred it?

24                  MR. RAMIS: I believe the question would be -- I  
25 believe the answer is no, Your Honor. If she was able to

1 show that she adequately handled the traffic impact, then  
2 we could not impose the bike requirement if she had some  
3 other mechanism.

4                   QUESTION: Who makes -- who is the  
5 decisionmaker? You -- you said that she could propose.  
6 She doesn't like the bike path. She doesn't like your  
7 plan. She can come up with an alternative. And suppose  
8 you say we, for a variety of reasons, like the bike path  
9 better. Who decides and what review is there of that  
10 decision?

11                  MR. RAMIS: Right. The decision is made by, in  
12 the first instance, the planning commission, and then, on  
13 appeal, to the city council. Under the law in Oregon,  
14 this is an adjudicatory process, with all the safeguards  
15 of an impartial decisionmaker, a decision on the record, a  
16 decision under written criteria. That decision is then  
17 subject to review by the land use board of appeals. And a  
18 property owner such as this one can introduce evidence at  
19 that trial level about constitutional violations and  
20 procedural violations.

21                  So, there was a second --

22                  QUESTION: Where does this appear in the record  
23 that -- that she can come forward with alternative  
24 solutions which must be accepted by the City? Does that  
25 appear --

1 MR. RAMIS: That's --

2 QUESTION: Can you give us some citations to the  
3 -- to the regulations or whatever?

4 MR. RAMIS: Yes, Your Honor. Yes, Your Honor.

5 The adjustment criteria are, first, the variance  
6 criteria at 18.134.050, which appears in this record in --  
7 in my brief at page B-49.

8 Second, the City engineer's ability to change  
9 the criteria based on alternative engineering solutions --

10 QUESTION: Not ability -- obligation -- if -- if  
11 she comes forward with it.

12 MR. RAMIS: Yes.

13 QUESTION: Okay.

14 MR. RAMIS: If she comes forward, she has a  
15 right to obtain a change in the application criteria.

16 QUESTION: Okay.

17 MR. RAMIS: That is at B-51 of the appendix,  
18 section 18.164.020(b).

19 And, finally, the consideration of change or  
20 mistake or positive attributes of the property which could  
21 justify change is at B-7 of the appendix. All of these  
22 processes are available.

23 QUESTION: Okay.

24 MR. RAMIS: And all of them, of course, would be  
25 decided in an adjudicatory procedure, subject to review on

1 -- on a substantial evidence standard, except in the case  
2 of allegations of constitutional violations.

3           QUESTION: Thank you, Mr. Ramis.

4           MR. RAMIS: Thank you, Mr. Chief Justice.

5           QUESTION: Mr. Kneedler, we'll hear from you.

6           ORAL ARGUMENT OF EDWIN S. KNEEDLER  
7           ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
8           SUPPORTING THE RESPONDENT

9           MR. KNEEDLER: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11           I would like to address, first, just one factual  
12 point about the -- or I guess policy point about the flood  
13 plain. The -- the legitimacy of -- of the flood plain  
14 approach taken by the City here has been addressed thus  
15 far only in terms of the adverse impacts that would be  
16 caused by increasing the impervious surface on the -- on  
17 the parking lot and expanding the building. And  
18 Petitioner suggests that the condition imposed on  
19 Mrs. Dolan should be proportional to that adverse impact.

20           That is one measure, and it's true the City's  
21 flood plain -- excuse me -- drainage plan does identify  
22 that measure as one method of allocating the cost. But  
23 there is another important consideration, and that's the  
24 benefit to Mrs. Dolan. She is right along the flood  
25 plain. And the City's drainage plan estimates that,

1 absent some improvements in the drainage channel, because  
2 of development all along the flood plain, the flood level  
3 will rise two to five feet, with a 40 percent increase in  
4 the amount of water during the 100-year flood plain --  
5 flood -- typical flood.

6 And so the improvement of the channel confers  
7 considerable benefits on the property owners immediately  
8 adjacent to the creek. And in -- in designing what sorts  
9 of conditions should be imposed --

10 QUESTION: What -- what benefits --

11 MR. KNEEDLER: It will prevent the -- will  
12 prevent the -- the plan is to widen the channel and to  
13 reinforce the slopes, so that the channel will have a  
14 greater carrying capacity in large floods. With a greater  
15 carrying capacity, the water will be carried past her  
16 property. Otherwise, it would -- it would rise and go  
17 onto her property.

18 QUESTION: Is there something in the record that  
19 indicates that, had the channel not been widened in some  
20 relatively expectable flood, her property would have been  
21 hurt?

22 MR. KNEEDLER: Yes. This is addressed on page  
23 six of the Respondent's brief. The channel has not yet  
24 been built, but this is the projection of -- of what would  
25 be necessary.

1                   QUESTION: Does it benefit only riparian  
2                   property owners who want to expand their facilities?

3                   MR. KNEEDLER: No, but it --

4                   QUESTION: It's sort of a haphazard way of -- of  
5                   assessing a benefit, right, when you want to expand your  
6                   facilities, since we're -- we're helping you on the flood  
7                   plain, we're going to -- we're going to make you dedicate  
8                   -- only if you want to expand your facilities.

9                   MR. KNEEDLER: Well, one -- one of the important  
10                  aspects of flood plain reg -- flood plain regulation came  
11                  in about 20 years ago. And -- and realistically, flood  
12                  plain regulation often has to take something of a given  
13                  what's already there, but -- but to attach conditions on  
14                  expanding what is already there.

15                  QUESTION: But the nexus that's -- that our  
16                  opinions require is -- is not a nexus to whether you're  
17                  benefitted or not. It's a nexus to the -- the permit to  
18                  which this -- this exaction is attached.

19                  MR. KNEEDLER: Right, and --

20                  QUESTION: And I don't see any nexus to the  
21                  permit.

22                  MR. KNEEDLER: Right, I --

23                  QUESTION: And the fact that you're benefitted  
24                  is very interesting, but, it seems to me, irrelevant to  
25                  the nexus requirement.

1                   MR. KNEEDLER: Right, I -- and that's the next  
2 point I wanted to get to. I just wanted to make the point  
3 that it is appropriate for a municipality, in deciding  
4 what conditions to attach, to take into account the unique  
5 characteristics of the land.

6                   QUESTION: Well, Mr. Kneedler, a moment ago in  
7 your response to my question about whether there was a  
8 showing in the record that Mrs. Dolan's property would be  
9 hurt in the foreseeable future, you referred me to page  
10 six --

11                  MR. KNEEDLER: I'm sorry, I misspoke. It's page  
12 eight. I'm sorry. Page eight of the red brief.

13                  QUESTION: Well, page seven has a finding in the  
14 drainage plan that there would be flooding in several  
15 areas along Fanno Creek, including areas near Petitioner's  
16 property. Now, does page eight have something better than  
17 that?

18                  MR. KNEEDLER: Immediately -- immediately  
19 adjacent -- adjacent to the indentation on page eight, it  
20 says upstream of Hall Boulevard, which is the stretch  
21 where her property is located. The flood stage reductions  
22 that would result from widening the channel will reduce  
23 the flood range from two to five feet over the next years.

24                  I would like to address the -- the test, though.  
25 As -- as we understand this Court's decision in Nollan,

1       the test is really one of whether the permit condition  
2       serves the same purpose as an outright denial. It's taken  
3       as a given in this case by virtue of Petitioner's  
4       concession that the permit could have been denied  
5       outright.

6                   So, what -- what this Court said in Nollan is  
7       that it agreed with the State's contention there that if  
8       the permit condition serves the same purpose as an  
9       outright denial would have done, that -- that the  
10      condition can be imposed. That's all the Court required.

11                  QUESTION: Is that all, just -- just -- you  
12       really think that's -- that Nollan said, for -- suppose  
13       the City is worried about urban congestion and pollution  
14       and someone who has a factory wants to -- wants to expand  
15       it infinitesimally, just a very little bit. Can the State  
16       require, as a condition of that permit, a million-dollar  
17       contribution to the City, which would go to -- to  
18       pollution reduction?

19                  MR. KNEEDLER: No. As --

20                  QUESTION: It serves the same purpose.

21                  MR. KNEEDLER: As we suggested in our brief, if  
22       the -- if -- and, in fact, Respondent seems to agree with  
23       this at page 19 of our reply brief, with our formulation,  
24       which is if -- if the landowner can show that the  
25       conditions being imposed is wholly out of relation to the

1 -- to the adverse impact --

2                   QUESTION: There is a proportionality element?

3                   MR. KNEEDLER: But -- but -- we think not in its  
4 own right. But it goes to a measure -- it goes to  
5 determining whether this is ultimately a land use  
6 regulation, as opposed to serving some other purpose.

7                   In Nollan, the Court articulated the question as  
8 whether the condition serves the same purpose. And the  
9 Court there concluded the condition did not. Because it  
10 did not serve the same purpose, the Court said it  
11 converted what was a legitimate land use regulation into  
12 something else. And we think that the same principle  
13 might well apply by virtue of gross disproportionality or  
14 no relation, it would convert land use regulation to  
15 something that's not.

16                  It's really a question of subterfuge or  
17 something in the nature of pretext -- is what the City is  
18 trying to do something other than land use regulation?  
19 But where that's not present, conditions serving the same  
20 purpose as a permit denial are -- are not something that  
21 are inherently suspect, but in fact are to be encouraged.  
22 They -- they discourage -- otherwise, a city could be  
23 encouraged to deny permits all the time, and have a rigid  
24 land use regulation scheme.

25                  But permit conditions that serve the same

1 purpose as the ultimate denial might afford flexibility to  
2 both sides. The City has ways in which to promote its  
3 environmental, its flood control, its traffic problems,  
4 and the landowner can dedicate an easement and get on with  
5 the work on his or her own property.

6           QUESTION: So, there's no proportionality  
7 requirement, but -- but proportionality is a subject of  
8 evidence to indicate whether in fact the required  
9 relationship -- i.e., serving the same purpose -- is  
10 present or not?

11           MR. KNEEDLER: That -- that's correct. It's an  
12 outer limit or -- or a touchstone for determining whether  
13 the same purpose should be served. And this is -- this is  
14 not a -- a principle unique to this Court's takings  
15 jurisprudence, it applies --

16           QUESTION: That seems to kind of ignore the word  
17 "substantial" in the test articulated in Nollan.

18           MR. KNEEDLER: But in -- in our view, the word  
19 "substantial" -- substantially advancing a governmental  
20 purpose -- to the extent it means something other than a  
21 reasonable relationship, we think goes to the question of  
22 whether the overall regulatory scheme furthers a  
23 governmental interest. And if the permit denial would --  
24 would further -- would substantially --

25           QUESTION: Well, I hadn't read it that way, but

1 I guess that's a way one could read it.

2 MR. KNEEDLER: Well, Nollan does -- does -- if  
3 we take as a given that the permit denial would  
4 substantially further the governmental interest, and if  
5 the permit condition serves the same purpose, it's lesser  
6 included, and therefore would substantially further the  
7 same purpose. We think that that -- that that would --  
8 that that would ordinarily follow as -- as a matter of  
9 course. And --

10 QUESTION: The burden, I assume, would be -- on  
11 your theory, would be on the landowner to show the  
12 disproportionality?

13 MR. KNEEDLER: Correct. Correct.

14 And this question of -- of relevance or  
15 germaneness is a principle this Court has applied in a --  
16 in a number of situations where -- where conditions are  
17 attached to expenditure of governmental funds or other  
18 governmental programs.

19 QUESTION: And are these tests relevant to an  
20 ultimate determination of whether what the City is doing  
21 is simply a pretext for furthering its own goals that do  
22 not proportionally relate to the property?

23 MR. KNEEDLER: Right -- we don't think it's  
24 necessary to inquire into the actual subjective  
25 motivation. But it's in the nature of a pretext inquiry.

1 As the Court said, again, in -- in Nollan, if it serves a  
2 different purpose, it converts the land use regulation to  
3 something else. And that's where we think proportionality  
4 does enter into it.

5                   QUESTION: Can -- could I come back to who the  
6 burden is on? You mean that a municipality, all it has to  
7 do is say, you know, there may be a thimble full of water,  
8 we're not going to do any studies, and therefore, we want  
9 10 percent of your land for flood control, and -- and the  
10 burden is shifted to Mrs. Dolan to do a study, to show  
11 that that is disproportionate?

12                  MR. KNEEDLER: No --

13                  QUESTION: Why should the burden be on her?

14                  MR. KNEEDLER: The City -- the City can't just  
15 assert that with -- without foundation, I think. But  
16 that's not at all what happened here. It's typical for  
17 Congress, for agencies, for cities --

18                  QUESTION: Well, what do you mean without  
19 foundation?

20                  MR. KNEEDLER: Well --

21                  QUESTION: Why isn't the burden on the City to  
22 demonstrate some rough proportionality?

23                  MR. KNEEDLER: What the City did was to adopt a  
24 code of general applicability, which -- which states, for  
25 example, that -- that increasing impervious surfaces will

1 increase runoff and increase flooding, as one example.  
2 And then the burden shifts to the landowner to say that  
3 this condition will not -- will not further the same  
4 purpose.

5                   QUESTION: That just shows you're in the same  
6 general ball park, flood control. But why doesn't the  
7 City have -- have the burden of showing that it's roughly  
8 proportional? That's an awful burden to put on the -- on  
9 the small individual property owner, to conduct a massive  
10 study to demonstrate that the City's wrong. All the City  
11 has to say is, well, flood control is flood control. One  
12 way to do it is to -- is to not expand your property.  
13 Another way to do it is to give us 10 percent of your  
14 property for --

15                  MR. KNEEDLER: The question is not principally  
16 one of quantification, but logical relatedness of the  
17 condition to the -- to the impact being addressed.

18                  QUESTION: Thank you, Mr. Kneedler.

19                  Mr. Smith, you have four minutes remaining.

20                  REBUTTAL ARGUMENT OF DAVID B. SMITH

21                  ON BEHALF OF PETITIONER

22                  MR. SMITH: Thank you, Mr. Chief Justice.

23                  QUESTION: Will you cover some of the  
24 contentions about the variances and so forth?

25                  MR. SMITH: Yes, Mr. Chief Justice.

1                   On the -- on the matter of a variance, I don't  
2 believe that it is appropriate for the City to establish a  
3 requirement for the dedication of real property and thrust  
4 upon the private property owner the unreasonable demand  
5 that in order to escape from having to surrender a fee  
6 title or an easement to the Government, it is necessary  
7 for them to go through a variance procedure in order to  
8 get out from under what would otherwise be an  
9 unconstitutional taking of private property.

10                  QUESTION: Well, what about the availability of  
11 conditions -- of -- of alternatives that she could have  
12 invoked and that the City would have had to accept as a  
13 matter of right?

14                  MR. SMITH: Your Honor, I don't believe that  
15 there were such alternatives. And I don't believe that  
16 the record supports that contention. And I have noted in  
17 appendix G of the petition for certiorari, at page G-12  
18 and G-14, two recitations that I think belie my  
19 distinguished colleague's representation that they do.

20                  This -- and I quote here from pages G-11 and  
21 G-12, where the City, in its findings, said, it appears to  
22 be impractical to perform the proposed reconstruction of  
23 Main Street on a piecemeal fashion, on a lot-by-lot basis.  
24 Therefore, we do not propose that any reconstruction of  
25 Main Street be required as a condition of approval of this

1 development proposal.

2                   Similarly, at page G-14, the City says,  
3 requiring surface water quality facilities on small sites,  
4 which certainly one and two-thirds acres is, could result  
5 in numerous facilities that could become a maintenance  
6 burden on the City. Furthermore, the applicant does not  
7 propose any such facilities, and there are no natural  
8 depressions or other areas of this site that are  
9 particularly suitable for water -- water quality features.

10                  I think that -- that answers both questions as  
11 to whether the City honestly believed that Mrs. Dolan  
12 could have avoided the dedications by engaging in either  
13 improvements to Main Street or the establishment of an  
14 onsite water quality impoundment facility.

15                  QUESTION: Do you agree with your colleague that  
16 the Oregon Supreme Court didn't consider the availability  
17 of variances, and they were not argued to the Oregon  
18 Supreme Court?

19                  MR. SMITH: That is correct, Mr. Chief Justice.

20                  I would -- would make one more point about  
21 proportionality. And that is, very essentially, that  
22 unless there is some requirement for proportionality  
23 between actual impacts and dedications, that even the most  
24 strenuous of dedications could have been required. The  
25 City could have found that Mrs. Dolan's new store would

1 have increased traffic by one additional vehicle trip per  
2 day. In the absence of proportionality, the City could  
3 have required her to dedicate 75, 95 percent of her land  
4 for a widening of Main Street.

5 No proportionality. We have our rational  
6 relationship. The City gets it. And there's no fairness.  
7 There's no justice. And what this Court said in Armstrong  
8 has no meaning at all.

9 QUESTION: Do the other State plans that you  
10 referred to in your main presentation -- New Jersey and  
11 elsewhere -- do they provide for some proportionality?

12 MR. SMITH: Yes, Your Honor, they do.

13 And, in fact, there is at least one State that I  
14 am told -- the State of -- I believe it's Virginia -- that  
15 even requires the old Illinois test and requires even a  
16 heightened degree of proportionality that puts an extreme  
17 burden on Government.

18 And it's noteworthy that -- that both the New  
19 Jersey and Wisconsin tests were adopted in the 1960's,  
20 well before this Court established its ruling in Nollan,  
21 and they have worked quite well.

22 Thank you, Mr. Chief Justice.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Smith.  
24 The case is submitted.

25 (Whereupon, at 11:04 a.m., the case in the

1 above-entitled matter was submitted.)  
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**FLORENCE DOLAN, Petitioner v. CITY OF TIGARD**

**CASE NO.: 93-518**

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