Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions

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TABLE OF CONTENTS

INTRODUCTION 104
I. THE STUDY 108
A. *Methodology* 108
B. *Why California?* 109
II. THE TAKINGS LANDSCAPE 112
III. THE RESULTS 115
A. *Planners' Knowledge of Decisions* 116
B. *Effects of* Nollan *and* Dolan *on Exactions/Impact Fees* 117
1. Cumulative Impacts and Long-range Planning 120
a. Circumstances Leading to Excessive Exactions 120
b. Higher Impact Fees in Developing Communities 122
2. The Academic Commentary 125
3. The Supreme Court View 131
C. *Types of Exactions and Fees Affected by* Nollan *and* Dolan 132
1. Types of Exactions Challenged Most Often 132

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HeinOnline -- 35 U.C. Davis L. Rev. 103 2001-2002

2. Types of Exactions that Pose Particular Legal Difficulty ... 134
3. The Effect of Land Exactions versus Fees ... 137
D. *More General Effects of the Shift in Takings Doctrine* ... 138
1. Frequency of Takings Objections and Threats ... 138
2. Effects of Takings Decisions on Planning Process More Generally ... 142
E. *The Takings Controversy and Popular Political Currency* ... 143
1. El Dorado County and the General Plan Update Process ... 147
2. Santa Cruz County and the Trails Master Plan ... 151
3. Public Access at Whaler's Cove ... 154
CONCLUSION ... 156
APPENDIX A ... 158
APPENDIX B ... 164

INTRODUCTION

For years, the Takings Clause has engendered extensive intellectual interest.[1] Since 1987, the Supreme Court has given scholars ample material to expound upon by deciding numerous takings cases, virtually all of them in favor of the property owner. Yet little takings scholarship addresses how Court doctrine actually shapes the behavior of those most affected by it.

In this Article, we provide extensive empirical evidence about the experience California municipalities have had responding to the Court's takings jurisprudence. We provide data from a survey of planners in a majority of California cities and counties to determine how their jurisdic-

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[1] *See generally* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); WILLIAM FISCHEL, REGULATORY TAKINGS (1995); Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991); Lawrence E. Blume & Daniel L. Rubinfield, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569 (1984); Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741 (1999); Daniel A. Farber, *Economic Analysis and Just Compensation: An Anti-Discrimination Theory of Takings*, 12 INT'L REV. OF LAW AND ECON. 125 (1992); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163 (1999); Michael Heller & James Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997 (1999); Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law,"* 80 HARV. L. REV. 1165 (1967); Carol M. Rose, Mahon *Reconsidered: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) [hereinafter Sax, *Police Power*]; Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) [hereinafter Sax, *Public Rights*].

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tions have reacted to *Nollan v. California Coastal Commission*[2] and related takings decisions. We also describe extensive qualitative research, including several in-depth case studies of particular takings-related disputes in California.[3] We offer our evidence as an antidote to the theoretical literature and use it both to analyze the ways in which land use practices have changed since 1987 and to evaluate the assumptions underlying several leading theories about the appropriate reach of the Takings Clause.

Our most surprising and counterintuitive conclusions involve the ways in which the new constitutional standards established by *Nollan* and a follow up case, *Dolan v. City of Tigard*,[4] have affected municipal planning behavior. The cases now require a local government, seeking to "exact" land from a developer in exchange for granting development approval, to establish that the exaction bears an essential nexus and is roughly proportional to the impact of the development. The cases initially engendered fears about their potentially chilling effects on land use practices. Yet we found that some types of communities—growth areas with large amounts of developable land—have reassessed their exactions policies in light of the decisions and have found that the essential nexus and rough proportionality requirements actually support large *increases* in fees imposed on development. The decisions seem to have nudged many localities into more systematic, comprehensive planning through the preparation of reports and studies justifying and documenting the rationale for exacting money or land from developers. In some jurisdictions this systematic planning has led to higher, not lower, fees imposed on developers. Contrary to initially negative reactions to the Court decisions, we found that an overwhelming percentage of California planners now view the *Nollan* and *Dolan* cases not as an encroachment upon their planning discretion but instead as establishing "good planning practices."

Though developing suburbs may fare well under the takings decisions, we also found that the decisions more negatively constrain the land use practices of highly built out urban communities with little available vacant land. Such communities, especially those with significant unfunded infrastructure needs, may face the greatest temptation to

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[2] 483 U.S. 825 (1987).

[3] *See* DANIEL POLLAK, CALIFORNIA RESEARCH BUREAU, HAVE THE U.S. SUPREME COURT'S 5TH AMENDMENT TAKINGS DECISIONS CHANGED LAND USE PLANNING IN CALIFORNIA? (2000) (summarizing survey and case studies author conducted in 1999 and 2000).

[4] 512 U.S. 374 (1994).

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impose "excessive"[5] exactions on developers, particularly if they have not sufficiently engaged in comprehensive, long-range planning and lack the ability to spread the costs of development impacts among all developers. The new standards set forth by the Court in *Nollan* and *Dolan* may restrict such local government practices. Although less developed communities may also attempt to impose excessive exactions on developers, they are likely to act with greater restraint because of competitive pressures from neighboring jurisdictions.

Our finding about this divide between developing communities, who may use the decisions to charge developers higher fees, and urban communities, who may find themselves with fewer options for offsetting the costs of development and financing infrastructure needs, could have larger significance for more general urban issues. If the divide persists and is widespread, it could exacerbate pre-existing urban-suburban divisions over traffic woes, substandard school conditions, the provision of affordable housing and other pressing local government concerns.

The distinction between community types and how they fare under the decision also sheds light on an important academic debate. A number of scholars have devoted considerable attention to evaluating whether the Supreme Court was correct in subjecting local government development decisions to heightened scrutiny under the Takings Clause. The academic debate has generally divided along two lines: either subject all local government development decisions to heightened scrutiny because the process of decision-making is likely to result in decisions that extract too much from private property owners;[6] or defer to local government decision-making because localities face competitive pressures to treat developers fairly, making heightened judicial review unnecessary.[7]

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[5] We use the term "excessive amounts" to refer to the practice of extracting fees and/or land from new development in excess of the public burdens (e.g., increased traffic, sewage, school usage) the new development will create. The Court decisions in *Nollan* and *Dolan* are presumably aimed at the use of excessive exactions. See discussion *infra* at n. 30-33.

[6] *See* FISCHEL, *supra* note 1, at 139 (reasoning heightened scrutiny is necessary because private owners may be harmed). For thoughtful critiques of Fischel, *see* James E. Krier, *Takings from Freund to Fischel*, 84 GEO. L.J. 1895 (1996); Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121 (1996).

[7] *See* Been, *supra* note 1. *But see* Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831 (1992) (criticizing Been's argument). *See generally* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (arguing political process should resolve question of when government can affect property interests).

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Our evidence, however, suggests a third, more nuanced possibility. Jurisdictions near build-out with significant unfunded infrastructure needs may more predictably attempt to extract excessive amounts from developers. Other communities, particularly those with large amounts of developable land who are instituting mechanisms to spread the public costs of development across all new development, seem to provide ample protection to developer interests and indeed often undercharge developers for the public costs their projects create.

Our survey and case studies also lead us to other interesting conclusions. We found, for example, that the *Nollan* and *Dolan* cases appear to encourage many jurisdictions to shift away from demanding land exactions from developers and toward imposing fees. Impact fees may generate fewer constitutional concerns because jurisdictions can more easily tailor them to the impacts created by a specific development.[8]

Moreover, our evidence shows that the Court decisions have affected municipalities' use of specific categories of exactions, and some of our results seem counterintuitive. For example, the most frequent category of exaction raising takings objections turns out to be traditional transportation-related exactions aimed at requiring developers to build or modify roads, interchanges or overpasses.[9] Given the less traditional exactions at issue in *Nollan* (an easement over beachfront property) and *Dolan* (land for a bike path) we found the frequency with which localities face challenges to traditional transportation-related exactions surprising. By the same token, and more predictably, exactions for less traditional forms of infrastructure or public goods, such as recreational, environmental, or natural resource amenities, appear to pose special problems for jurisdictions attempting to meet the *Nollan* and *Dolan* standards. As a result, jurisdictions will now likely impose such exactions less frequently. Whether the reduced use of environmentally related exactions will alter the physical environment of local communities permanently remains to be seen.

Finally, three of our case studies provide interesting information relevant to a debate central to the Fifth Amendment: the appropriate scope of the Takings Clause. The circumstances under which the government must compensate property owners for regulations that reduce the value of individual property have generated court attention and scholarly de-

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[8] For a discussion of whether *Nollan* and *Dolan* apply to impact fees *see infra* text accompanying notes 48-49.

[9] This category does not include less traditional transportation exactions such as the bike path at issue in *Dolan*.

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bate for decades. Although the Court has "generally eschewed" any "set formula" for determining the circumstances under which regulated property owners should receive just compensation,[10] numerous scholars have proposed such formulas. These formulas include as a factor, in one form or another, community sentiment about whether a particular property owner should be compensated for the loss in value to her property as a result of a government regulation. Our case studies suggest that the Court's own rulings on takings may in fact influence the public's view on whether a property owner should receive just compensation. Moreover community sentiment can be deeply divided about the appropriateness of compensation. Both findings complicate any proposed takings formula that takes into account community sentiment.

In analyzing the foregoing issues, this article proceeds in the following fashion. In Part I we first present our research methodology. We then describe why California proves a particularly interesting jurisdiction on which to focus in evaluating the effects of the takings decisions on local government decision-making. In Part II we provide a brief overview of the now familiar Supreme Court takings terrain in order to situate our empirical findings. In Part III we turn to the data and focus first on the ways in which the decisions affect the use of exactions to offset the impacts of proposed developments. We also present evidence about the frequency and impacts of takings challenges, about the ways in which planners view the Court decisions, and about how their jurisdictions have changed policies and practices as a result. We then describe three community battles in which the takings debate has played a central role in order to demonstrate the fluidity of public opinion about what constitutes a taking. Finally, we conclude by discussing the implications of our research.

I. THE STUDY

A. Methodology

The empirical evidence we present here has two sources. One is an extensive survey that Daniel Pollak of the California Research Bureau mailed to the planning directors of every city and county in the State of California. The survey attempted to gauge planners' knowledge of takings law, the impact of takings jurisprudence on land use planning and

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[10] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (citations omitted).

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regulation, and its impact on localities' use of exactions and fees.[11] Thirty-seven out of 58 California counties (64%) and 274 out of 472 cities (58%) responded to the survey.[12]

Pollak also conducted interviews, as well as field and archival research, to document instances in which the takings cases influenced local government policy or decision-making. Such research formed the basis for six detailed case studies. The case studies focus on a debate involving traffic infrastructure in the City of Murrieta, a rapidly developing community in Southern California; a dispute in Santa Cruz County over exactions for public trails; a struggle over public access to a public beach in Northern California via private property (nearly identical to the subject of the *Nollan* case); a debate around a general plan update process in rural Northern California; a decision by the City of West Sacramento over whether to demand an exaction from a service station developer for a regional bike path; and a decision by the City of Santa Rosa to create a new capital facilities fee to charge developers. Though the case studies are anecdotal, they were selected because they seemed fairly typical of situations throughout the state in which the new takings jurisprudence influenced the outcome of local land use decisions.

B. Why California?

No state has played a more significant role in United States Supreme Court takings jurisprudence over the past two decades than California. California governments and their constituents have played starring roles in four significant takings cases since 1987: Fred Nollan battled the California Coastal Commission;[13] the First English Evangelical Lutheran Church of Glendale took on Los Angeles County;[14] the Monterey-Del Monte Dunes Corporation charged that the City of Monterey had taken its property without just compensation;[15] and Bernadine Suitum levied the same allegation against the Tahoe Regional Planning Agency ("TRPA").[16] Each case involved challenges to California governmental

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[11] The survey questions are contained in Appendix A.

[12] The sample of respondents is not, of course, random. We attempt to account for potential bias and to analyze those who responded in Appendix B. Southern California localities responded to the survey disproportionately, though all regions of the state had at least a 50% response rate, and larger jurisdictions responded in greater percentages.

[13] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

[14] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

[15] City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687 (1999).

[16] Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997). The TRPA is techni-

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authority to regulate development, and the trend since the *Nollan* and *First English* cases in 1987 has clearly been in favor of tighter limits on governmental entities, particularly local governments charged with development authority.

As evidenced by the number of significant takings cases, California local governments provide an interesting laboratory for a number of reasons. First, the state is huge, both geographically and economically. The state's size means that there are a large number of state jurisdictions that face widely varied problems.[17] For example, California has small rural counties that face stagnant growth, enormous cities that face rapid growth, cites that have little vacant land on which to expand, and new jurisdictions that have sprung up to accommodate growth pressures. Accordingly, we analyzed much of our survey data with such differences in mind to determine, for example, whether high growth cities respond differently to the takings decisions than stagnant growth rural counties.

Second, California's local governments often lead the country in land use innovations, many of them controversial.[18] California obviously led the way in the local property tax reform movement when it enacted Proposition 13 in 1978. The state has continued to innovate via voter initiative in demanding that localities seek voter approval for new taxes.[19] California localities also led the way in adopting growth control measures in the 1970s, a practice that continues unabated today[20] and that of-

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cally not a California governmental entity, but rather an interstate agency established as the result of a 1969 compact between Nevada and California to govern and manage Lake Tahoe. *Id.* at 729. The Supreme Court just granted certiorari to hear another takings challenge to the TRPA's temporary growth moratorium and will hear the case next term. *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 150 L. Ed. 2d 749 (2001) (granting cert.). California also played prominent roles in takings disputes before the recent shift in doctrine. *See, e.g.*, San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 631 (1981) (dismissing takings challenge against open space designation as unripe); Agins v. City of Tiburon, 447 U.S. 255, 263 (1980) (dismissing takings challenge against growth control ordinance).

[17] California has 58 counties and 472 cities ranging in population size from 1,220 in Alpine County to 9,716,100 in Los Angeles County. Cal. Dep't of Fin., Demographic Research Unit, http://www.dof.ca.gov/html/domgrap/e2xls. (last visited Sept. 28, 2001).

[18] *See* FISCHEL, *supra* note 1, at 218-52 (devoting entire chapter to California's innovative and controversial land use measures).

[19] *See* Kirk Stark, *The Right to Vote on Taxes*, 96 NW. U. L. REV. (forthcoming 2001) (analyzing right to vote on taxes movement with special emphasis on California).

[20] *See* Lori Weisberg, *Curbing Growth Was on Voters' Minds*, SAN DIEGO UNION TRIB., Nov. 9, 2000, at A3 (reporting slow growth advocates prevailed on 35 out of 54 growth-related initiatives).

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ten engenders takings challenges.[21] The state's local jurisdictions have also relied heavily on exactions from developers in order to pay for the costs associated with growth.[22] The Supreme Court has obviously targeted this practice for special review under *Nollan* and *Dolan* and it is an increasingly common practice around the country.

With that said, we note that extrapolations from the California data should take into account the ways in which California may differ from other states. The very innovations that California has spearheaded make California unusual. Proposition 13, for example, dramatically alters the revenue raising options at the disposal of local governments by eliminating property tax increases as a policy choice. The right to vote on taxes requirement makes other local government revenue raising options quite onerous to implement. These tax limitations help explain why California localities rely so heavily on developer exactions and may explain why California local governments have figured so prominently in takings challenges.

The tax limitations may also lead California localities to favor certain kinds of development over other kinds. Many observers have noted that California local governments now work assiduously to attract retail businesses that generate sales tax revenue. Localities do this rather than approve new housing development because housing generates less revenue due to Proposition 13's tax limitations than retail development generates through increased sales taxes.[23]

California also faces growth pressures not applicable to some other states. In the past two decades California's population has grown 42 percent and analysts predict a 33 percent increase in population by 2020.[24] California local governments face growth challenges, and hence

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[21] *See* San Diego Gas & Elec. Co., 450 U.S. 621 (challenging San Diego's growth control ordinance); Agins v. City of Tiburon, 447 U.S. 255 (challenging Tiburon's growth control ordinance). For a critical view of growth control measures see Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977); Robert C. Ellickson, *Preface: The Effect of Growth Controls on Housing Prices on the San Francisco Peninsula*, 4 STAN. ENVTL. L.J. 3 (1982)

[22] *See* MARLA DRESCH & STEVEN M. SHEFFRIN, PUB. POL'Y INST. OF CAL., WHO PAYS FOR DEVELOPER FEES AND EXACTIONS? (1997) (discussing incidence and use of developer fees in California). *See generally* ALAN A. ALTSHULER & JOSE A. GOMEZ-IBANEZ, REGULATION FOR REVENUE (1993) (providing overview of rise of developer fees and exactions nationally); Been, *supra* note 1, at 478-83 (providing national overview of various exactions throughout U.S.).

[23] For a discussion of this point see, e.g., WILLIAM FULTON, THE RELUCTANT METROPOLIS: THE POLITICS OF URBAN GROWTH IN LOS ANGELES (1997); Paul Lewis & Elisa Barbour, *California Cities and the Local Sales Tax*, PUB. POL'Y INST. OF CAL. (1999).

[24] DEP'T OF FIN., STATE OF CALIFORNIA, INTERIM COUNTY POPULATION PROJECTIONS

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opportunities for extracting land and money from developers, in ways that states with stagnant or declining growth may not. Finally, California's statutory and case law governing land use development may differ in significant ways from other states in ways that could alter localities' land use practices. For example, in 1993 the California Supreme Court extended the exaction standards developed in *Nollan* and *Dolan* to impact fees, based in part on a California statute, the Mitigation Fee Act, (AB 1600), that requires localities to determine whether a "reasonable relationship" exists between impact fees and the effects of the development on which the fees will be assessed.[25] As a result, it is unclear whether the *Nollan/Dolan* standards will be applied in the same manner as a matter of federal constitutional law in other jurisdictions around the country, though a number of states have weighed in on the matter.[26]

II. THE TAKINGS LANDSCAPE

The shift in the United States Supreme Court's position toward takings challenges is well-known: the Court has moved from an attitude of deference to governments toward a stance that more rigorously protects property rights. In 1922, the Court handed down its famous decision in *Pennsylvania Coal Co. v. Mahon* holding that a government regulation that goes "too far" can work a taking under the Fifth Amendment.[27] Between 1922 and 1982, the Court virtually always found in favor of the government in regulatory takings cases. In 1982, the Court began a new pattern

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(2001) *at* http://www.dof.ca.gov/HTML/DEMOGRP/repndat.htm (visited Aug. 9, 2001).

[25] Ehrlich v. City of Culver City, 12 Cal. 4th 854, 865, 911 P.2d 429, 437-38 (1996).

[26] *See infra* text accompanying notes 48-49 for a more extensive discussion of this point, and *infra* note 49 for citations to state court cases that have addressed the issue.

Additionally, California, like many states, has a statute that requires governmental entities to consider the environmental effects of their decisions. *See* CAL. GOV'T CODE §§ 21050 (West 2001). The scope of California's Environmental Quality Act (CEQA) is, however, much broader than in many other states. In 1972, the California Supreme Court extended its environmental review requirements to public approval of private development projects in *Friends of Mammoth v. Bd. of Supervisors*, 8 Cal. 3d 247, 257, 502 P.2d 1049, 1055, 104 Cal. Rptr. 761, 767 (1972), a requirement the state legislature subsequently codified in CAL. PUB. RES. CODE § 21065(c) (West 2001). The application of CEQA to private developments may alter the relationship between local officials and private developers in a manner not present in states without such a requirement. For example, local governments may impose exactions in order to comply with CEQA's requirement that the environmental effects of a proposed development be mitigated. CEQA does not provide independent authorization to impose exactions but local governments may use their authority from other sources to impose CEQA-related exactions. DANIEL J. CURTIN, JR. & CECILY T. TALBERT, CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW 264 (2001).

[27] 260 U.S. 393, 415-16 (1922).

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by deciding numerous cases in favor of the property owner.[28]

In *First English Evangelical Lutheran Church v. County of Los Angeles*, the Court decided a case with potentially major implications for local government regulatory activity. In the case the Court held that governments must compensate property owners who successfully challenge a regulation under the Takings Clause rather than simply repealing the offending regulation.[29] Prior to the decision a locality could avoid paying monetary damages for so-called "temporary takings" simply by eliminating the challenged regulation. Accordingly, the stakes for local governments in enacting constitutionally-iffy ordinances are significantly higher as a result of *First English*. Local governments may become more risk averse with respect to regulations that raise some question about whether in fact they work a taking.

In the same year the Court decided *First English*, it also established a new constitutional standard to apply to development exactions in *Nollan v. California Coastal Commission*.[30] The Court later extended the *Nollan* standard in *Dolan v. City of Tigard*.[31] *Nollan* involved a landowner who sought to increase the size of a house located along the coast in southern California. In order to do so he needed approval from the California Coastal Commission, which gave Nollan the right to build a larger house in exchange for his grant of a public easement along the sandy beach in front of his home. Nollan challenged the Coastal Commission's demand for an exaction as a taking under the federal constitution. The high Court agreed and established a new standard for evaluating development exactions. The *Nollan* Court held that if a local government demands an exaction in exchange for the right to develop, there must be an "essential nexus" between the exaction and the impact of the development. In the Court's words, "the condition. . . [must] further the end advanced as the justification for" an outright ban on development.[32] The Coastal Commission's exaction, in the Court's view, bore no relationship to the reason for a development ban (to protect coastal views).

In extending *Nollan*, the *Dolan* Court found that an exaction the City of Tigard demanded of a property owner who wished to expand her hardware store — the dedication of land for a bike path and for the im-

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[28] In that year the Court decided a relatively obscure case, *Loretto v. Teleprompter Manhattan*, 458 U.S. 419 (1982), in favor of the property owner, even though the *Loretto* holding is quite limited and of relatively small consequence to local governments.

[29] 482 U.S. 304, 318-20 (1987).

[30] 483 U.S. 825, 837 (1987).

[31] 512 U.S. 374, 391 (1994).

[32] 483 U.S. at 837.

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provement of a storm drainage system — met the essential nexus test The Court nevertheless held that the City must demonstrate that the required exaction be "roughly proportional" to the impact of the development. In the case of the storm drainage land, the Court ruled that the exaction was too onerous since the City could have simply prohibited Dolan from building on the land rather than requiring her to dedicate it to the City. In the case of the bike path the Court held that the City had failed to make a sufficiently individualized determination that the impact of the development warranted the dedication of the bike path.[33] Thus, *Dolan* now requires localities to justify any exactions they demand of developers through an "individualized determination." *Nollan* and *Dolan* together establish a two- tiered test to determine the constitutional validity of exactions: the exaction must bear an essential nexus to the impact of the development and must also be roughly proportional to any harm the development causes.

Finally, two additional Supreme Court cases merit brief description. In *Lucas v. South Carolina Coastal Council*, the Court held that a governmental regulation that deprives property of "all economically beneficial or productive use of land" constitutes a taking of property.[34] However, *Lucas* does create an exception to this "categorical" rule where the regulation merely prohibits uses of property that constitute a common law nuisance or codifies restrictions in the state's background property laws.[35]

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[33] 512 U.S. at 395-96.

[34] 505 U.S. 1003, 1015 (1992).

[35] *Id.* at 1031. In an extremely important footnote in *Lucas*, the Court also provided guidance for determining which "property interest" the loss of value is to be measured against. *Id.* at 1016 n.7. As an example, the Court stated that "it is unclear" whether the *Lucas* categorical rule would apply to a regulation that requires a developer to leave 90% of a rural area undeveloped. *Id.* The rule would apply if the "property interest" was the land burdened with the regulation, severed from the total tract the developer owns. *Id.* The *Lucas* rule would not apply if the developer's total tract of land constituted the "denominator in [the] 'deprivation fraction. . . ". *Id.* Though the Court left open the question, it suggested that the answer "may lie in how the owner's reasonable expectations have been shaped by the State's law of property – i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Id.* Margaret Jane Radin labels this issue "conceptual severance." Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988).

The Court decided another important takings case last term. *See* Palazzo v. Rhode Island, 121 S. Ct. 2448 (2001) (deciding inverse condemnation action). The *Palazzo* case has important implications for both ripeness issues and for whether a property owner who acquires property after the imposition of a regulation that diminishes the property's value may challenge the regulation under the Takings Clause. *Id.* at 2458. Our survey obviously

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In the most recent takings case to reach the Supreme Court before we sent out our survey, *Del Monte Dunes v. City of Monterey*, the Court held that the *Dolan* rough proportionality standard is not applicable to local government decisions to deny development rights altogether. Instead, the Court concluded that the more traditional takings test should apply.[36] In its simplest formulation the test requires courts to invalidate regulations only if they fail to substantially advance a legitimate state interest or deny owners all economically viable uses of land.[37]

In short, over the past 14 years the Supreme Court has issued decisions that potentially alter the relationship between local government regulators and the regulated community, particularly the development community. Temporary takings now require monetary compensation; courts will review development exactions with greater scrutiny; local governments must justify development exactions more carefully; and absolute denials of development will constitute per se takings except under narrow circumstances. We now turn to our evidence about how local governments in California have fared as a result of the Supreme Court's more recent jurisprudence.

III. THE RESULTS

Much of the empirical evidence we gathered focuses on the ways in which the Supreme Court's takings decisions have affected exactions, either in kind or in fee. Because the *Nollan* and *Dolan* cases imposed new, explicit obligations on localities that impose exactions, we found, not surprisingly, that the takings decisions affected exaction practices most directly. We conclude from our evidence that *Nollan* and *Dolan* penalize ad hoc decisions to impose exactions—a practice that seems more likely

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did not include questions about the *Palazzo* case, however, so we refrain from analyzing it here.

[36] Del Monte Dunes v. City of Monterey, 526 U.S. 687, 703 (1999). The *Del Monte Dunes* Court also held that under some circumstances takings plaintiffs have a right to a jury trial. *Id.* at 703.

[37] Agins v. City of Tiburon, 447 U.S. 255 (1980). The Court has never been entirely clear about the traditional test to apply in a regulatory takings challenge, acknowledging in *Lucas* that "we have generally eschewed any 'set formula' for determining how far is too far [a diminution in value for takings purposes], preferring to engage in . . . essentially ad hoc factual inquiries." 505 U.S. at 1050. Factors relevant to such ad hoc factual inquiries include the extent of the diminution in economic value as a result of the regulation, the degree to which the regulation interferes with the distinct investment-backed expectations of the property owner and the character of the government harm. The takings decisions have been sufficiently opaque as to be labeled "a mess" and a "muddle" by prominent legal scholars. Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279 (1992); Rose, *supra* note 1.

HeinOnline -- 35 U.C. Davis L. Rev. 115 2001-2002

to occur in heavily urbanized areas—but may actually encourage the imposition of higher impact fees across a wider number of development projects in developing communities. We also suggest that *Nollan* and *Dolan* may disfavor land exactions and may make the imposition of impact fees more constitutionally palatable. After our exaction discussion we present evidence about the frequency and type of takings objections and the role takings rhetoric has played in three contentious land use debates.

A. Planners' Knowledge of Decisions

To set the stage for additional survey questions, the survey first asked city and county planners about their knowledge of recent significant U.S. Supreme Court takings cases.[38] The responses showed that California planners have a high awareness of the cases, particularly of *Nollan* and *Dolan*, the two cases that most directly affect their every day practice.[39] For example, as Table 1 indicates, 76% of county planners and 62% of city planners described themselves as "very familiar" with *Nollan*, while no county planners and fewer than 10% of city planners report no familiarity with the decision. The remaining planners describe themselves as somewhat familiar with the decisions. Planners' familiarity with the other cases we asked about was highest for *First English*, and then declined for *Lucas*, *Suitum* and *Monterey Dunes*, respectively.

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[38] For the full text of the survey see Appendix 1.

[39] At least four relatively recent works have found that knowledge of particular legal rules is surprisingly low even among those directly affected by the rules and even among those with direct involvement in their enforcement. *See* ROBERT ELLICKSON, ORDER WITHOUT LAW 48-52 (1991) (discussing layman and legal specialists' knowledge of trespass law); Robert Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 668-69 (1986) (finding no one in Shasta County, layman or professional, with complete understanding of formal trespass rules, including local lawyers); Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1977) (noting same findings for workers in Missouri); Pauline T. Kim, *Norms, Learning and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 448 (1999) (finding workers in New York and California consistently overestimate their employment rights and do not understand at will employment is default legal rule, with no significant difference in legal understanding among unionized workers, those responsible for hiring and firing). Our survey suggests that California city and county planners have more knowledge of takings jurisprudence, though our question asks only for a self-assessment of familiarity with the cases. The Kim and Ellickson studies of legal knowledge among workers and Shasta County residents, respectively, involve much more extensive surveying.

HeinOnline -- 35 U.C. Davis L. Rev. 116 2001-2002

TABLE 1: FAMILIARITY WITH U.S. SUPREME COURT CASES

How familiar are you with the following U.S. Supreme Court cases and their legal implications?[40]

	Familiarity With U.S. Supreme Court Cases					
	CITIES (n = 273)			COUNTIES (n = 37)		
Case	Not	Somewhat	Very	Not	Somewhat	Very
First English	10%	49%	42%	0%	46%	54%
Nollan	4%	35%	62%	0%	24%	76%
Dolan	8%	35%	58%	0%	30%	70%
Lucas	36%	39%	25%	17%	39%	44%
Suitum	48%	38%	15%	38%	35%	27%
Del Monte Dunes	54%	38%	8%	35%	49%	16%

B. *Effects of* Nollan *and* Dolan *on Exactions/Impact Fees*

As Table 1 above indicates, California planners have the highest levels of familiarity with the *Nollan* and *Dolan* decisions. This familiarity sometimes comes from directly experiencing the effects of the decisions, either through changed regulatory policy or by witnessing land use decisions that differ from decisions they would have made had *Nollan* and *Dolan* not existed. Before reporting and anayzling our evidence about the ways in which the two decisions have affected local land use practices, we describe the legal background in California that provides authority for local California governments to impose exactions in exchange for development approval, the behavior at issue in the *Nollan* and *Dolan* cases.

For decades or longer, local governments have imposed exactions—in land or money—in exchange for granting a developer the right to develop a parcel of land. The theory behind imposing exactions is that new development strains public services; exactions are designed to offset some or all of the burden the new development imposes.[41] In California, the legal authority to impose exactions comes from the police powers granted to cities and counties by the state's constitution.[42] Localities in

[40] Survey Question 2 (See Appendix A.)

[41] CURTIN & TALBERT, *supra* note 26, at 241; Been, *supra* note 1, at 478-83.

[42] *See* CAL. CONST. art. XI, § 7 (giving counties and cities general police powers). Technically, only "charter" cities and counties get their power from the constitution. "General

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California can impose exactions at several different steps of the development process depending on the nature of the proposed development: for general plan amendments; zoning changes or variances; use permits; subdivision or building permit approval; or approval of a property development agreement.[43] Put a different way, if a developer needs local government approval to build, the locality's police powers provide it with authority to "exact" something in exchange for that approval to offset the impacts of the development.

With this in mind, we asked California planners in our survey a series of questions about whether and under what circumstances they face objections from developers that a proposed exaction may constitute a taking. One question asked planners was at what stage of the planning or development process the objections were raised. Table 2 presents our results:

TABLE 2: STAGES AT WHICH TAKINGS OBJECTIONS OCCURRED

Please indicate in what stage(s) of planning, regulation, or other decision-making the takings objections occurred.[44]

	Percent of Resondents Reporting Takings Objections*	
Stage of Planning Process	Cities (n = 211)	Counties (n = 36)
Changes in General or Specific Plan	50%	81%
Zoning	59%	75%
Subdivision Approval	43%	64%
Building Permits	6%	3%
Conditional Use Permits/Variances	50%	67%
Rent Control Ordnance or Regulations	4%	0%
Other	18%	3%

*Note: There were 211 cities and 36 counties responding to this question. Each respondent could report multiple answers. Thus, the columns don't add up to 100%.

law" cities and counties get their power statutorily. *See* CAL. CONST. art. XI, § 3 (allowing counties and cities to adopt charters).

[43] *See* CURTIN & TALBERT, *supra* note 26, at 259 (providing helpful summary).

[44] Survey Question 3(c). *See* Appendix A (listing Survey Question 3(c)).

HeinOnline -- 35 U.C. Davis L. Rev. 118 2001-2002

As the table indicates, objections occur at multiple stages in the planning process, but seem most prevalent at stages where the local jurisdiction has the most discretion to approve or deny a development proposal.

Localities in California have used exactions for an array of purposes including streets, parks, school construction,[45] sewage, public art, low income housing, environmental mitigation and child care centers.[46] Although the use of exactions is widespread, the state legislature has placed some restraints on the ability of local governments to impose impact fees on developers. Very generally, California's Mitigation Fee Act requires localities to determine that a reasonable relationship exists between the purported need for an impact fee and the type of development subject to the fee (e.g., commercial development). The Act also requires that a "reasonable relationship" exist between any specific fee actually imposed on a particular project and the costs the project creates.[47] The state Supreme Court has interpreted "reasonable relationship" to be consistent with the standard imposed by *Nollan*.[48]

A few additional words about the Mitigation Fee Act and its relationship to the *Nollan* and *Dolan* cases are in order. The Supreme Court in *Dolan* clarified that *Nollan's* essential nexus and rough proportionality requirement apply to individual adjudicative decisions involving an individual parcel of land. More general "legislative determinations classifying entire areas of the city" appear to be subject to a less exacting standard of review.[49] Therefore, if a locality enacts an impact fee applicable to all new residential development, for example, the enactment may not be subject to *Nollan* and *Dolan*.[50] Moreover, the Court has yet to rule on

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[45] The California Legislature has capped the amount of impact fees for new school construction a local jurisdiction may levy. CAL. GOV'T CODE § 65995.6 (West 2001); *see also* CURTIN & TALBERT, *supra* note 26, at 261-64 (providing extensive discussion of California's treatment of school impact fees).

[46] CURTIN & TALBERT, *supra* note 26, at 261-64.

[47] CAL. GOV'T CODE § 6600(a)-(b) (West 2000).

[48] Ehrlich v. City of Culver City, 12 Cal. 4th 854, 860, 911 P.2d 429, 433 (1996).

[49] Dolan v. City of Tigard, 512 U.S. 374, 389 (1994) The Court was less than clear about how this distinction actually works in practice, however. *See* sources cited *infra* note 54.

[50] California's Supreme Court, in its *Ehrlich* decision, also made this distinction between "legislative" and "adjudicative" decisions in holding that the *Nollan* and *Dolan* tests apply to a city decision to impose a recreational mitigation impact fee on a particular developer. *See* 12 Cal. 4th at 868, 911 P.2d at 439 (comparing Culver City fee exaction to facts of *Nollan* and *Dolan*). The *Ehrlich* court also found that the *Nollan* and *Dolan* tests did not apply to a legislatively adopted art in public places fee applicable to a very broad range of developments. *See* 12 Cal. 4th at 886, 911 P.2d at 450. Several other states have drawn similar legislative/adjudicative distinctions. *See* Home Builders Ass'n of Dayton v. City of Beavercreek, 729 N.E. 2d 349, 356 (Ohio 2000) (examining municipal impact fee ordinance); Arcadia Dev. Corp. v. City of Bloomington, 552 N.W.2d 281, 286 (Minn. 1996) (finding no

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whether its tighter standards apply to impact fees as opposed to land exactions. California's Mitigation Fee Act, however, requires localities to use a "reasonable relationship" test at both the legislative enactment stage and the individual adjudicative stage. The state thus requires more of local governments than the United States Supreme Court's current approach (although, as the Court noted in *Dolan*, state courts have grappled with the appropriate level of scrutiny to apply to exactions for years)[51]. With that background in mind, we next describe several tentative conclusions we reached about the ways in which local government development decisions in California have been affected by *Nollan* and *Dolan*.

1. Cumulative Impacts and Long-range Planning

With respect to the use of exactions, we reach two significant conclusions. First, we found certain types of communities appear to be more likely to impose excesssive exactions (in other words exactions that likely violate the *Nollan/Dolan* requirements). At the same time, other communities are using the *Nollan/Dolan* standards to impose higher impact fees than they might have adopted prior to the decisions.

a. Circumstances Leading to Excessive Exactions

Jurisdictions with significant unfunded infrastructure needs and little developable land appear to face the greatest temptation to impose excessive exactions. Other jurisdictions may also attempt to do so but competition from nearby jurisdictions appears to provide a check on their potentially unconstitutional behavior.

In many instances, infrastructure and public service needs arise because of the accumulation of effects from multiple parcels of land. Localities that have failed to establish a structure to spread the costs of financing those infrastructure needs across all development sometimes resort to exacting land or fees from the "last developer in line" who makes the added infrastructure necessary. For example, in our case

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taking where city required mobile home park owners pay to relocate tenants on closing park); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696-97 (Colo. 2001) (upholding imposition of mandatory water plant investment fee on residential triplexes against takings challenge). After the *Ehrlich* decision the California Legislature amended the Mitigation Fee Act to require local governments to apply a "reasonable relationship" test to both legislatively enacted impact fees applying to a broad range of projects as well as to fees imposed on an individual project. CURTIN & TALBERT, *supra* note 26, at 256.

[51] 512 U.S. at 389-90.

HeinOnline -- 35 U.C. Davis L. Rev. 120 2001-2002

study of a proposed development in Murrieta, a rapidly developing city 75 miles north of San Diego, the city sought to exact from the owner-developer a 2-3 acre lot at the edge of the proposed development for a freeway onramp. The developer threatened legal action against the City and against the state Department of Transportation, ("Caltrans"), citing the *Nollan* and *Dolan* cases. He argued, among other things, that other development contributed to the necessity for a new onramp even though his proposed shopping center would generate an estimated 36,738 daily trips and even though his development would clearly benefit from improved traffic flow on and off the adjacent interstate. The financially strapped city, with an annual budget of just $11 million, spent $1.4 million out of its reserves to purchase the lot rather than face costly litigation.[52]

Better planning might have saved the City by, for example, assessing earlier developers traffic impact fees that the City could have used to offset the costs of the land purchase. Cities that wait too long to adopt such fees, though, can find themselves out of luck. For example, the City of Mountain View, in California's Silicon Valley, recently decided against adopting a traffic impact fee after a consultant's study showed that the vast majority of the needed traffic improvements were caused by existing development; the city has very little developable property. The City determined that any contributions from new development that were "roughly proportional" to the development's contribution to traffic needs would be too small to finance any significant improvements.[53]

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[52] It is not at all clear that the developer would have prevailed in a takings challenge. For example, he purchased the property after the City had set conditions for developing the property, including a condition that required the dedication of the contested acreage to Caltrans for development as a right of way. The City certainly could have established an "essential nexus" between the proposed new development and the need for the freeway on-ramp, may have been able to show "rough proportionality" and could have strengthened its argument by showing that the developer had no distinct investment backed expectation that he could develop the acreage since he bought the property knowing of the condition. It is unclear whether the "distinct investment backed expectation" prong of regulatory takings analysis applies to exactions cases. *See supra* note 35.

On the other hand, Murrieta left itself more vulnerable to a takings challenge through its lack of prior planning. The developer from whom the exaction was sought had a good argument that the city singled him out to offset the cumulative effects of prior developments. Indeed the city's own attorney argued that "due to . . . the Nollan Decision and the Dolan Decision . . . dedication is beyond nexus." POLLAK, *supra* note 3, at 40. Moreover, the Court's recent decision in *Palazzolo v. Rhode Island*, 121 S.Ct. 2448, 2462-64 (2001) allows property owners who purchase land after the imposition of a regulation to challenge that regulation under the Takings Clause. The case might have strengthened the developer's case.

[53] Telephone Interview with Michael Percy, Principal Planner, City of Mountain View

HeinOnline -- 35 U.C. Davis L. Rev. 121 2001-2002

The City of Alameda's recent experience with impact fees is similar. Alameda, another heavily developed city in Northern California, recently adopted a traffic impact fee at the highest level possible under an essential nexus/rough proportionality study. According to their city planner the city has significant unfunded infrastructure needs but the study showed that new development's fair share of new traffic infrastructure was only 25 percent. The city planner believes that if not for the nexus/rough proportionality requirements the city would likely have set the fees higher.[54]

b. Higher Impact Fees in Developing Communities

Many speculated in the post-*Nollan* environment that the takings rulings would restrain the regulatory hand of local governments. Our evidence shows, however, that *Nollan* and *Dolan* have in many cases had a different effect altogether. When municipalities pay greater attention to nexus and rough proportionality, and engage in more systematic, long-range planning they often can justify *higher* fees than they have previously charged.

Thus, developing communities that attempt to spread the costs of infrastructure and public services across all new development may fare significantly better as a result of the essential nexus/rough proportionality requirements. The City of Santa Rosa, a rapidly developing community northeast of San Francisco, decided to evaluate its old impact fees and to adopt a new capital facilities fee. As the City's Deputy Director of Community Development explained, the old fee was "negotiated. . . with

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(May 11, 1999).

[54] Telephone Interview with Bruce Knoph, Redevelopment Manager, City of Alameda (Jan. 25, 2001). It is worth pointing out that California planners may take the essential nexus/rough proportionality tests of *Nollan* and *Dolan* more seriously than other jurisdictions because California requires them to do so under the Mitigation Fee Act. Given that the Court seems to have limited *Nollan* and *Dolan* to individually adjudicated exactions imposed on an individual property owner, localities in other states may not need to conduct "essential nexus/rough proportionality" studies for broadly imposed impact fees in the way that the cities of Mountain View and Alameda did. This question is by no means settled, however. The Court's distinction between legislative enactment and individual adjudication seems less clear in practice than in theory. The *Dolan* plaintiff was subject to an exaction that was imposed on all new development along the route of the city's bike paths and on developers seeking to develop within the city's flood plain – Mrs. Dolan was not singled out to bear the costs of unmet infrastructure need, but rather was to bear the costs with all similarly situated property owners. 512 U.S. at 378-79. Two members of the Court would have granted certiorari on a Georgia case that might have clarified the issue. *See* Parking Ass'n v. City of Atlanta, 450 S.E.2d 200 (1994), *cert. denied*, 515 U.S. 1116 (1995) (Thomas, J. and O'Connor, J. dissenting).

HeinOnline -- 35 U.C. Davis L. Rev. 122 2001-2002

the building industry, done before nexus requirements. There was no study done to support it."[55] The new study showed that the City could increase its impact fees over the old level by four to five times.[56] The new fee finally adopted represented an average increase of approximately $1100 per residential housing unit and $1.43 per square foot of building space over the old fee. Santa Rosa chose to increase its fee but by a lower amount than the study supported in order to be able to attract new development. As Mayor Sharon Wright explained, "We have been working from a policy that development pays its own way, regardless. While that is a noble goal and something we should aim for, we are pricing ourselves into a situation where we will get nothing."[57]

The City of Redding also recently realized it could raise its impact fees significantly following the completion of a similar impact fee analysis. The analysis was done to impose development fees on new residential construction in order to accommodate growth over the next 20 years. Redding's impact fee report recommended major increases in fees for fire stations, parks, traffic, water, wastewater and storm drainage. The city chose to increase the fees but again by a much lower amount than the report supported. The report recommended raising fees on each new single family home to $17,755, but the city chose to raise the fees to $12,182 per home instead. The City Manager's Office and a Development Impact Fee Advisory Commmittee recommended the lower fee for, among other reasons, "the inability of the local economy to absorb such large increases" and "a desire to utilize other available City resources to lessen the effect of a dramatic increase in impact fees."[58]

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[55] Telephone Interview with Chuck Regalia, Santa Rosa Deputy Director of Community Development (Oct. 18, 1999).

[56] The study also showed that Santa Rosa could add about 60,000 residents to its current population of 126,600, and raise $83.1 million from new development necessary to support the residents. The new capital facilities fee will be spread among new commercial, residential and retail development on a per unit or per square footage basis.

[57] Mike McCoy, *Shifting Who Pays What in Santa Rosa*, SANTA ROSA PRESS DEMOCRAT, May 4, 1997, at A1.

[58] REDDING DEVELOPMENT IMPACT FEE ADVISORY COMMITTEE, RECOMMENDATION REGARDING ADJUSTMENTS TO THE CITY'S DEVELOPMENT IMPACT FEE PROGRAM 1 (July 24, 2000).

The fee increases included the following: Fire: instituted a new impact fee to pay for the capital costs of expanding the Redding Fire Department to meet the needs of new growth. The adopted fee of $105 on a single-family home was considerably less than the consultant's recommended $2,294 per home. The consultant's figure was based in part on the addition of two new fire stations to serve new development, but the City concluded it would not be able to afford to staff such stations even if it could use fees to build them. Parks: The previous park fees were $671 per single-family home. City staff recommended adopting a new fee of $1,584, which was $906 less than the maximum fee recommended by

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A recently reported battle in El Dorado County, a rapid growth area east of Sacramento, is consistent with the Santa Rosa and Redding stories. Voters in El Dorado enacted an initiative, Measure Y, in 1998 that requires developer-paid traffic impact fees to fully pay for building all necessary road capacity improvements to off-set the traffic impacts from new development. Last year, the El Dorado County Department of Transportation presented its study of mitigation fees sufficient to meet the commands of Measure Y to the County Planning Commission. The fees would triple the current level for new homes. Home builders now currently pay $6700 per new single-family dwellings in traffic impact fees whereas Measure Y, if implemented, could raise fees to approximately $19,000 per unit.[59] One of Measure Y's supporters, a former planning commissioner in the county, was stunned by the result of the study, stating that he "suddenly realized [the initiative] is more of a slow growth than a traffic [initative.]"[60]

The Santa Rosa, Redding and El Dorado County experiences suggest that *Nollan* and *Dolan* may provide a rather surprising opportunity to communities with developable space who face growth pressure. The nexus/proportionality requirements of the cases may assist communities in two ways. First the communities may be able to extract the full costs

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the consultant's study. The Advisory Committee recommended making up for this difference through a combination of redevelopment and general funds. Traffic: The existing traffic impact fee was raised from $996 per single-family home to $2,429. This was $1,652 less than the maximum justifiable fee calculated by the consultant ($4,081). City staff recommended that the City attempt to make up the difference through State Transportation Improvement Project (STIP) funds, as well as by deferring some projects beyond the 20-year planning horizon of the fee study. In addition, the new fee continued the City's existing practice of exempting industrial development from the traffic fee in order to help foster economic development. As the City's staff report noted, "proportional sharing of the traffic improvement program could be detrimental to the City's further economic prosperity." The City Manager recommended seeking redevelopment funds to offset the fees lost through this exemption. Water: The consultant recommended raising the City's water connection fee to $5,000 per single family home. The City instead opted for increasing it from $2,191 to $3,708 ($1,292 less than the maximum justifiable fee). The gap was closed by eliminating $1.5 million in miscellaneous unidentified future projects included in the consultant's projections, as well as by adopting general city-wide water rate increases. Wastewater: The City increased the Wastewater Connection Fee from $2,708 to $3,228 per single-family home, $1,534 less than the consultant's maximum justified fee. As with the water connection fee, the difference was accounted for by eliminating unspecified future projects and adopting general citywide rate increases. Storm Drainage: The City raised storm drainage fees from $150 to $388 per single-family home. This was the maximum justifiable amount calculated by the consultant.

[59] Erica Brooks, *Planners: Traffic Fees May Triple To Meet Measure Y*, EL DORADO COUNTY MOUNTAIN DEMOCRAT, Feb. 2, 2000 (on file with authors).

[60] *Id.*

HeinOnline -- 35 U.C. Davis L. Rev. 124 2001-2002

of development, or at least a greater share of those costs, out of developers and new home buyers. Second, the requirements may aid in putting the brakes on growth by imposing impact fees that dampen the enthusiasm for building.

The contrast in the way different types of communities are affected by the Court's exaction decisions is striking. Developing communities with significant amounts of vacant land may prosper under the decisions because of the potential to generate higher development impact fees. Heavily developed urban areas, which often face significant infrastructure challenges from traffic congestion, dilapidated schools, shortages of affordable housing and open space, may find their ability to use new development to finance unfunded infrastructure even more limited than it was prior to the decisions. Though the implications of this divide are a subject for another day, the decisions' potential to exacerbate the urban/suburban divide is noteworthy.

2. The Academic Commentary

The evidence we've just described—suggesting that *Nollan* and *Dolan* will penalize communities that fail to spread costs across all proposed new development but may reward those engaged in more systematic long-range planning—also sheds light on an ongoing debate in the academic community about the degree to which local government decisions ought to face heightened judicial scrutiny under the Takings Clause as compared with higher levels of government. The two basic positions are relatively polarized: either subject all local government decisions to heightened scrutiny because localities are routinely likely to impose exactions on developers in excess of the development's impact; or defer to local government decision-making in all cases because localities face competitive pressures to treat developers fairly. As we have just described, our preliminary evidence suggests a third, more nuanced possibility: under certain conditions localities may with some regularity seek to impose exactions that exceed the impact of the development; and under other conditions localities appear to charge developers less than the cost of the impact of their developments.

The principal advocate of the "heightened scrutiny for local government decision-making" point of view is economist William Fischel. Fischel suggests that owners of undeveloped land are particularly prone to confiscatory regulatory behavior on the part of local governments for two reasons. Such landowners: a) lack the ability to move their property to another jurisdiction (or "exit" the locality) and b) are unlikely, because of the peculiar structural makeup of local governments, to have a fair

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"voice" in the political process.[61] More specifically, city councils and county boards of supervisors protect majoritarian interests—namely the interests of homeowners within the jurisdiction—at the expense of more specialized interests, and lack the structural features of state and local governments that allow for logrolling and pressure by specific interests such as developers.[62]

Professor Vicki Been, by contrast, argues that no such heightened scrutiny for local land use decisions is necessary because developers can, in fact, exit municipalities that threaten to impose excessive exactions upon them.[63] Developers can use their exit power to relocate to more developer-friendly jurisdictions, and this competitive pressure keeps in check localities that would otherwise seek excessive exactions from developers.[64] Moreover, Been suggests, developers have sufficient opportunity to express themselves in the local political process.[65] Given these opportunities for exit and voice, she argues, courts need not scrunitize local

[61] FISCHEL, *supra* note 1, at 101, 133, 289-324. The terms exit and voice were coined in A. HIRSCHMAN, EXIT, VOICE AND LOYALTY 1 (1970) and have been used extensively in local government and takings scholarship. For examples see Been, *supra* note 1, at 473; Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147 (1992); Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 96-99 (1989).

[62] FISCHEL, *supra* note 1, at 289-324.

[63] *See* Been, *supra* note 1, at 509-45 (arguing "exit" creates market for public goods and tax packages).

[64] *Id.* at 510. Been's theory draws from a now famous article by Charles Tiebout, Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956), positing that the multiplicity of local governments creates a market under which local government "consumers" can at least in theory shop for their optimal mix of public goods and services. This market creates competition among municipalities that at least theoretically should mean that local governments will provide public services at efficient levels. *See* Been, *supra* note 1, at 506-08 (discussing Tiebout hypothesis). Been suggests that a municipality seeking exactions from a developer faces competition from at least three sources: other localities; its own electorate, to whom a developer can often directly appeal via voter initiative; and other levels of government, who may step in and overturn a local government decision or pressure the locality in the developer's favor. *Id.* at 509-11.

Professor Carol Rose, too, believes that localities provide unique opportunities for exit and voice, but agrees with Fischel that local decisions about the development of undeveloped land may provide the best example for when exit and voice are limited in their effectiveness. Rose, *supra* note 6, at 1136. Rose critiques Fischel's position on a different ground, namely that he places too much faith in the belief that the state and federal levels of government afford appropriate levels of opportunity for exit and voice. *Id.* at 1131-39.

[65] Been, *supra* note 1, at 510-11. Been focuses much more on developers' options for exit as opposed to voice, but also argues that courts need not subject exactions to heightened scrutiny because developers can appeal directly to voters if a locality attempts to levy excessive exactions. *Id.*

HeinOnline -- 35 U.C. Davis L. Rev. 126 2001-2002

government exactions with particular care.[66]

Our evidence suggests that localities behave in a less monolithic way than either Fischel or Been suggests. Rather than assuming that localities either provide sufficient competition to protect developers, or that localities possess structural infirmities that work to disfavor developers, under certain circumstances communities may overcharge and in others they may undercharge developers.

Fischel's theory gains support under at least two circumstances. First, a community will be more likely to overcharge developers if it has a deficit of unfunded infrastructure needs from past development, especially when opportunities to spread these costs among future developers are limited. It is tempting for such a community to try to fill these gaps through exactions imposed on the "last developer in line." Our Murrieta case study discussed earlier, in which the City attempted to exact land from a commercial developer to help provide a freeway offramp, provides an example. Although the development would have contributed to the traffic served by the facility, much of the need arose from prior developments.

This type of problem is especially likely to arise in a city that has neared the build-out point in its development. The Mountain View and Alameda experiences with impact fees are illustrative. Both cities, heavily urbanized, older communities, have little developable land remaining, so it is especially unlikely that their many unfunded infrastructure needs can be met by spreading the costs equitably among future developers. Such communities may find themselves in a dilemma, forced to choose between extracting excessive exactions from ongoing development, or else financing what improvements they can with scarce public funds. Been's theory appears not to hold true for these municipalities. In the examples discussed above, it was not economic competition that constrained their exaction behavior but rather the threat of takings rules.[67]

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[66] *Id.* at 473. Technically, Been argues that the unconstitutional conditions doctrine, which the Court implicitly applied in *Nollan*, need not apply to local government exactions. *Id.* at 511.

[67] It should be noted that the original goal of the case studies was to find examples where local governments changed their policies or practices in response to the takings rulings. Therefore, the case studies were chosen not to provide examples of actual unconstitutional takings, but to provide examples of how the takings rulings changed governmental behavior. Thus, it is no coincidence that, in many of our examples, the contested issues were ultimately resolved in favor of the developers or landowners. Nevertheless, these examples help to illustrate the types of circumstances in which governments consider actions that could arguably cross the line and become a taking.

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Such situations can arise through a failure to engage in comprehensive planning. By instituting a system of development fees, as the City of Santa Rosa did, infrastructure financing can keep pace with development, provided that the fees are instituted early enough in the growth of the community. A municipality that fails to do so may find itself struggling to catch up later, conducting its planning and exactions in a piecemeal, ad hoc fashion. However, the problem is not simply one of bad planning – the constraints on the ability of local governments in California to raise taxes also likely play a role.

Our evidence seems consistent with Stewart Sterk's critique of Been's theory. Sterk suggests that in numerous instances imperfect market conditions give certain municipalities monopoly power over developers. Such monopoly power provides municipalities with opportunities to extract "market distorting exactions" from developers.[68] Where a particular parcel of land possesses unique characteristics – access to transportation arteries and other infrastructure, public transportation, proximity to employment centers – the likelihood that a developer can "exit" to another jurisdiction and find a close substitute to the unique parcel declines.[69] These qualities seem particularly likely to exist in highly urbanized communities.[70]

To employ Fischel's terminology, voice and exit may be limited in at least two respects. First, the developers who escaped exactions prior to the last developer in line may have succeeded in persuading the municipality to limit exactions either through threats to take their business elsewhere or via less heavy handed arguments about the necessity for new development. But by the time the last developer in line comes around the cumulative effects of her development combined with the preceding developments may have made such arguments far less effective, resulting in a diminished voice. Second, the last developer in line may lack the opportunity for exit for reasons similar to those faced by developers in the highly developed localities described above being located adjacent to already developed parcels may provide opportunites that don't exist in other localities, particularly for commercial and/or retail development such as the Murrieta situation we previously described.[71]

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[68] Sterk, *supra* note 7, at 859.

[69] *Id.* at 859-60; *see* Been, *supra* note 1, at 530 (recognizing developers face tradeoffs between exactions and bundles of goods and services offered by cities).

[70] Sterk, *supra* note 7, at 859.

[71] Sterk suggests that the opportunity for a municipality to extract excessive exactions may be higher for commercial development than for residential development because the

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Fischel's theory about limited opportunities for "exit" and "voice" may also be true in communities that seek to protect or enhance unique natural amenities, the environment, or quality of life, and are willing to restrict development or place a heavy burden on developers in order to do so. These could include coastal and wine country communities, localities with particularly "green" voting populations that want to maintain a small town atmosphere, and wealthy suburbs with large residential acreage requirements. Politically, developers and landowners could have less "voice" in the local decision-making process than in other communities that place a higher value on growth. At the same time, these amenities would make it difficult for developers to find comparable parcels elsewhere.[72]

Our case studies again provide some evidence. One case study involved access to a popular scenic beach known as Whaler's Cove, located beneath the historic Pigeon Point lighthouse on the northern California coast. The County of San Mateo, and later the Coastal Commission, came under strong public pressure to apply pre-existing requirements to exact an easement from a property owner who applied to build a bed and breakfast to protect the only trail that provided beach access. The proposed exaction was eventually dropped when the landowner hired a lawyer who cited Supreme Court takings precedents to oppose the exaction.

In our Santa Cruz case study, the County proposed using exactions to help complete a network of recreational trails. The ensuing battle between property owners and trail supporters polarized the community. The property owners eventually prevailed, bolstered by Supreme Court takings rulings and doubts from the County Counsel about the County's

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uniqueness of particular parcels may matter more in the commercial context. *See id.* at 859 ("While competition from neighboring suburbs may limit the central city's power to collect market-distorting exactions from residential developers, it is less likely to constrain exactions on commercial development.")

The city, however, may also feel a particular need for retail development of the sort proposed in Murrieta, particularly in jurisdictions like California that return a portion of sales tax to the locality in which any retail sales take place. As Murrieta's then public works director, who strongly advocated in favor of seeking the exaction from the developer, nevertheless now acknowledges, the development "was sorely needed for this area. He [the developer] brought in . . . Home Depot. . .our best sales tax revenue generating development." POLLAK, *supra* note 3, at 42. Thus, armed with the threat of a lawsuit and the promise of lucrative retail development, it appears that the Murrieta developer very adequately expressed his "voice" to city decision-makers. Without the threat of a lawsuit, however, it is difficult to know whether he could have escaped the exaction.

[72] The facts in *Nollan* and *Dolan* support this point (coastal community in *Nollan*, bike path and open space demanded of the plaintiff in *Dolan*).

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ability to legally defend the exaction policy.

In both of these cases, exit opportunities would have been limited for the affected landowners. The bed and breakfast developer had no option to sell her land and buy a comparable parcel on another scenic coastal bluff next to a historic lighthouse. The Santa Cruz property owners were long-time residents with deep ties to a geographically unique and beautiful coastal community. In both cases, Supreme Court doctrine gave the landowners sufficient "voice" to prevail, something that may not have occurred absent the cases.

Our survey suggests that communities seeking to slow or curb growth are more likely to face takings challenges.[73] This evidence also provides support for our conclusion that certain types of communities may more predictably impose excessive exactions than others.

With respect to developing communities that do not have such unique characteristics or amenities Been's theory that competition among municipalities will keep such exactions in line seems more accurate. This is true especially when comparable neighboring communities have sufficient amounts of developable land. It is worth noting, for example, that when the City of Murrieta finally backed off from its contested freeway offramp exaction, city officials consoled themselves with the knowledge that at least they were averting a showdown with a valued developer – a developer whose investments had favored their city with sales tax revenues that he could have bestowed on their economic rival, the neighboring town of Temecula. The Santa Rosa, Redding and El Dorado examples also provide support for Been's hypothesis.

In such cases, developable land may be more fungible. Developers can shun communities that impose onerous exactions. And a developer can credibly threaten to move a development from one jurisdiction to another with virtually identical land if a jurisdiction imposes fees or exaction requirements that are too high.[74] For communities seeking to accommodate growth such exit threats can provide real pressure to keep rates or exactions low. Indeed Santa Rosa chose not to levy the maximum allowable impact fees in part out of concern that "we are pricing ourselves into a situation where we will get nothing" in terms of new development.[75] Redding, too, limited its fees for economic reasons and, in fact, exempts industrial development from traffic fees in order to fos-

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[73] *See supra* discussion accompanying note 91.

[74] In California this threat may work particularly well for developers of retail space because of the incentives California localities face to attract sales tax-generating development. *See supra* note 23.

[75] McCoy, *supra* note 57, at A1.

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ter economic growth.[76] Moreover the voice of the building industry or other developer representatives, speaking on behalf of the development community generally as opposed to a lone developer, may be quite prominent and influential. Recall the Santa Rosa Deputy Director of Community Development's comment that the original impact fees were "negotiated with the building industry."[77]

3. The Supreme Court View

As we previously described, the Supreme Court has suggested that its essential nexus/rough proportionality tests apply to "adjudicative decisions to condition [an] application for a building permit on an individual parcel." "Legislative determinations classifying entire areas of the city," the Court suggests, should be subject to a less exacting standard of review.[78] This distinction seems aimed at trying to identify the most likely circumstances under which municipalities will extract excessive amounts from developers (individual "ad hoc" decisions). Our evidence may identify those circumstances more precisely: those municipalities that seem especially likely to demand excessive amounts in land or fees from developers include communities with large, unmet infrastructure needs who have failed to spread costs among earlier developments, especially nearly built out communities. In addition, municipalities with unique amenities, such as beach towns, and perhaps communities that have adopted strong growth control measures, fall into the "likely to demand excessive exactions" category.

By contrast, communities with available developable land that is somewhat fungible and that are now engaged in long-term planning to spread anticipated infrastructure costs across all new development may treat developers more kindly. Whether such distinctions provide the basis for a different constitutional test is beyond our scope, but it seems worth noting that the legislative/adjudicative distinction may not capture all it is meant to. Developers in nearly built out towns with significant unmet infrastructure needs may face excessive exactions whether or not the exactions are legislatively enacted or applied on an ad hoc basis. Developers in growth communities with significant available land may protect themselves just fine due to ample competitive pressure from other municipalities as well as plenty of political "voice." The Court's distinctions, therefore, may be alternately under and over inclusive.

[76] POLLAK, *supra* note 3, at 68.

[77] *Id.*

[78] Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

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C. *Types of Exactions and Fees Affected by* Nollan *and* Dolan

1. Types of Exactions Challenged Most Often

Because of the prominence of the *Nollan* and *Dolan* decisions, we also asked planners whether they have encountered objections to particular exactions or fees for development on takings grounds and, if so, what types of fee or exaction they received objections to. A majority of county planners had experienced such objections (58%) and a smaller percentage of city planners had (35%). With respect to land exactions (as opposed to fees) fully half of all jurisdictions experiencing takings objections faced such objections for dedication of land for "building or modifying roads, interchanges, or overpasses." These road-related exactions were the most likely of the various categories to raise such objections for both cities and counties. Land exactions for the mitigation of wildlife, endangered species or wetlands impacts, open space or parks and public trails also raised objections in a high percentage of jurisdictions, as tables 3 and 4, below, demonstrate:

TABLE 3: TYPES OF EXACTIONS OBJECTED TO (counties only)

Please indicate what sorts of fees or exactions have been the subject of takings-related opposition.

	Percent Reporting Objections*	
Type of Exaction	Fees	Easements/Property Dedication
Open Space or Parks	19%	33%
Public Trails	0%	38%
Access to Coast or Other Scenic or Recreational Resource	0%	24%
Public Transit System	0%	0%
Building or Modifying Roads, Interchanges, or Overpasses	38%	48%
Bicycle Paths	5%	10%
Low- or Moderate-income Housing	10%	0%
Schools	57%	0%
Water or Sewerage Infrastructure	24%	5%
Police or Fire Protection	24%	0%
Flood Control or Other Public Safety	10%	10%
Mitigation of Wildlife, Endangered Species, or Wetlands Impacts	43%	43%

*Note: There were 21 respondents to this question. Each could report multiple answers. Thus, the columns do not add up to 100%.

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TABLE 4: TYPES OF EXACTIONS OBJECTED TO (cities only)

Please indicate what sorts of fees or exactions have been the subject of takings-related opposition.

	Percent Reporting Objections*	
Type of Exaction	Fees	Easements/Property Dedication
Open Space or Parks	44%	35%
Public Trails	5%	35%
Access to Coast or Other Scenic or Recreational Resource	0%	9%
Public Transit System	4%	10%
Building or Modifying Roads, Interchanges, or Overpasses	28%	50%
Bicycle Paths	4%	15%
Low- or Moderate-income Housing	19%	6%
Schools	28%	5%
Water or Sewerage Infrastructure	26%	10%
Police or Fire Protection	13%	4%
Flood Control or Other Public Safety	9%	18%
Mitigation of Wildlife, Endangered Species, or Wetlands Impacts	14%	31%
*Note: There were 78 respondents to this question. Each could report multiple answers. Thus, the columns do not add up to 100%.		

With respect to impact fees, the same two categories, exactions for transportation infrastructure and exactions to mitigate environmental harms or preserve open space, also generated a relatively high percentage of objections. Several other categories did as well. Notably, 57 percent of county planners faced objections to school-related impact fees.

It may be that the high level of objection to exactions and fees for the categories we describe simply reflects the frequency with which such exactions are used. For example, courts have upheld the authority of localities to exact land or to pay for roads for at least seventy-five years[78] and such exactions are common across the country.[79] Localities may face

[78] Ridgefield Land Co. v. Detroit, 217 N.W. 58, 59-60 (1928), *cited in* Been, *supra* note 1, at 408 n. 34.

[79] *See* R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 *Law & Contemp. Probs.* 5, 6 (1987), *cited in* Been, *supra* note 1, at 479 (noting 1958 survey found large majority of cities required developers to make physical improvements, including contructing roads).

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challenges to such transportation-related exactions with regularity simply because localities commonly impose such exactions.

2. Types of Exactions that Pose Particular Legal Difficulty

It may also be the case that certain types of exactions create particular difficulties for municipalities in establishing the essential nexus and rough proportionality standards of *Nollan* and *Dolan*. We asked planners to tell us whether they have become less likely to use certain types of fees or exactions as a result of *Nollan* and *Dolan*. Nineteen percent of cities and 35 percent of counties said "yes." The survey also gave respondents an opportunity to describe the specific type of fee or exaction that was so affected. Table 5 illustrates their responses.

TABLE 5: TYPES OF FEES/EXACTIONS USED LESS

	Types of Fees/Exactions That Are Used*	
Type of Fee	Cities	Counties
Road/Traffic/Street	32%	25%
Sewer/Water/Drainage	8%	0%
Habitat/Open	14%	17%
Trail/Public	16%	42%
Police/Fire	6%	0%
Housing	2%	0%
School	0%	8%
Other/Not	42%	33%

*Note: 50 cities and 12 counties responded to this question. Each respondent could provide multiple answers, so columns don't add up to 100%.

These numbers suggest that in terms of fees and dedications, the impact of *Nollan* and *Dolan* is greatest in the areas of transportation (roads and streets), habitat/open space/parks, and trails/public access exactions. For example, among cities that reported reducing their use of some types of fees or exactions, 32 percent say that this change affected their use of fees or exactions for road, traffic, or street improvements.

Of the types of exactions cities and counties are using less frequently, traffic impact fees and road improvements should not raise serious con-

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stitutional concerns for sophisticated planners. There are widely used and accepted methodologies available for communities that wish to calculate the cumulative impacts of development on traffic, determine the price of required traffic and road improvements, and apportion these costs to developers in the form of fees.[80] The high level of objections reported may suggest that municipalities will need to make the constitutional case to developers (by demonstrating nexus and rough proportionality) but they should have the tools to do so. They may, however, have more difficulty with other types of exactions.

Consider, for example, exactions to provide bicycle infrastructure. In our case study of West Sacramento, the city dropped its plan to require an exaction of an easement for a bicycle path because the city thought it couldn't establish a nexus or rough proportionality. Similarly, a traffic engineer from the City of Lafayette commented, "if I'm going to build a Jack in the Box, I know exactly where to go to look up how many [automobile] trips something like that will generate. But if I want to know how many bicycles go into a Jack in the Box, I have no idea . . . Our opinion is that [exactions are] questionable when the dedication is for non-traditional purposes, such as bikeways and public accessways." Even exactions for sidewalks may be viewed as tougher to support than those for traffic because of the difficulty of quantifying foot traffic.[81] Similarly, improvements for parks and drainage improvements can be difficult to quantify.[82] A special set of issues arises when fees or exactions are used to finance the kinds of natural resource services or ameneities that local governments seek to provide. These include threatened habitat or endangered species protection, open space or rural character for aesthetic or environmental reasons, and easements for recreational trails or access to publicly owned natural resources such as the coast.

In principle, local governments have the authority to mitigate environmental impacts as an exercise of the police power. In addition, the public trust doctrine confers on the public ownership of fish and wildlife, access to waterways and the coast, and even public rights associated with the preservation of scenic beauty. Nevertheless, the impacts of development on these public goods may be hard to quantify or even define with precision, thus making nexus and rough proportionality difficult to quantify.

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[80] *See* William Fulton, Guide To California Planning 227-300 (1999).

[81] Telephone Interview with Michael Henn, Planning Services Manager, City of Lafayette (May 12, 1999).

[82] Telephone Interview with Joe Heckel, Community Development Director, City of Cloverdale (Aug. 21, 1999).

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For example, a housing developer challenged the City of Irvine over a requirement rooted in the City's general plan that the developer build a hiking and equestrian trail on a City-owned right-of-way bordering a local flood control channel. The City believed it would have trouble establishing rough proportionality, and reduced the exaction to the provision of a freeway undercrossing for the trail.[83] In addition to questions about how to quantify the demand for different types of infrastructure and amenities, questions can arise about the "nexus" to particular developments. Natural resource amenities in particular tend to serve community-wide needs and are not as easily linked directly to the impact of a particular development. Both landowners and some courts may view such exactions as beyond the nexus or rough proportionality requirements. As the Santa Cruz County Counsel remarked after the trails controversy, "there's still a lot of uncertainty in takings law. Even if you have a subdivision and decide that a trail easement is legally appropriate to require for the use by future residents of the subdivision, can you open it to the public as part of a larger trail system? And will the answer depend on the extent to which the future residents would benefit from connection to the other parts of the trail system?"[84]

The long term results of the shift away from using exactions to finance natural resource amenities as well as parks, bike paths and other less traditional categories is not yet known. But a logical extension of our findings is that if localities do not find alternative means to finance such needs, we may see greater amounts of hardscape in some jurisdictions, less open space, and the provision of fewer environmental benefits.

[83] Telephone Interview with Sheri Vanderdussen, Director of Community Development, City of Irvine (May 18, 1999).

[84] Telephone Interview with Dwight Herr, Counsel, Santa Cruz County (Dec. 29, 1999). Beyond the legal questions, natural resource-related exactions seem to be especially contentious. Particularly in communities that are polarized over growth and environmental protection, these amenities may be controversial. Our survey found that such exactions are often the subject of opposition from the regulated parties, as the case studies in Santa Cruz and El Dorado Counties illustrate. Note also Tables 3 and 4, which show that public trails, open space, and habitat are often the subject of takings objections. Policies seen by some as mitigating the harms of urbanization can be viewed by others as unfairly burdening a private party with providing a public benefit.

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3. The Effect of Land Exactions versus Fees

Nollan and *Dolan* may have another systematic effect on local land use practices. Exactions for land may be more difficult to protect from constitutional attack than fees. In a number of instances our evidence suggests that localities have difficulty scaling exactions for land to the exact impacts of the development; instead it appears to be much easier, and perhaps reflects past practices, to scale the exaction to the public need for which it will be used. The Murrieta freeway interchange is a case in point — the city needed the entire 2-3 acre parcel for the interchange but backed away from exacting it when the developer presented evidence that his development was not the only cause of the increase in traffic. Several other jurisdictions reported similar policy changes in demanding exactions because of the difficulty in tying the impact of new development to the exaction demanded. Sometimes the jurisdictions backed off on "essential nexus" grounds and sometimes on "rough proportionality" grounds.

The City of West Sacramento, for example, decided against imposing an easement, to be used as part of an existing bike trail, as a condition for developing an Exxon station. City Planner Harry Gibson rejected the easement without even consulting the city attorney because "it was a pretty straightforward call, especially in light of the Oregon *Dolan* case." Gibson explained his conclusion, though, on *Nollan* grounds: the project, he argued, "was not going to generate any bike traffic."[85] Similarly, the California Coastal Commission, the defendant in the *Nollan* case, "no longer seeks offers to dedicate public access or public trail easements in 9.9 cases out of 10 that previously would have included such provisions" because of both nexus and rough proportionality concerns.[86]

Impact fees, by contrast, raise fewer concerns. They can clearly raise nexus issues if a jurisdiction tries to impose an impact fee to pay for a public improvement that bears no relationship to the development. But rough proportionality may be much easier to establish with a fee that can readily be adjusted depending on the size of the development. By contrast a land exaction is often based on the need for particular land owned by the developer seeking development approval and the size of the land

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[85] Telephone Interview with Harry Gibson, Director of Planning (now retired), City of West Sacramento (Oct. 1, 1999).

[86] Peter Douglas, Executive Director, California Coastal Commission. Speech presented to California Chapter of the American Planning Association (Oct. 13, 1997) (text on file with authors).

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may bear little relationship to the impact of the development.[87] Thus *Nollan* and *Dolan* may encourage an increase in the use of impact fees and a decrease in physical land exactions.[88]

D. More General Effects of the Shift in Takings Doctrine

1. Frequency of Takings Objections and Threats

In addition to our specific focus on exactions we also asked city and county planners about the frequency with which they face takings objections, whether such objections have increased in recent years and the stages at which takings objections occurred. By objections we mean not just cases where legal challenges were actually filed but instead instances where someone "opposes a proposed or existing land use policy, regulation, or decision on the grounds that it could constitute a taking (including a regulatory taking, temporary taking, or inverse condemnation)."[89] We thought it would be useful to know whether such objections occurred because of the chilling effect they can create on the planning process.

With respect to frequency of objections, one of our surprising findings is that counties appear to face such objections with much greater frequency than cities. For example only six percent of cities report takings objections occuring more than three times a year whereas 35 percent of counties do. Our results are summarized in Figure 1.

[87] Of course a jurisdiction could require the dedication of a portion of land that is roughly proportional to the impact of the development and pay for the remainder of the land out of impact fees imposed on other developments or out of General Fund revenue. The city of Murrieta might have tried such an approach for the freeway interchange.

[88] Indeed it is still unclear whether the *Nollan* and *Dolan* standards will apply to impact fees. *See supra* notes 48-50 and accompanying text.

[89] *See infra* App. A question 3(a) at 160.

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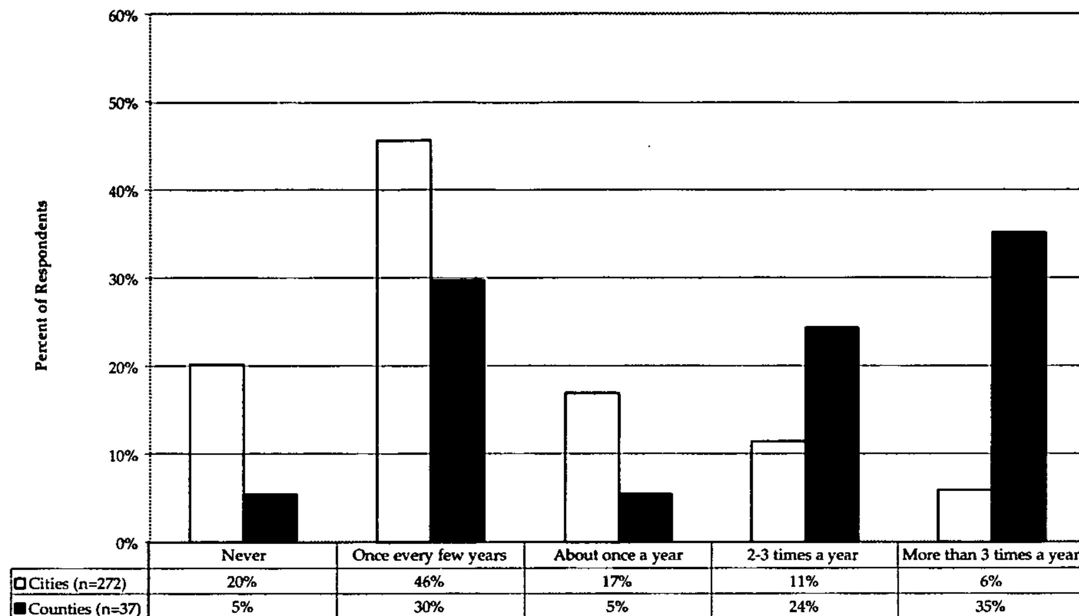
FIGURE 1: FREQUENCY OF TAKINGS OBJECTIONS

How often in your city/county's meetings, deliberations and discussions does someone oppose a proposed or existing land use policy, regulation, or decision on the grounds that it could constitute a taking...?[90]



We also assessed whether long-term planners (on the job 10 years or more) had noticed a trend in the frequency of takings challenges. Again only 33 percent of long-term city planners saw an increase in takings objections whereas 63 percent of long-term county planners experience such objections more frequently. See Figure 2.

Perhaps most notably, planners from a majority of responding California cities have experienced either less takings activity or the same amount over the course of the last ten or more years.

[90] *Id.*

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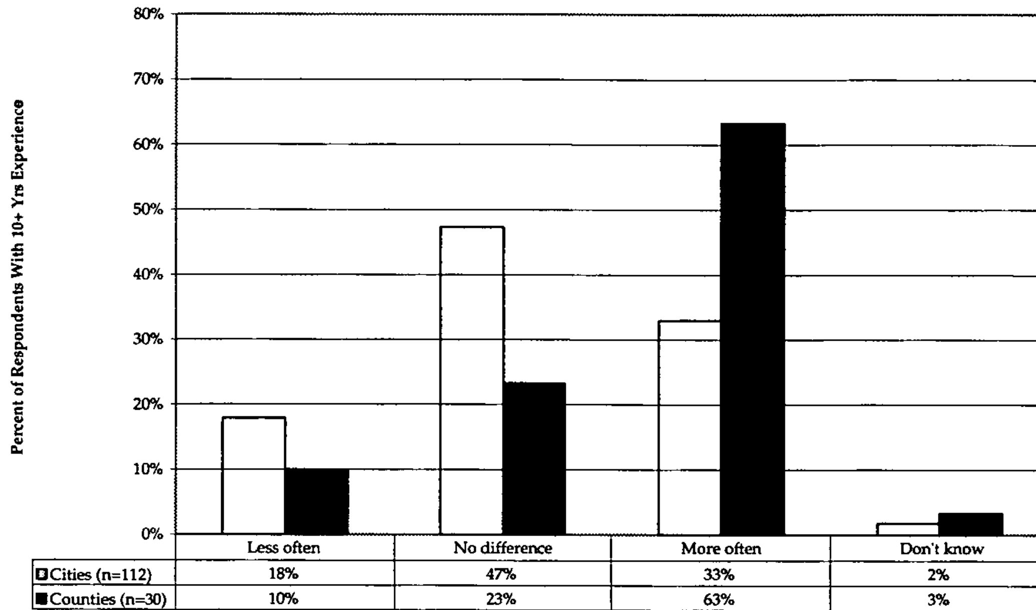
FIGURE 2: TREND IN TAKINGS OBJECTIONS (RESPONDENTS WITH 10 YEARS OR MORE EXPERIENCE)

Do you think the frequency of takings litigation threats has increased, decreased or stayed the same since the first time you started working as a planner in this jurisdiction?



	Less often	No difference	More often	Don't know
☐Cities (n=112)	18%	47%	33%	2%
■Counties (n=30)	10%	23%	63%	3%

Because of these differential responses we attempted to determine whether certain types of jurisdictions (e.g., large v. small, fast growth v. slow growth) were more likely to report takings related objections than others. We looked at population size, rate of single family home construction, population growth and whether a community had imposed aggressive growth control measures. We found inconsistent patterns among cities and counties. For example, high residential construction rates correlated with a high rate of takings objections for cities but not for counties. Population size also correlated positively with takings objections for cities but not counties. Population growth rate had no predictive force with respect to takings controversies for either cities or counties. Only the presence of three or more aggressive growth control measures, as reported in a survey conducted by Professor John Landis, correlated with an increase in takings related objections in both cities and counties, though the correlation was not statistically significant for coun-

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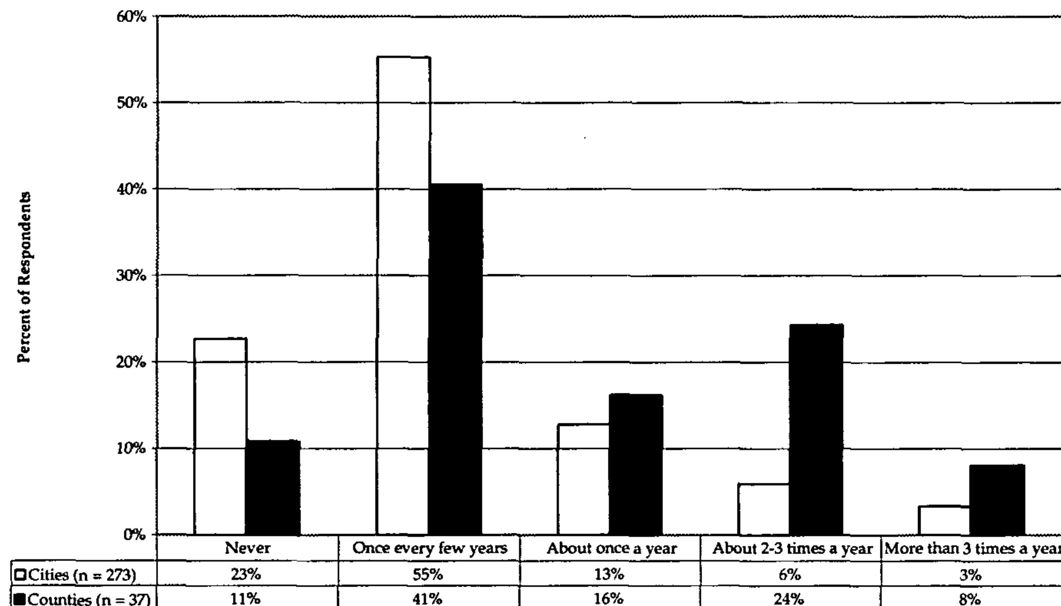
ties.[91] In short it is difficult to discern a pattern to predict which type of jurisdiction is most likely to experience a relatively high level of takings-related objections.

We also explored in the survey the extent of takings litigation – both the *threat* of litigation and the occurrence of actual lawsuits filed. Again, counties seem to face more takings-related controversy than cities. Among the cities, 22 percent reported takings litigation threats occurring once a year or more, while 48 percent of counties reported such threats occurring once a year or more. A high percentage of respondents indicate that their city or county has been threatened with takings litigation at some time.

FIGURE 3: FREQUENCY OF TAKINGS LITIGATION THREATS



	Never	Once every few years	About once a year	About 2-3 times a year	More than 3 times a year
□Cities (n = 273)	23%	55%	13%	6%	3%
■Counties (n = 37)	11%	41%	16%	24%	8%

We then asked how often the threat of a lawsuit becomes a reality. More specifically, the survey asked respondents whether their jurisdiction had been sued for an "alleged regulatory taking, temporary taking, or inverse condemnation." Thirty-three percent of cities and 46 percent of counties reported having been sued.

[91] *See* POLLAK, *supra* note 3, at 115-29 (analyzing results).

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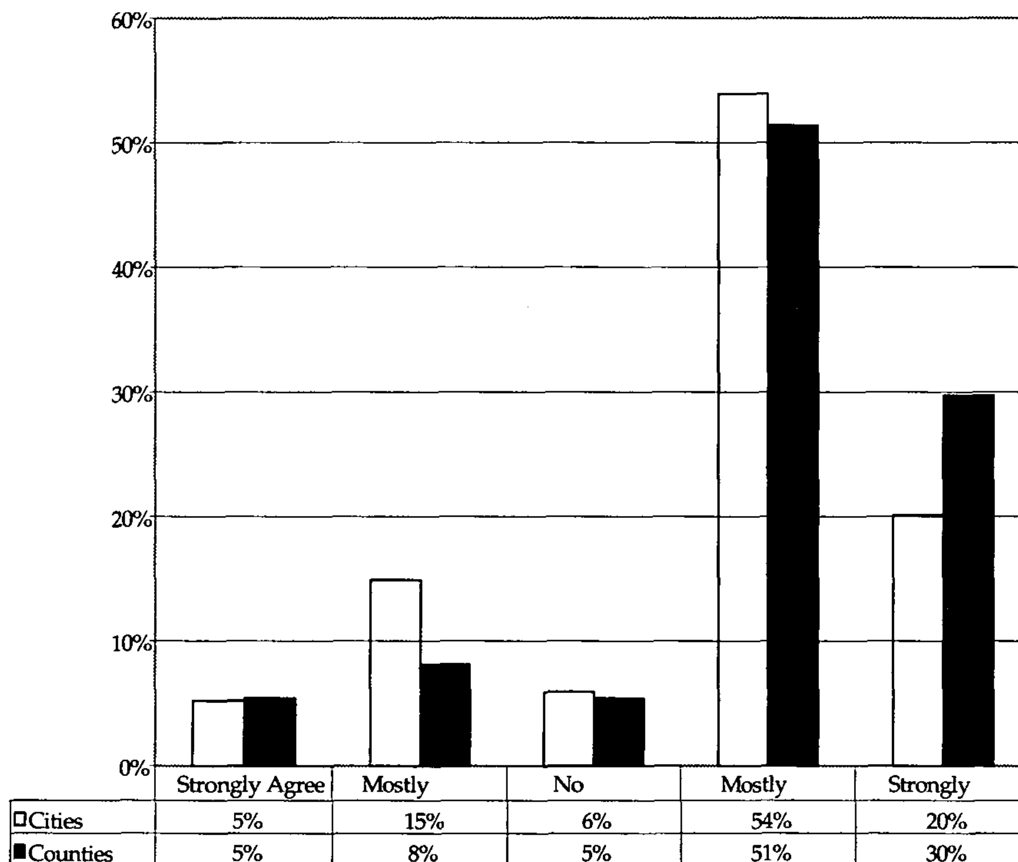
2. Effects of Takings Decisions on Planning Process More Generally

In the face of the tumult local governments have faced in the new takings environment, one of our most surprising findings is that a very large percentage of municipal planners view the Supreme Court takings precedents favorably. Figure 4 illustrates their views.

FIGURE 4: ATTITUDE TOWARD *NOLLAN/DOLAN* PRECEDENTS AS GOOD PLANNING PRACTICE

Please indicate the extent to which you agree or disagree with the following statement: "The nexus and rough proportionality standards established by the Nollan *and* Dolan *decisions, when followed carefully, simply amount to good land use planning practice."*[92]



	Strongly Agree	Mostly	No	Mostly	Strongly
Cities	5%	15%	6%	54%	20%
Counties	5%	8%	5%	51%	30%

As Figure 4 shows, 74 percent of city planners and 81 percent of county planners either mostly or strongly agree that *Nollan* and *Dolan* amount to good planning practice. Given the added burdens the cases

[92] *See infra* App. A question 11(a) at 163-64.

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place on cities and counties to justify their development decisions more carefully and the heightened judicial scrutiny to which these decisions are now subject, we were surprised by these results.

The survey data provides evidence of some of the ways in which planners concerned with doing "good planning" have responded to the Supreme Court rulings. For one thing, the takings rulings have made local governments re-evaluate their procedures and policies for setting the levels of fees and exactions. We asked respondents whether "concern about the takings issue led your city/county to adopt new standards, guidelines, or policies for the levels of fees or exactions the county will seek from developers during the last ten years." Forty-five percent of cities and 42 percent of counties answered "yes."

Another survey question asked, "During the last ten years, has concern about the takings issue prompted your city/county to adopt new standards for creating written findings or an administrative record of land use decisions?" The majority of respondents (55 percent of cities and 89 percent of counties) report that concern about takings has changed the way their jurisdiction prepares findings. Respondents with ten or more years of experience report making such changes at even higher levels: among veteran city planners, 60 percent report this adaptation, while among county planners the rate is 93 percent.

It is unclear exactly why planners view the decisions as favorably as they do. We have seen, however, that for at least some jurisdictions, the essential nexus/rough proportionality studies have demonstrated that the locality can charge higher, not lower, impact fees. And the takings rulings do tend to favor a comprehensive, long-range approach to planning that avoids ad hoc decision-making, a trend that would likely sit well with the natural inclinations of professionally trained planners.

E. The Takings Controversy and Popular Political Currency

Three of our case studies also suggest that takings-related controversies can garner significant public attention, in ways that provide interesting evidence against which to measure several competing theories about the proper reach of the Takings Clause. The quest to determine whether the government should compensate a property owner for losses caused by the imposition of a regulation has occupied both the Supreme Court and legal scholars for decades. The Court has, on more than one occasion, cited Charles Haar's statement that determining whether a regulation goes too far and works a taking requiring just compensation is "the

HeinOnline -- 35 U.C. Davis L. Rev. 143 2001-2002

lawyer's equivalent of the physicist's hunt of the quark."[93] Many scholars have weighed in, and several of the most influential theories about what constitutes a taking suggest, in one form or another, that public perceptions matter in the determination. In this section we discuss three case studies that involved high profile takings discussions where public sentiment played a prominent role. We do so for two reasons. First, the case studies demonstrate that public sentiment, not surprisingly, varies tremendously even within a particular locale so that what constitutes an egregious trampling of property rights to some may constitute sensible government behavior to others. Second, the case studies suggest that Supreme Court takings decisions affect public opinion about who should be compensated under the Takings Clause, making theories that rely on public perception much trickier in practice than in theory.[94]

The most influential scholarly formula for determining whether a property owner should be compensated is probably Frank Michelman's.[95] Michelman's formula is based on a utilitarian view that the government should compensate property owners for a regulatory taking when governmental gains outweigh the costs inflicted on those adversely affected. Michelman's most significant, and most commented upon, insight is that not only should standard costs and benefits enter into the calculus but "demoralization costs" should as well. More specifically, Michelman suggests that judges seeking to determine whether a particular governmental action constitutes a taking should weigh: 1) the net "efficiency gains" the government will experience in taking the challenged action (by efficiency gains Michelman means "the excess of benefits produced over losses inflicted" by the action); 2) the cost of the injuries sustained by the affected parties; and 3) "demoralization costs" created by a failure to compensate "losers and their sympathizers" (those adversely affected by the government action and others who would be "disturbed by the thought that they themselves may be subject to similar

[93] CHARLES HAAR, Land-Use Planning 766 (3d ed. 1976), *quoted in* Williamson Co. Reg'l Planning Comm. v. Hamilton Bank of Johnson City, 473 U.S. 172, 200 n.17 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 650 n.15 (1981).

[94] William Fisher suggested as much in a 1988 article. *See* William W. Fisher, III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774, 1775 (1988) (". . . the capacity of the judiciary to shape popular beliefs concerning the sanctity of private property poses problems for the devotees of some [approaches to the takings problem].").

[95] Michelman, *supra* note 1, at 1165. In addition to extensive scholarly treatment of Michelman's seminal article, the Court has cited the article in eleven takings opinions, including in its most recent pronouncement, *Palazzolo v. Rhode Island*, 121 S.Ct. 2448, 2465 (2001).

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treatment on some other occasion.").[96] Demoralization costs under Michelman's definition include both the dollar values necessary to offset "disutilities . . . from the realization that no compensation is offered" plus "the present capitalization dollar value of lost future production reflecting either impaired incentives or social unrest caused by demoralization of uncompensated losers [and] their sympathizers . . . ."[97]

Michelman is not the only scholar to focus on community or public sentiment in resolving takings disputes. Bruce Ackerman has suggested a somewhat similar utilitarian approach dependent, in part, on calculating the costs of "general uncertainty" that would result if parties received no compensation from government action that adversely affected them.[98] William Fischel takes a somewhat different path. He believes that, in determining whether a governmental regulation is reasonable, and hence requires no compensation to affected property owners, courts should apply an "ordinary practice," or "normal behavior" standard.[99] Thus, if a property owner is asked to conform her behavior to "normal" standards, or to bring her behavior from "subnormal" to "normal," the government need not compensate her. But if she is asked to engage in "supernormal" behavior then the landowner should be allowed to demand compensation. To illustrate, if a developer seeks to build ten single family homes on an acre in a community where all other single family homes are built on quarter-acre lots, the community should be able to deny him the right to do so without compensating him for his losses.[100] But if a developer is allowed to build only on three acre lots compensation would likely be due. The determination of what constitutes "normal" behavior in any given community is not easy,[101] but presumably community views matter in the calculus.

One obvious reason to rely on a takings standard that incorporates in some fashion community sentiment is to compensate property owners when the affected community thinks it would be just to do so.[102] To put it somewhat differently, if the affected community thinks the government is acting unjustly by denying compensation, demoralization may

[96] Michelman, *supra* note 1, at 1214.

[97] *Id.* For modifications of the Michelman formula see articles oollected in Fisher, *supra* n. 1 at n. 16.

[98] *See* ACKERMAN, *supra* note 1, at 88-112.

[99] FISCHEL, *supra* note 1, at 351-53.

[100] *Compare id.* at 367-68 *with* Rose, *supra* note 6, at 128 (calling Fischel's own application of the standard "extremely ambiguous.").

[101] *Fischel, supra* note 1, at 367-68.

[102] Fisher, *supra* note 94, at 1780.

HeinOnline -- 35 U.C. Davis L. Rev. 145 2001-2002

result; individuals may lose faith that the judicial system is behaving justly, and may even refuse to engage in certain forms of efficient economic activity.[103]

The case studies we describe below, however, suggest that determining what constitutes community sentiment or its variations (demoralization costs, in Michelman's terminology, ordinary standards, in Fischel's) may shift depending on the Supreme Court's own definition of what constitutes a taking. In other words, if the Court protects the interests of private property owners, property owners in the future may think they should be compensated. This shift in beliefs due to Court influence raises two problems. First, as Terry Fisher has argued, it makes application of the takings theories extremely difficult.[104] How is a Court to determine whether, for example, demoralization costs will rise if feelings of demoralization may depend on the outcome of the case? Or what behavior is to be considered "normal" if "normal" depends in part on community perceptions? Second, if the Michelman or Fischel tests were ever applied, the notion of what constitutes a taking might expand with each new decision. This would influence people to believe that property rights ought to be stronger than they ordinarily would have felt absent the court decision, which in turn would lead to new decisions strengthening property rights, and so on and so on. Our case studies at least suggest that Supreme Court doctrine helps shape beliefs about private property rights, something takings theorists need to contend with.

Our case studies also provide on-the-ground evidence of how community norms about what constitutes a taking may vary tremendously within a particular community. This variation poses particular difficulty for Fischel's theory: determining what constitutes "normal behavior" or "ordinary practice" may be much more difficult than he acknowledges. These differences within a particular community are also, however, important to Michelman. If part of the reason to include demoralization costs in any takings calculus is to promote a sense of justice, what happens when a good percentage of a community thinks it unjust to compensate? Or, as is more likely, when a good percentage of the community feels strongly that a community should regulate behavior but the compensation requirement would make such regulation financially impossible?

[103] *Id.*

[104] *Id.* at 1781.

HeinOnline -- 35 U.C. Davis L. Rev. 146 2001-2002

1. El Dorado County and the General Plan Update Process[105]

Takings rhetoric played a prominent role in El Dorado County, a Northern California community located east of the state's capitol, Sacramento, and just west of Lake Tahoe. El Dorado County is a county rich in beauty and natural resources, home to timber and mining industries and increasingly a bedroom community for Sacramento. The county's population grew by 34 percent between 1988 and 1998.[106]

It seems safe to say that El Dorado politics are a highly contentious matter with two principal factions. One group advocates slow growth and environmental policies to preserve open space and wildlife habitat for endangered species, as well as other measures to restrict rapid development.[107] The other group favors more rapid growth and a focus on economic development, and uses the language of the property rights movement in its political activities.

The El Dorado County Board of Supervisors found itself caught in a battle between the two factions in 1989, when it began the process of amending its General Plan in order to bring it into consistency with state law. The battle is still being waged 12 years later. The process began with consultants, hired by the County, proposing a plan that raised the ire of numerous private property owners. Specifically, the consultants suggested that the zoning on a number of large parcels of land be downzoned to preserve open space. The designations would impose 20 acre minimum lot sizes on a large amount of privately owned land. Though the original plan had its supporters, it generated petitions signed by hundreds of property owners and generated pre-printed cards to the Board arguing that the downzoning resulted in a "taking of private property without just compensation, i.e. by regulation."[108]

The County Planning Commission staff then generated a second draft of the General Plan but it, too, raised the ire of property owners aligned with the property rights faction. The Planning Commission itself then

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[105] Our case study descriptions borrow heavily from Daniel Pollak's summaries in Pollak, *supra* n. 3 at 42-65.

[106] Rand California Population and Demographic Statistics, Population Projection by County and Ethnicity, *available at* http://www.ca.rand.org/stats/popdemo/popdemo.html (last visited October 10, 2001).

[107] For example, 1996-97 saw the filing of at least 10 lawsuits against proposed developments, including one filed to invalidate El Dorado County's General Plan. Peter Hecht, *Growth in the Foothills Spurs Suits*, SACRAMENTO BEE, Nov. 9, 1997, at A1.

[108] El Dorado County Planning Comm'n, El Dorado County General Plan Third Administrative Draft, Presentation to the El Dorado County Board of Supervisors, Administrative Record at 202276, 202465 (Nov. 1, 1993). [hereinafter Third Administrative Draft].

HeinOnline -- 35 U.C. Davis L. Rev. 147 2001-2002

stepped in. One member of the Planning Commission served as president of the El Dorado Property Owners for Protection of Fifth Amendment Property Rights (also known as "Fifth . . . or Fight"). "Fifth or Fight" led the charge against the first two drafts and used Supreme Court doctrine to press its claims against the drafts:

> One would think that after the *"Lucas"* case before the U.S. Supreme Court, our County Planners would get the message. In *"Lucas,"* the Court interpreted the "setback" rules placed on Lucas' land as a "taking," which deprived Mr. Lucas of any economic value. Under the *Fifth Amendment to the U.S. Constitution*, Mr. Lucas must be compensated accordingly. Can El Dorado County afford to compensate all affected landowners for the "Scenic Corridor" setbacks? Obviously not. Clearly private property cannot be taken for public use without just compensation. As we consider "open space" and "recreation" and "preservation of wildlife habitat" and these infamous "scenic corridors," let us not forget that there are costs associated with each of these items.[109]

The result of the pressure from property rights advocates was the adoption of the third draft of the General Plan. We identify the changes with strikeouts for the deletions and underlining for the additions, as the original draft did:

1) The overall policy directives were changed to avoid language about limiting growth in specific areas of the county. For example: "The development of these visions and strategies serves to provide for the underlying approach of the General Plan. This approach is the identification ~~and where growth will be limited~~ of distinct planning concept areas where growth will be directed as a means of providing for a more manageable land use pattern. . .Specifically, the Plan will direct planned growth to Community Regions and Rural Centers and ~~limited~~ provide for planned growth within Rural Regions."[110]

2) Originally, specific plans for new communities were to require mandatory developer contributions of bicycle and pedestrian paths, transit stops, parking, and open space for sensitive habitats. These mandatory design features were changed to "negotiable design features."[111]

[109] President's Column, Fifth . . . or Fight, NEWSLETTER (El Dorado Prop. Owners for the Prot. of Fifth Amendment Prop. Rights, El Dorado, Cal.), Jan. 1993, at Vol. II, No. 1.

[110] El Dorado County General Plan Third Administrative Draft, presentation by the Planning Commission, Administrative Record, at 22213. The stricken language indicated deletions from the original draft and the underlined language shows additions.

[111] *Id.* at 16.

HeinOnline -- 35 U.C. Davis L. Rev. 148 2001-2002

3) The "Rural Residential Low Density (RRL)" designation was eliminated. It would have required minimum parcel sizes of at least 40-160 acres. In place of the RRL designation, such lands would now fall under the Rural Residential category. As for the latter, the revised plan doubled the maximum density for that designation from one unit per 20 acres to one per 10 acres.[112]

4) The "Natural Resource" land use designation, which allowed densities of only 1 unit per 160 acres was the most restrictive land use designation in the original plan. It was changed to reduce the types and amounts of land it would affect, in particular making it a designation to protect economic values rather than environmental ones: ~~"The purpose of this land use designation is to protect..."~~"The purpose of the Natural Resources (NR) designation is to identify areas that contain economically viable natural resources and to protect the economic viability of those resources and those engaged in harvesting/processing of those resources from interests that are in opposition to the managed conservation and economic, beneficial use of those resources. The important natural resources of the County includes~~ing~~ forested areas, and ~~important watershed and river canyons, critical wildlife habitat, rare and endangered species habitat~~, mineral resources, ~~wetlands, lakes and ponds, and areas where the encroachment of development would compromise those natural resource values.~~"[113]

5) Mandatory open space requirements were eliminated for the Planned Development Combining Zone Districts. These districts were intended to allow clustering of residential, commercial, and industrial land uses. The original language required that 40% of each development site in such a district be set aside for "commonly owned or publicly dedicated open space lands . . . ." The revision changed the "shall" in the open space requirement to a "may," and made the amount of open space negotiable.[114]

The Third Administrative Draft received Planning Commission approval by a 3-2 vote, a good reflection of the fractionalized politics in the County. The Board of Supervisors approved the draft, with minor modifications, in 1996.

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[112] *Id.* at 22.

[113] *Id.* In the version of the plan ultimately adopted in 1996, the definition of "important natural resources" included "watershed, lakes and ponds, river corridors, grazing lands," but not habitat or wetlands (*see* 1996 General Plan, policy 2.2.1.2).

[114] *See* Third Administrative Draft, *supra* note 107, at 22224. By the time the plan reached its final form, a mandatory open space set-aside of 30 percent had been reinstituted (*see* 1996 General Plan Policy 2.2.3.1).

Takings rhetoric clearly played a significant role in the alteration of the draft General Plan, though anti-environmentalism and concerns about economic growth also played a role. As the authors of the Third Administrative Draft explained:

> The document produced through this process is a product of the majority of the citizens and property owners of El Dorado County who participated in the many public workshops, hearings and requests for written input. These citizens cared enough, through their involvement, about future generations . . . to pass on to those generations not only the natural treasures of El Dorado County but the Constitutional right to privately own and enjoy a portion of those treasures.[115]

The battle over El Dorado's General Plan is not, however, finished. A coalition of local environmental groups and the Earthjustice Legal Defense Fund successfully challenged the Plan on the grounds that the County failed to comply with California's Environmental Quality Act.[116] The County will need to comply with CEQA before finalizing a new General Plan.

The El Dorado County takings dispute ended with the municipality backing off of land use decisions that might have been challenged under the Takings Clause had the locality enacted them. Perhaps the interesting lesson from the case studies is that the Supreme Court takings decisions appear to have galvanized political activists into weighing in on the planning process. But these battles also demonstrate that the Court's own decisions can shape public views about private property. For scholars interested in incorporating some measure of public sentiment into the takings calculus, the dynamic effects of the Court's own pronouncements surely need to be considered.

Moreover, suppose that the environmentalists had prevailed with the Board of Supervisors and the disaffected land owners had challenged the land use restrictions in court. If a court were to rely on Fischel's formula, how would it determine whether the challenged restrictions were merely incorporating the community's sense of "normal" or "ordinary" behavior or were demanding of property owners something beyond community standards? Though the acreage requirements in the originally proposed general plan were quite high, keep in mind that El Dorado County

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[115] *Id.* at 22223.

[116] *Court Ruling Shreds General Plan* EIR, MOUNTAIN DEMOCRAT, Feb. 10, 1999 (on file with authors).

HeinOnline -- 35 U.C. Davis L. Rev. 150 2001-2002

has large areas of open space and has been quite rural until recently. Thus a powerful coalition of activists wants to "preserve" this character through zoning restrictions, arguably limiting developers to existing community standards. Additionally, if a court were to consider the strength of community sentiment against the land use restrictions as some sort of measure of demoralization costs, what should it make of the strong community sentiment in favor of the preservation of open space? Wouldn't demoralization and a lack of faith in our system of justice result among the opponents of increased development?[117] The El Dorado case study at a minimum suggests that measuring community sentiment in a takings challenge would pose formidable challenges for a court.

2. Santa Cruz County and the Trails Master Plan

In Santa Cruz County, a Northern California County containing beautiful stretches of beach and spectacular forested mountainous terrain, opponents of a "Trails Master Plan" designed to link together biking, hiking and horseback riding trails througout the county actually used the slogan "Exaction= Extortion" in their campaign to kill the plan. The fight over the Trails Plan suggests that popular sentiment about the takings issue ran deep and wide. Of course it is impossible to know whether the Supreme Court's takings decisions shaped this sentiment or whether opponents of the plan simply capitalized on anti-government sentiment. Nonetheless, takings rhetoric played a dramatic role in the campaign. Moreover the slogan Exaction = Extortion sounds remarkably similar to Justice Scalia's statement in *Nollan* that the easement-in-exchange-for-development-approval was an "out-and-out plan of extortion."[118]

The controversy began when the County developed a trails master plan in the early 1990s. The plan, developed by a citizen's Trails Advisory Committee established by the County Board of Supervisors, included maps depicting a network of proposed trails. Many of the trails were to cross private property and the text of the plan stated that "private property which underlies a trail corridor ... may require a trail

[117] It may be that Michelman means to capture this community sentiment in favor of a regulation in the "benefits" portion of his takings calculus. He defines these benefits as "the total number of dollars which prospective gainers would be willing to pay to secure adoption." Michelman, *supra* note 1, at 1214. If not, however, the demoralization that might result among supporters of governmental regulatory action could surely cause some of the same problems Michelman identifies with respect to demoralization costs that might result from failure to compensate.

[118] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 (1987).

easement dedication as a condition of developmental permits."[119]

The maps in particular set off a storm of controversy in the County. The opposition, known as "Citizens for Responsible Land Use," was led by the son of one of the members of the Trails Advisory Committee, and thus the Trails Plan split family as well as foe. CRLU held community awareness meetings, raised money with apparent rapidity and ease and succeeded in attracting upwards of 200 people to community meetings. The CRLU accomplished this even though the controversial maps included, in bold faced type, the following language: "These maps do not convey rights to the public to use these recommended trail routes;" "these maps are conceptual, may not reflect the actual trail routes."[120] Moreover the plan gave first priority to using existing public and semi-public lands, second priority to gifts of easements or purchase from willing sellers and last priority to dedications of land from property owners. And the plan stated that "It is projected that required trail easement dedications will affect only a very small number of parcels throughout the County."[121]

The final draft trails plan was not even due to be released for public review and comment until early 1994, (though the Trails Advisory Committee submitted a preliminary draft to the Board of Supervisors in 1992, and released their maps prior to the 1994 date). Yet prior to the release of the final draft in November 1993, the Santa Cruz County Board of Supervisors passed a resolution by unanimous vote that stated that the County must comply with state and federal constitutional property rights protections. The Board also apparently altered its previous policy of requiring trails exactions as a condition of the issuance of a residential building permit, though it maintained the exaction condition for commercial building permits.[122] Two months later, before the final plan was released, the Board effectively shelved the Trails Plan altogether, after a hearing attended by 100 supporters of CRLU. The CRLU efforts did not, however, end there. The organization succeeded in getting the following language stricken from a general plan update that set forth the general

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[119] SANTA CRUZ COUNTY, TRAILS ADVISORY COMMITTEE AND COUNTY OF SANTA CRUZ PARKS, OPEN SPACE AND CULTURAL SERVICES DEPARTMENT, 1994 PUBLIC DRAFT TRAILS MASTER PLAN FOR THE COUNTY OF SANTA CRUZ 17 (1994).

[120] EL DORADO COUNTY PLANNING COMMISSION, THIRD ADMINISTRATIVE DRAFT GENERAL PLAN (annotated) 5, 13 (Oct. 1993).

[121] *Id.* at 16.

[122] Letter from Daniel Shaw, Planning Director, County of Santa Cruz and Benton Angove, Open Space and Cultrual Services Director, Santa Cruz County Department of Parks (Oct. 27, 1993) (on file with authors).

HeinOnline -- 35 U.C. Davis L. Rev. 152 2001-2002

plan's policy on trail easements:

> Obtain trail easements, consistent with the Trails Master Plan, by encouraging private donation of land . . . where required for critical links. Require dedication of trail easements in new development projects located within mapped trail corridors or along adopted trail routes consistent with the Trails Master Plan. Within urban areas, require trail easement dedication within the specified buffer areas adjacent to riparian corridors and wetlands, and/or within the riparian corridor.[123]

Instead, as a result of CRLU's lobbying, the new General Plan language now reads:

> Obtain trail easements by encouraging private donation of land, by public purchase, or by the dedication of trail easements, in full compliance with California Government Code Section 65909(a) for development permits and Government Code Sections 66475.4(b) and 66478.1 et seq. for land divisions, provided that state and federal constitutional rights of landowners are not violated . . . . Any trail easements so obtained shall not be put on any published trail maps until a complete trail from beginning to end has been obtained legally from the respective property owners, and only after adequate funds exist to implement a trail maintenance plan . . . . This policy is not intended and shall not be construed as authorizing the exercise of the County's regulatory power in a manner which will take or damage private property for public use without the payment of just compensation in violation of the Constitution of the State of California or of the United States.[124]

The Santa Cruz County experience leaves open whether Supreme Court takings doctrine shaped public opinion or merely reflected it. On the one hand the language of the campaign suggests Court influence and, indeed, CRLU hired a local land use lawyer to advise it. On the other hand the rhetorical campaign "Exaction = Extortion" clearly resonated deeply with many members of the community, who showed up in large numbers to community and government meetings, donated money and signed petitions. The Santa Cruz study also raises questions similar to the El Dorado case about the application of competing takings theories

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[123] Memorandum from Ron Powers, Supervising Planner, County of Santa Cruz, to Board of Supervisors (Mar. 18, 1994) (on file with authors).

[124] COUNTY OF SANTA CRUZ, 1994 GENERAL PLAN AND LOCAL COASTAL PROGRAM FOR THE COUNTY OF SANTA CRUZ, CALIFORNIA 7-22 (1994); memorandum from Ron Powers, *supra* note 119.

HeinOnline -- 35 U.C. Davis L. Rev. 153 2001-2002

had the Board of Supervisors acted differently and approved the original Master Trails plan. For example the County had apparently long had a policy of requiring trails exactions as a condition of the issuance of a residential building permit. One could argue that providing such an exaction constituted ordinary community standards and thus should not violate the constitution. Moreover, failing to exact trail easements, leaving an incomplete trail essentially unusable by the rest of the community, could certainly create disillusionment and demoralization among potential trail users.

3. Public Access at Whaler's Cove

Our third case study involved politics markedly different from those in the first two studies. Whaler's Cove is a beautiful and almost perfect public beach in southern San Mateo County (west of the Silicon Valley) but for one flaw: it has no legal public access except at low tide. Whaler's Cove is a small inlet flanked by rocky outcroppings at the foot of the historical Pigeon Point lighthouse. One of the reasons for its great public appeal, in addition to its beauty, is that the cove is protected from heavy winds ordinarily found in the area. The only trail to the beach crosses over a privately owned parcel of land that local resident Kathleen McKenzie sought to develop as a bed and breakfast. In circumstances remarkably similar to the *Nollan* case (indeed both involved the California Coastal Commission), the Commission and San Mateo County both considered exacting an easement over McKenzie's property in exchange for the right to build.

The McKenzie battle was complicated by a lawsuit she filed against the State of California seeking to quiet title to the parcel in order to prevent the State of California from claiming that the public had crossed the path on her parcel enough to create an implied dedication of land to the state. The state settled the case with her, granting the public use of the beach beyond the mean high tide line while granting McKenzie undisputed title over the path.

McKenzie's application for an inn on the site proposed building nine cabins in three detached clusters, together with an existing 1800 square foot structure to be used for storage and maintenance. The County's Local Coastal Program requires the establishment of a shoreline access trail as a condition for obtaining a commercial building permit. The County's Planning Administrator advised the Planning Commission, however, that it could not legally require trail access without running afoul of *Nollan* because the proposed project did not interfere with public access. At Planning Commission hearings on the issue, Mark Nolan (no relation to

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Fred Nollan), the head of a non-profit group that regularly took approximately 1,000 school children per year to Whaler's Cove, led public opposition to the project over the access issue. The County nevertheless approved the project with 29 conditions attached. McKenzie tried to negotiate limited public access with Nolan's group and some fishermen and succeeded with the fishermen but failed with Nolan.

Nolan then appealed the permit approval to the Coastal Commission and helped generate over 200 letters in support of his appeal. They included letters like the following:

> I am a fifth grade student at Loma Prieta School and have just gotten back from Science Camp. It was a wonderful experience for me and it would be a shame to close off the beach. I would also like my brother to go. He is in second grade and is so excited to be able to go when he is older.

McKenzie apparently even received threats and someone set fire to the fence on her property.

The California Coastal Act, which established the Coastal Commission, requires public access from the nearest road to the shoreline as a condition for the approval of coastal development projects. After a heated two hour Coastal Commission hearing at which numerous people testified emotionally about the value of access to Whaler's Cove, the Commission seemed to be leaning in favor of requiring such access. Commission staff, after consultation with their lawyers, however, issued a report concluding that a requirement of beach access would not meet the *Nollan* essential nexus requirement nor the *Dolan* rough proportionality standard.

Here, oddly, the Supreme Court rhetoric from the recent takings cases played only the smallest public role, but obviously had great legal significance for the bed and breakfast applicant. Public sentiment sharply favored the imposition of an easement for public access. Again how would Ms. McKenzie fare under Fischel's "ordinary practice" standard? Does strong public sentiment in favor of a fairly onerous exaction mean that the imposition of the exaction constitutes "normal behavior"? And should the strength of the public sentiment influence a court's decision about whether the imposition of the exaction is a taking?

The case studies each demonstrate the enormous complexity that would result if community sentiment played a prominent and explicit role in determining whether a property owner should receive compensation as a result of governmental action. The Court's own ad hoc inquiries into the question may leave much to be desired but adding commu-

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nity sentiment to its calculation might do little to remedy an already confused body of doctrine.

CONCLUSION

Our empirical evidence provides a preliminary assessment of how local governmental entities are behaving in response to the flurry of takings cases at the United States Supreme Court level. Some of our findings suggest that the decisions could have profound implications for land use planning. Developing communities may as a result of the decisions engage in more systematic planning, leading them to realize they can impose higher, not lower, impact fees. Heavily built out communities with signficant unmet infrastructure needs, by contrast, may find that the decisions restrict their ability to impose exactions on developers even further. The consequences for urban/suburban relationships could be quite serious.

Communities may rely less on land exactions and more on impact fees, and may use certain categories of fees far less frequently. If communities use exactions less often for various types of environmental amenities, as we suggest they will, the consequences could mean a loss of open space, fewer bike paths and nature trails, and less wetlands and habitat protection.

Finally, our evidence shows that public opinion may be shaped, and property rights activists invigorated by, the developer-friendly attitude in the Supreme Court. This shift in opinion can in turn leave some communities deeply divided about particular government land use decisions.

Questions remain that will benefit from additional empirical work. Will jurisdictions shift from land exactions to impact fees in larger numbers because of the Court decisions? How often are jurisdictions sued successfully as a result of the shift in doctrine? Do the requirements of *Nollan* and *Dolan* slow down the development approval process, and hence impose another unexpected burden on developers? Is the *First English* decision, in requiring monetary compensation for temporary takings, chilling innovative governmental regulatory efforts by making planners and local jurisdictions more risk averse?

Our empirical results begin to cast light on the takings landscape in important ways. They test certain academic theories about the appropriate role of judicial review for local land use decisions; they suggest to certain types of jurisdictions that effective and comprehensive long range planning may not only insulate a locality from constitutional attack but may fund infrastructure needs more fully; they illustrate the ways in

HeinOnline -- 35 U.C. Davis L. Rev. 156 2001-2002

which Supreme Court doctrine actually affects on the ground decision-making. And they suggest new directions for future takings research.

HeinOnline -- 35 U.C. Davis L. Rev. 157 2001-2002

APPENDIX A

SURVEY QUESTIONNAIRE

Please answer these questions to the best of your knowledge. If you would like additional space to add comments or expand upon answers, you may use the back page of the survey. *Your responses to the questionnaire will remain completely confidential. Only aggregate data from all the survey responses will be reported.*

Thank you in advance for your participation.

Q1. Please provide the following information.
Name of county:
Name and title of person filling out this questionnaire:
Number of years that you have worked as a planner in this county:
Would you like to receive a copy of the results of this study?
_ Yes _ No

Q2. How familiar are you with the following U.S. Supreme Court cases and their legal implications? (For each case, indicate with a check mark whether you are NOT familiar, SOMEWHAT familiar, or VERY familiar.)

	Not Familiar	Somewhat Familiar	Very Familiar
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles	☐	☐	☐
Nollan v. California Coastal Commission	☐	☐	☐
Dolan v. City of Tigard	☐	☐	☐
Lucas v. South Carolina Coastal Council	☐	☐	☐
Suitum v. Tahoe Regional Planning Agency	☐	☐	☐
Del Monte Dunes v. City of Monterey	☐	☐	☐

HeinOnline -- 35 U.C. Davis L. Rev. 158 2001-2002

Q3. a) How often in your county's meetings, deliberations and discussions does someone oppose a proposed or existing land use policy, regulation, or decision on the grounds that it could *constitute a taking* (including a regulatory taking, temporary taking, or inverse condemnation)? (Circle the number of your answer.)

1 Never
2 Once every few years
3 About once a year
4 Two or three times a year
5 More than three times a year

b) How often do you think that the opposition described in part (a) occurs now as compared to when you first began working as a planner in this jurisdiction? (Circle the number of your answer.)

1 It occurs less often now than when I first started as a planner in this jurisdiction
2 No difference now as compared to when I first started as a planner in this jurisdiction
3 It occurs more often now than when I first started as a planner in this jurisdiction
4 Don't know

IF YOU ANSWERED "NEVER" (CHOICE 1) IN PART (a), THEN SKIP TO Q4 ON THE NEXT PAGE.

c) Please indicate in what stage(s) of planning, regulation, or other decision-making the opposition described in part (a) has occurred. (Please check ALL that apply.)

_ Changes in general or specific plan _ Zoning changes
_ Subdivision approval _ Building permits
_ Conditional use permits/variances
_ Rent control ordinance or regulations
_ Other (please specify) ______________________________

d) We would also like to know whether any of the takings-related opposition dealt with in the previous parts of this question has arisen specifically in the context of *fees or exactions* for development. Since the time when you first started working as a planner in this jurisdiction, do you know of instances in which someone objected to or opposed fees or exactions for development on the grounds that these might constitute a regulatory taking? (Check yes or no.)_ Yes_ No

e) If you answered "no" in part (d), skip to Q4. If you answered "yes," please indicate what sorts of fees or exactions have been the subject of this opposition. (For each type of exaction that has been objected to as a possible taking, check the appropriate boxes indicating whether opposition has arisen in connection with fees, with easements or dedication of property, or both. Leave the boxes blank where no such objections have occurred.)

Type of Exaction That Was Objected To	Objections to Fees	Easements or Dedication of Property
Open space or parks	___	___
Public trails	___	___
Access to coast or other scenic or recreational resource	___	___
Public transit system	___	___
Building or modifying road(s), interchanges or overpasses	___	___
Bicycle paths		
Low- or moderate-income housing	___	___
Schools	___	___
Water or sewerage infrastructure	___	___
Police or fire protection	___	___
Flood control or other public safety	___	___
Mitigation of wildlife, endangered species, or wetlands impacts	___	___
Other (please specify)	___	___

Q4. a) In your opinion, are there any types of fees or exactions that your county has become less likely to seek from developers as a result of the precedents set in the U.S. Supreme Court's *Nollan* and *Dolan* decisions (as codified in AB 1600 and Government Code §66000 *et seq.*)?_ Yes_ No

b) If you answered "yes" in part (a), please indicate below what sorts of fees or exactions have been affected. If you need more space you may use the back page of the survey.

Q5. a) How often does it occur that your county is *threatened with litigation* (orally or in writing) by a property or business owner for an alleged regulatory taking, temporary taking, or inverse condemnation? (Circle number.)

1 Never

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2 About once every few years
3 About once a year
4 About two or three times a year
5 More than three times a year

b) Do you think the frequency of such threats has increased, decreased, or stayed about the same since the time you first started working as a planner in this jurisdiction? (Circle number.)
1 Increased
2 Decreased
3 Stayed about the same
4 Don't know

Q6. Since 1987, has your county ever been *sued* for an alleged regulatory taking, temporary taking, or inverse condemnation? (Check yes or no.)
_ Yes_ No

Q7. Does your county's liability insurance cover any costs associated with takings litigation? (answer yes or no, or if your insurance is ambiguous on this, answer "uncertain".)
_ Yes _ No _Uncertain

Q8. Since the time you first started working as a planner in this jurisdiction, do you think a desire to avoid takings litigation has prompted your county to use development agreements more often (for example, in order to obtain exactions that might otherwise be challenged as a taking)? (Check yes or no.)
_ Yes _ No

Q9. a) During the last ten years, has concern about the takings issue prompted your county to adopt new standards for creating written findings or an administrative record of land use decisions?
_ Yes _ No

b) Has concern about the takings issue led your county to adopt new standards, guidelines, or policies for the levels of fees or exactions the county will seek from developers during the last ten years?
_ Yes _ No

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c) In the last ten years, has your county ever conducted a study to ascertain, *for a specific development project*, the fees or exactions that would be permissible under the standards established by the *Nollan* and *Dolan* decisions (as codified in AB 1600 and Government Code §66000 *et seq.*)?
_ Yes _ No

d) If you answered "yes" to parts (b) or (c), did your county ever employ private consultants to conduct these studies?
_ Yes _ No

Q10. a) Since 1987, the U.S. Supreme Court has made several decisions that have set significant precedents in the law of takings. Can you think of any specific examples in which these precedents caused your county to make a land use decision or policy that was different from what you believe the county would have done in similar circumstances prior to these Supreme Court precedents?
_ Yes _ No

b) If you answered "yes" in part (a), please indicate below the stage or stages of the land use planning process in which your example(s) occurred and briefly describe (in a sentence or two) the type of action or decision affected. For more space you may use the back page of the survey.

Stage of ProcessBriefly Describe Decision or Policy Affected
General or specific plan

Zoning changes

Subdivision map approval
Building permits

Conditional use permit/variance
Rent control ordinance/regulations

Other (please specify)

Q11. Please indicate the extent to which you agree or disagree with the following statements. (Circle the number of your answer).

a) "The nexus and rough proportionality standards established by the *Nollan* and *Dolan* decisions, when followed carefully, simply amount

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to good land use planning practice."
1 Strongly disagree
2 Mostly disagree
3 Mostly agree
4 Strongly agree
5 No opinion

b) "U.S. Supreme Court decisions on takings have helped to create a legal climate that *reduces* our county's ability to manage land development to serve the needs of our community."
1 Strongly disagree
2 Mostly disagree
3 Mostly agree
4 Strongly agree
5 No opinion

THANK YOU FOR YOUR COOPERATION IN COMPLETING THIS QUESTIONNAIRE.

Please return this questionnaire using the stamped envelope provided. Or, you may send it by fax to (916) 654-5829.

If you have any questions, please call Dan Pollak (916) 657-2645 or send e-mail to dpollak@library.ca.gov.

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APPENDIX B

ANALYSIS OF SURVEY RESPONSE RATES

Because not all cities and counties responded, this is not a random sample, and the question arises of whether some sampling bias was introduced by the self-selection of the respondents. In other words, how representative is our sample of all the state's cities and counties?

As the following tables show, the response rate was somewhat higher among larger and faster-growing cities. This implies that, to some extent, the results may be more representative of these larger, faster-growing communities. The response rate also varied among different regions of the state.

With the state broken down into four regions,[1] the distribution of responses was as follows:

[1] "Southern CA" includes Ventura, Los Angeles, San Bernadino, Orange, Riverside, Imperial, and San Diego counties; "Bay Area" includes Sonoma, Napa, Solano, Marin, Contra Costa, Alameda, San Mateo, Santa Clara, and San Francisco counties; "Sacramento Region" includes Placer, El Dorado, Yolo, and Sacramento counties; "Other" includes Del Norte, Siskiyou, Modoc, Humboldt, Trinity, Shasta, Lassen, Tehama, Plumas, Mendocino, Glenn, Butte, Sierra, Lake, Colusa, Nevada, Sutter, San Joaquin, Amador, Calaveras, Stanislaus, Santa Cruz, Tuolumne, Alpine, Mono, Mariposa, Merced, San Benito, Monterey, San Luis Obispo, Santa Barbara, Kern, Kings, Fresno, Tulare, Inyo, and Madera counties.

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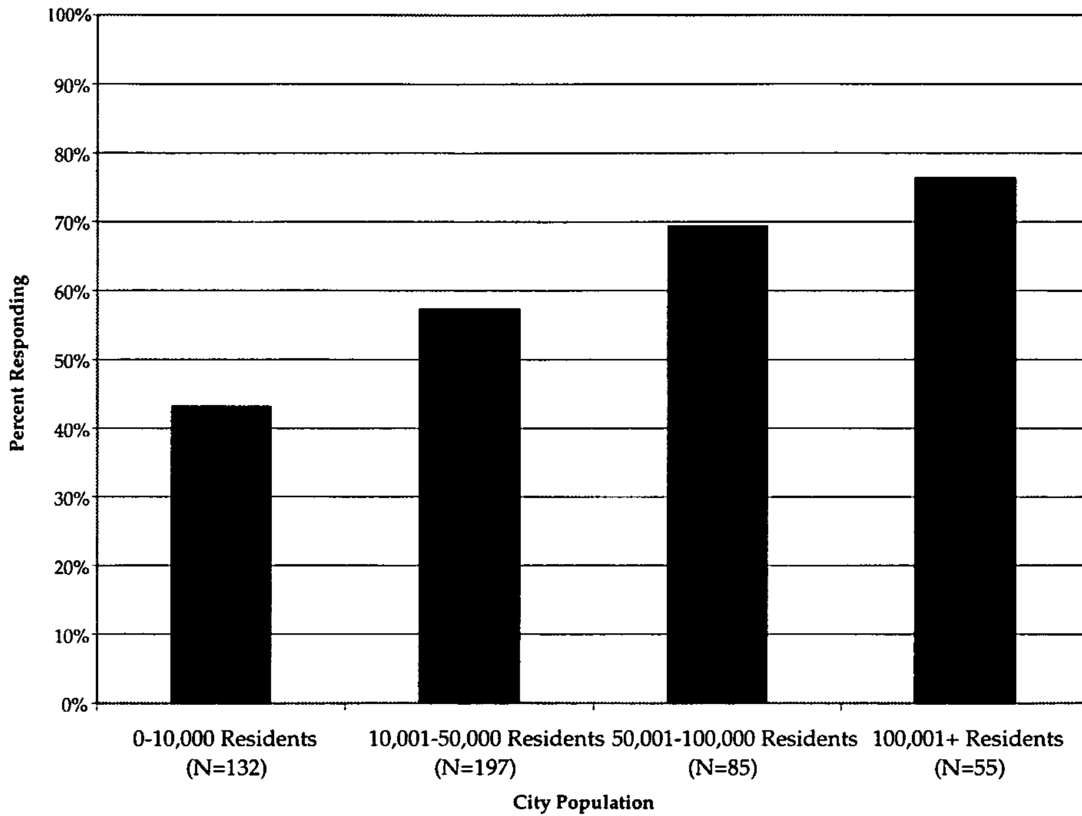
TABLE A1: CITY AND COUNTY RESPONSE RATES BY REGION
Response rates were highest from southern California (Los Angeles and San Diego regions). However, each region is well-represented in the sample.

In addition, we looked at response rate by population size.

Figure A1: Response Rate by City Population Size



ALL REGIONS	58%	64%

The response rate appears to be correlated with city population size. In other words, larger cities are disproportionately represented in the sample. This might be due to the fact that larger cities tend to have larger planning staffs.

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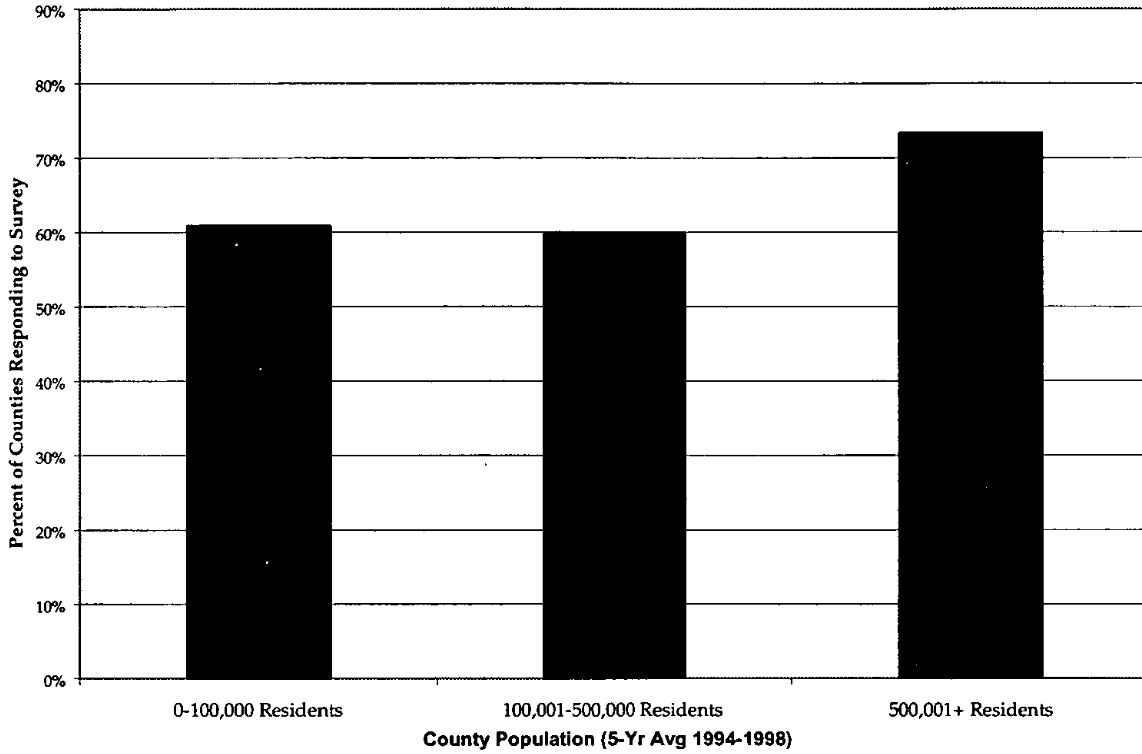
A similar pattern appears in the county responses, although to a lesser degree:

FIGURE A2: RESPONSE RATE BY POPULATION SIZE - COUNTIES



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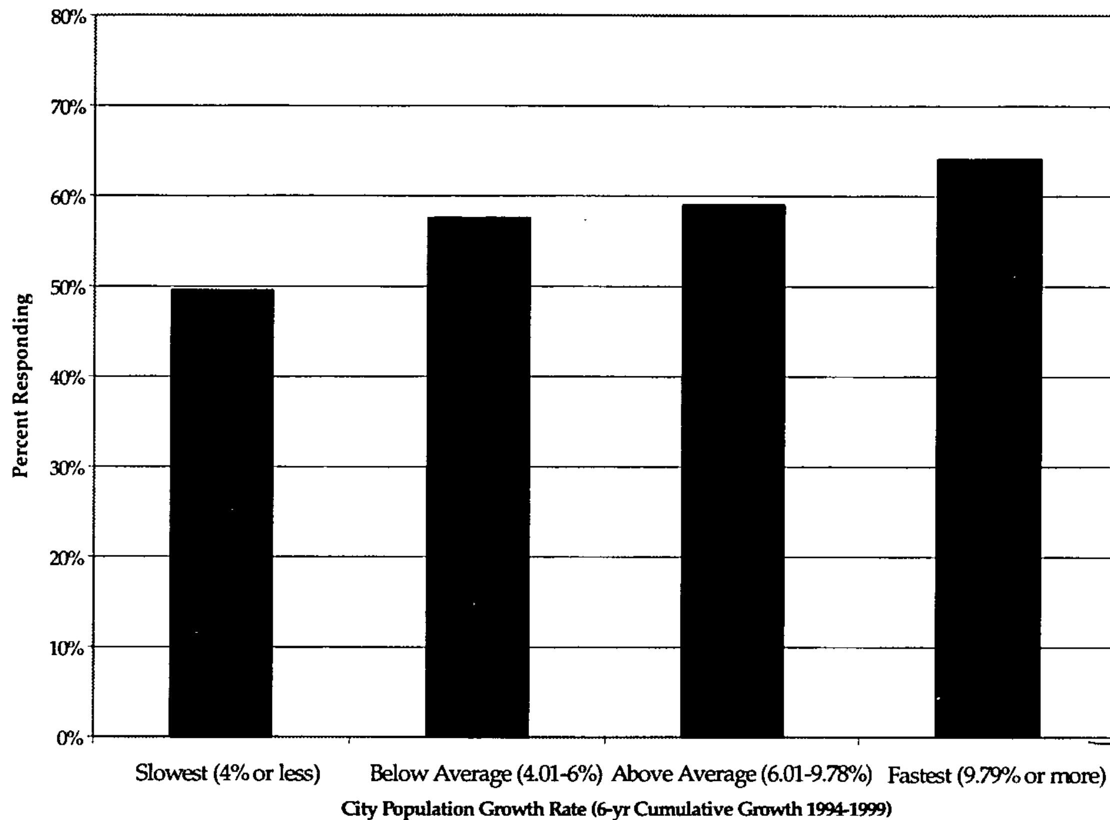
We also compared response rates based on population growth rates.[2] It appears that the city response rate may be related to the population growth rate.

FIGURE A3: CITY RESPONSE RATE BY POPULATION GROWTH RATE (6-YEAR CUMULATIVE GROWTH)



[2] Growth rate categories were created by calculating five-year cumulative population growth rates, and then dividing cities and counties into four categories containing roughly equal numbers of jurisdictions.

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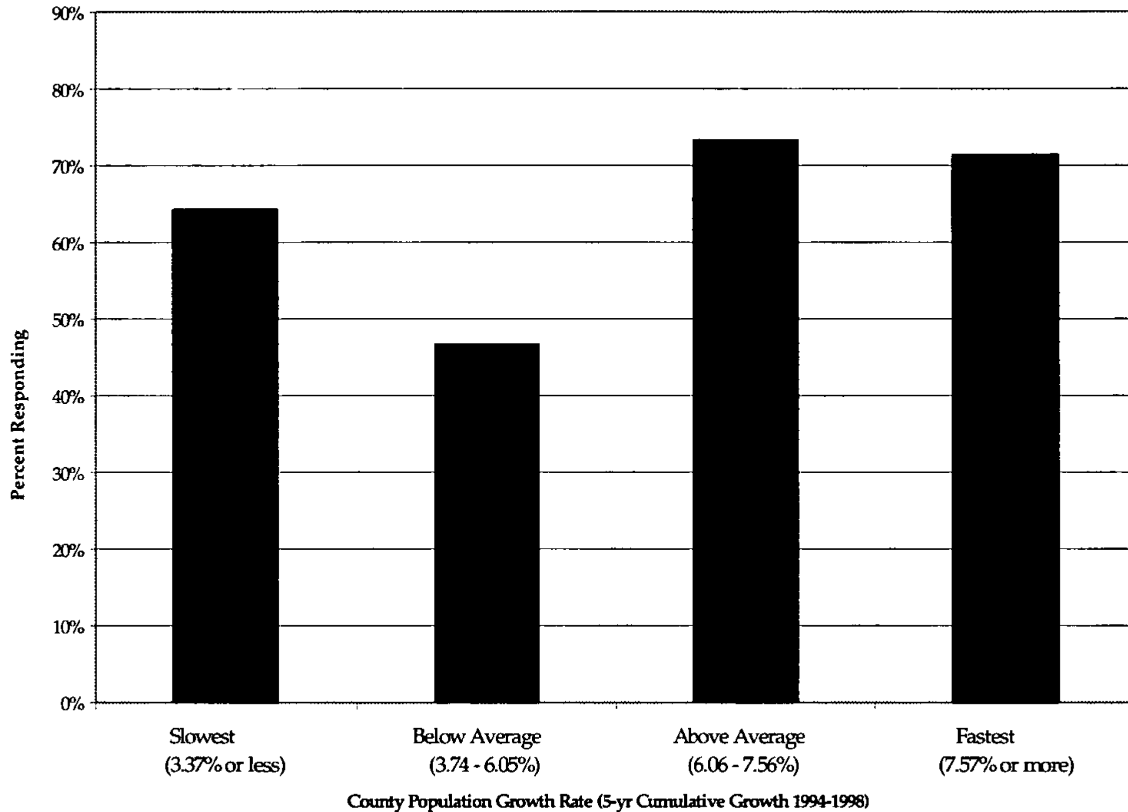
There is no clear relationship between growth rate and response rate among the counties:

FIGURE A4: COUNTY RESPONSE RATE BY POPULATION GROWTH



It is possible that faster-growing communities have a greater interest in takings issues due to having more development, which might make them more likely to respond to the survey. The data seem to support this for the cities, but for counties the trend is somewhat ambiguous.

Conclusion

There are variations in response rate that could potentially affect the overall results. However, the sample appears to be broadly representative of different regions, population sizes, and growth rates. The most pronounced bias seems to be that of city population size – there seems to be a consistent, marked trend toward a higher response rate with larger population size. In Appendix VI, we see that population size is correlated with some of the takings-related phenomena, such as frequency of takings objections. Therefore, the results of the survey could arguably over-represent the experience of larger-population cities. This in turn could mean that the results tend to overstate the frequency of phenomena (such as takings objections) that are correlated with population size.

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