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Batch v. Town of Chapel Hill - Takings Law and Exactions: Where Should North Carolina Stand?

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NOTES

BATCH v. TOWN OF CHAPEL HILL. Takings Law and Exactions: Where Should North Carolina Stand?

I. INTRODUCTION

In 1990, the North Carolina Supreme Court held in Batch v. Town of Chapel Hill\(^1\) that the Town of Chapel Hill had proper authority to deny the grant of a subdivision permit to Dr. Dierdre Batch because her application failed to "take into account . . . future road plans"\(^2\) set out by the town's Thoroughfare Plan. The court based its holding on a North Carolina statute\(^3\) which allows a town subdivision control ordinance to require a developer to account for both present and future road development when drawing up subdivision plans. The court refused to address the takings claim that Dr. Batch also advanced, holding that because the town had properly denied the subdivision permit, it was unnecessary to address the constitutional claims.\(^4\) Thus, the court posited, the case had been decided upon "adequate and independent state grounds."\(^5\)

The court's decision to affirm the Town of Chapel Hill's denial of Dr. Batch's subdivision permit based on technicalities of state law indicates an unwillingness by the court to address constitutional issues. In the last decade perhaps no topic has been so hotly debated as Fifth Amendment takings law claims. With the recent United States Supreme Court decisions of Nollan v. California Coastal Commission\(^6\) in 1987 and Dolan v. City of Tigard\(^7\) in 1994, the United States Supreme Court has begun to lay a foundation for determining when a government regulation or

2. Id. at 12, 387 S.E.2d at 662.
4. Batch, 326 N.C. at 14, 387 S.E.2d at 663.
5. Id. at 15, 387 S.E.2d at 664.
exaction is unconstitutional. The North Carolina Supreme Court has traditionally been reluctant to address such takings law issues. Such reluctance may stem from the fact that since takings law is still an evolving field, the court fears a decision today may face later reversal by the United States Supreme Court. However, the North Carolina Supreme Court cannot continue to decide important constitutionally charged cases on mere technicalities.

This note argues that the North Carolina Supreme Court improperly decided *Batch v. Town of Chapel Hill* by ruling on a mere technicality. Instead the court should have focused on the nature of the town's ordinance and the required exaction and should have addressed Dr. Batch's takings claim. Proper analysis of Dr. Batch's claim indicates that the condition the Town of Chapel Hill imposed was an unconstitutional exaction.

Part I of this note sets out the factual background and issues raised by the *Batch* decision and details the reasoning of both the North Carolina Court of Appeals and the North Carolina Supreme Court in ruling on the issues. Part II analyzes the courts' holdings on the takings claim issue and concludes that a taking did occur.

II. *Batch v. Town of Chapel Hill*

A. Factual Background

On September 16, 1986, Dr. Deirdre Batch applied to the Town of Chapel Hill for a permit to subdivide a twenty-acre tract into eleven individual lots within the extraterritorial planning jurisdiction of the Town. In 1983, prior to Dr. Batch's purchase of the land, the Town of Chapel Hill had adopted a Thoroughfare Plan for the Chapel Hill/Carrboro area. This Thoroughfare Plan included future plans to develop a limited access highway, called the Laurel Hill Parkway, part of which would pass directly through the northeast section of Dr. Batch's property.

Dr. Batch's subdivision plans did not accommodate for this proposed highway because at the time of her application for a permit, the road was not yet in existence. After reviewing Dr. Batch's subdivision application, Chapel Hill planning staff denied her permit on three bases, only two of which are relevant to a takings law analysis:

10. *Id.*
1. Plaintiff failed to indicate on her subdivision plat an intent to dedicate to the Town of Chapel Hill a right-of-way through her property for the proposed Laurel Hill Parkway.

2. Plaintiff failed to indicate on her subdivision plat an intent to dedicate to the Town an additional ten feet of right-of-way along Old Lystra Road and to improve Old Lystra Road by adding an additional twelve feet of pavement width as well as curb and gutter along the property's approximately 973 feet of frontage on that road.\(^1\)

On March 9, 1987, the Chapel Hill Town Council adopted its staff's recommendation and denied Dr. Batch's application.\(^2\) No other deficiencies in Dr. Batch's subdivision application were brought to her attention other than those three given by the planning staff,\(^3\) yet the Town Council stated the reasons for the denial of the application in very broad terms. One of the four reasons the Council gave for the denial was that the permit application "[d]oes not have streets which coordinate with existing and planned streets and highways"\(^4\) as required by the town's Development Ordinance. However, Town Planning Board minutes from an earlier January 6, 1987 meeting indicate that denial of the application was recommended because of Dr. Batch's "failure to incorporate the extension of the Laurel Hill Parkway . . . and failure to agree to widen Old Lystra Road."\(^5\)

Following the denial of her subdivision permit by the Chapel Hill Town Council, Dr. Batch filed a Writ of Certiorari and a Complaint in Superior Court, seeking a declaration that the denial of her application was unlawful and unconstitutional.\(^6\) She sought both an injunction compelling the Town of Chapel Hill to grant her subdivision permit and she claimed that the denial of her permit constituted a taking in violation of the Fifth Amendment of the Constitution.\(^7\)

The trial court ruled that the Writ of Certiorari and the Complaint were properly joined.\(^8\) The court found that Dr. Batch had

\(^{11}\) Batch, 92 N.C. App. at 603, 376 S.E.2d at 24.

\(^{12}\) Id.

\(^{13}\) Appellee's Brief to the N.C. Court of Appeals at 3, Batch v. Town of Chapel Hill, 92 N.C. App. 601 (1989).

\(^{14}\) Batch, 92 N.C. App. at 604, 376 S.E.2d at 25.

\(^{15}\) Defendant Appellant's Brief to the N.C. Court of Appeals at 6, Batch v. Town of Chapel Hill, 92 N.C. App. 601 (1989).

\(^{16}\) Batch, 326 N.C. at 8, 376 S.E.2d at 660.

\(^{17}\) Id.

\(^{18}\) Batch, 92 N.C. App. at 604, 376 S.E.2d at 25.
been deprived of her constitutional rights and that her property had been temporarily taken.\(^\text{19}\) The court granted summary judgment\(^\text{20}\) for Dr. Batch and ordered the Town of Chapel Hill to grant her subdivision permit.\(^\text{21}\) The Town of Chapel Hill appealed.

**B. The North Carolina Court of Appeals Opinion**

In a detailed and lengthy opinion, the Court of Appeals analyzed each part of Dr. Batch's claim and determined:

a) The trial judge had correctly allowed Dr. Batch to join her Writ of Certiorari with her Complaint.\(^\text{22}\)

b) The subdivision permit was denied because Dr. Batch failed to indicate an intent to dedicate portions of her tract as rights of way for the Laurel Hill Parkway and for expansion of Old Lystra Road.\(^\text{23}\)

c) The rational-nexus test set out by *Nollan* is the proper test to be adopted in North Carolina and applied to this case.\(^\text{24}\)

Thus, the Court held that Town of Chapel Hill's requirement that Dr. Batch dedicate a right of way for the Laurel Hill Parkway constituted an exaction that upon application of the *Nollan* test\(^\text{25}\) proved to be unconstitutional.\(^\text{26}\) The Court remanded the issue of whether the required dedication of a ten-foot strip of Old Lystra Road constituted an unconstitutional exaction.\(^\text{27}\)

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19. *Id.*
20. The Trial Court set out three conclusions of law in its summary judgment order, the first of which was as follows:

   Defendant's denial of Plaintiff's subdivision on the basis of Plaintiff's failure to dedicate a right of way necessary to accommodate the proposed Laurel Hill Parkway ... constitutes a temporary taking of that portion of the Plaintiff's property shown within the proposed right of way alignment of the Laurel Hill Parkway ... and unless compensation is paid ... the town's denial is in violation of the 5th and 14th Amendments to the United States Constitution.

*Batch*, 92 N.C. App. at 610, 376 S.E.2d at 28.

22. *Id.* at 608, 376 S.E.2d at 27.
23. *Id.* at 609, 376 S.E.2d at 27.
24. *Id.* at 616, 376 S.E.2d at 31.
25. It bears noting that the *Dolan* decision had not yet been handed down. Thus, the *Nollan* test was the only applicable test that the North Carolina Court of Appeals used to determine if an exaction was unconstitutional.
27. *Id.* at 625, 376 S.E.2d at 36. This note will focus only on the Laurel Hill Parkway condition and not the Old Lystra Road condition.
The Court of Appeals did not address the issues in this case from a traditional takings law analysis. Instead the court applied the test set out in Nollan, the first time a North Carolina court had ever addressed the question of whether an exaction constituted an unconstitutional taking. The Nollan test replaced the less stringent "reasonable relationship" test with the "essential nexus" test. This test required that there be an essential nexus between the exaction required and the goal of the regulation, i.e. the exaction had to "substantially advance [a] legitimate state interest." The court noted that when an exaction constitutes a physical taking of land (as the right of way required in Dr. Batch's case would), it does not matter "whether the condition imposed has only a minimal economic impact on the owner." The only relevant inquiry is whether the exaction meets the essential nexus test.

In its analysis of the essential nexus test, the court held that current statutory authority indicated that the North Carolina legislature believed it was the appropriate test to apply. The court pointed to several sections of N.C.G.S. § 160A-372 and held that "[r]ead the subdivision enabling statute as a whole, . . . it is clear the legislature contemplated that exactions can only be imposed without compensation when the exaction condition meets a need created by the development and that as a result of the exaction there will be a commensurate benefit to the subdivision."

The court then set out the test for determining whether an exaction amounts to an unconstitutional taking:

1. Identify the condition imposed.
2. Identify the regulation which caused the condition to be imposed.
3. Determine whether the regulation substantially advances a legitimate state interest.

28. Id. at 614, 376 S.E.2d at 30.
29. Id. at 616, 376 S.E.2d at 30.
30. Id. at 834.
31. Id. at 616, 376 S.E.2d at 30.
32. Batch, 92 N.C. App. at 614, 376 S.E.2d at 30.
33. Id. at 616, 376 S.E.2d at 31.
34. Id. at 620, 376 S.E.2d at 33.
4. If the regulation does substantially advance a legitimate state interest, determine whether the condition imposed advances that interest.

5. Determine whether the condition imposed is proportionally related to the impact of the development.\textsuperscript{35}

In applying this test, the court held that the condition imposed was that Dr. Batch "dedicate, accommodate, or reserve"\textsuperscript{36} a portion of her land as a right of way for the proposed Parkway. The court then identified the regulation relied on in imposing this condition as §6.5.1 and §7.7.1 of the Chapel Hill Development Ordinance which required that the streets serving a subdivision be in compliance with the Transportation Plan and the Comprehensive Plan of the town.\textsuperscript{37} The court assumed that a dedication of a right of way substantially advances a legitimate state interest of keeping streets and roads in compliance with the Comprehensive Plan. Thus satisfying the third and fourth prongs of the test.

The court then concluded that the Parkway condition failed to meet the last portion of the test, thus making it an unconstitutional exaction.\textsuperscript{38} The condition was held to be not "proportionally related to the impact of the development, and there is no commensurate benefit to the subdivision for its forfeit of land."\textsuperscript{39} This conclusion is supported by the fact that the Town of Chapel Hill had provided for the proposed parkway on the Thoroughfare Plan before Dr. Batch had even considered building a subdivision. Thus, the need for the parkway "[arose] not as a result of [Dr. Batch's] subdivision plan, but because of pre-existing traffic congestion."\textsuperscript{40} Additionally, town plans indicated that the parkway would be a limited access parkway which residents of the subdivision would be unable to access and that the plans for the parkway were indefinite as to timing and financing.\textsuperscript{41} This evidence clearly indicated to the court that there was no connection between the condition and the regulation.\textsuperscript{42} Thus, the court held that the con-

\textsuperscript{35} Id. at 621, 376 S.E.2d at 34. A close read of the test adopted by the North Carolina Court of Appeals reveals that it is not the exact same test adopted by the U.S. Supreme Court in \textit{Nollan}. Part II of this note will analyze the differences more closely.

\textsuperscript{36} Id.

\textsuperscript{37} Id. at 622, 376 S.E.2d at 34-35. \textit{See infra} text accompanying note 68.

\textsuperscript{38} \textit{Batch}, 92 N.C. App. at 622, 376 S.E.2d at 35.

\textsuperscript{39} Id.

\textsuperscript{40} Id. at 618, 376 S.E.2d at 32.

\textsuperscript{41} Id.

\textsuperscript{42} Id. at 619, 376 S.E.2d at 33.
dition as imposed was an unlawful exaction and the Chapel Hill Town Council could not constitutionally deny Dr. Batch's permit for failure to comply with the condition.\textsuperscript{43} The North Carolina Court of Appeals grappled with the issue of what constituted an unconstitutional exaction and wrote an intelligent opinion applying the law in an area of first impression. The North Carolina Supreme Court was not so brave.

C. The Opinion of the North Carolina Supreme Court

The North Carolina Supreme Court framed the entire issue as "whether the proceeding pursuant to [Dr. Batch's] petition for writ of certiorari to review the decision of the Town of Chapel Hill which denied [Dr. Batch's] subdivision permit application was properly joined with her cause of action alleging in her complaint constitutional violations."\textsuperscript{44} The court held that the proceedings were improperly joined. It concluded that the writ of certiorari should have been denied and that the order denying Dr. Batch's application should have been upheld.\textsuperscript{45} Likewise, it concluded that Dr. Batch's motion for summary judgment should have been denied.\textsuperscript{46}

The court began by addressing the joinder issue. It held that in reviewing the denial of the subdivision permit, the trial court was sitting as an appellate court because it was reviewing a quasi-judicial hearing decision.\textsuperscript{47} Thus, it could not properly grant summary judgment. Additionally, it could not substitute its findings of fact for those of the Town Council.\textsuperscript{48} Thus, the court held that if "even one of the reasons articulated by the town for denial of the subdivision permit is supported by . . . competent evidence on the record, the town's decision must be affirmed."\textsuperscript{49}

The Court then ruled that there was "no evidence in the record before the Town Council of any efforts on behalf of the town to require [Dr. Batch] to dedicate land for the right-of-way of Laurel Hill Parkway as a condition for approval of [Dr. Batch's] proposed

\textsuperscript{43} Id. at 622, 376 S.E.2d at 35.
\textsuperscript{44} Batch, 326 N.C. at 3-4, 387 S.E.2d at 656.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 11.
\textsuperscript{48} Id. at 12, 387 S.E.2d at 662 (citing Jamison v. Kyles, 271 N.C. 722, 157 S.E.2d 550 (1967)).
\textsuperscript{49} Id (citing Jennewin v. City Council of Wilmington, 62 N.C.App. 89, 93, 302 S.E.2d 7, 9 (1983)).
subdivision." It was the trial court that found this to be the fact and imposed it over the Town Council's finding that "the development does not have streets which coordinate with existing and planned streets and highways."

The court then ruled that as long as this finding by the Town Council is based on competent, material, and substantial evidence, it is a sufficient basis to support the denial of the subdivision application. The court found it to be sufficient because the Chapel Hill Town Ordinance "expressly requires that subdivision plans for streets and driveways . . . be in compliance with and coordinate to Chapel Hill's transportation plan." Thus, the court held that since Dr. Batch's subdivision application failed to "take into account" future road plans as set forth in the Thoroughfare Plan, it was validly denied.

The court then indicated that the only further inquiry that needed to be made was whether the town "had the authority to impose such a requirement and whether the town's resolution supporting the permit denial was unconstitutionally vague." The court pointed to N.C.G.S. § 160A-372 which authorizes a developer to take future and present road development into account when designing a subdivision. The court then declared without explanation that "a requirement that a subdivision design accommodate future road plans is not necessarily tantamount to compulsory dedication." Thus, the Town of Chapel Hill had authority to require Dr. Batch to "take future road plans into account" and was not unconstitutionally vague in denying her permit for that reason. The court ruled that it was unnecessary to decide any of Dr. Batch's constitutional claims and that summary judgment should have been entered for the Town of Chapel Hill since the "foundation of [Dr. Batch's] causes of action ha[d] been determined against [her]."

50. Batch, 326 N.C. at 7, 387 S.E.2d at 659 (emphasis added).
51. Id. at 12, 387 S.E.2d at 662.
52. Development Ordinance, § 6.5.1.
53. Batch, 326 N.C. at 13, 387 S.E.2d at 663.
54. Id. at 12, 387 S.E.2d at 662.
55. Id. at 13, 387 S.E.2d at 663.
56. Id.
57. Id. at 14, 387 S.E.2d at 663.
58. Id.
The court stated that its decision was based "solely upon adequate and independent state grounds."\(^{59}\) In making such a statement, the court was indicating to Dr. Batch and to the federal courts that the issue of whether there had been an unconstitutional taking had been laid permanently to rest.

D. Analysis of Dr. Batch’s Takings Claim

Unfortunately for the North Carolina Supreme Court, the federal courts did not view the court's decision in *Batch* with the same air of finality. Dr. Batch filed a complaint in federal district court alleging that her property was taken without just compensation in violation of the Fifth Amendment.\(^{60}\) The district court dismissed her case for lack of subject matter jurisdiction, but the Fourth Circuit, in an unpublished disposition, reversed the district court and held that the North Carolina Supreme Court ruled only on the denial of Dr. Batch's subdivision application.\(^{61}\) Thus, it never finally resolved her takings claim. Although the North Carolina Supreme Court thought it had disposed of the case on independent state law grounds, the Fourth Circuit made clear that the North Carolina Supreme Court "did not address the issue of whether the planned thoroughfare—along with its accompanying limitations and restrictions on the use of her property—constituted a taking without just compensation."\(^{62}\) The Fourth Circuit remanded the case for consideration of the takings claim, noting that there is a "distinction between the denial of the subdivision permit application and the possible consequences that may result from the planned thoroughfare through Batch's property."\(^{63}\)

Thus, Dr. Batch's taking claim is very much alive. Had the North Carolina Supreme Court ruled on the constitutional issue when it had the chance, the court could have played a role in resolving a part of North Carolina property law that is currently undecided. Since the *Batch* decision, no North Carolina case has addressed this same issue, and nationally, few courts have ruled on the subject of unconstitutional exactions. A thoughtful application of recent United Supreme Court decisions in the takings law area indicate however, that the North Carolina Court of Appeals

\(^{59}\) *Batch*, 326 N.C. at 15, 387 S.E.2d at 664 (citing *Michigan v. Long*, 463 U.S. 1032 (1983)).


\(^{61}\) Id. at 4.

\(^{62}\) Id.

\(^{63}\) Id.
was correct. Dr. Batch did establish that her land had been unconstitutionally taken.

E. Dr. Batch Established an Unconstitutional Exaction

[A]n exaction is a condition of development permission that requires a public facility or improvement to be provided at the developer's expense. An exaction is a condition of development permission that requires a public facility or improvement to be provided at the developer's expense.64 Virtually unheard of fifty years ago, exactions have become the method of choice among towns, low on finances, to accomplish needed community improvements without spending money.65 Thus, towns began conditioning the grant of a subdivision permit on requirements that the developers provide certain services, such as: expanding bordering roads, reserving land for community parks, or dedicating strips of land for new road construction.66 More recent exactions have required developers to pay fees rather than provide services. The constitutionality of exactions is a relatively new body of law. Developers are only recently beginning to challenge exactions as unconstitutional infringements on their rights as landowners.

Until the landmark United States Supreme Court decisions in Nollan v. California Coastal Commission67 and Dolan v. City of Tigard,68 state courts generally held that any exaction was constitutional so long as it was reasonably related to a government planning goal. The decisions in Nollan and Dolan reflected the United States Supreme Court's belief that the relative ease with which states could prove that an exaction bore a reasonable relationship to a governmental planning goal was resulting in an unfair burden upon private individuals to shoulder costs that should have been born by the public.

Nollan established that for an exaction to be constitutional, there had to be an "essential nexus" between the exaction and a substantial government interest.69 Dolan added a second part to the Nollan test and held that even if an essential nexus is established between the condition imposed and a legitimate state inter-

66. Id.
69. Nollan, 483 U.S. at 837.
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est, the exaction is still unconstitutional absent a showing that the required dedication bears a "rough proportionality" to the impact the development will bring.\textsuperscript{70}

In the \textit{Batch} case, the North Carolina Supreme Court determined that Dr. Batch was refused a subdivision permit because she failed to "take into account" the proposed Laurel Hill Parkway.\textsuperscript{71} Although the Court of Appeals found that the application was denied because of failure to "dedicate" a right-of-way to the town,\textsuperscript{72} the ruling of the North Carolina Supreme Court is binding because the issue of whether her subdivision application was properly denied was fully adjudicated by that court. Therefore, before the \textit{Nollan} and \textit{Dolan} tests can be applied, a more fundamental question must be answered. Does the condition that required Dr. Batch to "take into account" the proposed Laurel Hill Parkway in order to receive her subdivision permit constitute an exaction?

The North Carolina Supreme Court said no without stating why accommodation of future road plans is not the same thing as dedication of land for future roads. Clearly, had the Town voiced its denial of Dr. Batch's application in terms of "failure to dedicate land for a future highway" no one would have thought the condition anything other than an exaction. Simple analysis of what Dr. Batch would be required to do in order to "take into account" the proposed parkway indicates that such a condition is identical in form to a requirement of dedication.

The Chapel Hill Town Thoroughfare Plan showed that a strip of land seventy feet wide running through the center of Dr. Batch's land would be part of the future Laurel Hill Parkway. Such a designation of land interfered with Dr. Batch's subdivision plan because it ran through the center of 3 of her 11 lots and ran over a cul-de-sac accessing 4 of her lots. Because her subdivision application was denied for failure to take this proposed parkway into consideration, it is obvious what Dr. Batch would have had to do to bring her plan into conformity with the town Thoroughfare Plan. She would have had to redesign her subdivision so that the seventy-foot strip of land was unused. This would have required re-dividing the land into lots that did not overlap with the strip of land and re-routing roads so as not to cross that strip of land. The

\textsuperscript{70} \textit{Dolan}, 512 U.S. at 391.

\textsuperscript{71} \textit{Batch}, 326 N.C. at 12, 387 S.E.2d at 662.

\textsuperscript{72} \textit{Batch}, 92 N.C. App. at 610, 376 S.E.2d at 28.
net result was that Dr. Batch lost the use of this strip of land; the same as if it had been required as a dedication.

Although this is sufficient to qualify the condition as an exaction, further analysis makes such reasoning even clearer. Had Dr. Batch been required to dedicate the seventy-foot strip, the title would have passed to the Town of Chapel Hill. But as the Town of Chapel Hill conditioned it: she would retain title to the land, but would have to take the proposed highway into account for the Town. So what happens if the Town of Chapel Hill eventually decides to build the Laurel Hill Parkway? Is the town then going to pay Dr. Batch for the strip of land? Of course not, the town will merely come through and build the road on the strip of land that Dr. Batch so conveniently "accounted" for. If the town intended to pay Dr. Batch for the strip of land, it would never have required that she account for it. Rather at the time it decided to build the road, the town would have exercised its right of eminent domain and purchased the strip from Dr. Batch. It is precisely because the town would not pay for the strip of land that it required Dr. Batch to "account" for it. Such a condition has all the markings of an exaction.

Thus, having concluded that the condition imposed on Dr. Batch was in fact an exaction, the next step in determining whether such an exaction is constitutional is applying the Nollan-Dolan tests. Under Nollan, the exaction imposed must bear an essential nexus to a legitimate state interest. The exaction imposed was that Dr. Batch "dedicate, accommodate or reserve a right-of-way to coordinate her plan with the Town of Chapel Hill Thoroughfare Plan." 73 The legitimate state interest that the Town of Chapel Hill sought to advance was that a subdivision's streets and driveways must be in compliance with and coordinated with town planning. 74 Does an essential nexus exist

73. Batch, 92 N.C. App. at 621, 376 S.E.2d at 34.
74. The basis for this state interest can be found in § 6.5.1 and § 7.7.1 of the Chapel Hill Development Ordinance. § 6.5.1 states, "The type and arrangement of streets and driveways within the development shall be in compliance with and coordinate to Chapel Hill's Transportation Plan." § 7.7.1 reads as follows:
The subdivision should be designed with a street network which provides care, adequate access to all lots within the subdivision, and to properties adjoining the subdivision where such access is deemed desirable for the orderly future development of these properties. However, the design of the street network in a subdivision should not encourage through traffic (the origins and destination of which are external to the subdivision) to use local roads in a subdivision. Further,
between this exaction and the proffered state interest? To answer this question, a determination must be made as to whether a requirement that land “account” for a proposed highway substantially advances a governmental interest in having all roads comply or coordinate with a comprehensive plan. Certainly an argument can be made that it does, and that failure to coordinate subdivision road plans with town road plans would result in a tangled web of conflicting streets. This reasoning would be persuasive were it not for the fact that the Laurel Hill Parkway was not an existing road. It was not even a road planned for construction. Rather it was a road listed on the Official Map Act as a road that could possibly be built at some point in the future. In fact, today fifteen years after the Thoroughfare Plan was adopted, the Laurel Hill Parkway still is not under construction. Therefore, requiring Dr. Batch to “take into account” a proposed road does not substantially advance a governmental interest in maintaining conformity among roads when the road that the subdivision must conform with is not even under construction. Therefore, the Nollan test is not met.

However, even if the Nollan test was satisfied, the exaction required of Dr. Batch would still be unconstitutional because it would fail the Dolan test. The Dolan test requires that the exaction imposed bear “rough proportionality” to the projected impacts of the proposed development. Thus, “the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” The exaction imposed on Dr. Batch fails this test. First, the Laurel Hill Parkway was planned before Dr. Batch even submitted a subdivision application. Thus, “the Laurel Hill Parkway was designed to serve a public need completely distinct from and significantly greater than any need which might be cre-

the various streets, utilities, recreation areas and other community facilities serving a subdivision should be sized and located in conformity with the Comprehensive Plan.

75. It is important to note that when the Batch case was decided in 1990, the decision in Dolan had not yet been handed down. The Dolan decision did not come until 1994. However, the 4th Circuit issued its unpublished disposition in 1995 indicating that the federal courts would hear Dr. Batch's constitutional claim, so the Dolan decision is clearly applicable in determining if an exaction is unconstitutional.

76. Dolan, 512 U.S. at 391.
77. Id.
78. Batch, 326 N.C. at 4, 387 S.E.2d at 657.
ated by [Dr. Batch's] subdivision."79 The Thoroughfare Plan itself states that the purpose of the parkway is to "alleviate traffic congestion on Highway 15-501 created by new outlying subdivisions."80 Additionally, the proposed parkway would be limited access, thereby virtually guaranteeing that no trips from the subdivision would be made on the parkway.81 Given these facts, it is quite obvious that the required exaction is in no way related to the impact of the subdivision. The need for the parkway was caused by pre-existing conditions.82 The subdivision will not even be allowed access to the parkway. Therefore, the exaction is not "roughly proportionate" to the impact of the subdivision as required by Dolan and is unconstitutional.

The Court of Appeals decided this case without the benefit of the Dolan decision. It is interesting to note that in formulating its own test for determining if an exaction is unconstitutional, the court adopted the essential nexus test set forth by Nollan, but added to the test a second prong. The Court of Appeals held that not only did the condition imposed have to substantially advance a legitimate state interest, it had to be "proportionally related to the impact of the development."83 Upon examination this second prong is almost identical to the "rough proportionality" test adopted by Dolan. Thus, the Court of Appeals issued an insightful ruling that would still hold up in post-Dolan deliberations.

The Court of Appeals was correct in holding that the condition imposed on Dr. Batch was an unconstitutional exaction. The only error that the court made was in assuming that the condition imposed was an exaction without analyzing why. However, appropriate analysis indicates that the condition imposed was an exac-

80. Id.
81. Id.
82. Batch, 92 N.C. App. at 618, 376 S.E.2d at 32.
83. Id. at 621, 376 S.E.2d at 34.
tion and that such exaction was unconstitutional because it failed to meet the tests set out by Nollan and Dolan.

F. Dr. Batch Established an Unconstitutional Temporary Taking

Because the condition imposed by the Town of Chapel Hill was an unconstitutional exaction, Dr. Batch also has the right to pursue a claim that the denial of her subdivision application constituted a temporary taking. *First English Evangelical Lutheran Church v. County of Los Angeles*,

holds that if a regulation was determined to be invalid, the owner of the property might be entitled to damages on the theory that a temporary taking had occurred. Chief Justice Rehnquist states "[w]here this burden results from governmental action that amount[s] to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period." 85

Thus, Dr. Batch is entitled to compensation for the loss of the use of her land resulting from the imposition of an unconstitutional exaction. The interesting question then becomes: how do we value the lost use of land? A plausible argument can be made that Dr. Batch lost the ability to build a subdivision and is entitled to damages based on such loss. The problem is complicated by the fact that in order to decide the full extent of the temporary taking, the number of years Dr. Batch was prevented by the Town of Chapel Hill from using the strip of land must be determined. Additionally, it will be difficult for Dr. Batch to prove what value should be assigned to a lost ability to build a subdivision for a certain number of years. But the basic argument itself is sound. The exaction only related to a seventy-foot strip of land, but the effect of the exaction prevented Dr. Batch from using any of her property to build a subdivision. Thus, the regulation of the seventy-foot strip effectively regulated the whole twenty-acre parcel.

A more moderate approach to determining the damages suffered by Dr. Batch would be to value the loss of just the seventy-foot strip of land and not the resulting loss of value of the whole tract. Since any application Dr. Batch submitted would have been denied unless the seventy-foot strip was accounted for, the only true loss Dr. Batch suffered was the right to use the seventy-foot

85. Id. at 319.
strip of land. Proponents of this view would argue that while this case was pending, Dr. Batch could have submitted a revised application taking into account the seventy-foot strip of land, obtained a permit, and begun building on the unaffected land.

It seems, however, patently unfair to expect Dr. Batch to build around an exaction that is unconstitutional. Dr. Batch should have the right to wait for a full adjudication of her takings claim before making plans to alter her proposed use of the land. Therefore, the resulting loss of land should be valued by the overall effect such loss caused her property.

Allowing Dr. Batch to recover for a temporary taking based on a finding that the exaction imposed was unconstitutional has the desirable effect of making local governments analyze more carefully a regulation or exaction that they may wish to impose. Without allowing damages for a temporary taking, a town has no incentive to be careful about exactions it imposes. It can impose an exaction, sit back, and wait for the developer to either meet the condition or bring a lawsuit. If a lawsuit is filed and the town loses in court, then the only effect on the town is that it cannot impose the exaction. Allowing damages for the temporary taking that resulted while the developer was forced to bring a lawsuit punishes the town for its unconstitutional act.

CONCLUSION

The North Carolina Supreme Court erred by failing to address Dr. Batch's constitutional claim. The issue of whether an exaction is unconstitutional is an increasingly important question in the minds of property owners and developers alike. As society grows, the residential location of choice for accommodating such expansion is the subdivision. Thus, towns view the granting of subdivision permits as the perfect way to make developers pay for needed community improvements. While this “I'll do something for you if you do something for me” mentality may be appropriate in some circumstances, courts should never lose sight of the fact that the land upon which the exaction is imposed belongs to a private citizen. There must be strict and well-defined guidelines regulating the kinds of conditions a town may constitutionally impose upon the development of privately held land. North Carolina courts must be willing to address unlawful exaction claims so that developers may be assured that the courts will provide relief when a town has overstepped its constitutional limits.
In Dr. Batch’s case, the Town of Chapel Hill required the dedication of a strip of land for future highway use. A requirement of dedication should almost always be an unconstitutional exaction. Dedication is perhaps the most abhorrent form of regulation because it deprives the landowner of his most fundamental ownership right— the right to exclude others from his land. While it is understandable that towns may not always have the funds to finance highway construction entirely on their own, a town should first determine if other exactions exist that would provide a more reasonable alternative to a requirement of dedication. For example, a town could require that a fee be added onto the price of each lot in a subdivision payable to the town upon sale of the lot. Then the town could exercise its right of eminent domain when ready to build a road and use the fees to pay for the condemned land. However, even when an exaction takes the form of a fee, it still must meet constitutionality requirements.

The North Carolina Supreme Court should have applied *Nollan* and *Dolan* to the facts in Dr. Batch’s takings claim and held that the Town of Chapel Hill imposed an unconstitutional exaction. Had they done so, this case would have been over in 1990 instead of still dragging on today. The person hurt most by the court’s indecisiveness is Dr. Batch, the landowner the court is obligated to protect.

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