

Supreme Court, U.S.
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In the
Supreme Court of the United States

WEST LINN CORPORATE PARK, LLC,
Petitioner,

v.

CITY OF WEST LINN, et al.
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION IN SUPPORT
OF WEST LINN CORPORATE PARK, LLC**

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**MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE**

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for permission to file the attached brief amicus curiae in support of Petitioner West Linn Corporate Park, LLC. PLF sought consent of the parties and provided counsel for each party with more than ten days' notice of PLF's intent to file this amicus curiae brief. Petitioner consented, but the Respondent did not. Petitioner's consent is submitted with this brief. Pursuant to Rule 37, PLF moves the Court for leave to file the attached amicus curiae brief in support of the Petition.

Amicus Pacific Legal Foundation files this brief to assist the Court in considering an important and recurring issue of Fifth Amendment Takings law: whether the nexus and rough proportionality standards of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), apply when an exaction does not require the dedication of real property. PLF brings unique expertise to this task. For 38 years, PLF has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF represented the property owners in *Nollan v. California Coastal Commission* in the California state courts and the United States Supreme Court. PLF attorneys have been before the United States Supreme Court on three other occasions representing individuals whose right to use their property was unlawfully denied by government agencies. See *Rapanos v. United States*, 547 U.S. 715 (2006); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). PLF also has

participated as amicus curiae in nearly every major takings case before the United States Supreme Court in the past quarter of a century, including *San Remo Hotel L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

PLF believes that its litigation experience will provide an additional, valuable viewpoint on the issues presented in this case. Specifically, PLF will augment Petitioner's arguments by discussing the important effects of decisions limiting the *Nollan* and *Dolan* standards to exactions requiring the dedication of real property.

For the foregoing reasons, Amicus Pacific Legal Foundation respectfully requests that this Court grant its motion for leave to file the attached brief.

DATED: October, 2011.

Respectfully submitted,

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QUESTIONS PRESENTED

Local governments frequently require property owners to dedicate private property to public use as a condition for governmental approval of discretionary property development permits. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court held that such adjudicative property exactions violate the Fifth Amendment to the United States Constitution as uncompensated takings unless an “essential nexus” exists between the property exaction and a legitimate state interest, and the property exaction is “roughly proportional” to the projected impact of the development. In this case, a local governmental entity required Petitioner to construct and dedicate numerous off-site physical improvements on public property as a condition for governmental approval of discretionary permits to develop Petitioner’s property notwithstanding the absence of proportionality between the property exacted and the projected impact of the development. The two questions presented are:

1. Do the “essential nexus” and “rough proportionality” requirements of *Nollan* and *Dolan* apply equally to exactions of personal property as they do to exactions of real property?

2. Did the court below misconstrue this Court’s decision in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), when it refused to apply the protection of the Fifth Amendment to an exaction of personal property?

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BRIEF OF AMICUS CURIAE

Pacific Legal Foundation (PLF) submits this brief in support of the Petition for Certiorari.¹

SUMMARY OF ARGUMENT

This Court has ruled on only two Fifth Amendment takings cases involving exactions—*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The viability of the *Nollan/Dolan* takings tests in the context of development exactions generally was confirmed in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005): “[W]e reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed . . . by alleging . . . a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.” But this Court has not weighed in on whether the nexus and rough proportionality tests of *Nollan* and *Dolan* apply to the sort of land-use exaction at issue in this case.

The City of West Linn required that West Linn Corporate Park build off-site improvements and dedicate them to a public use in exchange for a development permit. The Ninth Circuit Court of Appeals refused to apply the *Nollan/Dolan* standards to determine the constitutionality of that exaction, continuing and expanding its efforts to limit the application of those standards to demands for the

¹ Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

dedication of real property. This cabining of *Nollan* and *Dolan* to their facts has resulted in government entities switching from exactions requiring the dedication of land to the kinds of exactions where government can escape the requirement to demonstrate that the burden imposed on new development is related to the impact on public facilities or programs.

**REASONS FOR GRANTING
THE PETITION**

I

**THE EXCEPTIONS TO *NOLLAN* AND
DOLAN ALLOW THE MAJORITY
OF EXACTIONS ON NEW
DEVELOPMENT TO EVADE
CONSTITUTIONAL SCRUTINY**

Some exactions on new development are constitutional; others are not. The standards for deciding whether an exaction falls into the first category or the second were set out by this Court twenty-four years ago in *Nollan v. California Coastal Commission*, 483 U.S. at 837 (A permit condition must be closely connected to the public harm it is intended to mitigate.). Seven years later, this Court defined how close a connection is required between the burdens imposed by a development exaction and the burdens created by a proposed development plan. *Dolan v. City of Tigard*, 512 U.S. at 391 (There must be rough proportion-ality—“the required dedication must be related both in nature and extent to the impact of the proposed development.”). Together, these tests ensure that property owners are not subjected to extortionate conditions on development. See *Lambert v. City and*

County of San Francisco, 529 U.S. 1045 (2000) (Scalia, Kennedy, and Thomas, J.J., dissenting from denial of certiorari) (“The object of the Court’s holding in *Nollan* and *Dolan* was to protect against the State’s cloaking within the permit process ‘an out-and-out plan of extortion.’”) (citations omitted).

The *Nollan* and *Dolan* standards could have gone a long way toward reducing the potential for governmental abuse in the permitting process. That has not happened. By focusing on the nature of the exaction, rather than a lack of nexus and proportionality, state and lower courts have created so many exceptions that the rule almost never applies.

In the Ninth Circuit, *Nollan* and *Dolan* do not apply to generally applicable monetary exactions (*McClung v. City of Sumner*, 548 F.3d 1219, 1222, 1225-27 (9th Cir. 2008)) (A takings challenge to a generally applicable development fee should be analyzed under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), instead of the “nexus” and “rough proportionality” tests of *Nollan* and *Dolan*). Nor do *Nollan* and *Dolan* apply to monetary exactions imposed in-lieu of the dedication of real property. *Mead v. City of Cotati*, 389 Fed. Appx. 637 (9th Cir. 2010) (“A generally applicable development fee is not the adjudicative land-use exaction subject to the ‘essential nexus’ and ‘rough proportionality’ tests” of *Nollan* and *Dolan*.).

Now, in this case, the Ninth Circuit carved out yet another exception to *Nollan* and *Dolan*. An individually imposed requirement that West Linn construct and dedicate to the city tangible physical improvements for the public benefit in exchange for a building permit is not, according to the Ninth Circuit,

properly analyzed under *Nollan* and *Dolan*. *West Linn Corporate Park LLC v. City of West Linn*, 2011 U.S. App. LEXIS 7911, at *4 (9th Cir. Apr. 18, 2011). Rather, the court noted, West Linn Corporate Park could have claimed a regulatory taking under the multi-factored test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, or a due process claim for the arbitrary imposition on conditions of development. *West Linn Corporate Park, LLC v. City of West Linn*, 2011 U.S. App. LEXIS 7911, at *5, n.3.

The Ninth Circuit and other courts increasingly are ruling to limit *Nollan* and *Dolan*'s applicability. This ignores the fact that both *Nollan* and *Dolan* support the view that the constitutional infirmity results, not from the precise nature of an exaction, but rather from the lack of an adequate nexus between the exaction and the use of the property. Without a close connection between the condition imposed on the use of land and the social evil that would otherwise be caused by the unregulated use of the owner's property, a permit condition is "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Nollan*, 483 U.S. at 837 (citations omitted).

When courts refuse to apply the nexus and rough proportionality standards to generally imposed exactions that do not require the dedication of real property, they wrongly focus on the nature of the exaction, when they should focus on the impediment that is being imposed on the exercise of a constitutional right. In other words, what is unconstitutional is that a landowner is forced to undertake an involuntary action that is not related in any real degree to any impact caused by the proposed use of the land. The particular type of involuntary

action and the manner of imposition are far less important to the analysis than is the lack of nexus and proportionality.

In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, this Court rejected the substantial advancement test as a takings test, because it “reveal[ed] nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights.” *Id.* at 542 (emphasis omitted). “A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through payment of compensation.” *Id.* at 543. Thus, the takings inquiry focuses only “upon the severity of the burden that government imposes upon private property rights.” *Id.* at 539.

By shifting the takings inquiry in *Nollan* and *Dolan* away from the lack of nexus and rough proportionality, the courts have opened the door for government to systematically impose exactions that would otherwise be deemed repugnant to the Constitution.

Sixteen years ago Professor Richard Epstein explained: “One of the reasons for *Dolan* was the hostile response in the lower courts to *Nollan*. Everywhere you looked the state satisfied the essential nexus test. The lower courts worked a pretty thorough nullification of *Nollan*, which was dutifully confined to its particular facts. We don’t know whether the same fate awaits *Dolan*.” Richard A. Epstein, *Introduction; The Harms and Benefits of Nollan and Dolan*, 15 N. Ill. U.L. Rev. 477, 492 (1995). Today, we do know the answer to that question. The vast majority of development conditions are free from meaningful

constitutional scrutiny and, as a result, property owners are deprived of important constitutional liberties. In this regard, the decision below conforms to a disturbing trend in the lower courts to excuse governments from their constitutional obligation to ensure that development conditions are sufficiently related to mitigate the harm created by new development. It is incumbent upon this Court to ensure that the *Nollan/Dolan* standards are not interpreted so narrowly as to make them meaningless as a constitutional takings standard.

II

LOCAL GOVERNMENTS AVOID EXACTIONS REQUIRING CONSTITUTIONAL SCRUTINY, FOCUSING INSTEAD ON EXACTIONS FALLING WITHIN THE EXCEPTIONS CARVED OUT BY THE NINTH CIRCUIT COURT

The Ninth Circuit has drawn a detailed roadmap for government to avoid successful constitutional challenges to exactions: impose conditions through generally applicable legislation; require the payment of fees, not the dedication of real property; include an option to pay a fee in-lieu of dedication of real property; or require off-site improvements where property owners must dedicate personal, not real, property. Are local governments paying attention? Absolutely.

PLF attorneys represented Michael Mead, a property owner in the City of Cotati, California. Mr. Mead obtained a permit to build four duplexes—eight individual units—on his 1.6 acres of vacant land on contiguous lots. In exchange for the

permit, he had to comply with the City's affordable housing ordinance by: (1) constructing at least two of the eight units as below-market units restricted for no less than 30 years for occupancy by moderate, low, or very low income households; (2) paying an in-lieu fee to the City; or, (3) seeking permission from the City to construct the required below-market units off-site, dedicate land to the City for its construction of below-market units, or provide a combination of on-site and off-site construction, in-lieu fees, and land dedication.

Mr. Mead challenged the constitutionality of the exaction under the Fifth Amendment to the United States Constitution. The trial court dismissed the case on ripeness grounds. The Ninth Circuit Court assumed without deciding that the takings claim was ripe, and went on to reject the claim because the City's ordinance included the option of paying an in-lieu fee. The court noted that "[a] generally applicable development fee is not the adjudicative land-use exaction subject to the 'essential nexus' and 'rough proportionality' tests" of *Nollan* and *Dolan*. *Mead v. City of Cotati*, 389 Fed. Appx. 637.

In 2007, the Wall Street Journal published an article discussing the nationwide trend of ever more burdensome exactions imposed on new development by local governments.² PLF represented several of the property owners discussed in the article, including Muhammed Ahmad and Jonette Banzon. Mr. Ahmad and Ms. Banzon wanted to build a home on a large corner lot they had purchased in rural Elk Grove,

² Kris Hudson, *Rising Use of 'Impact Fees' Rankles New-Home Buyers*, The Wall Street Journal, (Nov. 21, 2007), available at <http://online.wsj.com/article/SB119561637725500252.html> (last visited Oct. 6, 2011).

California. Unfortunately for them, the City of Elk Grove wanted to transform the narrow, two-lane rural roads into four-lane connector roads that would funnel traffic from the heavily populated parts of the city through the rural areas to freeway entrances to be built some time in the future. To facilitate this public project, the City adopted an ordinance requiring property owners seeking a permit for any new development to pay roadway fees of a prescribed amount per linear foot of property fronting a City road. The exaction for “frontage improvements” on the Ahmad/Banzon corner lot totaled \$240,360.³

Decisions of the Ninth Circuit would preclude review of this exaction from the analysis required by *Nollan* and *Dolan*. The City of Elk Grove would not have to demonstrate that one house occupied by two adults and one child would impact the adjacent roads so severely that Ahmad and Banzon could be forced to shoulder the financial burden of widening those public roads with all of the accompanying requirements for lighting, drainage, signing, and stripping, landscaping, and handicapped accessible sidewalks.

The Mead and Ahmad/Banzon cases demonstrate some of the ways local governments impose exactions to evade judicial scrutiny under *Nollan* and *Dolan*. Absent judicial oversight, and given the fungibility of money, governments can extort fees from a permit applicant to finance a variety of public projects benefitting the entire community, even projects wholly unrelated to the proposed development’s impact. William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*,

³ *Muhammed Ahmad and Jonette Banzon v. City of Elk Grove*, Sacramento Super. Ct. No. 05CS01760 (Filed Dec. 22, 2005).

67 Chi.-Kent L. Rev. 865, 881 (1991) (The author collected evidence that “many communities were using land use exactions to finance local expenditures that were only distantly related to the project that occasioned the exaction.”).

The kinds and amounts of development fees have exploded over the years to the point where it is a safe bet that monetary exactions are the fastest-growing and potentially most abusive form of permit conditions on new development. Between 2004 and 2008, the amount of money charged as an impact fee (generally ranging from thousands to tens of thousands of dollars per new housing unit) grew an average of 76 percent, with some jurisdictions increasing fees up to 225 percent in that four-year period. Clancy Mullen, Duncan Associates, *National Impact Fees Survey: 2008*, at 7 (Oct. 2008).⁴ In 2010, the national average of impact fees imposed on new residential dwellings grew to \$11,796, while the average impact fee for new industrial, office, and retail development ranged from \$3,137 to \$6,524 per 1,000 square feet. Clancy Mullen, Duncan Associates, *National Impact Fees Survey: 2010*, at 4-5 (Nov. 2010).⁵

These fees differ significantly from state to state, county to county, and city to city. *Id.* at 6. For example, in the southern states impact fees on new homes average less than \$1,000, while in California impact fees average \$23,441 per home. Clancy Mullen, Duncan Associates, *National Impact Fees Survey: 2010*,

⁴ Available at http://www.impactfees.com/publications%20pdf/2008_survey.pdf (last visited Oct. 6, 2011).

⁵ Available at http://www.impactfees.com/publications%20pdf/2010_survey.pdf (last visited Oct. 6, 2011).

at 6 (Nov. 2010). Impact fees are so pervasive that they affect nearly every aspect of housing, and have a serious detrimental impact on housing affordability. See Theo S. Eicher, Ph.D., *Growth Management, Land Use Regulations, and Housing Prices: Implications for Major Cities in Washington State*, at 10 (Feb. 2008) (The estimated cost of regulation and impact fees constitute nearly half the value of Seattle area homes.)⁶

So long as the courts limit the application of *Nollan* and *Dolan* to adjudicatively imposed exactions of real property, other types of exactions will continue to increase, raising serious constitutional issues affecting property owners nationwide. This Court “refrained from placing any limitations or distinctions or classifications on the application of the ‘essential nexus’ test,” but the Ninth Circuit and other courts have not shown such restraint. See *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995).

CONCLUSION

The nexus and proportionality requirements ensure that the purpose of the Fifth Amendment is fulfilled by protecting property owners from government actions that impact arbitrarily and unevenly on isolated individuals. See James L. Huffman, *Colloquium on Dolan: The Takings Clause Doctrine of the Supreme Court and the Federal Circuit: Dolan v. City of Tigard: Another Step in the Right*

⁶ Available at <http://depts.washington.edu/teclass/landuse/Seattle.pdf> (last visited Oct. 6, 2011).

Direction, 25 Env'tl. L. 143, 152 (1995). When the focus of the inquiry shifts from the burden on private property rights to the form of the exaction itself, *Nollan* and *Dolan* cannot function to lessen the risk of the extortionate use of the police power to exact unconstitutional conditions. The application of a constitutional takings test must not depend on arbitrary and ill-defined distinctions like the form of the exaction or the manner by which it is imposed.

The Petition for Writ of Certiorari should be granted.

DATED: October, 2011.

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v.
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Respondent.

AFFIDAVIT OF SERVICE

I, Patricia Billotte, of lawful age, being duly sworn, upon my oath state that I did, on the 11th day of October, 2011, send out from Omaha, NE 2 package(s) containing 3 copies of the MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF WEST LINN CORPORATE PARK, LLC in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

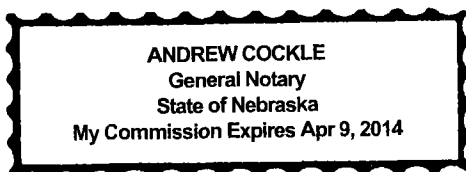
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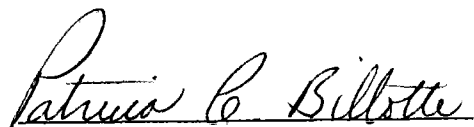
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Subscribed and sworn to before me this 11th day of October, 2011.
I am duly authorized under the laws of the State of Nebraska to administer oaths.





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Docket No. 11-299

West Linn Corporate Park, LLC v. City of West Linn

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No. 11-299

West Linn Corporate Park, LLC v. City of West Linn

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner West Linn Corporate Park, LLC contains 2,647 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 7, 2011.



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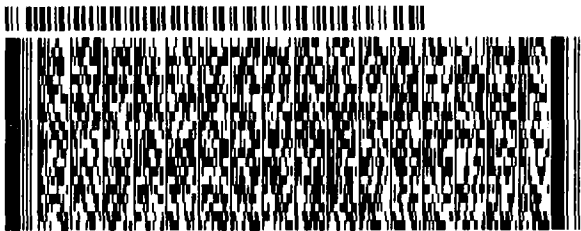
TO **CLERK OF THE SUPREME COURT
US SUPREME COURT BLDG
3035 V STREET NE**

WASHINGTON DC 20018

(202) 478-3341

REF: 12-592/26450/SPRING

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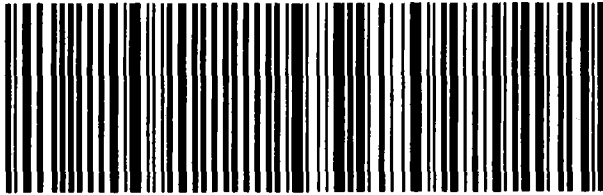
2311 Douglas Street • Omaha, Nebraska 68102-1214

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