

No. 11-299

IN THE
Supreme Court of the United States

WEST LINN CORPORATE PARK L.L.C.,
Petitioner,

v.

CITY OF WEST LINN, BORIS PIATSKI and
DOE DEFENDANTS 1 THROUGH 10,
Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 Corporate Disclosure Statement in the petition for writ of certiorari remains accurate.

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REPLY BRIEF FOR THE PETITIONER

In opposing the petition for writ of certiorari, respondents City of West Linn and Boris Piatski (collectively “respondent”) labor to obfuscate the important legal issue presented by this case. Try as it might, however, respondent cannot create impediments to this Court’s review where none exist. This case squarely presents the question whether the Takings Clause of the Fifth Amendment to the United States Constitution and the “essential nexus” and “rough proportionality” requirements of *Nollan v. California Coastal Commission* (“*Nollan*”), 483 U.S. 825 (1987), and *Dolan v. City of Tigard* (“*Dolan*”), 512 U.S. 374 (1994), apply to all property exactions

imposed through an *ad hoc* process for governmental approval of land-use permits, or whether those protections are limited to only exactions involving the dedication of interests in real property. That question is an important and recurring issue for both property owners and local governments. That question also is the subject of a deepening split of authority among state courts and lower federal courts, resulting in substantial uncertainty about the constitutional standards governing such property exactions.

Respondent expends little or no effort in its opposition to counter petitioner's argument that the legal issue presented here is of national importance or that the Supreme Courts of California and Texas have decided the issue contrary to the Oregon Supreme Court and the Ninth Circuit Court of Appeals. Instead, respondent raises the same subsidiary issues that it raised before the appellate courts below, issues which did not prevent those courts from deciding whether the constitutional protections of *Nollan/Dolan* apply to the type of property exactions at issue in this case. (App., 89a-90a, 120a-121a.) The petition for writ of certiorari should be granted to answer the important legal question directly presented by this case and to bring needed uniformity and clarity to the treatment of federal takings claims.

REASONS FOR GRANTING THE PETITION

A. This Case Squarely Presents the Legal Question Whether the Takings Clause and the Requirements of *Nollan/Dolan* Apply to Exactions of Personal Property

In its labors to confuse, respondent devotes the bulk of its opposition to presenting its version of the

facts. But respondent's factual arguments raise no impediments to this Court's review. Only one fact is essential to this petition. That fact is straightforward and undisputed – namely, that respondent required petitioner to construct and dedicate substantial off-site public improvement projects as a condition for respondent's *ad hoc* approval of petitioner's development permit. The petition does not require this Court to resolve any factual disputes about the required public improvements or concerning the payment of just compensation. Instead, the legal question is simply whether petitioner has stated a cognizable takings claim under the Fifth Amendment because the "essential nexus" and "rough proportionality" requirements of *Nollan/Dolan* apply to exactions involving personal property like the exactions imposed in this case. Neither the Ninth Circuit nor the Oregon Supreme Court perceived any factual or procedural impediments to deciding that legal question, and no impediments exist.

In arguing to the contrary, respondent raises three arguments about the merits of petitioner's claim. But these defenses, individually or collectively, do not affect in any manner the question whether petitioner, or any other property owner subjected to such exactions, possesses a cognizable takings claim under *Nollan/ Dolan*. For this reason, despite the fact that each of these three defenses was exhaustively briefed to the Ninth Circuit, that court properly concluded that respondent's defenses were secondary to the fundamental issue of whether a claim exists. (App., 121a.) This Court should make a similar determination because none of respondent's defenses have the potential to prevent or impede the Court's answer to the important legal question posed here.

Respondent's first argument is that petitioner already received just compensation for its dedication of off-site improvements through payment of certificates for System Development Charges ("SDC certificates"). (Opp. Br. at 1, 21-22.)¹ This argument is both legally irrelevant and factually wrong. It is legally irrelevant because the petition does not present any question about whether just compensation was paid to petitioner for the required public improvements. And the question of what damages are caused by a constitutional violation says little or nothing about whether such a violation has, in fact, occurred. Therefore, despite being raised below, no lower court reached the just compensation issue. Instead, both the Ninth Circuit and the Oregon Supreme Court concluded that no payment of just compensation was required even assuming that the imposed conditions were not "roughly proportional" to the impacts of the development because the imposed conditions involved only the dedication of personal property and not the dedication of real property. (App., 89a, 121a.) Thus, the petition presents only the question whether the Ninth Circuit and the Oregon Supreme Court were correct in concluding that the Takings Clause and the requirements of *Nollan/Dolan* are inapplicable to exactions of personal property that governmental entities impose in

¹ In connection with this claim, respondent insists, without offering any specifics, that petitioner "has misstated the factual basis of [petitioner's] federal takings claim." (Opp. Br. at 1.) However, petitioner's statement of the facts of this case – including the nature and costs of the off-site public improvements and the amount of cash payments that respondent required from petitioner as a condition for development – is consistent with the Ninth Circuit's statement of the facts in its published decision. (App., 22a-36a.)

exchange for *ad hoc* approval of land-use permits. Other courts have reached the exact opposite conclusion, and this significant split of authority warrants this Court's review.

Respondent's claim regarding SDCs (or System Development Charges) is also factually inaccurate. The courts below expressly did not accept respondent's claim that just compensation was paid to petitioner in the form of SDC certificates. As the Ninth Circuit explained, SDCs "represent what the City considers, and attempts to recapture as, 100 percent of costs that result from the impacts of property development." (App., 32a.) Because petitioner paid more in cash and in constructing public improvements than the amount of SDCs assigned to petitioner, petitioner sought reimbursement of the overpayments. In lieu of paying cash, respondent provided petitioner with SDC certificates. But the Ninth Circuit correctly recognized that "SDC certificates are not the functional equivalent of cash" because they "only cover up to 50% of SDCs on a future project, may not be exchanged for cash, and are valid only for ten years." (App., 33a.) Although the certificates are alienable, "the market for [SDC] certificates is small, and the certificates have limited value." (*Id.*) The Ninth Circuit also correctly recognized that petitioner "was only able to sell its certificates for \$ 12,251, a seventy-five percent discount." (App., 33a.) Respondent's claim that petitioner has been justly compensated by SDC certificates is unsupported by any factual findings of the lower courts.²

² The Oregon Supreme Court made no findings about SDCs because "the Ninth Circuit does not pose questions that require our consideration of the validity of the SDCs." (App., 55a, n.3.)

Respondent's other factual and procedural arguments against review also lack merit. Respondent urges that petitioner's federal takings claim is barred because petitioner purchased the property after the development conditions were first imposed. (Opp. Br. at 26-27.) This argument was raised both before the district court and the Ninth Circuit, and neither court accepted that petitioner lacked the ability to prosecute its claims. Raising this argument again here, respondent fails to acknowledge that this Court already has concluded that a subsequent purchaser of property may bring a takings claim based on conditions imposed before the purchase in circumstances where the takings claim was not ripe for the previous owner. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001) ("A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken."). In this case, there is no dispute that petitioner purchased the property before any takings claim was ripe. There also is no dispute that the property taken belonged to petitioner, not to the petitioner's predecessor in interest. Moreover, the development conditions ultimately imposed on petitioner were significantly more onerous than the development conditions imposed in the conditional approval of the project for petitioner's predecessor in interest. The fact that petitioner purchased the property after conditional approval of the project does not present any barrier to review of the question whether the Takings Clause and the requirements of *Nollan/Dolan* apply to exactions involving dedications of personal property.

Respondent's prudential ripeness argument also presents no barrier to review. See *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997)

(describing the ripeness requirements established by this Court in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), as prudential in nature). Respondent stresses that neither the Ninth Circuit nor the Oregon Supreme Court "overturned" the district court's decision that petitioner's federal takings claim was not ripe. (Opp. Br. at 25-26.) But, despite petitioner's appeal of the district court's ruling, neither court reached the ripeness of petitioner's federal takings claim while each court, despite respondent's ripeness challenge, decided the question presented here, whether a property owner could base a takings claim on the exaction of personal and not real property. In its decision, the Oregon Supreme Court recognized the state-law exhaustion requirement applied only to valid state-law claims, and it concluded that state law did not recognize petitioner's takings claim. (App., 64a ("If state law does not recognize [petitioner's takings] claims, then [petitioner's] failure to take administrative steps preliminary to their assertion cannot serve as a basis for entry of judgment against [petitioner].").) Following the Oregon Supreme Court's lead, the Ninth Circuit also did not reach respondent's ripeness argument. (App., 121a ("Like the state-law claim, we need not address whether this claim is ripe.")) Instead, the Ninth Circuit relied on its threshold determination that petitioner failed to state a cognizable federal takings claim because the exactions at issue involved only personal property and not real property. (App. 121a.) The correctness of that holding is squarely presented by this petition and warrants review by this Court.³

³ In any event, despite respondent's claim to the contrary, petitioner's federal takings claim is ripe for review. *Williamson*

B. The Question of Whether the Takings Clause Applies to Exactions of Personal Property Is a Recurring and Important Issue for Both Property Owners and Local Governments, and Only This Court Can Resolve the Split of Authority

Respondent cannot deny the importance of the legal question whether exactions of personal property are subject to the protections of the Takings Clause and the “essential nexus” and “rough proportionality” requirements of *Nollan/Dolan*. “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Because this core principle of distributive fairness is as threatened by a disproportional exaction of personal property as it is by a disproportional exaction of real property, the distinction adopted by the Ninth Circuit in this case creates grave constitutional concerns.

County dealt with a pure regulatory takings claim in which the issue before the Court was whether application of a zoning ordinance deprived the owner of all economically viable use of his land. *Williamson County*, 473 U.S. at 179-83. Under these circumstances, this Court required a sufficiently definite determination by the local government as to what uses of the land were permitted. *Id.* at 191. But in this case, there is no dispute about the permitted uses of petitioner’s property or regarding the finality of the exactions imposed by respondent as conditions for petitioner’s development permit. By the time of trial, all actions in the case were final, petitioner’s property had already been taken, and there was no prudential reason not to reach the merits of petitioner’s takings claim.

The impact of the Ninth Circuit's rule is not merely theoretical. As *amici* National Association of Homebuilders and 24 state associations state, it is pervasive throughout the United States for local governments to condition approval of land-use permits on the construction and dedication of public improvements or the dedication of other personal property. (See HBA Amicus Br. at 6.) *Amicus* Pacific Legal Foundation also notes "that monetary exactions are the fastest-growing" form of development condition and that, between 2004 and 2008, the amount of these fees grew by an average of 76 percent. (See PLF Amicus Br. at 9.) Thus, the decision in this case has wide-ranging, practical consequences.

Because of the current split in authority about the applicability of *Nollan/Dolan* to *ad hoc* exactions involving personal property, there is no uniformity in the treatment of federal takings claims. Some governmental entities – such as those in California and Texas – are subject to judicial decisions that require exactions of personal property to be "roughly proportional" to the impacts of development to avoid claims for just compensation. See *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), *cert. denied*, 519 U.S. 929 (1996) (*ad hoc* monetary exactions imposed as conditions for development are subject to *Nollan/Dolan* requirements); *Flower Mound, Texas v. Stafford Estate Ltd. Partnerships*, 135 S.W.3d 620 (Tex. 2004) (same). But other governmental entities – including those in Oregon following the Oregon Supreme Court and Ninth Circuit decisions in this case – are free to impose disproportional *ad hoc* exactions as conditions to development so long as those exactions do not involve real property.

In opposing the petition, respondent does not deny this split of authority. Instead, respondent tries to discount the significance of the conflict by suggesting that the issue already has been resolved by this Court's decision in *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005). But *Lingle* does not address – much less answer – whether the Takings Clause and the requirements of *Nollan/Dolan* apply to exactions of personal property.

Lingle involved a facial challenge to a state rent ceiling under the Takings Clause. *Lingle*, 544 U.S. at 532. Nothing in *Lingle* hinted – much less decided – that the requirements of *Nollan/Dolan* should be limited to only exactions involving real property. Instead, the Court in *Lingle* simply reiterated that *Nollan/Dolan* “involve a special application of the ‘doctrine of unconstitutional conditions.’” *Id.* at 547. *Lingle* did not imply that the doctrine of unconstitutional conditions is limited to exactions of real property. Indeed, *Lingle* explained that this Court's takings jurisprudence, including the *Nollan/Dolan* analysis, is uniquely concerned with how burdens on property rights are distributed among property owners. *Id.* at 542. That concern suggests that this Court would judge takings of *all* types of property, whether real or personal, with the same focus on distributive fairness, rather than engage in the facile distinction between different types of property utilized by the Ninth Circuit in this case.

Contrary to respondent's claim, *Lingle* also has not ended the widespread confusion and debate about the applicability of *Nollan/Dolan* to exactions of personal property. Subsequent to *Lingle*, other state courts continued to follow the lead of the *Ehrlich* and *Flower Mound* decisions and applied the requirements of

Nollan/Dolan to exactions not involving the dedication of real property. See, e.g., *Ocean Harbor House Homeowners Ass'n v. California Coastal Comm'n*, 77 Cal. Rptr. 3d 432, 444 (Cal. Ct. App. 2008) ("Both *Nolan* and *Dolan* involved permit conditions that required the dedication of land or an interest in land. However, the *Nollan-Dolan* test is not limited to such conditions."); *Toll Bros., Inc. v. Board of Chosen Freeholders of Burlington*, 944 A.2d 1, 13 n.2 (N.J. 2008) (New Jersey's application of a strict nexus test between the required off-site improvements and the impact of the development is consistent with *Dolan*). Commentators also have offered differing interpretations of *Lingle*. See, e.g., Timothy M. Mulvaney, *The Remnants of Exaction Takings*, 33 *Environ. L. & Pol'y J.* 189, 212-14 (2010) (describing discussion of *Nollan/Dolan* in *Lingle* as "insightful dicta" that "could be read" as limiting the application of these cases to all but a "narrow set of exactions involving public, physical invasions"); Daniel L. Siegel, *Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 *Stan. Environ. L. J.* 577, 580 (2009) (positing theory that *Nollan/Dolan* "can only apply to permit conditions that dedicate real property"); Jane C. Needleman, *Exactions: Exploring Exactly When Nollan and Dolan Should Be Triggered*, 28 *Cardozo L. Rev.* 1563, 1576 (2006) (urging that *Nollan/Dolan* should not be limited to exactions of real property.) Until this Court explicitly resolves the question about the applicability of *Nollan/Dolan* to exactions involving personal property, the debate will persist, and federal takings claims will continue to receive different treatment in different jurisdictions. This fundamental constitutional issue requires guidance from this Court.

CONCLUSION

The question whether the “essential nexus” and “rough proportionality” requirements of *Nollan/Dolan* apply to *ad hoc* exactions of personal property as they do to exactions of real property is squarely presented by this case, is the subject of a split of authority, and is an important and recurring question for both property owners and local governments. Both the Oregon Supreme Court and the Ninth Circuit refused to apply the constitutional protections of *Nollan/Dolan* because, according to those courts, this Court has not yet made clear its intent to apply the “essential nexus” and “rough proportionality” standard to exactions of personal property. (App., 89a, 121a.) But where, as here, there is no principled constitutional distinction between dedications of real and personal property, this Court should make clear that the protections of *Nollan/Dolan* are not subject to such fine distinctions. The petition for writ of certiorari should be granted.

Respectfully submitted,

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