No. 70659

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

City of Battleground, Washington,

Appellant,

v.

The Benchmark Land Company,

Respondent.

**MEMORANDUM OF *AMICI CURIAE*
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WASHINGTON STATE ASSOCIATION OF MUNICIPAL
ATTORNEYS IN SUPPORT OF PETITION FOR REVIEW**

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 2

A. The Court of Appeals Erred by Applying *Nollan* and *Dolan*. 2

B. The Court of Appeals Misapplied *Nollan* and *Dolan*. 7

1. The Court of Appeals Erred by Refusing to Consider the City's Safety Concerns. 7

2. The Court of Appeals Erred by Excluding Traffic Impacts on Other Portions of North Parkway. 9

IV. CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Arcadia Dev. Corp. v. Bloomington, 552 N.W.2d 281 (Minn. Ct. App. 1996) ... 3
Benchmark Land Co. v. City of Battle Ground, 94 Wn. App. 537, 972 P.2d 944 (1999). ... 9
Christianson v. Snohomish Health Dist., 133 Wn.2d 647, 946 P.2d 768 (1997) ... 6
City of Monterey v. Del Monte Dunes at Monterey Ltd., 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999) ... 4
Clajon Prods. Corp. v. Petera, 70 F.3d 1566 (10th Cir. 1995) ... 3
Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) ... *passim*
Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 452 (1998) ... 3, 4
GST Tucson Lightwave, Inc. v. City of Tucson, 949 P.2d 971 (Ariz. Ct. App. 1997) ... 3
Harris v. Wichita, 862 F. Supp. 287 (D. Kan. 1994) ... 3
Home Builders Ass'n of Cent. Arizona v. Scottsdale, 930 P.2d 993 (Ariz. 1997) ... 3
Lambert v. City and County of San Francisco, 529 U.S. 1045, 120 S. Ct. 1549, 146 L. Ed. 2d 360 (2000) ... 4
Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) ... 3
McCarthy v. City of Leawood, 894 P.2d 836 (1995) ... 3
Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) ... *passim*
Penn Central Transp. Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) ... 3
S.E.Cass Water Resource Dist. v. Burlington N. R.R. Co., 527 N.W.2d 884 (N.D. 1995) ... 3
Sperry Corp. v. United States, 493 U.S. 52, 110 S. Ct. 387, 107 L. Ed. 2d 290 (1989) ... 6
Texas Manufactured Hous. Ass'n v. Nederland, 101 F.3d 1095 (5th Cir. 1996) ... 3
Unity Real Estate Co. v. Hudson, 178 F.3d 649 (3d Cir. 1999) ... 4
Waters Landing Ltd. Partnership v. Montgomery County, 650 A.2d 712 (Md. 1994) ... 3

Table of Authorities (Cont.)

Yee v. City of Escondido, 503 U.S. 519, 112 S. Ct. 1522,
118 L. Ed. 2d 153 (1992) 6

STATUTES

RCW 39.92 9
RCW 39.92.010 9

I. INTRODUCTION

The *amici curiae* supporting the City of Battle Ground's ("City's") Petition for Review are the Association of Washington Cities ("AWC") and the Washington State Association of Municipal Attorneys ("WSAMA"). *Amici* adopt and incorporate by reference the City's description of the decision below and issues presented for review.

II. STATEMENT OF THE CASE

Melrose Park is a 56-home subdivision that abuts North Parkway Avenue, a busy arterial road in the City. Benchmark Land Company, Melrose Park's developer, describes this stretch of North Parkway as "black as * * * the inside of a cow's belly * * * it's narrow, there are ditches on both sides, it's scary, and when it's raining and dark, I mean you can't see anything." CP 572. School buses make special trips into the subdivision to ensure that school children are not forced to walk a short distance along North Parkway. CP 561. A child on a bike died in an automobile accident along North Parkway in August 1995, just as Benchmark began developing Melrose Park. CP 510. In Benchmark's words: "there isn't any question that the thing is just terrible." CP 572.

In seeking approval of its subdivision application, Benchmark offered to make improvements to North Parkway. CP 373-74. After

discovering that such improvements would be more costly than anticipated, however, Benchmark rescinded this offer. CP 375. The City was therefore forced to impose these safety improvements as a condition of Benchmark's subdivision approval. The City Council acted to protect the safety of the residents. In the words of a City Council member "I would not put 56 more families in harms way on purpose." CP 575.

III. ARGUMENT

The Court of Appeals erred both by extending the land dedication tests from *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) to the safety requirement at issue in this case and in how it applied those tests. Unless reversed by this Court, the decision below will place an enormous and unwarranted new burden on local governments throughout Washington that will dramatically impede their ability to ensure the orderly and safe development of land.

A. The Court of Appeals Erred by Applying *Nollan* and *Dolan.*

Nollan and *Dolan* involved forced dedications of land. Compelled dedications merit scrutiny under the Takings Clause because developers are forced to convey land to the public without receiving just compensation. Non-land conditions imposed to

protect the safety of subdivision residents and the public simply do not raise the same issues under the Takings Clause. Although a safety condition might be so oppressive that it qualifies as a taking under other Supreme Court rulings,[1] the special tests of *Nollan* and *Dolan* clearly do not apply.

Support for this proposition abounds. *Nollan* and *Dolan* both emphasize the special nature of required dedications.[2] The vast majority of lower federal and state courts addressing the issue have limited *Nollan* and *Dolan* to dedication requirements.[3] Five justices in the 1998 case, *Eastern Enterprises v. Apfel,* 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 452 (1998), agreed that the Takings Clause is "the wrong legal lens," *id*. at 554 (Breyer J., dissenting), to view challenges to a regulation that "simply

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[1] *See, e.g.,* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (categorical taking when regulation prohibits all economically viable use of property); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (multi-factored takings inquiry).

[2] *See* Nollan, 483 U.S. at 841 ("We are inclined to be particularly careful * * * where the actual conveyance of property is made a condition to the lifting of a land-use restriction"); Dolan 512 U.S. at 385 (distinguishing permit conditions from "a requirement that she deed portions of the property to the city.").

[3] *See, e.g.,* Texas Manufactured Hous. Ass'n v. Nederland*,* 101 F.3d 1095, 1105 (5th Cir. 1996); Clajon Prods. Corp. v. Petera*,* 70 F.3d 1566, 1578-79 & 1579 n.21 (10th Cir. 1995); Harris v. Wichita, 862 F. Supp. 287, 294 (D. Kan. 1994); McCarthy v. City of Leawood, 894 P.2d 836, 845 (1995); Home Builders Ass'n of Cent. Arizona v. Scottsdale*,* 930 P.2d 993, 1000 (Ariz. 1997); GST Tucson Lightwave, Inc. v. City of Tucson, 949 P.2d 971, 978 -79 (Ariz. Ct. App. 1997); Waters Landing Ltd. Partnership v. Montgomery County*,* 650 A.2d 712, 724 (Md. 1994); Arcadia Dev. Corp. v. Bloomington, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996); S.E. Cass Water Resource Dist. v. Burlington N. R.R. Co.*,* 527 N.W.2d 884, 896 (N.D. 1995).

imposes an obligation to perform an act." *Id*. at at 539-547 (Kennedy, J., concurring in the judgment and dissenting in part).[4] And in 1999, in *City of Monterey v. Del Monte Dunes at Monterey Ltd.,* 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999), the Court unanimously reversed one of the few courts to apply *Dolan* broadly, ruling that *Nollan* and *Dolan* apply only to "exactions – land-use decisions conditioning approval of development on the dedication of property to public use." *Id.* at 702.

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[4] *See also* Unity Real Estate Co. v. Hudson, 178 F.3d 649, 658-59 (3d Cir. 1999) ("[t]here are five votes against the plurality's Takings Clause analysis," and lower courts "are bound to follow the five-four vote against the takings claim * * *.").

The Court of Appeals' reliance on the plurality opinion in *Eastern Enterprises* to support application of *Nollan* and *Dolan* here is difficult to fathom. The plurality's reference to the fact that the retroactive liability placed on coal companies under the Coal Act was "substantially disproportionate" to the benefits the company received, 524 U.S. at 529, was explained a year later by the unanimous Supreme Court in *Del Monte Dunes*, which clarified that "in a general sense concerns for proportionality animate the Takings Clause." 526 U.S. at 702 (citation and quotation omitted). Considering proportionality in a multi-factored takings analysis is different than applying *Dolan*, which demands that the government prove "rough proportionality." In the Court's words, "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use." 526 U.S. at 702. *Eastern Enterprises* does not support the expansion of *Nollan* and *Dolan*; as explained above, it strongly undercuts it.

Equally baffling is Benchmark's attempt to use Justice Scalia's statement in a case the Supreme Court decided not to review to question the opinions Justice Kennedy expressed in his *Eastern Enterprises* concurrence and *Del Monte Dunes* opinion. See Benchmark's Answer at 13-15 (citing Lambert v. City and County of San Francisco, 529 U.S. 1045, 120 S. Ct. 1549, 146 L. Ed. 2d 360 (2000) (Scalia J., joined by Thomas J., and Kennedy J., dissenting from denial of certiorari). Justice Kennedy's support for review in *Lambert* means just that -- he would have heard the case -- and nothing more. If this Court is searching for evidence of Justice Kennedy's views on expanding *Nollan* and *Dolan*, it need not go beyond his statements in *Del Monte Dunes* and *Eastern,* which conclusively demonstrate that he would oppose the expansion proposed here.

Benchmark is correct that *Del Monte Dunes* concerned the application of *Nollan* and *Dolan* to a permit denial. Thus, *Del Monte Dunes* does not foreclose the possibility that the Court could some day extend *Nollan* and *Dolan* to "affirmative contributions" such as the safety requirement here. But in considering Benchmark's call for judicial activism, this Court must evaluate the wisdom and logic of such an extension. Both factors counsel strongly against Benchmark's request.

Logically, the tests of *Nollan* and *Dolan* cannot be extended here. The *Nollan* and *Dolan* tests are derived from the Supreme Court's unconstitutional conditions doctrine.[5] *Nollan*'s and *Dolan*'s rooting in the doctrine of unconstitutional conditions limits their tests to cases where the permit condition constitutes a per se taking. The reason is simple: Unconstitutional conditions cases involve a two-step inquiry into: (1) whether a government benefit is being conditioned on the relinquishment by the claimant of a constitutional right; and (2) whether the burden on the right is justifiable or amounts to an unconstitutional condition. There were unconstitutional conditions in *Nollan* and *Dolan* because in both cases the landowners were asked to relinquish a per se constitutional right

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[5] *See* Dolan, 512 U.S. at 385 ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in

– the right to receive compensation for a physical expropriation of property – in exchange for receipt of a government benefit – a permit to develop their property. *See Nollan*, 483 U.S. at 831; *Dolan*, 512 U.S. at 384.

It defies logic to use the unconstitutional conditions doctrine, which is designed to determine whether a constitutional right was improperly conditioned, in cases in which it is not even clear that a constitutional right is being infringed. The Court has ruled that regulatory obligations and fees are not analogous to physical occupations of land and are not per se takings.[6] The Court has also found that an ordinance that "does not effect a physical taking in the first place" cannot form the basis of an unconstitutional conditions claim.[7] These rulings foreclose the application of *Nollan* and *Dolan* to the safety improvements required here.

Wisdom counsels even more strongly than logic against extending *Nollan* and *Dolan*. Chief Justice Rehnquist in *Dolan*

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exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.")

[6] *See* Sperry Corp. v. United States, 493 U.S. 52, 62 n.9, 110 S. Ct. 387, 107 L. Ed. 2d 290 (1989) ("It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, *money is fungible.").*

[7] Yee v. City of Escondido, 503 U.S. 519, 532, 112 S. Ct. 1522, 118 L. Ed. 2d. 153 (1992). *See also* Christianson v. Snohomish Health Dist., 133 Wn.2d 647, 660, 946 P.2d 768 (1997) ("The burden shifted to the city in *Dolan* only because it exacted a property interest as a condition to a permit.").

lauded cities for engaging in the "commendable task of land use planning" and emphasized that *Dolan* constituted only "outer limits to how this may be done." 512 U.S. at 396. Applying *Nollan* and *Dolan* here would transform this outer limit into a constitutional straightjacket that would greatly interfere with the efforts of government officials who are struggling to make Washington's communities safe, healthy and livable.

B. The Court of Appeals Misapplied *Nollan* and *Dolan*.

Even assuming, *arguendo,* that *Nollan* and *Dolan* were applicable here, the ruling below must be reversed because of the manner in which the court applied those tests. Indeed, the only reason the City failed *Nollan* and *Dolan* below is that the court refused to consider the compelling safety concerns that justified the improvements. In applying *Nollan* and *Dolan*, the court looked only at impacts on traffic. The court then excluded most of the City's traffic evidence, finding relevant only the impacts on the stretch of North Parkway where improvements were required. The *Nollan* and *Dolan* tests do not resemble the unfair gauntlet that the City had to run in this case.

1. The Court of Appeals Erred by Refusing to Consider the City's Safety Concerns.

The parties agree that the City required Benchmark to make improvements to North Parkway primarily out of concern for the safety of Melrose Park residents.[8] Remarkably, however, in applying *Nollan* and *Dolan,* the court below makes no mention of safety considerations. This violates *Dolan*, which makes clear that a reviewing court must look at each legitimate state interest furthered by the proposed condition and evaluate "rough proportionality" for that portion of the condition demanded to address each concern. *Dolan*, 512 U.S. at 394-395 (addressing in turn flood risks and traffic congestion). Here, the safety of Melrose Park residents (unquestionably a legitimate state interest) would have been significantly furthered by the required improvements on North Parkway. A correct application of *Dolan* required the court to first consider which portions of the improvements were justified by safety concerns and then address improvements not justified by these concerns.[9]

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[8] Benchmark concedes that "the street is dangerous" and if the subdivision is built, "there are going to be kids going up there and there are going to be pedestrians and there are going to be bikes and there are going to be cars." CP at 572. The City Council agonized over putting the new residents in "harms way." CP at 575. The condition at issue consists primarily of improvements -- curbs, a sidewalk and a bike path – that will address these safety issues.

[9] Admittedly, it is difficult to evaluate "rough proportionality" in the context of a safety requirement. How precisely was the lower court supposed to determine whether the costs of installing a sidewalk is "roughly proportional" to the value of preventing a child from being fatally injured while biking along North Parkway? The answer, of course, is that such calculations are nearly impossible for courts to make. Courts therefore err by applying *Dolan* to safety conditions. Courts, like the one below, only compound that

2. The Court of Appeals Erred by Excluding Traffic Impacts on Other Portions of North Parkway.

The Court of Appeals compounded its error by excluding evidence of traffic impacts on North Parkway south of Melrose Park. The parties agreed that Melrose Park would add 534 vehicle trips per day to the City's public streets and that many of these travelers would use North Parkway. CP 489, CP 507-08. The court ruled, however, that the City could only consider trips along the precise stretch of North Parkway that abutted Melrose Park. The court based this ruling on *Nollan*'s "essential nexus" test, which the court interpreted to exclude evidence of problems not clearly solved by the condition demanded. *Benchmark Land Co. v. City of Battle Ground*, 94 Wn. App. 537, 549, 972 P.2d 944 (1999).

The Court of Appeals misread *Nollan*, which permits the City to consider all the traffic impacts created by Benchmark's proposed development and require improvements that are logically related to those impacts. *Nollan* demands only that the condition "serves the same governmental purpose" as would a denial based on traffic impacts, *see* 483 U.S. at 837. *Nollan* does not demand that the City show that the

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error by ignoring important safety considerations in order to apply to *Dolan* without the messy distraction of trying to balance lives against street improvements.

improvements solve all traffic harms stemming from the development.[10]

The City made an "individualized determination," in the words of *Dolan,* 512 U.S. at 391, that improvements on North Parkway were necessary for the safety of Melrose Park residents. The City's traffic study demonstrated that residents would generate hundreds of daily trips on North Parkway. In doing so, the City demonstrated that the improvements were related both in nature and extent to safety risk and traffic problems that the City is seeking to address. That is all *Nollan* and *Dolan* require.

IV. CONCLUSION

The Court of Appeals transformed *Dolan*'s "outer limit" into a constitutional straightjacket at the expense of public safety. This Court should grant the City's petition and reverse the ruling below.

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[10] To illustrate, suppose that instead of requiring Benchmark to make the improvements to North Parkway, the City required that Benchmark and other developers pay a transportation impact fee to cover their fair share of those improvements. No one would question the authority of the City to charge Benchmark a transportation impact fee, such as the one authorized by RCW Chapter 39.92, that mitigates *all* the direct impacts of the proposed development on North Parkway. Nor would anyone conceivably object if the City used the entire fee collected from Benchmark to make improvements on the section of North Parkway adjoining Benchmark's subdivision. *See, e.g.,* 39.92.010 (directing expenditures of Chap. 39.92 impact fees). Common sense, as well as *Nollan,* compel the same rule here. The City should have been permitted to consider all of Melrose Park's traffic impacts on North Parkway in demonstrating that the required improvements met *Dolan*'s rough proportionality requirement.

Respectfully submitted this 2nd day of August, 2002.

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