NO. 02-0369

IN THE
SUPREME COURT OF TEXAS

TOWN OF FLOWER MOUND, TEXAS,
Petitioner,

v.

STAFFORD ESTATES LIMITED PARTNERSHIP,
Respondent.

On Petition for Review from the
Second Court of Appeals at Fort Worth, Texas

BRIEF OF *AMICI CURIAE* TEXAS MUNICIPAL LEAGUE, TEXAS CITY ATTORNEYS ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER TOWN OF FLOWER MOUND, TEXAS

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Town of Flower Mound, Texas	Defendant; Appellant/Cross-Appellee; Respondent/Petitioner

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STATEMENT OF THE CASE

Amici hereby adopt the Statement of the Case in the Town of Flower Mound's Petition for Review.

STATEMENT OF JURISDICTION

Amici hereby adopt the Statement of Jurisdiction in the Town of Flower Mound's Petition for Review.

ISSUE PRESENTED

1. Does the rough proportionality standard promulgated in *Dolan v. City of Tigard*, 512 U.S. 372 (1994) apply to all development conditions or only to conditions that require the dedication of property to the public?

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Amici Curiae respectfully submit this brief under Texas Rule of Appellate Procedure 11 in support of the Petition for Review filed by the Town of Flower Mound seeking review of a decision of the Second Court of Appeals at Fort Worth. The appellate court applied the "rough proportionality" test set forth in *Dolan v. City of Tigard,* 512 U.S. 374 (1994) to a mere road improvement requirement even though the *Dolan* test is expressly designed to govern only government-compelled dedications of land. This dramatic expansion of *Dolan* seriously threatens the ability of cities to protect

public safety and welfare through reasonable permit conditions that address the harmful impacts of development. The ruling below improperly calls into question countless permit conditions imposed by Texas municipalities during the last ten years.

INTEREST OF *AMICI CURIAE*

The Texas Municipal League is a non-profit association of approximately 1,045 Texas cities. The Texas City Attorneys Association, an affiliate of the Texas Municipal League, is an organization of more than 400 attorneys who represent Texas cities and local officials in the performance of their duties. The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA members include attorneys from more than 1,400 cities across the country, and IMLA serves as the legal voice for the nation's local governments.

As noted by the *Dolan* Court, municipal officials "have long engaged in the commendable task of land use planning * * *." *Dolan*, 512 U.S. at 396. *Amici* thus bring a vital perspective to regulatory takings issues and have a strong interest in ensuring that takings jurisprudence remains appropriately tailored so that it does not undermine legitimate planning and other community protections. Because the appellate court's ruling presents a grave threat to permit conditions designed to protect the public interest, *Amici* respectfully request this Court to grant the petition for review.

STATEMENT OF FACTS

Amici hereby adopt the Statement of Facts in the Town of Flower Mound's Petition for Review.

SUMMARY OF THE ARGUMENT

Dolan's rough proportionality test is expressly rooted in the doctrine of unconstitutional conditions. As a result, it necessarily applies only to dedication requirements because these requirements would constitute a taking if unilaterally imposed. This limitation is reflected in the *Dolan* Court's repeated emphasis on how the dedication requirement in that case impaired Mrs. Dolan's right to exclude, a right twice described by the *Dolan* Court as one of the most important sticks in the bundle of property rights. *Dolan*, 512 U.S. at 384, 393. The critical importance of the right to exclude to the *Dolan* test also is made clear by the related case of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), which established the logical nexus test for dedication requirements.

In *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687 (1999), the Court reaffirmed that *Dolan*'s rough proportionality test properly applies only to "land-use decisions conditioning approval of development on the dedication of property to public use." *Id.* at. 702. Last month's ruling in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465 (2002) similarly emphasizes that it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *Id.* at 1479 (footnote omitted). Accordingly, *Dolan*'s rough proportionality test for dedication requirements should not be applied to non-invasive regulations like the road improvement requirement at issue.

ARGUMENT

The appeals court applied *Dolan*'s rough proportionality test to hold that a road improvement requirement in a development permit worked a taking of property, thereby requiring the Town of Flower Mound to pay the developer $425,426 in compensation. The challenged road improvements promote traffic safety and road durability. *See Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 71 S.W.3d 18, 39 (Tex. App.—Fort Worth 2002, pet. filed). The improvements also create better sight distances along the road, provide an additional degree of safety by widening the shoulders, establish safer access points and better traffic flow, and enhance the durability and life expectancy of the road, thereby reducing the necessity for and cost of repair. *Id*.

The appellate court ruled that the road improvement requirement worked a compensable taking even though it is undisputed that the proposed subdivision would generate about 750 additional vehicular trips per day, and even though the court concluded that the road improvements are logically related to the Town's legitimate interest in traffic safety and road durability. *Id.* at 39-40. The court so ruled even though the proposed 247-home subdivision would impose traffic costs on the Town exceeding $879,000, whereas the cost of the required road improvements is only $484,304. *Id.* at 42. The court so ruled even though the Town imposed the requirement pursuant to a legislative mandate that applies to similarly situated developers. *Id*. at 24-25. And the court so ruled even though the developer accepted the full benefits of the permit without challenging the requirement prior to final plat approval. *Id*. at 27.

Most importantly, the appeals court concluded that a taking occurred under *Dolan* even though the road improvement requirement does not compel the developer to dedicate land to the public.

As shown below, the appeals court's ruling reflects a fundamental misunderstanding of *Dolan*. *Dolan*'s rough proportionality test -- described by the *Dolan* Court as an "outer limit[]" on "the commendable task of land use planning" -- is limited to compelled dedications of land that infringe the owner's right to exclude others from the property. 512 U.S. at 396. Because the road improvement requirement in this case does not impair the developer's right to exclude, *Dolan* has no application. The appeals court's sweeping application of *Dolan* calls out for review to ensure that Texas cities retain the flexibility needed to implement reasonable permit conditions that protect the public interest.

I. The Appeals Court Erred By Dramatically Expanding the Application of *Dolan*'s Rough Proportionality Test Well Beyond Government-Compelled Dedications of Land that Impair the Owner's Right to Exclude.

The overriding fact of the *Dolan* case -- one that readily distinguishes *Dolan* from the case at bar -- is that the City of Tigard required Mrs. Dolan to deed a portion of her land to the public. *Dolan*, 512 U.S. at 379-82. Dolan applied for permission to expand her plumbing and electric supply store. *Id*. at 379. As a condition of the permit, the city required her to dedicate a strip of land behind her store in the floodplain along nearby Fanno Creek. The dedicated land would have been used as part of a public bike path, walkway, and greenway. *Id*. at 379-380. The purpose of the dedication was to reduce traffic congestion on nearby roads and flood risks along the creek. *Id*. at 381-382.

The *Dolan* Court ruled that to pass muster under the Takings Clause, permit conditions that compel dedications of land must be roughly proportional to the harm anticipated from the proposed development. *Id*. at 391-396. The Court began its analysis by observing that "had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred." *Id*. at 384. In contrast to other land-use controls, a unilaterally imposed dedication requirement works a taking because "public access would deprive petitioner of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id*. at 384 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

The *Dolan* Court then tied its analysis to "the well-settled doctrine of 'unconstitutional conditions.'" 512 U.S. at 385. Under this doctrine, "the government may not require a person to give up a constitutional right -- here the right to receive compensation when property is taken for a public use -- in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Id.* In other words, because *Dolan*'s rough proportionality test is rooted in the doctrine of unconstitutional conditions, it necessarily applies only to conditions that would be a taking if unilaterally imposed.

Later in its analysis, the *Dolan* Court again emphasized the right to exclude, observing that the city failed to explain "why a public greenway, as opposed to a private one, was required in the interest of flood control." *Id.* at 393. The Court continued: "The difference to petitioner, of course, is the loss of her ability to exclude others. As we

have noted, this right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id*. (citation omitted). The Court then stressed that as a result of the permanent easement required from Dolan, "[h]er right to exclude would not be regulated, it would be eviscerated." *Id*. at 394. Because the dedication would have permanently destroyed Dolan's right to exclude, it would have worked a taking if unilaterally imposed and thus was subject to an unconstitutional-conditions analysis under the rough proportionality test.

The critical nature of the right to exclude also permeates *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), which established the logical nexus test for dedication requirements. The Nollans sought permission to replace a small oceanfront bungalow with a much larger home. The permit included a condition requiring the Nollans to dedicate a public easement along the beach. Because the larger house would reduce the public's view of the ocean from the coastal highway, the state argued that the dedication would help address this "psychological barrier." *Id.* at 827-829, 835, 838. The *Nollan* Court concluded that the dedication did not have a logical nexus to the anticipated harm, stating that it was "quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." *Id.* at 838.

Using language remarkably similar to *Dolan*, the *Nollan* Court likewise derived its nexus requirement from the doctrine of unconstitutional conditions:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to

> rebuild their house on agreeing to do so, we have no doubt there would have been a taking.

Id. at 831. Like *Dolan*, *Nollan* emphasized that the dedication requirement impaired the Nollans' right to exclude, quoting *Kaiser Aetna*'s admonition that the right to exclude is one of the most essential sticks in the bundle of property rights. *Id*. And like *Dolan*, the *Nollan* Court explicitly justified its searching review on the fact that the Nollans were required to give up a portion of their land: "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 * * *." *Id.* at 841.

Even before *Dolan*, the Court made plain the centrality of physical invasions to unconstitutional-conditions analysis under the Takings Clause. In *Yee v. City of Escondido*, 503 U.S. 519 (1992), owners of mobile home parks challenged a rent control law and restrictions on evictions. The Yees argued, among other things, that it would be unconstitutional for the government to condition their right to rent the property on the forfeiture of their right to receive compensation for a physical occupation. The Court flatly rejected the argument because there was no compelled occupation of their land:

> Petitioners argue that if they have to leave the mobile home park business in order to avoid the strictures of the Escondido ordinance, their ability to rent property has in fact been conditioned on such a forfeiture. This argument fails at its base, however, because there has simply been no compelled physical occupation giving rise to a right to compensation that petitioners could have forfeited.

Id. at 531-532. Distinguishing *Nollan*, the Court observed that if the city had required the Yees to rent the property to others in the first place, then the city might "lack the power to condition [the Yees'] ability to run mobile home parks on their waiver of this right."

Id. But because the ordinance "does not effect a physical taking in the first place," the Yees' unconstitutional-conditions argument failed. *Id*.

In *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998), Judge Brunetti refused to apply *Dolan* and *Nollan* to an impact fee because he recognized the critical link between the unconstitutional-conditions analysis in *Dolan* and *Nollan* and a compelled physical invasion:

> The first step in the unconstitutional exactions cases is to determine whether [unilateral] government imposition of the exaction would be a taking. Because *Nollan* and *Dolan* both involved physical invasions of private property, the Court found the exactions were *per se* takings * * *. Neither *Nollan* nor *Dolan* provide a court with any guidance to determine whether the imposition of a $1000 per tenant fee constitutes a taking. It is this first step in the analysis that plaintiffs have entirely ignored in litigating this case.

Id. at 812.

Like the claimants in *Yee* and *Garneau*, the developer here has failed altogether to show that the road improvement requirement would have been a taking if unilaterally imposed.[1] And unlike the dedication requirements in *Nollan* and *Dolan*, which would have worked a per se taking if unilaterally imposed, a road improvement requirement and other non-invasive terms cannot serve as the basis of an unconstitutional-conditions allegation that warrants scrutiny under *Dolan*'s rough proportionality test.

[1] If a municipality were to impose a road improvement requirement unilaterally (*i.e.*, outside the context of a permit condition), any takings challenge to that requirement would have to meet the test for regulatory takings set forth in *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998). The developer here has made no such showing.

II. Subsequent U.S. Supreme Court Rulings Confirm that *Dolan* Is Inapplicable to the Road Improvement Requirement.

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), the U.S. Supreme Court once again reaffirmed that *Dolan*'s rough proportionality test applies only to "land-use decisions conditioning approval of development on the dedication of property to public use." *Id.* at. 702. The appeals court in the case at bar recognized that the high court has never applied *Dolan* to a road improvement requirement or other non-invasive permit conditions, and it acknowledged that the *Del Monte Dunes* Court reaffirmed that *Dolan* is designed to apply to the special context of dedications. Nevertheless, it relied heavily on a single Washington state appeals court case in declining to read *Del Monte Dunes* as limiting *Dolan* to dedications. *Flower Mound,* 71 S.W.2d at 32 (citing *Benchmark Land Co. v. City of Battleground*, 14 P.3d 172 (Wash. Ct. App. 2000, review granted)). However, the *Benchmark* case is now on appeal. Moreover, it provides especially weak guidance because the Washington Supreme Court previously vacated the lower court's application of *Dolan* in *Benchmark* just three months after the ruling in *Del Monte Dunes*. *See Benchmark Land Co. v. City of Battle Ground*, 989 P.2d 1140 (Wash. Aug. 31, 1999) (No. 67901-1) (granting review and remanding 972 P.2d 944). The timing of the Washington Supreme Court's remand in *Benchmark* -- very shortly after *Del Monte Dunes* -- strongly suggests a deep suspicion of applying *Dolan* outside the special context of compelled dedications. Moreover, even if *Del Monte Dunes* were ambiguous (which it isn't), as shown above *Dolan* and *Nollan* themselves are expressly tied to dedications that impair the right to exclude.

The heightened scrutiny afforded to impairments of the right to exclude has a long lineage in takings jurisprudence. Many years before *Dolan,* the Court held that a government-compelled permanent physical occupation is a per se taking because it permanently impairs the owner's right to exclude. *See Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982). The *Loretto* Court adopted its per se rule because impairment of the right to exclude is "qualitatively more severe than a regulation of the *use* of property." *Loretto*, 458 U.S. at 436. In the words of the *Loretto* Court, "an owner suffers a special kind of injury when a *stranger* directly invades and occupies an owner's property." *Id.* at 436.

Just last month, the U.S. Supreme Court once again reaffirmed the crucial distinction between physical invasions and non-invasive land-use controls in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465 (2002). After canvassing decades of takings jurisprudence that illuminate the key differences between invasive and non-invasive government actions, the *Tahoe-Sierra* Court concluded that takings cases involving physical invasions do not apply to non-invasive land-use controls: "This longstanding distinction * * * makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *Id.* at 1479 (footnote omitted).

The appellate court in the case at bar ignored the *Dolan* Court's repeated emphasis on the right to exclude, ruling instead that *Dolan*'s rough proportionality test applies whenever there is a risk of "leveraging." *Flower Mound*, 71 S.W.3d at 33. But

leveraging is nothing more than the exercise of a bargaining party's negotiating position, and it occurs on both sides of the table. This so-called "leveraging" standard is far too broad, for virtually every permit condition raises some risk of leveraging. The appellate court itself conceded that under its approach, *Dolan* would apply to "any requirement that a developer provide or do something as a condition to receiving a municipal approval * * *." *Flower Mound*, 71 S.W.3d at 30 n.7. Under this remarkably expansive application of the rough proportionality test -- described by the *Dolan* Court as a mere "outer limit[]" on "the commendable task of land use planning" -- Texas courts would be forced to assume the role of zoning appeal boards, flyspecking virtually every permit condition to find the requisite proportionality. 512 U.S. at 396. This reading of *Dolan* cannot be countenanced. *Compare Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998) ("[C]ourts should not assume the role of a super zoning board").

The appellate court's ruling not only disregards precedent, but also is plainly out of step with the majority of cases from courts around the country, which limit *Dolan* to the special context of dedications. *See* Flower Mound Petition for Review, at nn.3-5 (citing cases). Most of the lower court cases cited by the appeals court to support its ruling were decided prior to the *Del Monte Dunes* reaffirmation that *Dolan* is limited to the special context of dedications. And all were decided prior to the *Tahoe-Sierra* Court's emphatic pronouncement that rules of takings liability established for physical invasions are inapplicable to non-invasive land-use controls.

For all these reasons, this Court should review this case and return *Dolan*'s rough proportionality test to its appropriate place in Texas takings jurisprudence.

PRAYER

Amici respectfully request that this Court grant the Town's Petition for Review, reverse the judgment of the court of appeals, enter a judgment in favor of the Town, and grant such other relief, general or special, at law or in equity, to which the Town of Flower Mound may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief of Amici Curiae has been served upon the following individuals by certified mail this ___ day of May 2002.

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