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**Court of Appeals**  
**State of New York**

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PAUL SMITH and JANET SMITH,

*Petitioners-Plaintiffs-Appellants,*

*against*

THE TOWN OF MENDON, PLANNING BOARD OF THE TOWN OF  
MENDON, RICHARD BURWARDT in his official capacity as Chairman of the  
TOWN OF MENDON PLANNING BOARD,

*Respondents-Defendants-Respondents.*

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**AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TOWNS OF THE STATE  
OF NEW YORK, NEW YORK STATE CONFERENCE OF MAYORS AND  
MUNICIPAL OFFICIALS, AND THE AMERICAN PLANNING ASSOCIATION  
IN SUPPORT OF THE TOWN OF MENDON**

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Dated: September 22, 2004

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## **STATEMENT OF CORPORATE RELATIONSHIPS**

The Association of Towns of the State of New York and the New York State Conference of Mayors and Municipal Officials are not-for-profit corporations with no subsidiaries or affiliates. The American Planning Association is a not-for-profit corporation with chapters throughout the United States.

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## **INTEREST OF *AMICI CURIAE***

The Association of Towns of the State of New York was established in 1933 to help towns obtain greater economy and efficiency by providing training programs, research and information services, technical assistance, legal services, computer software programs, insurance programs, and a variety of publications. In addition, the Association monitors State legislation and advocates town concerns to the New York State Legislature. The membership of the Association consists of 97 percent of New York's 932 towns.

The New York State Conference of Mayors and Municipal Officials (NYCOM) is a not-for-profit voluntary membership association established in 1910. Its members include 58 of the State's 62 cities and 515 of the State's 554 villages. NYCOM is devoted to protecting and advocating the interests of cities and villages throughout the State. NYCOM's mission is to improve the administration of municipal affairs in New York State by providing courses of training for municipal officials in service in New York State cities and villages. Additionally, NYCOM provides its members with legislative advocacy at both the state and federal levels on issues of concern to local governments. NYCOM has consistently been granted permission to submit briefs *amicus curiae* to this Court, the four New York State Appellate Courts, the Federal Courts in New York State, and the Supreme Court of the United States.

The American Planning Association (APA) is a nonprofit public interest and research organization, founded in 1978 exclusively for charitable, educational, literary, and scientific research purposes to advance the art and science of planning—physical, economic, and social—at the local, regional, state, and national levels. APA's mission is

to encourage planning that will contribute to public well-being by developing communities and environments that meet more effectively the needs of people and society. With 46 regional chapters, APA and its professional institute, the American Institute of Certified Planners, represent more than 30,000 practicing planners, officials, and citizens across the nation involved with urban and rural planning. Sixty-five percent of APA's members work for state and local government agencies. APA regularly files amicus briefs in takings cases to ensure that takings jurisprudence continues to allow for reasonable land use planning in the public interest.

*Amici's* members "have long engaged in the commendable task of land use planning." *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994). *Amici* thus bring a vital perspective to this case and have a compelling interest in ensuring that takings jurisprudence remains appropriately tailored so that it does not undermine legitimate planning and other community protections.

#### **PRELIMINARY STATEMENT**

The key question in this case is whether the heightened scrutiny of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), should apply to a development restriction that does not infringe a landowner's right to exclude others from his property. As this brief demonstrates, the answer is surely no. The "essential nexus" and "rough proportionality" tests – described by the *Dolan* Court as establishing an "outer limit[]" on land use planning – are limited to compelled dedications of land that impair the landowner's right to exclude others. 512 U.S. at 396. Because the challenged permit condition is an ordinary land use restriction that does not impact that right, *Dolan* scrutiny is inapplicable. By so ruling, this Court

can ensure that New York's municipalities retain the flexibility they need to implement reasonable permit conditions that protect the public interest.

It is important to note at the outset what this case is not about. All parties acknowledge that the instant development restriction is a conservation easement, and more specifically a negative easement, which simply restricts the use of portions of the landowners' property without granting the Town of Mendon or the public any rights to use or access the property. What's more, the parties agree that the permit condition is actually less restrictive than development limits already applicable to the property under the Town's Environmental Protection Overlay Districts (EPODs). App. Br. at 15, 41; Town Br. at 10-11. Whether such a condition is properly termed an exaction does not decide the case. As we demonstrate below, a proper analysis of the issues turns on whether the challenged permit condition impairs the value at the core of *Nollan* and *Dolan*, the right to exclude others, not the technical label one might use to describe the condition.

Land use controls must comply with constitutional requirements, but it is critical that courts apply the appropriate standard of constitutional review so that local officials and land use planners retain the flexibility needed to address environmental, health, and safety concerns related to development. Appellant's contention that this Court should apply the *Nollan/Dolan* scrutiny to a demand that a landowner refrain from developing a portion of property reflects a profound misreading of Supreme Court precedent and should not be countenanced.

## ARGUMENT

### I. THE HEIGHTENED SCRUTINY TESTS OF *NOLLAN* AND *DOLAN* DO NOT APPLY TO DEVELOPMENT RESTRICTIONS THAT DO NOT INFRINGE THE LANDOWNERS' RIGHT TO EXCLUDE OTHERS FROM THE PROPERTY.

A review of *Nollan* and *Dolan* demonstrates that the tests they prescribe are wholly inappropriate for the case at bar. In both cases, the government required the landowners to permit the public to physically occupy portions of their property on an ongoing basis. The Supreme Court's heightened scrutiny is a direct result of this infringement on the landowners' right to exclude others, which is considered "one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). No such infringement of the right to exclude is present in this case.

In *Dolan*, the City of Tigard demanded that Mrs. Dolan dedicate a public greenway on her property in exchange for permission to expand a commercial business on her lot. *Dolan*, 512 U.S. at 388. 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 a creek adjacent to the property. *Id.* at 381-382. The *Dolan* Court held that permit conditions that compel dedications of land to the public must be roughly proportional to the harm anticipated from the proposed development. *Id.* at 391-96. In doing so, however, the Court emphasized that "public access would deprive petitioner of the right to exclude others," *id.* at 384, and observed 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.” *Id.* As a result of this land dedication, the Court stressed, Mrs. Dolan “would lose all rights to regulate the time in which the public entered onto the greenway, regardless of any interference it might pose with her retail store. Her right to exclude would not be regulated, it would be eviscerated.” *Id.* at 394.

Likewise in *Nollan*, the California Coastal Commission required the Nollans to dedicate a lateral public easement across their beachfront property in exchange for permission to demolish an existing bungalow and replace it with a much larger three-bedroom house. *Nollan*, 483 U.S. at 828. The state argued that the dedication was necessary to compensate for reduction in the public’s view of the ocean from the highway. *Id.* at 827-829, 835, 838. Focusing again on the right to exclude, the Court concluded that the dedication did not logically address the harm caused by the development, 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. 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.* at 831; *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”). And like *Dolan*, the *Nollan* Court explicitly based its searching review on the fact that the Nollans were required to give up a portion of their land for public use: “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.

That *Nollan* and *Dolan* are limited to compulsory conditions that impact the right to exclude is consistent with the entire body of takings law. Takings jurisprudence has traditionally distinguished between land use restrictions that involve physical invasions or occupations of property and those that merely impact a property's use or economic value. The Takings Clause is particularly protective where the government requires a property owner to endure a physical trespass or forced dedication of property so that the property may be used by others. See *Nollan*, 483 U.S. at 831 (citing *Loretto*, 458 U.S. at 433); *Kaiser Aetna*, 444 U.S. at 176. Indeed, the Supreme Court has ruled permanent encroachments on the right of exclusive possession to be categorical or *per se* takings. *Loretto*, 458 U.S. at 432. As explained by the *Nollan* Court,

where governmental action results in '[a] permanent physical occupation' of the property, by the government itself or by others, 'our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.'

*Nollan*, 483 U.S. at 831-32 (quoting *Loretto*, 458 U.S. at 432-435) (internal citations omitted).

Similarly, courts have held that a *per se* taking occurs when government action denies the owner of all economically viable use of a property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). As the *Lucas* Court explained, "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Id.* at 1017. By contrast, when the government restricts the use of property without actually occupying it or requiring that the owner provide access to others, a lesser standard of review applies. In these non-categorical cases, courts considering a takings claim must undertake "complex factual assessments of the purposes

and economic effects of government actions.” *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

It takes only a moment’s reflection to see the wisdom in the bright line the Court has drawn between restrictions on property use and government actions that result in physical invasions. The government needs to secure permanent physical access to property relatively rarely, and it is appropriate to require compensation in many such cases. In dramatic contrast, government could hardly go on if every restriction on property use demanded compensation. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), (“[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”) The staple of ubiquitous zoning codes in place in communities around the country are lot coverage or floor-area-ratio requirements that limit the percentage of land that can be developed. Almost as common are setback requirements, buffer zones, and limits on the development of wetlands, steep slopes, and flood plains. *See* Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law*, § 4.13 (2003). Likewise, subdivision regulations commonly require that certain portions of a property be permanently set aside from development. *See, e.g., City of Annapolis v. Waterman*, 745 A.2d 1000, 1012, 1020 (Md. 2000) (rejecting application of *Dolan* to an open space condition for subdivision approval). The heightened scrutiny applied in *Nollan* and *Dolan* is the result of the Court’s longstanding rule that conditions infringing the right to exclude are different and warrant more exacting justification than use restrictions like these. *Loretto*, 458 U.S. at 430 (reaffirming “the distinction between a permanent physical occupation . . . and a regulation that merely restricts the use of

property.”). To hold otherwise would call into question many of these common zoning tools which municipalities employ to protect natural resources, public safety, and community character.

The Supreme Court resolved any doubt as to the applicability of *Nollan* and *Dolan* review to non-invasive development conditions in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). There, the Court confirmed that the *Dolan* “rough proportionality” test does not apply “beyond the special context of exactions – land use decisions conditioning approval of development on the dedication of property to public use.” *Del Monte Dunes*, 526 U.S. at 702-03. As this Court recognized in *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96, 106 (N.Y. 1999), “[t]he issue [of the limited reach of *Nollan/Dolan*] was finally resolved by the United States Supreme Court in *City of Monterrey v. Del Monte Dunes*.” *Dolan*’s rough proportionality test is inapposite “when, as here, the zoning law merely ‘den[ies] \* \* \* development.’” *Bonnie Briar*, 94 N.Y.2d at 107; *Wonders v. Pima County*, 89 P.3d 810, (Ariz. Ct. App. 2004) (finding the *Dolan* test inappropriate for reviewing challenge to a native plant preservation condition that did not infringe the right to exclude).

Indeed, the Supreme Court reiterated once again the crucial distinction between physical invasions and non-invasive land-use controls in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). After reviewing decades of takings jurisprudence illuminating 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 noninvasive 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 323 (footnote omitted).

Compelled dedication of private property for public enjoyment raises serious concerns in takings jurisprudence because of the importance of the landowner’s right to exclude. *Nollan* and *Dolan* must be viewed in this context. Because the conditions at issue in this case do not require Appellants to dedicate their property to public use or compromise in any way their right to exclude others, this Court should decline to apply heightened scrutiny in this case.

## **II. THE *NOLLAN* AND *DOLAN* TESTS ARE ROOTED IN THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS AND ARE INAPPLICABLE TO WORKADAY PLANNING CONDITIONS.**

### **A. *Nollan* and *Dolan* Are Unconstitutional Conditions Tests.**

As explained above, *Nollan* and *Dolan* are premised upon the idea that compelled physical encroachments on land are *per se* takings because of their impact on the landowners’ right to exclude. But there remains a related reason why these tests are inapplicable here. The Supreme Court grounded the *Nollan/Dolan* test in the “well-settled doctrine of ‘unconstitutional conditions.’” *Dolan*, 512 U.S. at 385. By doing so, the Court limited the test’s application to situations in which the underlying condition would itself be unconstitutional.

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 constitutional right is justifiable or amounts to an unconstitutional condition. *Nollan* and *Dolan* involved unconstitutional conditions because in both cases the landowner was asked to forgo a constitutional right –

the right to receive compensation for *per se* takings infringing their right to exclude – in exchange for receipt of a government benefit – a permit to develop their property. *Nollan*, 483 U.S. at 831; *Dolan*, 512 U.S. at 384.

In *Nollan*, the property owners were granted permission to renovate beachfront property on the condition that they dedicate a public easement across their beach. As the Court explained:

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

483 U.S. at 831. The Supreme Court began its analysis in *Dolan* in a similar manner, noting that “[w]ithout question, 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.” *Dolan*, 512 U.S. at 384.

Although in both cases, the Supreme Court ruled that the conditions standing alone would constitute a taking, the Court also recognized that the power to deny issuance of a development permit necessarily included the power to condition the granting of that permit on reasonable dedications. The Court thus focused on the nature of the conditions and their relationship to the development project. As the Court said in *Dolan*:

‘Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission’s assumed power to forbid construction of the house in order to protect the public’s view of the beach must surely include the power to condition construction

upon some concession by the owner, even a concession of property rights, that serves the same end.’

*Dolan*, 512 U.S. at 394 (quoting *Nollan*, 483 U.S. at 836). Likewise, the Court held in *Yee v. City of Escondido*, 503 U.S. 519 (1992), that an ordinance that “does not effect a physical taking in the first place” cannot form the basis of an unconstitutional conditions claim. *Id.* at 532.

Numerous courts have recognized that *Dolan* is an unconstitutional conditions case that does not apply absent a compelled physical invasion or other *per se* taking. The Ninth Circuit, noting that “*Nollan* and *Dolan* both involved physical invasions of private property,” rejected application of *Dolan* scrutiny to an impact fee. *Garneau v. City of Seattle*, 147 F.3d 802, 812 (9th Cir. 1998).<sup>1</sup> Maryland’s high court likewise referred to the “*Nollan/Dolan* unconstitutional conditions” test in rejecting a challenge to a condition that portions of a subdivision be reserved for recreational use because the restriction did not infringe the claimants’ right to exclude others. *City of Annapolis*, 745 A.2d at 1012, 1020 (“As we have noted, the condition in the case at bar does not interfere with appellees’ rights to exclude others. The condition does not require them to confer any rights of access to members of the general public.”). As this Court noted in *Bonnie Briar*, the *Dolan* “rough proportionality” test is simply “inapposite” to cases, like the one at bar, that are based merely on restriction of development. 94 N.Y.2d at 107; *accord Wonders v. Pima County*, 89 P.3d at 810 (noting *Dolan*’s lineage in the “well-settled doctrine of ‘unconstitutional conditions’”).

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<sup>1</sup> While Judge Brunetti’s lead opinion in *Garneau* did not command a majority of the court, it has been cited approvingly by a unanimous panel of the Ninth Circuit in *San Remo Hotel, Ltd. v. San Francisco City & County*, 364 F.3d 1088, 1098 (9th Cir. 2004), *petition for cert. filed* (U.S. Sept. 10, 2004) (No. 04-340).

Appellants have completely failed to demonstrate how the dedication of the conservation restrictions at issue in this case would work a taking if unilaterally imposed. Indeed, their burden is nearly impossible when one considers that the conditions simply memorialize legislatively-imposed EPOD restrictions that already apply to the property and which the Smiths do not contest. Further, the restrictions at issue mirror the language of the Mendon Town Code §200-2(I) (R. 196), which authorizes the Town to seek dedication of conservations easements to protect properties located within EPODs.

Development conditions and land use regulations like these that simply limit the potential uses of property and do not require that a landowner relinquish a *per se* right to compensation cannot be the subject of an unconstitutional conditions claim. Because *Nollan* and *Dolan* are unconstitutional conditions cases arising from the forced abrogation of the right to exclude, they are simply inapposite to the case at bar.

**B. Recording of Conservation Restrictions Is a Common and Reasonable Planning Tool.**

That the Town of Mendon would want to memorialize a conservation restriction through a recorded easement is neither surprising nor extraordinary. The Appellants' property is located in a farming area (R. 65) and totals nearly ten acres. The Honeoye Creek passes through the property (R. 53, R. 55), portions of which are steeper than a 15 percent grade (R. 49), contain a mix of old growth deciduous and evergreen trees (R. 50), and a wood lot within the meaning of the Town Code (R. 64). As the Town has indicated, the purpose of the permit condition is to “put subsequent buyers on notice that the property contains constraints which limit development within these environmentally sensitive areas of the Site.” (R. 187).

Conservation easements are “one of the most important and fastest growing instruments used to protect private land in the United States.” Adam E. Draper, *Conservation Easements: Now More than Ever—Overcoming Obstacles to Protect Private Lands*, 34 *Envtl. L.* 247, 248 (2004). Municipalities across the country are increasingly turning to conservation easements in the course of approving building permits in order to provide additional protections for natural resources in their jurisdiction. Such easements not only provide additional notice of conservation restrictions to future owners, they provide the municipality with additional legal redress in the event that the landowner violates the terms of the easement.

Similar requirements have been imposed by cities and towns in New York and across the country. For example, we are advised that the City of Brentwood, Tennessee, enacted a zoning ordinance several years ago which allows the Planning Commission to require the dedication of perpetual scenic or conservation easements in new subdivisions. We are also advised that the City of Minnetonka, Minnesota, routinely requires landowners to dedicate conservation easements over a portion of the property as a condition of site plan approval. In addition, the guidelines of the Maine Land Use Regulation Commission, which acts as the planning and zoning board for areas of Maine which lack local governments empowered to exercise local land use controls, also contemplate such conditions. *See* Maine Land Use Regulation Commission, Guidelines for Selection of Easement Holders, available at <http://www.maine.gov/tools/whatsnew/attach.php?id=2645&an=1> (“In reviewing and acting upon applications for development, the Commission may require, as an enforceable condition of approval, or applicants may propose conservation easements for

the protection of significant natural resources as part of a development proposal.”). These are but a sampling of the many communities that require similar dedications.

Like these other jurisdictions, the Town of Mendon has concluded that its conservation easement requirement is a necessary and reasonable supplement to regulations protecting environmentally sensitive areas. As this Court has repeatedly held, protection of open space against the “ill effects of urbanization,” *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980), is a legitimate government objective. *Bonnie Briar*, 94 N.Y.2d at 108. Zoning decisions in furtherance of that objective are entitled to deference. *Id.* (“So long as the method and solution the Board eventually chose substantially advances the public interest, it is not this Court’s place to substitute its own judgment for that of the Zoning Board.”). The Town’s action in this case is consistent with sound planning practices in place nationwide and should not be subject to heightened scrutiny under the Takings Clause.

### CONCLUSION

For the reasons set forth above, this Court should rule *Nollan/Dolan* scrutiny inapposite to non-invasive land use restrictions required as a condition of a building permit. The judgment of the Supreme Court of the State of New York, Appellate Division, should be affirmed.

Respectfully submitted,

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September 22, 2004

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