

NO. 07-35231

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAPPS BREWING, INC., a Washington corporation, and
DANIEL and ANDREA McCLUNG,

Plaintiffs/Appellants,

v.

CITY OF SUMNER, WASHINGTON,

Defendant/Appellee.

Appeal from the United States District Court
for the Western District of Washington

BRIEF OF AMICUS CURIAE
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
SUPPORTING AFFIRMANCE

TIMOTHY J. DOWLING

Community Rights Counsel
1301 Connecticut Ave. N.W.,
Suite 502
Washington, D.C. 20036
(202) 296-6889
(202) 296-6895 (fax)

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus International Municipal Lawyers Association states that it is a non-profit organization that has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

	Page
Statement of Interest of Amicus Curiae	1
Introduction and Summary of Argument.....	1
Argument	5
I. <i>Dolan</i> Applies Only To Adjudicatively Imposed Permit Conditions That Require The Dedication Of Land	5
II. Subsequent Rulings By The U.S. Supreme Court And This Court Confirm That <i>Dolan</i> Applies Only To Adjudicatively Imposed Permit Conditions That Require The Dedication Of Land	15
III. Permit Conditions That Impose A Generalized Monetary Obligation Or Otherwise Require The Expenditure Of Funds Are Not Takings Of Property.....	21
IV. The Claimants' Theory Of Liability Would Improperly Federalize Land Use Permit Disputes Across The Board ...	27
CONCLUSION.....	31

TABLE OF AUTHORITIES

CASES	Page
<i>Brown v. Legal Found. of Washington</i> , 538 U.S. 216 (2003).....	4, 24, 25
<i>City of Monterey v. Del Monte Dunes at Monterey, Ltd.</i> , 526 U.S. 687 (1999).....	3, 16
<i>Commercial Builders of Northern California v. City of Sacramento</i> , 941 F.2d 872 (9th Cir. 1991).....	19, 20, 26
<i>Commonwealth Edison Co. v. United States</i> , 271 F.3d 1327(Fed. Cir. 2001) (2003).....	23-24, 26
<i>Dodd v. Hood River County</i> , 136 F.3d 1219 (9th Cir. 1998).....	29
<i>Dolan v. City of Tigard</i> , 512 U.S. 374 (1994)	passim
<i>Eastern Enterprises v. Apfel</i> , 524 U.S. 498 (1998)	passim
<i>Garneau v. City of Seattle</i> , 147 F.3d 802 (9th Cir. 1998).....	passim
<i>Hoehne v. County of San Benito</i> , 870 F.2d 529 (9th Cir. 1989).....	29
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164 (1979).....	7
<i>Lingle v. Chevron U.S.A. Inc.</i> , 544 U.S. 528 (2005)	3, 16, 17
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982).....	7
<i>Nollan v. California Coastal Comm'n</i> , 483 U.S. 825 (1987).....	passim

<i>Parella v. Ret. Bd.</i> , 173 F.3d 46 (1st Cir. 1999).....	24
<i>Penn Central Transp. Co. v. New York City</i> , 438 U.S. 104 (1978).....	12, 20
<i>Phillips v. Washington Legal Found.</i> , 524 U.S. 156 (1998).....	25, 26
<i>Raskiewicz v. Town of New Boston</i> , 754 F.2d 38 (1st Cir. 1985)	29
<i>River Park, Inc. v. City of Highland Park</i> , 23 F.3d 164 (7th Cir. 1994).....	29
<i>San Remo Hotel, L.P. v. San Francisco City & County</i> , 364 F.3d 1088 (9th Cir. 2004), <i>aff'd</i> , 545 U.S. 323 (2005)..	2, 18-19
<i>Sylvia Dev. Corp. v. Calvert County</i> , 48 F.3d 810 (4th Cir. 1995).....	29
<i>United States v. Sperry Corp.</i> , 493 U.S. 52 (1989)	4, 20, 21, 22
<i>Unity Real Estate Co. v. Hudson</i> , 178 F.3d 649 (3d Cir. 1999)	24
<i>Webb's Fabulous Pharmacies, Inc. v. Beckwith</i> , 449 U.S. 155 (1980).....	25
<i>Yee v. City of Escondido</i> , 503 U.S. 519 (1992).....	13

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V	passim
----------------------------	--------

TREATISES

Daniel P. Selmi & James A. Kushner, LAND USE REGULATION (1999).....	28
--	----

LAW REVIEW ARTICLES

Carol M. Rose, *Planning and Dealing*, 71 Calif. L. Rev. 839
(1983)..... 28

Frank I. Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600
(1988)..... 20

Fred Bosselman, *Dolan's Mysteries Explained?*,
51 Land Use L. & Zoning Dig. 3 (1999)..... 24

Kathleen M. Sullivan, *Unconstitutional Conditions*,
102 Harv. L. Rev. 1415 (1989) 11

Statement of Interest of Amicus Curiae¹

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 approximately 1,400 municipalities across the country. IMLA serves as the legal voice for the nation's local governments.

Municipal officials are responsible for what the U.S. Supreme Court calls “the commendable task of land use planning.” *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994). IMLA thus brings a vital perspective to regulatory takings issues and has a strong interest in ensuring that takings jurisprudence remains appropriately tailored so it does not undermine legitimate planning and other community protections. IMLA respectfully requests this Court to affirm the ruling by the District Court.

Introduction and Summary of Argument

Plaintiffs-Appellants (“Tapps” or “the claimants”) make the remarkable argument that whenever a municipality requires a

¹ This brief is being filed with the consent of the parties.

landowner to provide for new infrastructure or otherwise expend funds for the public's benefit, the requirement constitutes a *per se* taking of the landowner's money. See Tapps Br. 13-14. They further argue that when such a requirement is imposed as a permit condition, the condition must meet the rough proportionality test established in *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

We demonstrate below that the claimants err on first principles. Not surprisingly, they ignore the relevant rulings from this Court – *e.g.*, *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998), and *San Remo Hotel, L.P. v. San Francisco City & County*, 364 F.3d 1088 (9th Cir. 2004), *aff'd*, 545 U.S. 323 (2005) – which make clear that *Dolan* does not apply to permit conditions that impose impact fees or otherwise require the expenditure of funds.

This Court's holdings in *Garneau* and *San Remo* are compelled by the governing case law from the U.S. Supreme Court. *Dolan's* rough proportionality test is rooted in the doctrine of unconstitutional conditions. As a result, it necessarily applies only to permit conditions that require the dedication of land to the

public because only these requirements would constitute a *per se* taking if unilaterally imposed. This limitation is reflected in *Dolan'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. The *Dolan* court also made clear that its rough proportionality test applies only to dedications adjudicatively imposed on a case-by-case basis, not legislatively imposed conditions that apply to a class of landowners such as the stormwater improvement requirements at issue.

In *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687 (1999), the Court unanimously 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. And in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), the Court again described *Dolan* as limited to "an adjudicative exaction requiring dedication of private property." *Id.* at 547.

In contrast to compelled dedications of land, the government may require the expenditure of funds for the public's benefit without triggering liability under the Takings Clause. *E.g.*, *United States v. Sperry Corp.*, 493 U.S. 52 (1989) (fee to help pay for international arbitration tribunal is not a taking). In fact, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), five justices concluded that the imposition of a generalized monetary obligation is not properly subject to takings analysis, and federal appellate courts across the country repeatedly have held that this ruling is binding precedent that lower courts are bound to follow.

The claimants' reliance on *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003), is misplaced. *Brown* and its progeny do not stand for the proposition that a government-compelled expenditure of money constitutes a physical taking of the money. Rather, they hold that the expropriation of a *discreet, identifiable* monetary account – such as the Interest on Lawyers Trust Accounts at issue in *Brown* – can constitute a taking. The case at bar presents no such expropriation.

If accepted, the claimants' theory of liability could turn virtually every permit dispute into a federal case by constitutionalizing matters that always have been the province of local land use boards and the state courts. An affirmance of the district court's ruling does not, of course, leave landowners without recourse. Rather, it leaves the bulk of permit conditions to the standards imposed by state constitutional and statutory land use law. The claimants lost on their state claims and chose not to appeal those rulings to this court. They should not be allowed to improperly shoehorn these state law issues into a federal constitutional claim.

ARGUMENT

I. *Dolan* Applies Only To Adjudicatively Imposed Permit Conditions That Require The Dedication Of Land.

The *Dolan* Court described its rough proportionality test as establishing only an "outer limit" on land use planning. *Dolan*, 512 U.S. at 396. It is critical, therefore, to identify the relatively narrow confines of this outer limit. The language and logic of *Dolan*, as well as the related case of *Nollan v. California Coastal*

Comm'n, 483 U.S. 825 (1987), demonstrate that the special scrutiny required by those rulings applies only to permit conditions that require the permittee to dedicate land to the public, and only when those permit conditions are imposed adjudicatively on a case-by-case basis.²

The central, overriding fact of *Dolan* – one that readily distinguishes *Dolan* from the instant case – is that the City of Tigard required Mrs. Dolan to dedicate a portion of her land to the public. *Dolan*, 512 U.S. at 379-83. 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 Fanno Creek. The dedicated land would have been used as part of a public bike path, walkway, and greenway. *Id.* at 379-80. The purpose of the

² The claimants acknowledge (Br. 3) that their development added impervious surface and thereby increased stormwater drainage, at least to some extent. There can be little doubt, therefore, that the stormwater improvements at issue have a logical nexus to the

dedication was to alleviate traffic congestion on nearby roads and reduce flood risks along the creek. *Id.* at 380-82.

dedication was to alleviate traffic congestion on nearby roads and reduce flood risks along the creek. *Id.* at 380-82.

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 *per se* 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)); accord *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (right to exclude others is “one of the most treasured strands in an owner’s bundle of property rights”).

The Court expressly distinguished land-use controls that do not require a dedication of land, which have routinely withstood constitutional scrutiny, from restrictions that are “not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.” *Dolan*, 512 U.S. at 385.

The *Dolan* court then tied its analysis to “the well-settled doctrine of ‘unconstitutional conditions.’” *Id.* at 385. The court explained that 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.* The requisite relationship for compelled dedications, the court held, is rough proportionality. *Id.* at 391. In other words, because *Dolan*’s rough proportionality test is rooted in the doctrine of unconstitutional conditions, it can apply 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). 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, informed by the rough proportionality test.

The critical nature of the right to exclude also permeates *Nollan*, which established the logical nexus test for dedication requirements. The Nollans sought permission to replace a small oceanfront bungalow with a much larger home. *Nollan*, 483 U.S. at 827-28. 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

highway, the state argued that the dedication would help address this “psychological barrier.” *Id.* at 827-829, 838. The court concluded, however, 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 similar to *Dolan*, the *Nollan* Court also 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 their 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, one of the most essential sticks in the bundle of property rights. *Id.* And like *Dolan*, the *Nollan* court justified its searching review because

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.

By rooting *Nollan* and *Dolan* in the doctrine of unconstitutional conditions, the court necessarily limited the application of the nexus/proportionality test to cases where the government action would constitute a *per se* taking if unilaterally imposed. The reason is simple. Unconstitutional conditions cases involve a two-step inquiry into: (1) whether a government benefit or approval is being conditioned on the relinquishment by the claimant of a constitutional right; and (2) whether the burden on the constitutional right is justifiable. *See Dolan*, 512 U.S. at 385; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1427 (1989). The court found unconstitutional conditions in *Nollan* and *Dolan* because in both cases the landowners were asked to relinquish a clear constitutional right – the right to receive compensation for what would be a *per se* taking if unilaterally imposed – 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 384-85.

The claimants criticize the District Court's use of this two step analysis (Tapps Br. 20-22), but it flows directly from the *Dolan* court's reliance on the doctrine of unconstitutional conditions. Oddly, despite their criticisms, the claimants themselves seem to recognize this. *Id.* at 13-14 (noting that "the starting point is to ask whether the exaction, standing alone, would be a *per se* taking," and if so, then one applies the rough proportionality test to the permit condition). The district court actually went further than necessary by asking whether the requirement, if unilaterally imposed, would constitute either a *per se* taking or a non-*per se* taking under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). It is difficult to fathom why the claimants would object to this analysis, since it gave them an additional opportunity, albeit unsuccessful, to show liability. Amicus IMLA concurs, however, that *Penn Central* normally does not figure into the *Dolan* two-step inquiry.

The Court reaffirmed the centrality of physical invasions to this unconstitutional-conditions analysis under the Takings Clause in *Yee v. City of Escondido*, 503 U.S. 519 (1992). There, 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 in this way. 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,” the Yees’ unconstitutional conditions argument failed. *Id.*

In a second important limitation on its ruling, the *Dolan* court confined its rough proportionality test to permit conditions that are adjudicatively imposed on a case-by-case basis, as opposed to legislatively imposed on a class of landowners such as the stormwater improvement requirements at issue. The court distinguished “legislative determinations” from “an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel.” *Dolan*, 512 U.S. at 385. The majority cited this distinction as one of “two relevant particulars” for justifying more searching constitutional scrutiny than that used for requirements imposed on a class of landowners. *Id.*

The *Dolan* court returned to this distinction once again to respond to the dissent’s contention that the rough proportionality test improperly places the burden of proof on the defendant, and it justified the burden shifting by invoking the adjudicative nature of the challenged permit condition:

JUSTICE STEVENS’ dissent * * * is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here,

by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.

Id. at 391 n.8 (citation omitted).

In the case at bar, the City of Sumner has not required the claimants to dedicate land to the public. The challenged condition does not implicate the right to exclude because the City owns an easement for the stormwater pipe. Appellants' Excerpts of Record 50. Nor was the permit condition imposed adjudicatively, but instead was included under generally applicable legislative requirements. Accordingly, *Dolan* is inapplicable.

II. Subsequent Rulings By The U.S. Supreme Court And This Court Confirm That *Dolan* Applies Only To Adjudicatively Imposed Permit Conditions Requiring The Dedication Of Land.

Following *Dolan*, numerous federal and state courts have ruled that both *Nollan* and *Dolan* are properly limited to cases involving dedication requirements. The City of Sumner has collected these cases in its scholarly analysis of the issue (City Br. 34-38 & n.24). Indeed, when this Court issued a ruling contrary to this overwhelming trend, the U.S. Supreme Court unanimously

overruled this portion of the ruling. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999). In rejecting this Court’s ruling, the *Del Monte Dunes* court confirmed that *Dolan*’s 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.” *Id.* As noted by the high court, *Dolan* addressed “dedications demanded as conditions of development,” not “the much different questions” arising from permit denials and other land use controls. *Id.* Because *Dolan* scrutiny is inappropriate for a permit denial, which severely restricts land use, *a fortiori* it is inappropriate for less intrusive non-dedicatory permit conditions, and is properly limited to compelled dedications of land that implicate the fundamental right to exclude.³

More recently, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), the court again characterized *Dolan* as limited to

³ The claimants (Br. 17) offer a contrary reading of *Del Monte Dunes* based on a Texas state court ruling, but we encourage the Court to consult *Del Monte Dunes* directly. Its treatment of *Dolan* is clear, as is this Court’s reading of *Del Monte Dunes* in *San Remo* (see page 19, *infra*).

compelled dedications of land, describing *Dolan* as “holding that an adjudicative exaction requiring dedication of private property must also be ‘roughly proportional’ . . . both in nature and extent to the impact of the proposed development.” *Id.* at 547.

This Court, too, has recognized that *Dolan* applies only to compelled dedications of land. In *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998), the Court refused to apply *Dolan* and *Nollan* to an impact fee imposed on landlords for tenant relocation expenses because it recognized the critical link between the unconstitutional-conditions analysis in *Dolan* 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.

Id. at 812 (emphasis added). The lead opinion for the Court in *Garneau*, written by Judge Melvin Brunetti, holds unequivocally that where a permit condition would not constitute a taking if

unilaterally imposed outside the permit context, “the inquiry [under *Nollan* and *Dolan*] would end.” *Id.* at 809.

Judge Spenser Williams wrote a concurring opinion that went even further than the lead opinion. He concluded that the Takings Clause has no application at all permit requirements that call for the payment of money, and that these requirements should be analyzed under the Due Process Clause instead. *Id.* at 813-16 (Williams, J., concurring). This conclusion was prescient because, as explained in section III below, just a few weeks later five Justices of the U.S. Supreme Court came to the same conclusion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

Because Judge Williams would have gone further than Judge Brunetti, it is clear that both panel members agreed, at a minimum, that *Dolan* was inapplicable to the tenant relocation fee at issue. This Court has cited Judge Brunetti’s lead opinion in *Garneau* with approval as binding precedent. *See San Remo Hotel L.P. v. San Francisco City and County*, 364 F.3d. 1088, 1098 (9th Cir. 2004), *aff’d*, 545 U.S. 323 (2005).

This later ruling in *San Remo* is especially significant because this Court carefully compared California jurisprudence regarding the scope of *Dolan* to the Ninth Circuit's jurisprudence, and unanimously ruled that this Circuit "has also rejected the applicability of *Nollan/Dolan* to monetary exactions such as the ones at issue here." *San Remo*, 364 F.3d at 1097. It also observed that the Supreme Court's decision in *Del Monte Dunes* limits *Dolan* to "land-use decisions conditioning approval of development on *the dedication of property to public use*," and that *Dolan* thus does not apply to other kinds of government actions. *Id.* at 198 (emphasis in original; internal quotes omitted).

Prior to *Dolan*, this Court also limited the application of *Nollan*'s nexus test to compelled dedications of land in *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991). In that case, the developers argued that *Nollan* applied to a permit condition requiring the payment of a fee to assist with the financing of affordable housing for low-income workers. They contended that the city failed to show that nonresidential development

contributed to the need for low-income housing and that the fee therefore failed *Nollan's* nexus test. *Id.* at 873. This court rejected the argument, however, observing that “the only circuit court to treat a fee provision as an unconstitutional taking under *Nollan* was ultimately reversed by the Supreme Court.” *Id.* at 875 (citing *United States v. Sperry Corp.*, 493 U.S. 52 (1989)). Respected scholars agree with this Court’s reading of *Nollan*. *E.g.*, Frank I. Michelman, *Takings*, 1987, 88 Colum. L. Rev. 1600, 1608-15 (1988) (*Nollan's* essential nexus test limited to compelled dedications of land).

Like the claimants in *Garneau*, *San Remo*, and *Commercial Builders*, the claimants here have failed to show (nor could they) that the stormwater improvement requirements would have been a taking if unilaterally imposed.⁴ Unlike the dedication requirements in *Nollan* and *Dolan*, which would have worked a

⁴ If a municipality were to impose a stormwater 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 *Penn Central*. The claimants here have not, and cannot, make such a showing, and instead disclaim reliance on *Penn Central*.

per se taking if unilaterally imposed, an infrastructure improvement requirement and other non-invasive conditions cannot serve as the basis of an unconstitutional-conditions allegation that warrants application of the *Dolan* rough proportionality test.

III. Permit Conditions That Impose A Generalized Monetary Obligation Or Otherwise Require The Expenditure Of Funds Are Not Takings Of Property.

Longstanding precedent makes clear that government actions requiring the expenditure of funds for the public's benefit do not trigger liability under the Takings Clause. For example in *United States v. Sperry Corp.*, 493 U.S. 52 (1989), the company asserted a takings challenge to a federal statute that required claimants before the Iran-United States Claims Tribunal to pay a portion of any award as fee to help fund tribunal expenses. The Federal Circuit viewed the fee as an expropriation of money and struck down the requirement as an unconstitutional taking. *Id.* at 58. The Supreme Court unanimously disagreed and flatly rejected the takings challenge (*id.* at 60-65), emphasizing that it is "artificial" to view such requirements as a physical expropriation

of money. *Id.* at 62 n.9. “Unlike real or personal property,” the court insisted, “money is fungible,” and thus requirements to spend money are not subject to *per se* takings analysis. *Id.*

Five justices reached the same conclusion more recently in *Eastern Enterprises*. There, a coal company challenged a federal statute requiring the expenditure of funds for employee health benefits, contending that it imposed a disproportionate burden and thus violated the Takings Clause. *Eastern Enterprises*, 524 U.S. at 503-19. Justice Anthony Kennedy cast the deciding vote against the takings claim, concluding in a concurrence that government actions that impose a financial obligation should be analyzed under the Due Process Clause, not the Takings Clause:

The law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so. To the extent it affects property interests, it does so in a manner similar to many laws; but until today, none were thought to constitute takings. To call this sort of governmental action a taking as a matter of constitutional interpretation is both imprecise and, with all due respect, unwise.

Id. at 540 (Kennedy, J., concurring in the judgment and dissenting in part).

Four other justices, writing in dissent, agreed with Justice Kennedy that the Takings Clause was inapplicable to the requirement to expend funds, stressing that the “case involves, not an interest in physical or intellectual property, but an ordinary liability to pay money * * *.” *Id.* at 554 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting). Accordingly, the Takings Clause was “the wrong lens” through which to view the case. *Id.*

Lower courts across the country have read and applied this conclusion by the five concurring and dissenting justices in *Eastern Enterprises* as binding precedent for the proposition that a requirement to expend money for the public’s benefit is not subject to takings analysis. *E.g., Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339-40 (Fed. Cir. 2001) (lower courts “are obligated to follow the views” of the five concurring and dissenting justices in *Eastern Enterprises* that “the mere imposition of an obligation to pay money, as here, does not give

rise to a claim under the Takings Clause”); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999) (“we are bound to follow the five-four vote against the takings claim in *Eastern*”); *Parella v. Ret. Bd.* 173 F.3d 46, 58 (1st Cir. 1999) (same). Respected scholars agree. *E.g.*, Fred Bosselman, *Dolan’s Mysteries Explained?*, 51 Land Use L. & Zoning Dig. 3 (1999) (the reasoning of the five justices in *Eastern* shows that generalized monetary charges are immune from challenge under the Takings Clause).

The claimants’ reliance on *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003), and similar cases is misplaced and contrary to this Court’s precedents. *Brown* does not hold that a government-compelled expenditure of money constitutes a physical taking of the money. Rather, it simply recognizes that the direct expropriation of a *discreet, identifiable* monetary account can constitute a taking. Although the *Brown* court ultimately rejected the takings claim before it, it did observe that the expropriation of an Interest on Lawyers Trust Account (IOLTA) is “akin” to a taking. *Id.* at 235. This conclusion flowed naturally from the court’s earlier ruling that the interest

generated by IOLTA accounts remains the private property of the owner of the principal. See *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998). Similarly, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), the court ruled that "under the narrow circumstances" of that case (*id.* at 164), the expropriation of interest on interpleader funds deposited with a state court constituted a taking where the transfer served no public purpose and was simply a naked appropriation of the interest. *Id.* at 162-65.

Brown, Phillips, Webb's, and similar cases, however, in no way undercut the holdings of *Sperry* and *Eastern Enterprises* that a generalized monetary obligation is not a taking. The justices who rejected the takings claim in *Eastern Enterprises* expressly distinguished *Webb's* by observing that *Webb's* involved a discreet account. See *Eastern Enterprises*, 524 U.S. at 555 (Breyer opinion) ("But the monetary interest at issue [in *Webb's*] arose out of the operation of a specific, separately identifiable fund of money. * * * Here there is no specific fund of money; there is only a general liability"). Indeed, *Phillips* and *Eastern Enterprises* were both

decided during the same term, and thus there is no reason to believe there is any tension between them.

This Court, too, has recognized the same distinction in refusing to apply *Nollan* to impact fees. As noted above, in *Commercial Builders* this Court rejected the argument that impact fees and other requirements to spend money for the public good are analogous to a physical expropriation of the money. 941 F.2d at 875-76. The Court stressed that in *Webb's*, the statute expropriating interest on interpleader funds served no purpose (other than the naked transfer of the interest to the state) because another statute required parties to cover the expenses incurred in maintaining such funds. *Id.* But it flatly rejected the suggestion that *Webb's* applies more broadly to any compelled expenditure of funds for the public good, noting that *Sperry* “disposed of a similar argument.” *Id.*; see also *Commonwealth Edison*, 271 F.3d at 1338-39 (distinguishing *Phillips* and *Webb's* from *Sperry* and *Eastern Enterprises* because the former involved the expropriation of a discreet fund of money whereas the latter involved a generalized monetary obligation).

In the case at bar, the stormwater improvement requirement does not expropriate a discrete, identifiable monetary account. Rather, like the monetary obligations at issue in *Eastern Enterprises*, *Sperry*, and similar cases, the claimants here remained free to satisfy the stormwater improvement obligation through the use of any funds at their disposal. Under governing precedent, this requirement does not implicate the Takings Clause, much less *Dolan's* rough proportionality test.⁵

IV. The Claimants' Theory Of Liability Would Improperly Federalize Land Use Permit Disputes Across The Board.

If accepted, the claimants' remarkable theory of takings liability could transform almost every land use permit into a federal case, thereby improperly constitutionalizing routine land use disputes. Planning theory and land use law have become far

⁵ The claimants' supporting amici fare no better. Finding no precedent from this Court or the U.S. Supreme Court to support their position, Amici Pacific Legal Foundation, et al. rely instead on a hodgepodge of non-authoritative citations, including a non-precedential dissent from a denial of certiorari (PLF Br. 4, 12, 15), a non-precedential GVR (grant, vacate, and remand) order (*id.* at 11-12), and a law review article written by amici's employee. *Id.* at 4-5, 9, 11, 14, 18 (citing article by PLF attorney Breemer). These non-authoritative citations require no further response.

more flexible in recent decades as compared to the early twentieth-century model of strict Euclidian zoning.⁶ To accommodate changing land use patterns, developer interests, and community needs, local governments and landowners now negotiate at length over the conditions to be included in a development permit. Conditions requiring improvements or other expenditures of funds are an essential tool of this flexible system.⁷

For example, developers and local officials routinely negotiate over permit terms designed to alleviate the negative impact of the proposed development on schools, roads, sewers, open space, wetland protection, recreational facilities, and a host of other issues of interest to the community. Any of these conditions might require the permittee to expend funds to alleviate the harm anticipated from the project. If every such permit condition were subject to *Dolan* as the claimants contend,

⁶ *E.g.* Daniel P. Selmi & James A. Kushner, LAND USE REGULATION 161-62 (1999); Carol M Rose, *Planning and Dealing*, 71 Calif. L. Rev. 839, 879-80 (1983) (describing how “local governments have continued to develop new devices to retain ‘flexibility,’” which “put the locality into the desirable position of being able to bargain ad hoc with individual developers”).

⁷ *Id.*

every permit dispute ultimately would wend its way to federal court under the Takings Clause.

As this Court and many other federal appellate courts have noted, “[t]he Courts of Appeals were not created to be ‘the Grand Mufti of local zoning boards.’” *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) (quoting *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989); accord, *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828 (4th Cir. 1995) (“Resolving the routine land use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts.”); *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985) (“[F]ederal courts do not sit as a super zoning board or a board of zoning appeals.”); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994) (Easterbrook, J.) (“Federal courts are not boards of zoning appeals. * * * [S]tate courts often afford relief on facts that do not support a federal claim.”).

The claimants’ unprecedented theory of liability would not only transform federal courts into land use appeal boards, but also

severely damage the flexible land use negotiation process, in at least two ways. First, inappropriate extension of *Dolan's* rough proportionality test could result in the under-regulation of land use proposals. Due to fear of liability and litigation costs, planners and local officials might fail to impose appropriate permit terms to mitigate the harmful effects on neighboring landowners and the community at large.

Second, the claimants' radical expansion of *Dolan* could, for the same reasons, lead to over-regulation as local officials seek to avoid expensive trials and potential liability over permit conditions by simply denying permit applications. Risk-averse planners who would otherwise be willing to bargain and strike reasonable deals could end up denying applications for fear that needed permit conditions would trigger costly and time-consuming litigation and possible takings liability under unduly broad liability standards.

The proper confinement of *Dolan's* rough proportionality test to compelled dedications does not leave landowners without recourse. Rather, the vast bulk of permit conditions will continue

to be evaluated under the standards imposed by state constitutional and statutory land use law. The claimants here lost on their state claims and chose not to appeal those rulings to this court. They should not be allowed to improperly shoehorn their state law issues into a federal constitutional claim.

Conclusion

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

/s/

TIMOTHY J. DOWLING

Chief Counsel
Community Rights Counsel
1301 Connecticut Avenue, N.W.
Suite 502
Washington, DC 20036
(202) 296-6889
(202) 296-6895 (facsimile)

Attorney for Amicus Curiae
International Municipal Lawyers
Association

June 20, 2007