No. 11-1447

In The Supreme Court of the United States

COY A. KOONTZ, JR.,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF OF *AMICI CURIAE* INSTITUTE FOR JUSTICE AND THE CATO INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. A central pillar of IJ's mission is to protect the rights of individuals to own and enjoy their property, both because an individual's control over his or her property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights. The ability of the government to interfere with private property without adequate safeguards gravely threatens individual liberty. For this reason, IJ both litigates cases to defend the property rights of individuals and files *amicus curiae* briefs in relevant cases, including *Florida v. Harris*, No. 11-817 (U.S., argued Oct. 31, 2012); *Sackett v. Envtl. Prot. Agency*, 132 S. Ct. 1367 (2012); *Alvarez v. Smith*, 558 U.S. 87 (2009); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Bennis v. Michigan*, 516 U.S. 442

[1] Counsels of record have consented to the filing of this brief. Petitioners and Respondents have filed blanket consent to all *amicus* filings with the Clerk of Court. *Amici* have given the parties timely notice of our intention to file no less than seven days prior to the party's deadline for filing its principal brief in this matter and have provided the parties with an electronic copy of this filing. Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amici curiae* Institute for Justice and Cato Institute, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

(1996); *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). Additionally, IJ produces high-quality, original research on issues related to property rights.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs on a host of legal issues, including property rights.

In filing this *amicus* brief in support of Petitioner, *amici* urge this Court to extend the "essential nexus" and "rough proportionality" test established in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to non-real property exactions. Without meaningful judicial scrutiny of non-real property exactions, municipalities have engaged in widespread abuse. Adopting the rule articulated by the Florida Supreme Court – that "the *Nollan/Dolan* rule with regard to 'essential nexus' and 'rough proportionality' is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval" – will undermine private property rights by allowing abuse to continue unchecked.

All parties in this case have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

Amici file this brief to draw this Court's attention to the widespread abuse of non-real property exactions in the absence of judicial scrutiny. The "essential nexus" and "rough proportionality" tests of *Nollan* and *Dolan* require what amounts to a cause-and-effect relationship between exactions and the social problems for which they are meant to compensate. *See Pennell v. City of San Jose*, 485 U.S. 1, 20 (1987) (Scalia, J., dissenting) ("Traditional land-use regulation . . . does not violate [the principle that private property shall not be taken for public use without just compensation] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy.").

Limiting the application of *Nollan/Dolan* to exactions of real property would effectively eliminate the exactions doctrine as a check on government extortion. By drawing a distinction between real property and non-real property in this context – a distinction that is not supported by *Nollan* and *Dolan* – non-real property exactions are insulated from judicial scrutiny. Such a result undermines the cause-and-effect relationship, eliminating public officials' accountability and encouraging abuse and extortion. Indeed, in

the absence of judicial scrutiny, abuse of non-real property exactions has become widespread.

Extending *Nollan/Dolan* to non-real property exactions would not prevent local governments from imposing them. It would merely require that when the government places conditions on permit approval, the conditions make sense.

ARGUMENT

Under this Court's precedent, a government entity may only impose an exaction when the condition serves the same public purpose that would have supported a total ban of the proposed development (an "essential nexus"), *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987), and the condition is "related both in nature and extent to the impact of the proposed development" ("rough proportionality"). *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). If a court determines that the exaction lacks an essential nexus or rough proportionality, the exaction is a taking for which just compensation must be paid. *See Dolan*, 512 U.S. at 385-86.

In developing the *Nollan/Dolan* test, this Court was particularly concerned with local governments leveraging their exaction power as an "out-and-out plan of extortion" to force individuals to give up their constitutional right to compensation "in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship

to the property." *See Nollan*, 483 U.S. at 837 (citation omitted); *Dolan*, 512 U.S. at 385. That is exactly what happens in jurisdictions in which *Nollan*/*Dolan* has been limited to exactions of real property. In the absence of judicial scrutiny, municipalities routinely use non-real property exactions as a tool of extortion; without any meaningful limits on their power, municipal officials freely demand anything and everything – except real property – in exchange for government permits. That is why *Nollan*/*Dolan* must apply with equal force to both real property and non-real property exactions.

In Part I of this brief, *amici* explain that limiting *Nollan*/*Dolan* to real property would effectively eliminate the exactions doctrine as a check on government extortion. In Part II, we show that, in the absence of judicial scrutiny, non-real property exactions are widely abused. Finally, in Part III, we clarify that extending *Nollan*/*Dolan* to non-real property exactions will not eliminate governmental officials' "authority and flexibility to independently evaluate permit applications and negotiate a permit award that will benefit a landowner without causing undue harm to the community or the environment." *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1230 (Fla. 2011). In short, applying *Nollan*/*Dolan* to non-real property exactions will enable government officials to impose conditions on permit approval while preventing abuse by ensuring that those conditions make sense.

I. Limiting *Nollan/Dolan* to Real Property Exactions Would Effectively Eliminate The Exactions Doctrine as a Check on Government Extortion.

The *Nollan/Dolan* test provides an important check on the government's exaction power. In *Nollan*, landowners asked this Court to invalidate a condition placed on their development permit by the California Coastal Commission requiring them to grant a public easement across their beachfront property. 483 U.S. at 828. In holding that the condition amounted to a taking for which just compensation must be paid, this Court stated that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837 (citation omitted). In other words, in order to be valid, a condition must bear an "essential nexus" to the development restriction. *Id.*

Seven years later, in *Dolan*, a landowner asked this Court to invalidate a condition requiring her to dedicate a portion of her property to the city for use as a greenway and a pedestrian/bicycle pathway in order to obtain a permit to expand her business. 512 U.S. at 379-80. This Court found that, although the condition met the "essential nexus" test, it bore no relationship to the impact of the proposed development on the community. *See id.* at 395. In invalidating the condition, this Court held that, after determining whether an essential nexus exists between the permit

condition and the development restriction, a reviewing court must also determine whether the "degree of the exactions demanded by the city's permit conditions" is "roughly proportional" to the "projected impact of [the] . . . proposed development." *Id.* at 388. Although "[n]o precise mathematical calculation is required" to show rough proportionality, "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391.

Read together, *Nollan* and *Dolan* stand for the proposition that the government may not impose extortionate permit conditions on landowners in exchange for the right to develop their property. This flows from the doctrine of unconstitutional conditions, which provides that "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan*, 512 U.S. at 385 n.11 (citation omitted). Nothing in *Nollan* or *Dolan* expressly limits their application to exactions of real property, and in practice such a limitation permits the government to exact real property without paying for it by "exact[ing] a sum of money and us[ing] that money to compensate the landowner in an eminent domain proceeding. In either case, the end result is the same: the government has taken the land from the landowner." *Garneau v. City of Seattle*, 147 F.3d 802, 819 n.5 (1998) (O'Scannlain, J., dissenting).

Limiting *Nollan/Dolan* to real property exactions would effectively eliminate the exactions doctrine as a meaningful check on government extortion. This problem is not just theoretical. Local governments have responded to the absence of judicial scrutiny for non-real property exactions by engaging in a torrent of abuse. Indeed, requiring the government to demonstrate an "essential nexus" and "rough proportionality" only in the context of real property exactions provides an easy road map to avoid judicial scrutiny: governments need only demand money or labor to avoid limitations on their exaction power. Not surprisingly, the jurisdictions that have declined to extend the *Nollan/Dolan* test to non-real property exactions have seen widespread abuses of government leverage over property owners.

II. In the Absence of Judicial Scrutiny, Non-Real Property Exactions Are Widely Abused.

Where an exaction lacks any connection to the public impact of the proposed land use, such an exaction may amount to "out-and-out . . . extortion." *Nollan*, 483 U.S. at 837 (citation omitted). This is no less true for non-real property exactions as it is for exactions of real property, yet only the latter need meet the "essential nexus" and "rough proportionality" test of *Nollan/Dolan*. In the absence of judicial scrutiny, abuse is widespread.

Below, *amici* detail some of the myriad extortionate conditions demanded of property owners in

exchange for government permits: municipalities use exactions to finance municipal pet projects; to force individuals to give up constitutional rights; to circumvent legal safeguards on private property rights; and to require individuals to perform expensive building and mitigation projects.

A. Municipalities use exactions to finance municipal pet projects.

In the absence of judicial scrutiny, municipalities use non-real property exactions to finance municipal pet projects by requiring property owners to pay enormous fees in exchange for government permits. Often called "development fees" or "impact fees," this type of non-real property exaction is widely abused.[2] "The one-time fees, imposed on builders and often folded into home prices and passed on to buyers, are used by cities to fund construction of infrastructure such as roads, sidewalks, parks and even fire stations

[2] Some jurisdictions have extended *Nollan*/*Dolan* to monetary exactions. For example, in California and Arizona, monetary exactions are subject to judicial review unless they are imposed through generally applicable legislation like municipal ordinances. *See, e.g.*, *Home Builders Ass'n v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997); *Ehrlich v. City of Culver City*, 911 P.2d 429, 439 (Cal. 1996). But although monetary exactions are reviewable in state court, the Ninth Circuit will not review them. *See Garneau*, 147 F.3d 802.

for rapidly growing neighborhoods."[3] The prevalence of impact fees has steadily increased since they first appeared in the 1950s, and can now be found in hundreds of state and city codes across the country.[4] A survey performed by Kansas State University in 2006 found that 39% of the cities surveyed imposed impact fees on new construction that year, up from 25% in 2002.[5] And a recent survey of impact fees in cities nationwide revealed that, on average, fees for a single-family home now total more than $11,000.[6]

While municipalities justify development fees to fund so-called public improvements[7] or to cover

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[3] Kris Hudson, *Rising Use of 'Impact' Fees Rankles New-Home Buyers*, Wall Street J., Nov. 21, 2007, *available at* http://online.wsj.com/article/SB119561637725500252.html.

[4] *See* State Information, ImpactFees.com, http://impactfees.com/state-local/state.php (last visited Nov. 21, 2012) (collecting websites that contain state enabling acts, procedures and requirements for impact fee statutes in 35 states).

[5] Hudson, *supra* note 3.

[6] Clancy Mullen, *National Impact Fee Survey: 2012* at app. 7 (Aug. 20, 2012), *available at* http://impactfees.com/publications%20pdf/2012_survey.pdf.

[7] For example, school board trustees in Galt, California recently approved a fee for any new residential housing construction. "Revenue from fees collected on residential development may be used to pay for construction or reconstruction of school facilities; acquisition or leasing of land for school facilities; design of school facilities; and permit and plan checking fees, among other things." Jennifer Bonnett, *Galt Elementary School District Board Increases Developer Fees*, Lodi News-Sentinel, Oct. 26, 2012, *available at* http://www.lodinews.com/news/article_0f24a173-9c96-5833-98ea-6536779b875c.html.

administrative costs associated with processing permit applications,[8] in reality they are often tools of extortion used to obtain cash for municipal pet projects or to make up for budget shortfalls. For example, city officials in Elk Grove, California needed money to finance a major road project that would turn a two-lane country road into a major four-lane thoroughfare. To raise money for the road project, Elk Grove officials passed an ordinance requiring property owners seeking development permits to pay roadway fees of a prescribed amount per linear foot of property fronting a city road.[9]

For Muhammed Ahmad and Jozette Banzon, who wanted to build a single-family home worth about $500,000 on a corner lot they owned in Elk Grove, the fee added up to nearly half the cost of the home. In exchange for the development permit, city officials demanded the couple pay $240,357 for "road improvements" around the rural property. Ahmad and Banzon were eventually able to negotiate the fee

[8] When restaurant owner Navor Zavala wanted to add a small patio with seating to his neighborhood Mexican restaurant, local planners required him to pay a fee of $700 just to process the application. They also wanted him to install 10 parking spaces and room for bicycle parking. *SLO Builders Face Steep Fees For Minor Development*, CalCoastNews.com (Nov. 1, 2012), http://calcoastnews.com/2012/11/slo-builders-face-steep-fees-for-minor-development/.

[9] *See* Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of Pacific Legal Foundation in Support of West Linn Corporate Park, LLC at 7-8, *West Linn Corp. Park, LLC v. City of West Linn*, 132 S. Ct. 578 (2011) (No. 11-299).

down to about $10,000, but only after a public-interest law firm took their case sued the city.[10] But because that kind of development fee is not subject to *Nollan/Dolan* scrutiny in California, Elk Grove officials were free to try to extort the cost of road improvements for an entire neighborhood from one family. In the absence of judicial scrutiny, officials had no incentive to ensure that their roadway fee bore a meaningful relationship to the expected impact on the community of one couple's single-family home.

The absence of judicial scrutiny has also enabled San Francisco officials to force local hotel owners to pay for the cost of building low-income housing. San Francisco's Hotel Conversion and Demolition Ordinance requires hotel owners that want to convert so-called residential units into tourist units to obtain a conversion permit from the city, but in order to obtain the permit, hotel owners must pay to replace converted residential units, or build the units themselves. The city decides how much that will cost.

For Claude Lambert, owner of the historic Cornell Hotel, San Francisco officials decided the amount was $600,000. Mr. Lambert purchased the Cornell Hotel in 1978 after twelve years working there as a janitor.[11] After he experienced difficulty renting the

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[10] Hudson, *supra* note 3.

[11] National Center for Public Policy Research, *Hotel Must Allocate Rooms to Homeless Without Full Compensation*, CNSNews.com (July 7, 2008), http://v2cnsnews.cloud.clearpathhosting.com/news/article/hotel-must-allocate-rooms-homeless-without-full-compensation.

hotel's 24 residential units, he applied for a permit to convert them to tourist use. The city insisted that replacing those units would cost $600,000. He offered to pay $100,000, but the city refused the offer and denied the permit. *See Lambert v. City & Cnty. of San Francisco*, 67 Cal. Rptr. 2d 562, 570 (Cal. Ct. App. 1997), *cert. denied*, 529 U.S. 1045 (2000).

Mr. Lambert tried – unsuccessfully – to challenge the permit denial. He argued that the city denied the permit because he refused to succumb to the city's extortionate condition that he pay $600,000, but the California courts found that, because the city denied the permit, the condition was never actually imposed. *See Lambert*, 67 Cal. Rptr. 2d at 569 ("San Francisco did not demand anything from Lambert as a condition of a use permit. It simply denied the permit outright."). Accordingly, despite the obviously extortionate nature of the condition, it was never reviewed on the merits.[12] Requiring individuals to agree to extortionate conditions before challenging them, rather than allowing individuals to honestly object, is just

[12] The California Court of Appeal curiously explained that "the Planning Commission might have granted the permit upon payment of $600,000[, but that] does not make its refusal to issue the permit into a taking." 67 Cal. Rptr. 2d at 1182. But this is a distinction without a difference. Indeed, "[t]here is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than as a condition subsequent should make a difference." 529 U.S. 1045, 1048 (2000) (Scalia, J., dissenting).

another way courts have avoided requiring non-real property exactions to make sense.

The same was true of a similarly extortionate demand on the owners of San Francisco's San Remo Hotel, who also wanted to convert "residential" units into tourist units.[13] The owners of the hotel, brothers Tom and Robert Field, sought a permit to convert the 62 residential rooms to tourist rooms. In exchange for the permit, city officials demanded that the owners pay $567,000 to replace the converted units.[14] The owners tried to challenge the fee in court, but first the state and then federal courts held the Fields' claims barred on various procedural grounds.[15] The case was ultimately decided by this Court in 2005, but the $567,000 exaction was never reviewed on the

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[13] National Center for Public Policy Research, *Hotel Owners Must Pay off City in Order to Rent Rooms to Tourists*, CNSNews.com (July 7, 2008), http://cnsnews.cloud.clearpathhosting.com/news/article/hotel-owners-must-pay-city-order-rent-rooms-tourists.

[14] Press Release, San Remo Hotel, SF Hotel Responds to High Court Defeat in Property Rights Case (June 20, 2005), *available at* http://www.sanremohotel.com/pdf/PvB-SRop-release 05-1006.pdf.

[15] The Fields filed an action asserting facial and as-applied takings claims in state court, and subsequently in federal district court. The case wound its way up and down the state and federal court systems with various adverse findings on procedural grounds, including statute of limitations, issue preclusion, abstention, and ripeness pursuant to *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). *See San Remo Hotel, L.P. v. City and Cnty. of San Francisco*, 545 U.S. 323, 330-38 (2005).

merits. *See San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 333-34 (2005).

The case of Michael Mead is yet another example. Mr. Mead owned 1.6 acres of property in Cotati, California. He wanted to develop it with four duplexes.[16] In order to obtain the necessary development permit, municipal officials demanded that Mr. Mead comply with the City's affordable housing ordinance, which would have required Mr. Mead to: 1) construct at least two of the eight units as below-market units restricted for no less than 30 years for occupancy by moderate, low, or very low income households; 2) pay an in-lieu fee to the City; or 3) seek permission from the City to construct the required below-market units off-site, dedicate land to the City for its construction of below-market units, or provide a combination of on-site and off-site construction, in-lieu fees, and land dedication.[17]

Mr. Mead challenged the constitutionality of the exaction but lost because the ordinance included an option to pay a fee. The Ninth Circuit specifically found that "[a] generally applicable development fee is not an adjudicative land-use exaction subject to the 'essential nexus' and 'rough proportionality' tests" of *Nollan* and *Dolan*. *Mead v. City of Cotati*, 389 Fed. Appx. 637, 638-39 (9th Cir. 2010). But monetary

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[16] *See* Brief *Amicus Curiae* of Pacific Legal Foundation in Support of West Linn Corporate Park, LLC, *supra* note 9, at 6-7.

[17] *Id.*

exactions in the form of development fees may be just as extortionate as demands of real property when they are "designed to address a problem unrelated to the owner's use of property or be in an amount that is excessive for addressing the problems that do arise from the property."[18] In the absence of judicial scrutiny, that determination is never made.

In addition to development fees, some municipalities also structure non-real property exactions as "payments in lieu" – fees paid to local governments "in lieu of" something else, most commonly taxes or real property.[19] These fees are meant to compensate for revenue lost due to the nature of ownership or use

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[18] J. David Breemer, *Article: The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go From Here*, 59 Wash. & Lee L. Rev. 373, 398 (2002).

[19] For example, the Englewood, Colorado City Council recently approved a park dedication fee that requires residential developers to pay a $20,000 per acre fee in lieu of dedicating land for city parks. Clayton Woullard, *Englewood to Charge Developers a Fee In Lieu Of Setting Park Land Aside*, Denver Post, Sept. 26, 2012, *available at* http://dpo.st/QVbuP7. Municipalities across the country allow fees in lieu of land dedication. *See, e.g.*, Hollister, Cal. Mun. Code § 16.55.030- .050; Houston, Tex. Mun. Code § 42-252, -253; Newcastle, Wash. Mun. Code § 17.20.030; Baraboo, Wis. Mun. Code § 17.83. Some states even publish manuals that give municipalities explicit instructions on how to implement fee-in-lieu ordinances. *See, e.g.*, Pennsylvania Land Trust Association, *Public Dedication of Land and Fees-in-Lieu for Parks and Recreation: A Guide to Using Section 503(11) of the Pennsylvania Municipalities Planning Code* at 15-18 (Dec. 15, 2008), *available at* http://www.dcnr.state.pa.us/ucmprd2/groups/public/documents/document/dcnr_002299.pdf.

of a particular property. Payments in lieu of taxes ("PILOTs"), for example, are voluntary payments made by nonprofit organizations to compensate local governments for lost tax revenue. PILOTs are susceptible to abuse by municipal officials when they go from being voluntary to mandatory payments in exchange for government-issued permits.

For example, city officials in Scranton, Pennsylvania are looking for ways to leverage PILOTs to make up for their own budget shortfalls.[20] Scranton's economic recovery plan hinges on securing PILOTs from the city's largest nonprofit organizations, including the University of Scranton.[21] The city's ultimate goal is for PILOTs to make up 3% of its revenue and be expanded to include all non-profit organizations in the city. At the same time, the Scranton City Council has recently threatened to oppose all applications for zoning variances submitted by nonprofits.[22] The city's threat to oppose all nonprofits' zoning

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[20] Jim Lockwood, *Devil Is In Details In Scranton's New Recovery Plan*, Scranton Times Tribune, Sept. 16, 2012, *available at* http://thetimes-tribune.com/news/devil-is-in-details-in-scranton-s-new-recovery-plan-1.1373895.

[21] Jim Lockwood, *Scranton Eyes Its Seven Largest Nonprofits For Contributions*, Scranton Times Tribune, Aug. 2, 2012, *available at* http://thetimes-tribune.com/news/scranton-eyes-its-seven-largest-nonprofits-for-contributions-1.1353318.

[22] Jim Lockwood, *Nonprofit Organization Warily Eyeing Scranton's Feud With Tax-Exempt Institutions*, Scranton Times Tribune, Oct. 4, 2012, *available at* http://thetimes-tribune.com/news/nonprofit-organization-warily-eyeing-scranton-s-feud-with-tax-exempt-institutions-1.1382714.

variance applications while it simultaneously seeks ever-larger PILOTs from them is little more than a veiled plan of extortion. In the absence of judicial scrutiny, however, Scranton officials are free to require nonprofits to pay larger PILOTs as a condition of zoning variance approval.

Impact fees can, of course, satisfy *Nollan/Dolan*. The idea of impact fees is that they are *related to the impact* of development on the community. Where impact fees actually compensate for the expected impact of development, they will survive *Nollan/Dolan* scrutiny. But "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Where impact fees are wildly disproportionate to the anticipated impact of development, judicial scrutiny is the only way individuals can secure relief.

B. Municipalities use exactions to force individuals to give up constitutional rights.

In the absence of judicial scrutiny, municipalities use exactions to force individuals to give up constitutional rights in exchange for government permits. City officials in Carlsbad, California, for example, condition the granting of building permits on the waiver of voting rights protected by the state's constitution.

Under the California Constitution, before a municipality may pass the cost of public improvements on to individual property owners in the form of "assessments,"[23] it must hold an election in which all property owners in the proposed assessment district are entitled to vote. Cal. Const. Art. XIIID. But a Carlsbad, California ordinance requires property owners requesting building permits to pay the cost of "public improvements" up front, before an election can even take place. *See* Carlsbad, Cal., Mun. Code § 18.40.060. If a property owner cannot afford the assessment, he or she must sign a waiver, called a "Neighborhood Improvement Agreement," *see* Carlsbad, Cal. Mun. Code §§ 18.40.070, 18.40.090, consenting to the assessment and giving up any future right to vote in an assessment election. Carlsbad, Cal. City Resolution 2000-237 (July 25, 2000). The waiver not only binds current property owners, but also every future owner of the property as well. Carlsbad property owners thus have a choice: pay the city a form of assessment up front, or give up the right to ever object to assessments in the future.

Craig and Robin Griswold were faced with that choice when, in 2004, they requested a permit to build an addition to their single-family home. In exchange for the permit, Carlsbad officials demanded

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[23] Assessments differ from ordinary taxes in that they pay for improvements for a particular neighborhood, and only property owners in the affected neighborhood are required to pay them.

the Griswolds pay nearly $115,000 for various street improvements, including paving, sidewalk, curb, and gutter improvements, and underground and overhead utilities – none of which were implicated by the Griswold's construction plans.[24] If the Griswolds wanted to proceed with the addition, they had to choose between paying for the neighborhood improvements themselves or signing away their constitutionally protected right to vote on future assessments. City officials attempted to justify the enormous fee by explaining that "development is a privilege and development is allowed to be conditioned."[25]

The Griswolds ultimately signed the waiver under protest[26] and tried to challenge the exaction in court. But the non-real property exaction was never reviewed on the merits. Instead, the trial court dismissed the case on procedural grounds, *see Griswold v. City of Carlsbad*, No. 06-CV-1629WQH, 2007 U.S. Dist. LEXIS 72007, *11-14, *17-20 (S.D. Cal. Sept. 27, 2007), and the Ninth Circuit – in which non-real property exactions get no judicial scrutiny – upheld the dismissal, finding that the Griswolds waived their right to challenge the condition because

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[24] Brief *Amicus Curiae* of Pacific Legal Foundation in Support of Petitioners at 14, *Didden v. Port Chester*, 549 U.S. 1166 (2006) (No. 06-652).

[25] Michael Burge, *Property Rights At Issue*, San Diego Union-Trib. at NC-2, Aug. 16, 2006.

[26] A copy of the Griswold's waiver is available at http://eminentdomain.typepad.com/Griswoldwaiver.pdf.

they proceeded with construction after obtaining the permit. *See Griswold v. City of Carlsbad*, 402 Fed. Appx. 310, 311 (9th Cir. 2010) (unpublished) ("[T]he Griswolds' agreement to the deferral of the assessments and their construction of the improvements under their permit effected a valid waiver of their right to challenge the conditions of their permit.").

Some exactions blatantly impinge on property owners' "right to exclude" others from their property as conditions of obtaining government permits. For example, in 1990 the city of Seattle, Washington, passed a "Tenant Relocation Assistance Ordinance" that required landlords to pay relocation assistance in the amount of $2,000 to low-income tenants displaced "by demolition, change of use, substantial rehabilitation, or removal of use restrictions." *Garneau v. City of Seattle*, 147 F.3d 802, 804 (9th Cir. 1998) (*quoting* Seattle, Wash. Mun. Code § 22.210.130(A)). In other words, property owners were required to pay relocation assistance as a condition of obtaining a development permit. Property owners challenged the ordinance, but the trial court and then the Ninth Circuit rejected the property owners' takings claim. The Ninth Circuit specifically noted that neither *Nollan* nor *Dolan* "provide a court with any guidance to determine whether imposition of a [fee] constitutes a taking."[27] 147 F.3d at 812.

[27] The Ninth Circuit found that *Dolan* did not apply to the property owners' takings claim for two reasons: (1) *Dolan* applies

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Seattle's ordinance never could have survived *Nollan/Dolan* scrutiny. As Judge O'Scannlain pointed out in dissent, the "proposed development . . . causes no discernible harm whatsoever because . . . [w]hether or not a landlord develops his land, the tenants must bear moving expenses when they vacate the premises. This burden should come as no surprise to tenants, who, *by definition*, are legally obliged to move out eventually, perhaps involuntarily." 147 F.3d at 817-18 (O'Scannlain, J., dissenting) (emphasis in original). Indeed, a landlord's "right to evict the tenant at the expiration of the lease . . . is known as the 'right to exclude,' which . . . is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* Seattle's ordinance conditioned permit approval on waiving that right subject to the payment of displaced tenants' relocation expenses, the magnitude of which bore "no relation whatsoever to the tenants' actual or even expected moving costs." *Id.* at 818.

That municipalities may impose conditions on development is not in dispute. But when those conditions involve real property exactions, courts review them to make sure they make sense. When municipal

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only to as-applied takings challenges, not to facial takings challenges," and (2) "*Dolan* does not address when a taking has occurred, instead, it addresses only how close a fit the exaction . . . must have to the harms caused by development." 147 F.3d at 811.

officials demand that property owners waive constitutional rights as a condition of permit approval, that demand is no less deserving of judicial scrutiny.

C. Municipalities use exactions to circumvent legal safeguards of private property rights.

In the absence of judicial scrutiny, municipalities also use exactions as an end-run around legal safeguards of private property rights. City officials in the Village of Port Chester, New York, for example, attempted to extort nearly $1 million out of local property owners Bart Didden and Domenick Bologna using the threat of eminent domain.

Didden and Bologna jointly owned a piece of property in Port Chester. Part of that property lay within a redevelopment district and had been designated for future retail development. Several years after the redevelopment district was approved, representatives of CVS Pharmacy approached Didden and Bologna about the possibility of constructing a CVS Pharmacy on their property.[28] Didden and Bologna applied for the necessary approvals from Port Chester to proceed with the project, and they received preliminary site approval. But after Didden and Bologna had already begun the process of obtaining the necessary approvals for the project, Village officials

[28] Petition for a Writ of Certiorari at 3-4, *Didden v. Port Chester*, 549 U.S. 1166 (2007) No. (06-652).

directed them to meet with Gregg Wasser, one of the principals of G&S Port Chester (the chosen developer for the redevelopment district).[29]

At that meeting, Wasser demanded that Didden and Bologna pay him $800,000. Wasser calculated the $800,000 demand based on his estimate that developing the property as a retail pharmacy would yield approximately $2,000,000 in profit. If Didden and Bologna refused, Wasser would cause Village officials to commence a condemnation proceeding to take the portion of their property in the redevelopment district. In other words, paying $800,000 was the condition for which Didden and Bologna would receive the purported "government benefit" of not having their property taken by eminent domain. They refused the extortionate demand, and Port Chester filed a condemnation petition to acquire their property the following day. The purpose of the condemnation action? To transfer it by lease to G&S Port Chester to build a Walgreens.[30]

Over the next several months, Didden and Bologna repeatedly told Village officials about the $800,000 demand and requested that it suspend the condemnation.[31] But the Village approved of Wasser's actions.

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[29] The Village's approval of the redevelopment district included a finding of "public purpose" for the future use of eminent domain. *Id.* at 3.

[30] *Id.*

[31] *Id.* at 5-6.

Indeed, it was Wasser who decided the property would be taken by eminent domain. Rather than suspend the condemnation proceeding, the Village directed Didden and Bologna to negotiate with Wasser, even though it was Wasser who caused the Village to initiate the condemnation proceeding, and it was Wasser who would directly benefit from it.

Didden and Bologna tried to challenge the attempted extortion and subsequent condemnation in federal court, but the Southern District of New York dismissed the case.[32] *Didden v. Port Chester (Didden I)*, 322 F. Supp. 2d 385, 390 (S.D.N.Y. 2004). The Second Circuit affirmed, ruling in part that the $800,000 demand did not constitute an unlawful exaction. *Didden v. Port Chester (Didden II)*, 173 Fed. Appx. 931, 933 (2d Cir. 2006), *cert. denied*, 549 U.S. 1166 (2007).

As with the Griswolds' case, no meaningful judicial scrutiny was dedicated to the blatant attempt at extortion and abuse of power on the part of Village officials. *See Didden I*, 322 F. Supp. 2d at 390 (holding that "threats to enforce a party's legal rights are not actionable" and noting that plaintiffs' "allegation of an extortionate demand of $800,000 to avoid condemnation adds nothing of legal significance to Plaintiffs' claims"); *Didden II*, 173 Fed. Appx. at 933 (summarily

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[32] The district court explained that because the developer could cause the Village to condemn the property pursuant to a redevelopment plan, the developer's threat to do what he was entitled to do by law did not violate the Constitution. *Didden v. Port Chester*, 322 F. Supp. 2d 385, 390 (S.D.N.Y. 2004).

finding that the $800,000 demand was not "an unconstitutional exaction in the form of extortion"). But had Village officials demanded Didden and Bologna deed a portion of their land, rather than turn over a large sum of money, in exchange for not having their property taken, the exaction would have been reviewed under the "essential nexus" and "rough proportionality" tests of *Nollan* and *Dolan*. Using the threat of condemnation to exact money from property owners is no less deserving of judicial scrutiny. Indeed, permitting this type of exaction absurdly allows a municipality to exact money from a property owner which it can then use to pay compensation when it takes the property through eminent domain.[33]

Using exactions to perpetrate eminent domain abuse is only one way municipalities use exactions as an end-run around legal safeguards of property rights. Where the government imposes restrictions that abridge a property owner's right to exclusivity, the government is required to pay for them. *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982); *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014-15 (1992). But the government may impose the same restrictions without having to pay for them by simply making the restrictions a condition of permit approval.

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[33] This is exactly the situation Judge O'Scannlain posited in his dissent in *Garneau*. *See* 147 F.3d 802, 819 n.5.

That is what happened to Paul and Janet Smith, who owned a 10-acre lot in rural Mendon, New York. The Smiths wanted to build a single-family home on their lot and applied to the town for the necessary development permits. *Smith v. Town of Mendon*, 822 N.E.2d 1214, 1215 (N.Y. 2004). Town officials granted preliminary site approval on the condition that the Smiths file "a conservation restriction on any development" within the portion of their property that fell within a designated "environmental protection overlay district" ("EPOD").[34] *Id.*

The conservation restriction would have bound the Smiths and any subsequent owners in perpetuity, and it would have prohibited them from "[c]onstruction, including, but not limited to structures, roads, bridges, drainage facilities, barns, sheds for animals and livestock and fences, the [c]lear-cutting of trees or removal of vegetation or other ground cover, changing the natural flow of a stream or disturbing the stream bed, installing septic or other sewage treatment systems, and using motorized vehicles." *Id.* at 1216 (internal quotation marks omitted). In essence, it would have prevented the Smiths from doing anything with portions of their property.

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[34] The EPODs themselves also restricted what the Smiths could do with their property. However, the EPODs were subject to amendment by the Town, whereas the conservation restriction encumbered the property in perpetuity. 822 N.E.2d at 1216. In addition, "[u]nder the EPOD regime, the Town could only issue citations for violations, whereas with the conservation restriction, it could seek injunctive relief." *Id.*

The Smiths rejected the condition and challenged it in court. The trial court concluded that the conservation restriction was an exaction – though not an illegal one – but the intermediate appellate court reversed, finding that the condition was not an exaction because it did not require the dedication of property to "public use." *Smith v. Town of Mendon*, 4 A.D.3d 859, 860 (N.Y. App. Div. 2004) (*quoting City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702 (1999)). The New York Court of Appeals affirmed, reasoning that *Dolan* only applies to challenges based on exactions, not when "the landowner's challenge is based on denial of development." 822 N.E.2d at 1218. But contrary to the Court of Appeals' opinion, the conservation easement at issue was exactly the type of nonpossessory interest in real property "which imposes use restrictions on the landowner . . . for the benefit of the public," *id.* at 1225 (Read, J., dissenting) – and exactly the type of exaction that warrants judicial scrutiny.[35]

[35] A California trial court struck down a similar easement after the California Coastal Commission had attempted to require one couple to dedicate an agricultural easement to the state over 143 acres of their property in exchange for a permit to build a 6,000 square foot single-family home. *See* J. David Breemer, *Decision in Sterling "Forced Farming" Case: Agricultural Easement "Flat Out Unconstitutional,"* PLF Liberty Blog (June 25, 2010, 1:43 PM), http://plf.typepad.com/plf/2010/06/decision-in-sterling-forced-farming-case-agricultural-easement-flat-out-unconstitutional.html. The easement would have restricted use of almost all of the Sterlings' land exclusively to farming forever. A California trial court struck down the condition imposing the easement, finding that it was an illegal exaction. Specifically, the court held that the imposition of the affirmative agricultural easement

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In the absence of judicial scrutiny, however, municipalities are free to use exactions to avoid liability for basic property rights violations.

D. Municipalities use exactions to force individuals to undertake expensive building and mitigation projects.

In the absence of judicial scrutiny, municipal officials also use exactions to force individuals to perform expensive labor such as off-site mitigation or construction. In this case, for example, the St. Johns River Water Management District in Orange County, Florida required petitioner Coy Koontz to perform expensive mitigation on property several miles away from his as a condition of obtaining a permit to develop his own land. *See* 77 So. 3d at 1224.

In Philadelphia, Pennsylvania, the local Zoning Board of Adjustment has the power to demand virtually anything in exchange for granting a variance application. These demands need not – and indeed typically do not – have anything to do with the nature of the variance being sought. Rather, the Board often

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constituted "an unconstitutional taking, as it [was] disproportionate to the public impact of the house proposed. Further, the required nexus between the public impact and the affirmative agricultural easement ha[d] not been adequately substantiated." *Sterling v. Cal. Coastal Comm'n*, No. CIV 482448, Decision and Order Re: Plaintiff's Petition for Writ of Mandate (Cal. Sup. Ct. Cnty. of San Mateo Apr. 9, 2010), *available at* http://www.pacificlegal.org/document.doc?id=422.

imposes requirements – called "provisos" – that condition obtaining a variance on unrelated steps. In the absence of judicial scrutiny, these provisos are just as heavily abused as other types of non-real property exactions.

For example, when Ramesh Naropanth, owner of Cedar Street Supermarket, applied for a variance that would allow his neighborhood convenience store to sell sandwiches, he ended up having to satisfy a condition that had nothing to do with the variance. Mr. Naropanth already sold bread and deli meat. The variance would merely have enabled him to sell the two together in sandwich form. But Mr. Naropanth's first application for a zoning variance was flatly rejected. At the hearing on his application, community members insisted on outlandish demands utterly unrelated to the variance, including that he make financial contributions to various local causes. His second application was ultimately approved on the condition that he install expensive new security grates on his windows – a process that cost him nearly $8,000.[36]

Mr. Naropanth ultimately obtained the variance. But in the absence of judicial scrutiny, Philadelphia officials are free to force property owners to spend thousands of dollars to satisfy the random whims

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[36] Robert McNamara, Institute for Justice, *No Brotherly Love for Entrepreneurs: It's Never Sunny for Philadelphia's Small Businesses* at 9-10 (Nov. 2010), *available at* https://www.ij.org/images/pdf_folder/city_studies/ij-philly_citystudy.pdf.

of Board and community members. Indeed, in Mr. Naropanth's case, there was no connection whatsoever between his application for a zoning variance that would allow him to sell sandwiches and the condition that he install security grates.

Many extortionate conditions relate to the provision or construction of affordable housing in exchange for development permits. Government officials in Santa Fe County, New Mexico, for example, require property owners to sign an agreement to build "affordable housing units" and sell them to "county-approved buyers" in order to obtain city approval to subdivide their parcels. *See Alto Eldorado Ptnrs. v. City of Santa Fe*, No. 08-0175, 2009 U.S. Dist. LEXIS 47158, *4-6 (D.N.M. April 20, 2009).[37] Even though subdividing property might have no effect on the presence or lack of affordable housing in the county, the ordinance would nevertheless require property owners to build and sell affordable housing units on the county's behalf. Property owners challenged the condition in federal court as an illegal exaction. Even though they sought only declaratory and injunctive relief – and no compensation – their case was dismissed based on Supreme Court precedent requiring claims for just compensation to be litigated first in state and then federal court.

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[37] *See also* Paul J. Beard II, *Santa Fe "Affordable Housing" Case Appealed to Supreme Court*, PLF Liberty Blog (July 12, 2011 2:06 PM), http://plf.typepad.com/plf/2011/07/santa-fe-affordable-housing-case-appealed-to-supreme-court.html.

Sometimes demands of labor or money, like the provision of affordable housing, are framed as a choice: property owners can "choose" to perform labor or off-site mitigation as an "alternative" to paying fees. But a choice between two extortionate conditions is not a choice at all. Under San Francisco's Hotel Conversion and Demolition Ordinance, Mr. Lambert (owner of the Hotel Cornell) and the Fields (owners of the San Remo Hotel) would have been permitted to build replacement low-income housing themselves instead of paying the several-hundred-thousand dollar fees. But building affordable housing units for the city as a condition of developing one's own property is no less extortionate than being forced to give the city money to pay for that construction. The same can be said of the "choice" given to Mr. Mead by the city of Cotati: the option to build affordable housing "off-site" is no less extortionate than paying for the city to build it. Conditioning the grant of a permit on the requirement that a property owner perform expensive labor – like off-site mitigation in Mr. Koontz's case or the construction of affordable housing in many other cases – or pay a fee is equally extortionate. And either way, in the absence of judicial scrutiny, municipalities can use exactions to force individuals to undertake expensive building projects – or at the very least pay for them.

III. Subjecting Non-Real Property Exactions to *Nollan/Dolan* Scrutiny Would Enable Municipalities to Evaluate and Negotiate Permit Applications While Preventing Abuse.

Extending the *Nollan/Dolan* test to non-real property exactions would not extinguish the government's ability to evaluate and negotiate permit applications based on the anticipated impact on the community or environment. There is no "reason why limiting a government exaction from a developer to something roughly proportional to the impact of the development . . . will bring down the government." *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 639 (Tex. 2004). Rather, extending *Nollan/Dolan* to non-real property exactions would permit government officials to demand them where doing so makes sense – just as government officials are permitted to demand exactions of real property so long as they bear an "essential nexus" to the government purpose supporting the development restriction, and a "rough proportionality" to the impact of the proposed development.

In the jurisdictions in which the *Nollan/Dolan* test applies to monetary exactions, local governments impose fees that meet the "essential nexus" and "rough proportionality" standards. For example, the city of Beavercreek, Ohio enacted an ordinance to finance road construction made necessary by an intense period of new development. *Home Builders Ass'n v. City of Beavercreek (Beavercreek I)*, Nos. 97-CA-113 & 97-CA-115, 1998 Ohio App. LEXIS 4957, *4-7 (Ohio Ct. App. Oct. 23, 1998). Fees were assessed "based on the

category within which a particular new development fit" (*e.g.*, single or multi-family dwelling units, commercial or office developments). *Id.* at *7-8. These rates were calculated according to a formula meant to approximate the impact of each new development on the road system.[38] The ordinance had an appeal provision as well as a provision for review every two years. *Id.* at *8.

Local developers challenged the imposition of the impact fee as an unconstitutional taking, but the trial court upheld the ordinance under *Nollan* and *Dolan*. Based on its review of evidence and testimony regarding the impact fee system and the methodology for calculating fees, the trial court found "that a reasonable relationship existed between the city's need to construct new roadways and the traffic generated by new development," and also that, based on the methodology for calculating the fees, "the fees were reasonable and that a reasonable relationship existed between the fee paid and the benefits accruing to developers." *Home Builders Ass'n v. City of*

[38] The formula started with the "total cost of the proposed roadway system [which was then] reduced by certain credits. The remaining cost was then divided by the total number of trip ends generated by all new development. This resulted in a 'fee per trip,' which was multiplied by the number of trip ends associated with a particular type of development. As an example, the impact fee team estimated that a new single family dwelling would generate ten new daily trip ends. After multiplying this number by the fee per trip of $59.40, the team arrived at the $ 594 impact fee for each new single family dwelling unit." *Beavercreek I*, 1998 Ohio App. LEXIS 4957, at *7-8.

Beavercreek (Beavercreek II), 729 N.E.2d 349, 357-58 (Ohio 2000). The appellate court reversed, but the Ohio Supreme Court agreed with the trial court that "the dual rational nexus test . . . based on the *Nollan* and *Dolan* cases" is the proper test "for evaluating the constitutionality of an impact fee ordinance when a Takings Clause challenge is raised." *Id.* at 156. The Ohio Supreme Court found that the trial court's conclusions under *Nollan/Dolan* were proper and upheld the impact fee. *Id.*

The Illinois Supreme Court upheld a similar transportation impact fee under *Nollan/Dolan*. Illinois' Road Improvement Impact Fee Law "provided a comprehensive scheme for the enactment of impact fee ordinances in counties with a population of over 400,000 and all home rule municipalities." *N. State Home Builders Ass'n, Inc. v. Cnty. of Du Page*, 649 N.E.2d 384, 388 (Ill. 1995). Under the act, impact fees were not to exceed "'a proportionate share of costs incurred by a unit of local government which are specifically and uniquely attributable to the new development paying the fee.'" *Id.* (*quoting* the code). County officials in Du Page, Illinois passed their own transportation impact fee ordinance pursuant to the enabling act. *Id.*

Local developers challenged the enabling act and local ordinance, but the Illinois Supreme Court upheld them under the tests articulated in *Nollan* and *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 Ill. 2d 375, 380 (1960), Illinois' proportionality standard. Specifically, the court found that it was "clear

that a nexus exists between preventing further traffic congestion and providing for road improvements to ease that congestion," *id.* at 389, and also that the enabling act's requirement that impact fees imposed "must be 'specifically and uniquely attributable to the traffic demands generated by the new development paying the fee' . . . comports with the dictates of *Pioneer Trust*[.]" *Id.* at 390 (*quoting* code).

Just as with the Illinois and Ohio transportation impact fees, applying *Nollan/Dolan* does not prevent municipalities from imposing appropriate fees. For example, the roadway fee of $10,000 that was ultimately imposed by Elk Grove officials on the Griswolds' development, *see supra* Part II.B, could plausibly be proportional to the impact of their development on nearby roadways. So too could development fees imposed by cities to pay for sewer and other infrastructure improvements necessitated by new development be proportional to the impact of that development. Extending *Nollan/Dolan* to these types of exactions requires nothing more.

Furthermore, nothing prevents municipalities from assessing general taxes in order to fund municipal projects. For example, voters in Wildomar, California just voted to approve an annual $28 tax per household to fund municipal parks.[39] Requiring the

[39] City News Service, *Riverside Cities' Ballots Include Taxes, Changes In Pay*, Desert Sun, Nov. 6, 2012, *available at* http://www.mydesert.com/viewart/20121105/NEWS03/311050033/Riverside-cities-ballots-include-taxes-changes-pay; *see also* Tim O'Leary,

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public – rather than targeted individuals – to pay for public improvements from which all will benefit is entirely appropriate, whereas insulating exactions from judicial scrutiny allows municipalities to unfairly place the burden of funding municipal improvements on permit applicants when they are singled out to bear public costs. *Cf. Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

As shown in Part II, *supra*, municipalities will take any available opportunity to use exactions to impose extortionate conditions on property owners. Meaningful judicial scrutiny of non-real property exactions does not prevent the government from imposing exactions. It simply ensures a meaningful cause-and-effect relationship between exactions – both of real and non-real property – and the social problems for which they are meant to compensate. Accordingly, *Nollan* and *Dolan* should apply with equal force to both real property and non-real property exactions.

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Third Time Appears To Be Charmed As Wildomar Voters Narrowly OK Park Tax, Valley News, Nov. 9, 2012, *available at* http://www.myvalleynews.com/story/67593/.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the decision of the Florida Supreme Court and extend *Nollan/Dolan* to non-real property exactions.

Respectfully submitted,

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