

No. 93-518

In the Supreme Court of the United States

OCTOBER TERM, 1993

FLORENCE DOLAN, PETITIONER,

v.

CITY OF TIGARD, RESPONDENT

**On Writ of Certiorari
to the Oregon Supreme Court**

**BRIEF AMICUS CURIAE OF THE
AMERICAN FARM BUREAU FEDERATION AND THE
OREGON FARM BUREAU FEDERATION
IN SUPPORT OF PETITIONER**

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether a per se taking requiring the payment of just compensation occurs when a municipality physically occupies a portion of a privately-owned lot as a condition for permitting the owner to develop the remainder of the property.
2. Whether a municipality may take a portion of a privately-owned lot, without paying just compensation, as a condition for permitting a use of the remainder of the property that has not been shown to cause a nuisance.
3. Whether conditions imposed on the use of private property must be strictly scrutinized to ensure that they are narrowly tailored to abate a nuisance that would result from the proposed use.

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. THE FORCED DEDICATION OF PART OF MS. DOLAN'S PROPERTY FOR PUBLIC USE IS A PER SE TAKING FOR WHICH COMPENSATION MUST BE PAID	11
A. The City's Exaction Amounted To A Perma- nent Physical Invasion Of Petitioner's Land And Was Therefore A Per Se Taking ..	12
B. There Is No Exception To The Per Se Takings Rule For Physical Invasions Of Land Imposed As A Condition On Lawful Use	14
II. THE CITY OF TIGARD MAY NOT IMPOSE CONDITIONS ON THE USE OF PROPERTY EXCEPT IN RESPONSE TO A THREATENED NUISANCE, AND NO NUISANCE HAS BEEN DEMONSTRATED HERE	17

TABLE OF CONTENTS - Continued

	Page
A. The Oregon Supreme Court Relied Upon A Police Powers Exception That Eviscerates The Requirement Of Just Compensation For Takings	18
B. The Text, History, And Constitutional Role Of The Takings Clause Are Inconsistent With Recognition Of A Police Powers Exception	20
C. Any Exception To The Just Compensation Requirement Should Be Limited To The Prevention Of Nuisances	22
III. THE CITY'S EXACTION VIOLATES THE TAKINGS CLAUSE BECAUSE IT IS NOT NARROWLY TAILORED TO ABATE A NUISANCE THAT WOULD RESULT FROM PETITIONER'S PROPOSED DEVELOPMENT	24
A. Exactions Of Private Property Should Be Subjected To Strict Scrutiny	25
B. The City Of Tigard's Exaction Of Ms. Dolan's Land Cannot Withstand Strict Scrutiny .	28
CONCLUSION	30

TABLE OF AUTHORITIES

Cases:	Page
<i>Agin v. City of Tiburon</i> , 447 U.S. 255 (1980)	26
<i>Armstrong v. United States</i> , 364 U.S. 40 (1960)	10, 22
<i>Craig v. Boren</i> , 429 U.S. 190 (1976)	26
<i>Curtin v. Benson</i> , 222 U.S. 78 (1911)	27
<i>J.E.D. Associates, Inc. v. Town of Atkinson</i> , 432 A.2d 12 (N.H. 1981)	27
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164 (1979)	12
<i>Keystone Bituminous Coal Ass'n v.</i> <i>DeBenedictis</i> , 480 U.S. 470 (1987)	19
<i>Loretto v. Teleprompter Manhattan CATV</i> <i>Corp.</i> , 458 U.S. 419 (1982)	11, 12, 13, 15
<i>Lucas v. South Carolina Coastal Council</i> , 112 S. Ct. 2886 (1992)	<i>passim</i>
<i>Monongahela Navigation Co. v.</i> <i>United States</i> , 148 U.S. 312 (1893)	8, 22
<i>Mugler v. Kansas</i> , 123 U.S. 623 (1887)	26

TABLE OF AUTHORITIES—Continued

	Page
<i>Nollan v. California Coastal Comm'n</i> , 483 U.S. 825 (1987)	<i>passim</i>
<i>Penn Central Transp. Co. v. City of New York</i> , 438 U.S. 104 (1978)	22
<i>Pennsylvania Coal Co. v. Mahon</i> , 260 U.S. 393 (1922)	19, 22
<i>Pioneer Trust & Sav. Bank v.</i> <i>Village of Mount Prospect</i> , 176 N.E.2d 799 (Ill. 1961)	27
<i>PruneYard Shopping Center v. Robins</i> , 447 U.S. 74 (1980)	13
<i>Pumpelly v. Green Bay Co.</i> , 80 U.S. (13 Wall.) 166 (1872)	12
<i>United States v. Causby</i> , 328 U.S. 256 (1946)	13
<i>United States v. Lynah</i> , 188 U.S. 445 (1903)	11, 21
<i>Yee v. City of Escondido</i> , 112 S. Ct. 1522 (1992)	7, 11, 15, 16

TABLE OF AUTHORITIES—Continued

	Page	
Miscellaneous:		
<i>Federalist No. 10</i> (Madison) (C. Rossiter ed. 1961) . .	10	
<i>Federalist No. 54</i> (Madison) (C. Rossiter ed. 1961) . .	21	
Lawrence, <i>Means, Motives, and Takings:</i>		
<i>The Nexus Test of Nollan v. California Coastal Commission</i> , 12 Harv. Envtl. L. Rev. 231 (1988) .	25	
McConnell, <i>Contract Rights and Property Rights:</i>		
<i>A Case Study in the Relationship Between Individual Liberties and Constitutional Structure</i> , 76 Cal. L. Rev. 267 (1988)	20	
Michelman, <i>Property, Utility, and Fairness:</i>		
<i>Comments on the Ethical Foundations of “Just Compensation” Law</i> , 80 Harv. L. Rev. 1165 (1967)	12	
J. Nedelsky, <i>Private Property and the Limits of American Constitutionalism</i> (1990)	10	
Note, “‘Take’ My Beach, Please!”: <i>Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions</i> , 69 B.U. L. Rev. 823 (1989)		26
Stoebuck, <i>A General Theory of Eminent Domain</i> , 47 Wash. L. Rev. 553 (1972)	20	

TABLE OF AUTHORITIES—Continued

	Page
J. Story, <i>Commentaries on the Constitution of the United States</i> (R. Rotunda & J. Nowak eds. 1987)	20

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INTEREST OF THE AMICI CURIAE

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. It has member organizations in all 50 states

* Written consents of the parties to the filing of this brief have been filed with the Clerk.

and Puerto Rico representing more than 4.2 million member families.

The Oregon Farm Bureau Federation (OFBF) is a voluntary non-profit membership association organized under the laws of the State of Oregon. It has its principal offices in Salem, Oregon. OFBF individually and through joint and collective efforts seeks to promote, protect, and represent the economic, social and educational interests of farmers in Oregon. OFBF is composed of more than 13,500 member families in Oregon. OFBF is a member of AFBF.

The American Farm Bureau Federation and the Oregon Farm Bureau Federation have a direct interest in the outcome of this case. The members of AFBF and OFBF own or lease significant amounts of property and depend on their land for their livelihoods. They are, therefore, vitally interested in the proper interpretation of the Just Compensation Clause of the United States Constitution. The Oregon Supreme Court's ruling that government may impose an expropriatory condition on a lawful use of land not shown to create a nuisance, and thereby effectively dispossess an owner of his or her property rights without paying compensation, is contrary to the interests of AFBF, OFBF, and their members.

STATEMENT OF FACTS

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." The issue in this case is whether a municipality may require a landowner to dedicate a portion of her property to public use as a condition to granting a development permit, yet evade the constitutional obligation to pay just compensation merely by asserting that some possible harmful effect of the proposed development, which is not shown to amount to a nuisance, may be offset by the dedication. The Oregon Supreme Court incorrectly held that it may.

1. Petitioner Florence Dolan owns a parcel of 1.67 acres of land in Tigard, Oregon. The lot is currently improved with a 9,700 square foot commercial structure. Petitioner applied to the city for a permit to remove that structure and to replace it with a larger commercial building of 17,600 square feet, with appropriate parking. Pet. App. A3.

Petitioner's lot is in the Action Area Overlay Zone (AAO Zone) that overlaps part of Tigard's Central Business District Zone (CBD Zone). In the CBD Zone, the commercial use petitioner proposes "is permitted outright." Pet. App. G16. Within the AAO Zone, however, local regulations permit "[t]he City [to] attach conditions to any development" in order to implement the Tigard Comprehensive Plan. *Id.* at G17. Pursuant to these regulations, the city conditioned its grant of a permit to Ms. Dolan on her dedicating 7,000 square feet, or about one-tenth of her lot, to public use. *Id.* at A4 & n.3. This part of Ms. Dolan's lot comprised "all portions of the site that fall within the existing 100-year floodplain" of Fanno Creek, which was adjacent to petitioner's property, plus a 15-foot strip of land next to the floodplain boundary which was to be used as a greenway and for construction of a pedestrian and bicycle path. *Ibid.*

a. The city purported to justify this exaction in two ways. First, land within and adjacent to the Fanno Creek floodplain must be given over to public use "for storm water management purposes." Pet. App. G37. According to the Tigard Planning Commission, that dedication was "reasonably related" to the expansion proposed by petitioner because the new building would "increas[e] the site's impervious area," and this "would be expected to increase the amount of storm water runoff from the site to Fanno Creek." *Ibid.* The Planning Commission "expected" that such "additional stormwater runoff resulting from additional development, both from the subject site and elsewhere within the Fanno Creek drainage basin," would "increase flow within the creek" and require "channel

modifications in this area to offset the increase in stream flow.” *Id.* at G40. Conditioning new development of Ms. Dolan's lot on dedication of the floodplain and adjacent area for public use would permit the city to make these channel modifications, the Commission found, thereby “reducing the possibility of floodwater damages and threats to public safety.” *Ibid.*

The Planning Commission noted that the city's Master Drainage Plan called for widening Fanno Creek by only five feet, not the full 15 feet that the city exacted from Ms. Dolan adjacent to the floodplain. Pet. App. G38-G39. The additional ten-foot strip of land that the city took was to accommodate a “path [next to] and vegetative screening up to the relocated bank” of Fanno Creek. *Id.* at G42-G43. This path and screening were required, the Commission found, to implement the city's Master Plan for Fanno Creek Park, which called for the eventual creation of a 35-acre park around the creek. *Id.* at G42.

b. The city also asserted that its exaction of Ms. Dolan's land was “reasonably related” to Tigard's transportation needs. Pet. App. G24. The city had previously adopted a Comprehensive Pedestrian/Bicycle Pathway Plan which called for creation of a path in the vicinity of Fanno Creek. *Id.* at G21-G22. City regulations required that any development request for property on which that path could be located be scrutinized “to ensure that the adopted plan is properly implemented,” and that development approval be conditioned on “the necessary easement or dedications for the pedestrian/bicycle pathwa[y].” *Id.* at J2. Similarly, standards for new development in the AAO Zone stipulated that the city could impose conditions to further the provision of “continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bike paths identified in the comprehensive plan.” *Id.* at G18-G19.

In accordance with these regulations, the Planning Commission, in justifying the exaction of a strip of Ms. Dolan's land adjacent to the floodplain for construction of a path and greenway, focused on the “imperative” need for a “continuous pathway * * * to function as an efficient, convenient, and safe” part of “a multi-modal transportation system serving the varied needs of the City's citizens and businesses.” Pet. App. G25, G26. The Commission noted that such “a system cannot fully function with missing pieces,” and that omission of the section of the planned path on Ms. Dolan's property would make the system “less convenient and efficient.” *Id.* at G27.

The Commission also found that “[i]t is reasonable to assume that customers and employees of the future uses of [Ms. Dolan's] site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs.” Pet. App. G24. According to the Commission, Ms. Dolan's proposed development “is anticipated to generate additional vehicular traffic” and therefore “increas[e] congestion”; “[c]reation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on * * * nearby streets and lessen the increase in traffic congestion.” *Ibid.*

2. Ms. Dolan appealed the imposition of these conditions to the Land Use Board of Appeals (LUBA) (Pet. App. D1), and then to the Oregon Court of Appeals. *Id.* at C1. Each tribunal rejected Ms. Dolan's appeal, on the ground that the Tigard Planning Commission's findings had demonstrated a “reasonable relationship” between the effects of Ms. Dolan's proposed use and the exactions that had been imposed by the city.

3. Before the Oregon Supreme Court, petitioner renewed her arguments that (1) a regulatory body must demonstrate an “essential nexus” or “substantial relationship” between the impact of a development and the dedication required, which was missing here; (2) the

city had failed to show even a “reasonable relationship” between the impact of the development and the conditions imposed; and (3) because the city's conditions required permanent physical occupation of a portion of petitioner's property, they amounted to a per se taking. Pet. App. A10-A11 & n.8.

The Oregon Supreme Court rejected these arguments. First, it held that under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the “reasonable relationship” test governs the analysis of conditions imposed on land use. Pet. App. A13-A14. To satisfy that test, an exaction merely must “serv[e] the same purpose that a denial of the permit would serve.” *Id.* at A15.

Second, the City of Tigard's findings that “expanded use of [Ms. Dolan's] site is anticipated to generate additional vehicular traffic,” and that “[c]reation of a * * * pedestrian/bicycle pathway system” could “lessen the increase in traffic congestion,” were sufficient to show that dedication of a strip of Ms. Dolan's property for a pathway was reasonably related to the proposed redevelopment of the land. Pet. App. A16. The city's findings that “[t]he increased impervious surface [created by the development] would be expected to increase the amount of storm water runoff,” and that dedication of the Fanno Creek floodplain and an adjacent strip of land as greenway would allow for improvement of the storm drainage system, demonstrated a “reasonable relationship” between Ms. Dolan's planned use of her property and the city's exaction. *Id.* at A15-A17.

Finally, the court also rejected petitioner's per se taking argument. Citing *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992), it held that no per se taking occurred here because Ms. Dolan had control over whether the dedication would have to be made; she could “avoid physical occupation of [her] land by withdrawing th[e] application for a development permit.” Pet. App. A11 n.8.

Justice Peterson dissented. *Nollan*, he said, imposed a more stringent standard: Government “must show that the granting of the permit probably will create specific problems, burdens, or conditions that theretofore did not exist, and that the exaction will serve to alleviate the specific problems, burdens, or conditions that probably will arise from the granting of the permit.” Pet. App. A19. The city’s findings of fact did not meet that burden. Rather, they “sugges[t] that such exactions were to be attached to *all* requests for improvement” in order to facilitate the city’s previously adopted goals, such as “[p]rovision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems.” *Id.* at A20, A21.

Although the city’s findings “show the resolve of the city to get the easements and the purpose for the easements,” Judge Peterson concluded, they “in no way establish that the easements necessarily are needed because of increased intensity of use of [Ms. Dolan’s] (or anyone else’s) property.” Pet. App. A23. Rather, Tigard had simply “decided that it needed a pedestrian/bicycle pathway and a flood control greenway easement along Fanno Creek.” It had determined that “[o]ne way of getting these, free of cost,” was to require “all owners who propose to change the use of their property to convey the easements to the city.” *Id.* at A29-A30.

SUMMARY OF ARGUMENT

“[I]n any society the fullness and sufficiency of the securities which surround * * * the use and enjoyment of * * * property constitute one of the most certain tests of the character and value of the government.” *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324 (1893). The City of Tigard failed that test when it required Ms. Dolan to dedicate one-tenth of her lot to public use as a condition for developing the remainder of the lot for a perfectly lawful commercial purpose that it never showed would cause a nuisance.

1. Physical occupations of private land by government are a special category, akin to eminent domain. They are never justifiable without the payment of compensation, and always constitute a per se taking. There is no exception to this rule for occupation imposed as a permit condition.

The conditions imposed by Tigard on Ms. Dolan's use of her land were a physical occupation. They required the dedication of part of Ms. Dolan's property for the construction of a pathway and greenway and for widening Fanno Creek. These physical constructs would occupy Ms. Dolan's property; and the public use of these facilities would also amount to an occupation. In these circumstances, Tigard's exaction is a per se taking for which compensation is required.

2. Under the Just Compensation Clause, government may not take private land, without paying compensation, merely to serve the public interest. It may do so only when its actions “duplicate the result that could have been achieved in the courts—by adjacent landowners * * * under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally.” *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 (1992). That “nuisance” standard is properly applied to regulatory takings in general, including those exacted as permit conditions. Applying that standard, reversal is required in this case. The city has never even attempted to show that the alleged effects of Ms. Dolan's development in increasing stormwater flow into Fanno Creek and area traffic—the effects its conditions are purportedly designed to remedy—constitute nuisances under Oregon law.

3. Even if an increase in stormwater flow and increased traffic resulting from a development had been shown to be nuisances under Oregon law, reversal would still be required in this case. Though a municipality may impose conditions on a proposed use in order to abate a nuisance that would result from that use, such conditions do

not pass constitutional muster unless they are narrowly tailored and the minimum exaction necessary to prevent the nuisance.

The conditions at issue here cannot survive that strict scrutiny. Dedication of land is never necessary to abate a nuisance, but is always a per se taking. Moreover, the city has never offered more than unsupported speculation about the impact of Ms. Dolan's development. It has not demonstrated that increased stormwater flow or increased traffic will in fact result from the proposed use; still less has it quantified those effects. It has thus failed to show that *any* particular permit condition is necessary to prevent the proposed development from creating a nuisance. To the contrary, the evidence suggests that the city's real purpose is to achieve general public goals of improving Tigard's transportation and stormwater management systems. Under the Takings Clause, Ms. Dolan may not be singled out to contribute part of her property to achieve these general public goods.

ARGUMENT

For the Framers of our Constitution, private property was “the clear, compelling, even defining, instance of the limits that private rights place on legitimate government.” J. Nedelsky, *Private Property and the Limits of American Constitutionalism* 9 (1990). The Framers saw the protection of property rights—rights in land in particular—as “the first object of government.” *Federalist No. 10*, at 78 (Madison) (C. Rossiter ed. 1961). The Takings Clause lies at the heart of the constitutional scheme to protect such rights from the grasp of transient political majorities; it was “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.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). For the common good, individuals might be forced to give up their property—but only upon payment of fair compensation from the common purse.

The Oregon Supreme Court's decision in this case destroys this careful balance between individual rights and community needs. It allows a municipality to achieve public goals at the private expense of a few individuals. The court endorsed the City of Tigard's determination that rather than pay for the creation of public goods like a bicycle path or stormwater management out of the city's coffers—which might require the raising of taxes—it would extort part of some individuals' land for those purposes as the price for permitting them to use the remainder of their property in a lawful and non-noxious manner that has never been shown to create a nuisance under state law. The Takings Clause does not countenance that result. To the contrary, it specifically prohibits government from invading “private right under the pretext of the public good.” *United States v. Lynah*, 188 U.S. 445, 470 (1903).

I. THE FORCED DEDICATION OF PART OF MS. DOLAN'S PROPERTY FOR PUBLIC USE IS A PER SE TAKING FOR WHICH COMPENSATION MUST BE PAID

It has long been recognized that where government “regulations * * * compel the property owner to suffer a physical invasion of his property,” a per se taking occurs that is “compensable without case-specific inquiry into the public interest advanced in support of the restraint.” *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992). See, e.g., *Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (1992). Thus, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-433 n.9, 434-435 (1982), this Court noted that when government action results in a “permanent physical occupation” of property, its decisions “uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.”

Amici believe that this per se takings rule should be applied when government physically occupies land as a condition of its lawful use. Physical occupation is different in kind from other permit conditions, and comparable to the exercise of eminent domain. Moreover, it is difficult to imagine any circumstances in which physical occupation would be necessary to prevent a nuisance that would otherwise be caused by a proposed use. See *infra*, pages 22-23.

In order physically to occupy Ms. Dolan's land, the City of Tigard should have used its formal powers of condemnation. Having proceeded instead to impose a permanent occupation on part of petitioner's property as a permit condition, the city has run afoul of the Takings Clause.

A. The City's Exaction Amounted To A Permanent Physical Invasion Of Petitioner's Land And Was Therefore A Per Se Taking

There can be no question as to the “physical” character of the occupation Ms. Dolan will suffer as a result of the conditions imposed by the city. The pedestrian and bicycle path and public greenway for which the city intends to use Ms. Dolan's land are physical constructs on the land, like the dam in *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872), and the one-half inch diameter cable deemed a physical occupation and thus a taking in *Loretto*, 458 U.S. at 422.

In addition, “permanent physical occupation” occurs when government action gives the public “a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.” *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 (1987); see also *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) (creation of public right of access to privately-owned pond a taking). In this case, the City of Tigard's express goal in insisting that Ms. Dolan

give up part of her land for a path and greenway was to create a right of way for use by pedestrians and bicyclists, and also to further the city's goals of creating a public park around Fanno Creek. Such public uses amount to a permanent physical invasion, and thus a per se taking. See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967) ("The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, `regularly' use, or `permanently' occupy, space or a thing which theretofore was understood to be under private ownership").

This physical occupation of Ms. Dolan's land is unqualified. Like the television cable in *Loretto*, the path and greenway here will not be terminable by petitioner at will or after a specified period. Moreover, the terms of the city's exaction do not allow Ms. Dolan the discretion to implement time, place, or manner restrictions of the sort available to the landowner in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980). See also *Loretto*, 458 U.S. at 436 (the forced occupation of land is "qualitatively more severe" if the owner has "no control over the timing, extent, or nature of the invasion").

The physical invasion of petitioner's land is no less a per se taking because the city has decided to deprive Ms. Dolan of ten percent of her land rather than the entire parcel. "[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Loretto*, 458 U.S. at 436-37; see also *United States v. Causby*, 328 U.S. 256, 265 n.10 (1946) ("an owner is entitled to the absolute and undisturbed possession of *every part of his premises*") (emphasis added). To the contrary, permanent occupations are takings "even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his

land.” *Loretto*, 458 U.S. at 430. Here, the amount of land involved and the seriousness of the interference with Ms. Dolan’s use of her property dwarf the taking found unconstitutional in *Loretto*.

B. There Is No Exception To The Per Se Takings Rule For Physical Invasions Of Land Imposed As A Condition On Lawful Use

The Oregon Supreme Court refused to hold that a per se taking had occurred in this case, reasoning that Ms. Dolan had control over whether the dedication would have to be made; she could “avoid physical occupation of [her] land by withdrawing th[e] application for a development permit.” Pet. App. A11 n.8. The practical implications of this analysis are astonishing.

According to the Oregon Supreme Court, government may physically occupy private land at will—even though such occupation is at the very core of the wrongs prohibited by the Takings Clause—provided only that it does so in the form of a condition related, however tenuously, to the grant of some permit. By multiplying the uses for which it requires permits, then, government can increase its opportunities for invading private land to further public goals. It is unlikely that financially-strapped municipalities will ignore this incentive. It would not be surprising, if the decision below were upheld, to see permitting requirements developed for even the most ordinary uses of land—and to see a concomitant expansion in government exactions wrung from land-owners in exchange for the grant of a permit. See *Nollan*, 483 U.S. at 837 n.5.

The Oregon Supreme Court is mistaken, however, in its belief that government may escape the per se takings rule by the simple expedient of occupying private property as a condition for the grant of a permit. It would render the Takings Clause meaningless if government were able to obtain private property by this indirect means when it could not constitutionally achieve the same result by directly demanding that the landowner turn over his property. And

this Court's precedents do not allow such a result. The physical nature of the City of Tigard's occupation of Ms. Dolan's land not only brings this case firmly within the per se takings rule laid down in this Court's decisions, but also clearly distinguishes the situation here from that in *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992), upon which the Oregon Supreme Court purported to rely.

In *Yee*, this Court considered an argument that laws controlling the rents that mobile home parks could charge their tenants and limiting their ability to terminate a tenancy amounted to a governmentally-endorsed physical invasion by the tenants, and thus were a per se taking. This Court held that the rent and tenancy regulations were not a per se taking, because the mobile home parks “voluntarily rented their land to mobile home owners,” and no law “compels [the parks], once they have rented their property to tenants, to continue doing so.” 112 S. Ct. at 1528. “Put bluntly, no government *has required any physical invasion of petitioners' property*”; rather, the “tenants were invited by petitioners, not forced upon them by the government.” *Ibid.* (emphasis added). This, the Court noted, was very different from the per se physical taking that occurs when “government * * * *requires* the landowner to submit to the physical occupation of his land.” *Ibid.* (emphasis in original).

The exactions from the park owners in *Yee* and from Ms. Dolan are very different. The regulations at issue in *Yee* merely governed a “relationship between landlord and tenant.” 112 S. Ct. at 1529. Here, in contrast, the city does not seek to regulate any relationship between Ms. Dolan and bicyclists, pedestrians, or park users; there is no relationship to regulate. Ms. Dolan has *not* chosen to invite bicyclists (and so on) onto her property; she is having “strangers” forced upon her by the city. See *Loretto*, 458 U.S. at 436 (“an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property”).

This Court acknowledged the importance of this very distinction in *Yee*, when it said that “[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy.” 112 S. Ct. at 1529. This case is like the one in which government forces a tenant onto a landlord; the city seeks to compel Ms. Dolan to open up a portion of her land to recreational users in perpetuity, merely so that she can preserve her right to redevelop her land in a lawful manner.

Ms. Dolan, unlike the landowners in *Yee* who “voluntarily rented their land” (112 S. Ct. at 1528), is being *required* by the city to dedicate her land for use by the public. Although she has the option of forsaking the redevelopment of her property and thereby escaping the city's exaction, there would be nothing “voluntary” about such a decision to give up a desired and perfectly lawful use of her land. As this Court explained in *Nollan*, 483 U.S. at 833 n.2, “the right to build on one's own property * * * cannot remotely be described as a `governmental benefit.’ And thus the announcement that the application for (or granting of) the permit [to build] will entail the yielding of a property interest *cannot be regarded as establishing [a] voluntary `exchange’*” for such a benefit (emphasis added).

Nor do *amici* believe that *Nollan*, insofar as it may suggest that physical occupation is analyzed under different rules when imposed as a permit condition, should bar the per se takings analysis set out here. To begin with, the land-owner in *Nollan* does not appear to have argued that the easement exacted in that case was a per se taking. Moreover, though the easement in *Nollan* amounted to a physical occupation, it did so far less obviously than the condition imposed in this case, which envisaged the construction of permanent physical structures—a pathway, greenway, and widened creek—on Ms. Dolan's property. In any event, *amici* can discern no justification in the language or history of the Takings Clause for treating

permit conditions that require a physical occupation differently from other physical occupations.

A landowner's right to use and enjoy her property as she sees fit, provided that she does not transform her property into a nuisance, is a foundational bulwark of our polity. The notion that government has the power to force a landowner to elect either to give up that right or else to give up part of her land to public occupation is antithetical to the Takings Clause. An involuntary exaction of a portion of an individual's property as a condition for making ordinary use of the remainder of the property is unmistakably a physical invasion; *amici* urge this Court to make clear that it falls within the per se takings rule and requires payment of compensation.

**II. THE CITY OF TIGARD MAY NOT IMPOSE
CONDITIONS ON THE USE OF PROPERTY
EXCEPT IN RESPONSE TO A THREATENED
NUISANCE, AND NO NUISANCE HAS BEEN
DEMONSTRATED HERE**

Amici believe that the condition placed on the lawful development of Ms. Dolan's property amounted to a physical occupation, and was therefore a per se taking for which compensation is required. See *Lucas*, 112 S. Ct. at 2893; *Nollan*, 483 U.S. at 831-832. In any event, even if no per se taking were involved, the City of Tigard would still be required to compensate Ms. Dolan for the value of the land it took for public use through the imposition of a condition on a lawful use. Properly interpreted, the Takings Clause prohibits uncompensated takings of this sort except where the goal of the exaction is to abate a nuisance that would be caused by the proposed use. Here, the city has not shown that Ms. Dolan's proposed redevelopment would cause a nuisance.

A. The Oregon Supreme Court Relied Upon A Police Powers Exception That Eviscerates The Requirement Of Just Compensation For Takings

The Oregon Supreme Court undertook no analysis of the City of Tigard's goals in depriving Ms. Dolan of a substantial part of her land. It simply assumed that the municipality's stated aims of improving stormwater management, transportation, and recreational facilities were "legitimate state interest[s]," and that no further scrutiny of the city's purposes was necessary. Pet. App. A12. *Amici* believe, however, that where government takes private property, much more searching scrutiny of its goals is required. Contrary to the Oregon Supreme Court's assumption, it should not be enough to pass muster under the Just Compensation Clause that a government acts for purposes that are within the scope of its broad police power.

To be sure, the Oregon Supreme Court's view that it need not engage in serious scrutiny of the City of Tigard's asserted goals in taking Ms. Dolan's land finds support in the language of some of this Court's precedents. This Court has frequently focused inquiry in regulatory takings cases upon the means by which government pursues its ends. It has appeared satisfied not to scrutinize the nature of those ends, provided only that they constitute "legitimate state interests."

This focus on means to the effective exclusion of ends, *amici* contend, fails to place the correct burden on government to defend the goals of an uncompensated taking. To permit municipalities to deprive individuals of their property merely in order to "advance legitimate state interests"—to further some public good or to counter some perceived public harm—would strip the Takings Clause of its central purpose to prevent the redistribution of private property by transient political majorities. Indisputably, "such a justification can be formulated in practically every case." *Lucas*, 112 S. Ct. at 2898 n.12. See also *Keystone Bituminous Coal*

Ass'n v. DeBenedictis, 480 U.S. 470, 513 (1987) (Rehnquist, C.J., dissenting) (“[N]early every action the government takes” can be described as preventing some grave public harm). As a practical matter, then, scrutiny of government’s goals to see if they serve legitimate state interests is the equivalent of no scrutiny at all; it imposes no meaningful restraint on government officials.

A broad “legitimate state interest” or “police powers” exception to the Takings Clause is unwarranted in light of the history, explicit text, and central constitutional role of that provision. It would effectively interpret the Clause out of the Constitution as a restraint on regulatory deprivations of property. Justice Holmes warned of this result in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922):

When th[e] seemingly absolute protection [of the Just Compensation Clause] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

B. The Text, History, And Constitutional Role Of The Takings Clause Are Inconsistent With Recognition Of A Police Powers Exception

The text of the Takings Clause is unambiguous, mandating that “private property [shall not] be taken for public use, without just compensation.” Although government may deprive a person of his property in order to put it to public use, government’s right to do so is conditioned on the payment of just compensation. Given the explicit command of the Clause, the creation of a police powers exception is illegitimate.

The Takings Clause’s history and constitutional role likewise indicate that there should be no broad police powers exception. The payment of compensation when government took private

property to serve the common good was “a principle of the common law * * * of immemorial usage” (Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 583 (1972)), and the continued “protection of private property was a nearly unanimous intention among the founding generation.” McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Cal. L. Rev. 267, 270 (1988). See generally J. Story, *Commentaries on the Constitution of the United States* 510-511 (R. Rotunda & J. Nowak eds. 1987). There is no indication that the Framers thought a broad swathe cut through the middle of this principle entitled government to take property without compensation where it appeared that this would benefit the public welfare.

To the contrary, the recognition of a constitutional loophole for conditions on the use of property that merely advance “legitimate state interests” is wholly inconsistent with the historical purpose of the Takings Clause. The Framers of the Constitution and Bill of Rights regarded the protection of individual property rights as a central goal of government. “Government,” James Madison wrote, “is instituted no less for protection of the property than of the persons of individuals.” *Federalist No. 54, supra*, at 339. The Framers would have been shocked at the notion that the Takings Clause, which lies at the heart of this protection, requires no more than lower-tier due process scrutiny of government's purposes in commandeering private property.

The Takings Clause was one of a series of protections in the Bill of Rights guarding the individual from arbitrary or oppressive actions of fleeting political majorities. The Clause disciplines government by forcing it to weigh the benefits to the community of depriving a person of his property against the constitutionally-mandated compensation that would have to be paid for the taking. Property could always be taken for the common good—but only if

government were prepared to pay compensation out of the common purse. Hence the distrust of government underlying our constitutional structure of separated powers and checks and balances and our Bill of Rights can clearly be seen at work in the Takings Clause, which imposes a taxpayer burden to check the excess zeal of property-envious communities. The Takings Clause, moreover, requires the government to treat individuals with dignity by ensuring that, if government takes the individual's property, it must compensate him for that significant intrusion.

Finding “no warrant in the laws or practices of our ancestors” for governmental “authority [to] inva[de] private right under the pretext of the public good” (*United States v. Lynah*, 188 U.S. at 470), this Court has long recognized that the purpose of the Takings Clause was to shield individual rights from government action that would convert one person's property to community use. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (the Takings Clause “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”); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (the Clause “prevents the public from loading upon one individual more than his just share of the burdens of government”). A police powers exception to the just compensation requirement is inconsistent with this purpose. The teaching of the Takings Clause is that where public benefits are achieved by depriving individuals of property, the costs “must be borne by all [a community's] taxpayers [and not] imposed entirely on the owners of the individual properties.” *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 139 (1978) (Rehnquist, J., dissenting). The cardinal principle that should guide interpretation of the Takings Clause is that government may *not* sacrifice the property interests of some to benefit others: “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.*” *Pennsylvania Coal*, 260 U.S. at 416 (emphasis added). See also *Nollan*, 483 U.S. at 841-842.

C. Any Exception To The Just Compensation Requirement Should Be Limited To The Prevention Of Nuisances

If an exception to the just compensation requirement is to be recognized for permit conditions, it must be considerably narrower than the “police powers” exception relied upon by the Oregon Supreme Court. If the Takings Clause is to give the security and predictability to property rights that the Framers intended, *amici* believe that any exception should be no broader than that held in *Lucas* to apply to cases in which government regulation destroys the entire value of property: Government may only impose conditions on the lawful use of real property, without paying compensation, when its actions “do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners * * * under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally.” 112 S. Ct. at 2900. Upon this principle, a municipality may impose a condition on the grant of a permit to use land only when it shows that the proposed use would create a nuisance identifiable as such under existing state law rules. *Id.* at 2901. There is no discernable reason why *Lucas's* “nuisance” standard should be restricted to cases involving “total takings”; a uniform rule limiting the ends for which government may deprive an owner of land without paying compensation should apply in all takings cases.

Applied to the facts of this case, the “nuisance exception” requires reversal. The City of Tigard asserted that Ms. Dolan's proposed development would increase the flow of water into Fanno Creek and would cause an increase in traffic. It purported to justify taking one-tenth of her land as a response to these concerns. The city did not even attempt, however, to “identify background

principles” according to which these effects could be labelled a nuisance under Oregon law. *Lucas*, 112 S. Ct. at 2901-2902. Absent a showing that these effects were a nuisance that the city or Ms. Dolan's neighbors could have prevented by bringing an action, the city could not take Ms. Dolan's land as a condition for permitting development without violating the Takings Clause.

III. THE CITY'S EXACTION VIOLATES THE TAKINGS CLAUSE BECAUSE IT IS NOT NARROWLY TAILORED TO ABATE A NUISANCE THAT WOULD RESULT FROM PETITIONER'S PROPOSED DEVELOPMENT

A municipality may only impose an exaction as a condition on the lawful use of land in response to effects of that use that amount to a nuisance under state law. As a concomitant of that rule, *amici* believe that the *extent* of any exaction must be no greater than is necessary to abate the threatened nuisance. Even if an increase in water flow into Fanno Creek and an increase in traffic were nuisances under Oregon law—which the city has never shown—the decision below should still be reversed because it rests upon the application of too lax a standard of scrutiny of the relationship between the asserted effects of the proposed development and the dedication Ms. Dolan was required to make.

The court below found that Tigard would have no obligation to compensate Ms. Dolan under the Takings Clause if it could demonstrate a “reasonable relationship” between the effects of her proposed development and the city's decision to take a portion of her land for use as a bicycle and pedestrian path and greenway, and for stormwater management purposes. Pet. App. A13-A14. The city satisfied that standard, the court held, merely because it asserted that “the exaction serve[d] the same purpose that a denial of the permit would serve.” *Id.* at A15. This resort to what is effectively lower-tier due process scrutiny is inconsistent with this

Court's precedents and totally at odds with the importance that the Framers attached to the protection of property rights.

A. Exactions Of Private Property Should Be Subjected To Strict Scrutiny

The Oregon Supreme Court's "reasonable relationship" standard is contrary to this Court's decision in *Nollan*, which, as one commentator has written, "exemplified heightened scrutiny." Lawrence, *Means, Motives, and Takings: The Nexus Test of Nollan v. California Coastal Commission*, 12 Harv. Envtl. L. Rev. 231, 247 (1988). In *Nollan*, this Court held that in order to escape the just compensation requirement, government must show that a land use regulation "substantially advances" state interests. 483 U.S. at 834. In explicating "the standards for determining * * * what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter" (*ibid.*), this Court expressly *rejected* a suggestion that lower-tier due process or equal protection scrutiny should be used (*id.* at 834 n.3):

[O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, * * * not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective." * * * [T]here is no reason to believe * * * that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical.

See also, *e.g.*, *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (a regulatory taking must bear a “real or substantial relation” to the government’s goals); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

At the very least, this Court’s formulation of the inquiry as to whether a condition imposed upon land use “substantially advances” the government’s interest suggests an intermediate level of scrutiny. *Cf. Craig v. Boren*, 429 U.S. 190, 197 (1976) (gender-based distinctions must be “substantially related to achievement of * * * [government’s] objectives” in making those distinctions). Applying such scrutiny, a court would “rejec[t] * * * loose-fitting characterizations” of the harm a development *might* cause as “incapable of supporting” a municipality’s regulatory taking. *Id.* at 199; see also Note, “‘Take’ My Beach, Please!”: *Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. Rev. 823, 847 (1989) (under *Nollan*, “the extracted dedication must serve to alleviate the development’s specific externalities; it cannot be intended to relieve burdens or losses unrelated to the development”).

Amici believe, however, that a more demanding standard, comparable to that used in assessing invasions of other fundamental rights, is mandated by the importance of property rights in our constitutional scheme and the central role of private property in our Nation’s economic and political success. We urge this Court strictly to scrutinize claims that a permit condition is justified because a proposed use would cause harm amounting to a nuisance. Such a condition should be upheld only where it is narrowly tailored to abate a nuisance that demonstrably will result from the proposed land use. This test accords as well with the *per se* takings analysis set out above (at 11-17), for we can conceive of no situation in which it would be necessary physically to occupy property or otherwise to require dedications in order to prevent a nuisance.

The application of strict scrutiny to regulatory takings such as permit conditions is supported not only by the foundational role of the Takings Clause in our constitutional architecture—which suggests that government intrusions upon the use of private land must be minimized to the greatest extent possible—but also by this Court's decision in *Curtin v. Benson*, 222 U.S. 78 (1911). In *Curtin*, the United States had prevented an owner of unfenced land within a national park from grazing his cattle upon his property, as a means of preventing the cattle from wandering onto government-owned land. This Court held that the government could not regulate away such “essential uses of private property.” *Id.* at 86. To ensure “that no injury could result to others,” the United States might require that an owner fence his land to prevent “the trespass of his cattle on other lands,” or it might simply prohibit such trespasses. *Ibid.* But it could not constitutionally seek to prevent injury by the unnecessarily overbroad means of denying the owner the use of his land for grazing.

Similarly, a number of state courts have required that a municipality justify permit conditions by showing that “the burden cast upon the [landowner] is specifically and uniquely attributable to his activity.” *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961). For example, in *J.E.D. Associates, Inc. v. Town of Atkinson*, 432 A.2d 12, 15 (N.H. 1981), overruled on other grounds, *Town of Auburn v. McEvoy*, 553 A.2d 317 (N.H. 1988), the court held that an exaction from a subdivision developer related to improving a road would be unconstitutional “[u]nless the traffic has increased as the result of the subdivision”; and that “[i]f traffic now is greater than before because of the subdivision, then the [developer] can be required to contribute to the cost of [improving the road], *but only in the proportion that the increased use of the road attributable to the [developer's] subdivision bears to the road's total use*” (emphasis added). *Amici* submit that this is precisely the sort of careful analysis of whether an exaction is directly and proportionally

related to the proven impact of the proposed use that is required by the Takings Clause; we add only that the impact addressed must amount to a nuisance.

B. The City Of Tigard's Exaction Of Ms. Dolan's Land Cannot Withstand Strict Scrutiny

Applying either an intermediate level of scrutiny or the strict scrutiny that *amici* believe is appropriate, reversal is required in this case. None of the agencies or courts that have considered Ms. Dolan's claims applied either of these heightened levels of scrutiny. Each inquired only whether the seizure of petitioner's property was reasonably related to the city's undocumented claims that the proposed development would burden its flood control system and cause an increase in traffic.

Furthermore, it is clear that the city's action in this case cannot withstand heightened scrutiny. Even assuming that added strain on Fanno Creek or an increase in traffic caused by the new development could be labelled a nuisance, the conditions imposed on development of Ms. Dolan's land have not been shown to be narrowly tailored to counter, or even substantially related to, those effects. First, the city has not demonstrated that those effects will in fact result from development, let alone made any attempt to quantify them. Instead, it has merely asserted that “[i]t is reasonable to assume” that customers and employees of the site “could” use the pathway, and that such use “could offset” some assumed but undocumented increase in traffic due to the development. Pet. App. G24. And it has only postulated that “[t]he increased impervious surface” of the development will lead to some unspecified “increased storm water flow” into Fanno Creek. *Id.* at G37. Second, the city has failed to show that the conditions imposed are *proportionally* related to effects of the proposed development. Indeed, it is impossible to imagine that taking away one-tenth of an owner's land could *ever* be a necessary and proportional response

to a threatened nuisance. Lesser restrictions on use would *always* be available.

Unsupported speculations about the impact of a development and the remedial effect of an exaction are wholly insufficient to justify an uncompensated taking under a heightened standard of scrutiny. As Justice Peterson said in dissent below, at a minimum the city “must show that [the proposed development] will create specific problems, burdens, or conditions that theretofore did not exist, and that the exaction will serve to alleviate the specific problems, burdens, or conditions that probably will arise.” Pet. App. A19. In addition, *amici* believe, the city must show that any taking is no greater than necessary to remedy the problems it is able to document and that those problems amount to a nuisance. In this case, the city asks us to take on faith that Ms. Dolan's development will increase stormwater flow and pedestrian and bicycle traffic; and it has made absolutely no effort to show that those effects are a nuisance or that taking a tenth of Ms. Dolan's land is necessary to abate that nuisance.

In fact, the city's justifications for taking petitioner's land on their face strongly suggest that the city was not trying to counter the detrimental impact of the proposed development, but was using the opportunity to further its *general* goals to improve transportation and recreation facilities and stormwater management. Thus, the Planning Commission conceded that it wished to widen Fanno Creek because it “expected” there to be “additional stormwater runoff resulting from additional development, both from the subject site *and elsewhere within the Fanno drainage basin.*” Pet. App. G40 (emphasis added). And the Commission purported to justify taking Ms. Dolan's land for a bicycle path by reference to its desire for a “continuous pathway,” with no “missing pieces,” to “function as an efficient, convenient, and safe” part of “a multi-modal transportation system serving the varied needs of the City's citizens and businesses.” *Id.* at G25, G26, G27. This shows, as Justice Pe-

terson concluded, that Tigard had “decided that it needed a pedestrian/bicycle pathway and a flood control greenway,” and decided that “[o]ne way of getting these, free of cost,” was to take the necessary land from owners unlucky enough to need some permit. *Id.* at A29-A30. The Fifth Amendment, however, does not countenance this sort of “out-and-out plan of extortion.” *Nollan*, 483 U.S. at 837. Though the city’s long-range transportation, recreation, and stormwater management plan “may well be * * * a good idea,” landowners like Ms. Dolan cannot be singled out to “be compelled to contribute to its realization.” *Id.* at 841.

CONCLUSION

The judgment of the Oregon Supreme Court should be reversed.

Respectfully submitted.

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