No. _____

In The
Supreme Court of the United States

DANIEL and ANDREA McCLUNG,
Petitioners,
v.
CITY OF SUMNER, WASHINGTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As a condition for approving their building permit, the City of Sumner required Dan and Andrea McClung to replace a much undersized City-owned storm sewer that served their property and numerous other lots within a several block area.[1] While the McClungs' project contributed little to the need for the new larger pipe, they were nevertheless required to bear 85 percent of its cost. The McClungs ask the Court to resolve whether just compensation is due when a permit applicant is required to upgrade a public facility far beyond what is necessary to mitigate the impacts of the new development. The questions presented are:

1. When government requires a land use permit applicant to upgrade publicly-owned infrastructure facilities to legislatively prescribed standards, is just compensation due where the government fails to show that the burden of the upgrade is roughly proportional to the impacts of the new development?

2. Do the nexus and proportionality standards of *Nollan v. California Coastal Commission*, and *Dolan v. City of Tigard*, apply only to required dedications of real property, or do they equally

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[1] The first sentence of the Ninth Circuit opinion inaccurately implies that the storm water pipe at issue belongs to the McClungs: "the McClungs … learned that *their* underground storm drain pipe did not meet the City's requirement...." (emphasis added). App. A at 4a. The pipe is <u>not</u> the McClungs' pipe; it is the City's pipe. That fact is uncontroverted. App. D at 52a, App. G at 59a–60a.

apply to a monetary exaction that requires the permit applicant to upgrade a public infrastructure facility?

3. Is a property owner barred from seeking just compensation because he yields under financial duress to a permit condition that effects a taking of property?

PARTIES

The petitioners, Daniel and Andrea McClung, are husband and wife.

The respondent, City of Sumner, is a municipal corporation organized under the laws of the State of Washington.

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The opinion of the Ninth Circuit Court of Appeals is reported at 548 F.3d 1219 (2008), and is reproduced as Appendix A to this petition. The district court's opinion is reported as *Tapps Brewing Inc., et al. v. City of Sumner*, 482 F. Supp. 2d 1218 (2007), and is reproduced as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit Court of Appeals, as modified upon consideration of petitioners' motion for rehearing *en banc*, was filed and entered on December 1, 2008. App. A. This petition for writ of certiorari is timely filed under Rule 13.1 of the Rules of the Supreme Court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

The Fifth Amendment to the United States Constitution provides, in pertinent part, "nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The McClungs' Property

Between 1983 and 1993, Daniel and Andrea McClung acquired four adjoining lots on the northwestern corner of Valley and Main Streets in

Sumner, Washington. Soon after they obtained title to the last one, they asked the City of Sumner to vacate the alley at the rear of the lots. The City agreed to the vacation, but retained a utility easement beneath the vacated alley for its stormwater pipe – the pipe at the heart of this dispute. App. D at 52a. The pipe serves a drainage subbasin much larger than the McClungs' property, including several blocks to the west and roughly half of the adjoining high school complex on the north.

The City of Sumner's 1992 Stormwater Comprehensive Plan and the Stormwater Regulations in Ordinance 1603

In 1992 the City of Sumner adopted a Stormwater Comprehensive Plan to address flooding problems within the city and to plan additional drainage capacity to accommodate future development. To that end, the Plan called for upgrading the City pipe behind the McClungs' lots to a 24-inch diameter pipe.

In 1993 the City enacted Ordinance 1603, which established new stormwater regulations and adopted by reference the comprehensive drainage standards of the King County Surface Water Manual. The Ordinance and Manual set minimum pipe size standards for new construction. They did not, however, directly address the question of financing upgrades to public drainage facilities. Nonetheless, the City and the Ninth Circuit interpreted the Ordinance to require developers to upgrade any public storm sewer serving a proposed development to the 12-

inch diameter minimum pipe standard set by the King County Manual.[2]

The Stormwater Upgrade Required of the McClungs

After the alley behind their lots was vacated, the McClungs proceeded with plans to convert a house on one of their lots into a Subway Shop and to pave the vacated alley for parking. The project added only a small amount of new impervious surface area. After withdrawing its initial recommendation for stormwater control measures, the City advised the McClungs that they were required instead to replace the City's existing storm sewer in the old alleyway with a new 24-inch diameter pipe to bring it up to the standard set by the 1992 Stormwater Comprehensive Plan. The new pipe increased the drainage capacity more than sixteen times.

The McClungs' project had little to do with the need for the larger stormwater pipe. Their project generated little additional stormwater, and they had never experienced flooding on their property. They had, however, witnessed periodic flooding in the adjoining school parking lot which also drained into

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[2] This interpretation of Ordinance 1603 is dubious because Sumner Municipal Code § 13.36.050 provides that the developer is only responsible for "a fair and equitable pro rata portion of specific off-site drainage improvements which become necessary due to specific new development…." Whether the Ninth Circuit correctly interpreted Ordinance 1603, however, is irrelevant to the constitutional Takings issue. Petitioners maintain that the question of whether compensation is due does not depend on whether the upgrade was legislatively authorized.

the pipe. The new pipe would cure the pre-existing deficiency of the old one and provide additional capacity for future development throughout the subbasin. As the City Engineer told the Public Works Director and City Manager, "Replacement of this pipe is needed whether McClung develops or not. The additional contribution of storm water due to the [McClung] development is small. The development creates only an additional 3800 sq. ft. of impervious area." App. F at 7a.

The City told the McClungs that (1) replacing the City's existing pipe with a new 24-inch diameter pipe was a condition of their development; (2) the McClungs were financially obligated to pay the full cost of upgrading the City pipe from 6 inches to 12 inches; and (3) the City would waive $8,000 to $8,500 in permit fees to offset the costs of upgrading the pipe from 12 inches to 24 inches. App. E at 55a–56a. The total cost of the upgrade was approximately $50,000. The net cost to the McClungs, after offsetting the fee waiver, was approximately 85 percent of the total cost.

B. PROCEDURAL HISTORY

The McClungs initiated this lawsuit in state court and first sought summary judgment on state law theories. That motion was denied, and the denial was affirmed in *Tapps Brewing, Inc. v. City of Sumner*, 106 Wn. App. 79, 84, 22 P.3d 280 (2001). On remand, the trial court refused to consider the McClungs' claim that the upgrade obligation was illegal. On a second appeal, the Washington Court of Appeals reversed that refusal and remanded for consideration of the legality of the City's stormwater pipe upgrade obligation, including whether the upgrade obligation was an

unconstitutional taking. *Tapps Brewing Co., Inc. v. City of Sumner*, (unpublished opinion reported at 125 Wn. App. 1024, 2005 WL 151932, 8, 2005 Wash. App. LEXIS 158, 3-4).

In January 2006, the City removed the case to federal court based on federal question jurisdiction over the McClungs' federal Takings claim. After the McClungs' motion to remand was denied, the case was presented on cross motions for summary judgment. The district court dismissed the McClungs' state law claims and, after determining that the McClungs' federal Takings claim was ripe, it granted summary judgment to the City on that claim, as well. App. B.

The Ninth Circuit affirmed the district court on three grounds. First, it held that requiring the McClungs to upgrade the City's pipe from 6 inches to 12 inches was a "legislative, generally applicable development condition" (App. A at 10a), not an individual land use exaction, and therefore it was not subject to *Nollan*/*Dolan* scrutiny. App. A at 15a. Second, as an alternative ground for that result, it held that even if the upgrade were considered an exaction it is a monetary exaction, and monetary exactions are not subject to heightened scrutiny. App. A at 16a, 17a. Finally, as to the portion of the upgrade that increased the pipe size from 12 inches to 24 inches, it held that the McClungs' claim is barred because they "voluntarily" agreed to make that

upgrade in exchange for a waiver of permit fees.[3] App. A at 22a.

REASONS FOR ALLOWANCE OF THE WRIT

The first two questions presented for review are central to much of the conflict and controversy that continue to engulf the essential nexus and rough proportionality requirements of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). There are splits of authority and a wide ranging debate among commentators on both of these issues.[4] This case

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[3] On the ripeness issue the Ninth Circuit concluded that only prudential ripeness concerns are presented, and it assumed without deciding that the McClungs' federal takings claim is ripe. App. A at 10a.

[4] The immense body of commentary addressing *Nollan* and *Dolan* continues to grow apace and to reflect widely divergent viewpoints regarding what the law is and what it should be. Some of the more recent commentary includes: Alan Romero, ENDS AND MEANS IN TAKINGS LAW AFTER *LINGLE V. CHEVRON*, 23 J. Land Use & Envtl. L. 333 (2008); Michael B. Kent, Jr., CONSTRUING THE CANON: AN EXEGESIS OF REGULATORY TAKINGS JURISPRUDENCE AFTER *LINGLE V. CHEVRON,* 16 N.Y.U. Envtl. L.J. 63 (2008); Lauren Reznick, NOTE, THE DEATH OF *NOLLAN* AND *DOLAN*?, 87 B.U. L. Rev. 725 (2007); James E. Holloway & Donald C. Guy, THE CLIMAX OF TAKINGS JURISPRUDENCE IN THE REHNQUIST COURT ERA, 16 Penn St. Envtl. L. Rev. 115 (2007); D.S. Pensley, NOTE, REAL CITIES, IDEAL CITIES, 91 Cornell L. Rev. 699 (2006); Steven A. Haskins, CLOSING THE *DOLAN* DEAL—BRIDGING THE LEGISLATIVE - ADJUDICATIVE DIVIDE, 38 Urb. Law. 487 (2006); Carlos A. Ball & Laurie Reynolds, EXACTIONS AND BURDEN DISTRIBUTION IN TAKINGS LAW, 47 Wm. & Mary L. Rev. 1513 (2006); Jane C. Needleman, NOTE, EXACTIONS: EXPLORING EXACTLY WHEN *NOLLAN* AND *DOLAN* SHOULD BE TRIGGERED, 28

offers a clear opportunity for the Court to resolve some of that conflict and to provide needed guidance for the uniform application of *Nollan*/*Dolan* principles.

The third ground upon which the Ninth Circuit based its decision presents a more novel question, but one that calls for the Court's consideration as a necessary corollary to resolving the first two questions. The substance of the Ninth Circuit's ruling is that a permit applicant waives his right to seek relief from an unconstitutional condition if he accedes to permit terms that grant an ancillary discretionary benefit (here, the waiver of permit fees) along with permit approval. This theory, however, is no more than a subterfuge to circumvent the doctrine of unconstitutional conditions. If not reversed, it can readily be exploited to all but nullify the doctrine of unconstitutional conditions.

Cardozo L. Rev. 1563 (2006); John C. Keene, WHEN DOES A REGULATION "GO TOO FAR?", 14 Penn St. Envtl. L. Rev. 397 (2006); Sarah B. Nelson, COMMENT, *LINGLE V. CHEVRON USA, INC.*, 30 Harv. Envtl. L. Rev. 281 (2006); W. Barr, H. Weissmann, J. Frantz, THE GILD THAT IS KILLING THE LILY, 73 Geo. Wash. L. Rev. 429 (2005); Mark Fenster, TAKINGS FORMALISM AND REGULATORY FORMULAS: EXACTIONS AND THE CONSEQUENCES OF CLARITY, 92 Cal. L. Rev. 609 (2004); J. David Breemer, THE EVOLUTION OF THE "ESSENTIAL NEXUS," 59 Wash. & Lee L. Rev. 373, 395-96 (2002).

A. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *DOLAN V. CITY OF TIGARD* AND WITH DECISIONS OF OTHER COURTS HOLDING THAT PERMIT CONDITIONS REQUIRING PUBLIC INFRASTRUCTURE UPGRADES ARE SUBJECT TO *DOLAN'S* HEIGHTENED SCRUTINY.

The Ninth Circuit held that government may require an individual permit applicant to upgrade public infrastructure to a legislatively established standard without regard to *Dolan's* rough proportionality requirement. They reasoned that such a requirement is not a land use exaction at all but, instead, "a general requirement imposed through legislation."[5] App. A at 15a. This holding conflicts with *Dolan* and with decisions of other courts which have addressed *Dolan's* applicability to permit conditions requiring public infrastructure upgrades.

Contrary to the Ninth Circuit's holding, *Dolan* indicates that a permit condition that calls for new public infrastructure is not exempt from heightened scrutiny simply because it requires upgrading to a legislatively prescribed standard. In *Dolan,* the City of Tigard required Mrs. Dolan to dedicate real estate for new public infrastructure: a public greenway and a pedestrian/bicycle pathway. These dedications were required to satisfy the legislatively established site

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[5] The Ninth Circuit held that such legislation is subject to judicial review only under the deferential *ad hoc* standards of *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978). App. A at 10a.

development standards set by the City's Community Development Code ("CDC").[6] *See Dolan,* 512 U.S. at 379-380. The fact that the dedications were mandated by legislation and imposed to satisfy legislative standards, however, did not exempt them from heightened scrutiny. Legislative standards and policy must be implemented in a constitutional manner and here, as in *Dolan,* "the Takings Clause requires the city to implement its policy by condemnation" unless the City makes the required showing of nexus and rough proportionality between the impacts of the new development and the burden of the exaction. *Dolan,* 512 U.S. at 395 n.10. The Ninth Circuit's contrary holding is a direct repudiation of *Dolan*.

The Ninth Circuit's decision also is directly at odds with the decision of the Texas Supreme Court in *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 47 Tex. Sup. Ct. J. 497, 135 S.W.3d 620 (2004). There, the court ruled that heightened scrutiny does apply to a permit condition requiring the developer to upgrade a public street adjoining the development. The applicable legislative authority in *Town of Flower Mound* was equivalent to that in *Dolan* and in this case: a local ordinance that assigned the permit applicant responsibility to bring adjoining public infrastructure up to legislatively prescribed standards. After carefully analyzing *Dolan,* the Texas Supreme Court concluded that there was no meaningful

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[6] The CDC provided, in pertinent part, "the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway." CDC § 18.120.180.A.8 (emphasis added).

distinction between a permit condition which requires the applicant to use its money to upgrade public infrastructure to legislative standards and the permit condition in *Dolan* which required a dedication of land to meet legislative standards. Other courts have reached the same result.[7]

The Ninth Circuit took a different tack to reach the opposite conclusion. Rather than adhering to *Dolan*, it based its rule on state court decisions which have held that generally applicable development impact fees

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[7] *See, e.g., Benchmark Land Co. v. City of Battle Ground*, 103 Wn.App. 721, 14 P.3d 172 (2000) (*aff'm on other grounds, Benchmark Land Co. v. City of Battle Ground,* 146 Wn.2d 685, 49 P.3d 860 (2002) (half-street improvements to fronting streets mandated by ordinance held subject to heightened scrutiny); *Amoco Oil Co. v. Village of Schaumburg*, 277 Ill.App.3d 926, 940, 661 N.E.2d 380, 389 (1995) (legislative dedication requirement subject to *Nollan/Dolan* scrutiny) (*cert denied* 519 U.S. 976); *Schultz v. City of Grants Pass*, 131 Or.App. 220, 884 P.2d 569 (1994) (dedication of land for street improvements as required by ordinance subject to heightened scrutiny); *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980) (street dedication required by ordinance invalid where dedication did not relate to impact of new development); *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page,* 165 Ill.2d 25, 649 N.E.2d 384 (1995) (interpreting state constitution, court held traffic impact fee subject to heightened scrutiny); *United Dev. Corp. v. City of Mill Creek*, 106 Wn.App. 681, 26 P.3d 943 (2001), *rev. den.*, 35 P.3d 380 (2001) (drainage upgrade requirement invalid under statute and ordinance unless it directly mitigates impact of new development). *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (transfer of interest on funds held in court registry to court clerk pursuant to statutory mandate constitutes taking of property without just compensation); *Brown v. Legal Found. of Washington,* 538 U.S. 216 (2003) (transfer of private funds to government as mandated by court rule is "more akin" to physical taking than to regulation of property).

are exempt from heightened *Nollan*/*Dolan* scrutiny.[8] App. A at 11a. The Ninth Circuit reasoned that if legislatively prescribed impact fees are exempt from heightened scrutiny, then a legislatively prescribed public infrastructure upgrade must also be exempt from heightened scrutiny.

The rationale of the impact fee decisions, however, does not extend to permit conditions which impose individual public infrastructure upgrade requirements.[9] Those cases involved broad based fees calculated in accordance with legislatively prescribed formulae and uniformly applied to legislatively determined classes. Such uniform fee structures do not pose the same risk of unfair, disproportionate leveraging as permit conditions requiring individuals to make unique upgrades to public infrastructure. Individualized upgrade exactions are not formulaic fees which rationally and uniformly apportion public infrastructure costs to classes of properties which create the infrastructure needs. Instead, Mrs. Dolan and the McClungs were arbitrarily selected to bear unique and disproportionate upgrade burdens simply

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[8] *City of Olympia v. Drebick*, 156 Wn.2d 289, 126 P.3d 802 (2006); *San Remo Hotel L.P. v. City & Cty. of San Francisco*, 117 Cal. Rptr.2d 269, 41 P.3d 87 (Cal. 2002); *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 187 Ariz. 479, 930 P.2d 993 (1997); *McCarthy v. City of Leawood*, 257 Kan. 566, 894 P.2d 836 (1995). *See also, Parking Ass'n of Georgia v. City of Atlanta*, 264 Ga. 764, 450 S.E.2d 200 (1994), *cert. den.* 515 U.S. 1116 (1995) (*Dolan* does not apply to a development condition imposed through a legislative process rather than through individualized determinations).

[9] The validity of these impact fee decisions has not been addressed by the Court and is not placed at issue by the facts of this case.

because they happened to apply for building permits to improve their property.

The Ninth Circuit's analysis went astray, in part, because it failed to follow the path laid out by this Court for analyzing land use exactions. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546-47 (2005). That analysis starts by asking whether, absent a permit application, the City would have been required to pay compensation if it had forced the McClungs to upgrade the City's stormwater pipe. If the answer is *yes* (and *Dolan* makes clear that the answer is *yes),* then compensation is required unless the government establishes nexus and rough proportionality. *See First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304, 315 (1987) (government action that works a taking necessarily implicates the obligation to pay just compensation).

The Ninth Circuit's decision, if not reversed, will seriously undermine *Dolan* and the protections of the Takings Clause. It allows municipalities to allocate public infrastructure costs arbitrarily, rather than according to the specific impacts of a proposed development or according to a rational and uniform scheme of generally applicable impact fees. It permits gross inequity in the allocation of infrastructure costs and allows municipalities to do exactly what the Takings Clause forbids: select some 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). The Court should, therefore, grant the writ to resolve the conflicts and confusion over the application of *Nollan*/*Dolan* scrutiny to permit conditions that require public infrastructure upgrades.

B. THE COURT SHOULD CLARIFY THE APPLICATION OF HEIGHTENED SCRUTINY TO MONETARY LAND USE EXACTIONS.

As an alternative ground for its holding, the Ninth Circuit ruled that heightened scrutiny does not apply to monetary exactions because monetary exactions do not require the applicant to "relinquish rights in the real property" and because "money is fungible." App. A at 16a, 17a. This, too, is a question hotly debated by courts and commentators. Some courts and commentators suggest that *Nollan*/*Dolan* scrutiny does not apply to monetary exactions.[10] Most courts, however, disagree.[11] The Court should accept review

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[10] *San Remo Hotel, L.P. v. S.F. City & County*, 364 F.3d 1088 (9th Cir. 2004), *aff'd on other grounds,* 545 U.S. 323 (2005); *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998); *Commercial Builders of N. Cal. v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. den*., 504 U.S. 931 (1992). *See also*, *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 187 Ariz. 479, 486, 930 P.2d 993, 1000 (1997) (fee is a "considerably more benign form of regulation" and therefore not subject to heightened scrutiny) c*ert. denied* 521 U.S. 1120 (1997)); *Commonwealth Edison Co. v. U.S*., 271 F.3d 1327, 1340 (Fed.Cir. 2001), *cert. den*., 535 U.S. 1096 (2002); *United States v. Sperry Corp*., 493 U.S. 52 (1989) (percentage fee exacted from Iran-United States Claims Tribunal award as service fee is not a *per se* taking); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539-550 (1998) (J. Kennedy *concurring and dissenting*; excessive payment required by Coal Act not considered taking of property); Daniel Pollak, REGULATORY TAKINGS: THE SUPREME COURT TRIES TO PRUNE AGINS WITHOUT STEPPING ON *NOLLAN* AND *DOLAN*, 33 Ecology L.Q. 925, 931 (2006).

[11] *Rose Acre Farms, Inc. v. U.S*., 373 F.3d 1177, 1197 (Fed Cir. 2004), *cert. den*., 545 U.S. 1104 (2005); *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), *cert. den.*, 543 U.S. 956 (2004); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620

to resolve whether monetary exactions are *per se* exempt from *Nollan*/*Dolan* scrutiny and whether government can require a permit applicant to pay for upgrading public infrastructure without regard to the limitations of *Nollan*/*Dolan.*

There are three compelling reasons why there should be no distinction between a land use permit condition that requires an applicant to dedicate an interest in real property and a condition that requires the applicant to pay to build new public infrastructure. First, the Takings Clause extends to all property:

(2004); *Ehrlich v. City of Culver City*, 50 Cal.Rptr.2d 242, 246, 11 P.2d 429, 433 (1996), *cert. den*., 519 U.S. 929 (1996) ("We thus reject the city's contention that the heightened takings clause standard formulated by the Court in *Nollan* and *Dolan* applies only to cases in which the local land use authority requires the developer to dedicate real property to public use as a condition of permit approval."); *Benchmark Land Co. v. City of Battle Ground*, 103 Wn.App. 721, 14 P.3d 172 (2000); *Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd*., 96 Wn.App. 522, 979 P.2d 864 (1999); *Clark v. City of Albany*, 137 Or.App. 293, 904 P.2d 185 (1995); *St. Johns River Water Mgmt. Dist. v. Koontz*, --- So.2d ----, 2009 WL 47009, 3 (Fla.App. 2009). *Cf. Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) (required transfer of private funds to government is "more akin" to physical taking than to regulation of property); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155,162 (1980) (exaction of interest on funds held in court as taking); *Washington Legal Found. v. Legal Found. of Washington*, 236 F.3d 1097, 1110 (9th Cir. 2001) ("[t]he Fifth Amendment protection of property would be eviscerated were we to construe confiscation of fungible intangibles [money] as not amounting to a taking, as defendants urge.") *modified on rehearing en banc*, 271 F.3d 835, *aff'd on other grounds*, *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003); *Garneau v. City of Seattle*,147 F.3d 802, 815 (9th Cir. 1998) (J. O'Scannlain *concurring and dissenting*).

money is no exception. *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (monetary exaction that is not reasonably related to services provided to or burdens created by the payor is a taking of property, not merely an exercise of police power). When property (including money) is taken for public use, compensation is required. The obligation to pay compensation depends on the nature of the taking, not the type of property taken.[12] It does not matter that money is fungible: fungibility does not determine whether compensation is due when property is taken for public use.

Second, exempting monetary exactions from *Nollan / Dolan* scrutiny is fundamentally inconsistent with the very purpose of development mitigation exactions and fees. "Impact fees are payments required by local governments of new development for the purpose of providing new or expanded public capital facilities required to serve that development." American Planning Association, Policy Guide on Impact Fees, (ratified 1997). "The main goal of the imposition of exactions is 'to shift to the developer the costs of the public infrastructure that the development requires.' Essentially, exactions force developers to internalize the 'external cost' they impose on the surrounding community." *Rogers Mach., Inc. v. Washington County*, 181 Or.App. 369, 382, 45 P.3d 966, 973 (2002), *cert. den.*, 538 U.S. 906 (2003) (*quoting* Abraham Bell and Gideon Parchomovsky, GIVINGS,

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[12] Obviously, there are circumstances in which government may legitimately require the payment of money or other property without compensation, *e.g.,* taxation, legitimate fees and penalties. But absent such circumstances, heightened scrutiny should apply to exactions of money, just as any other property.

111 Yale L.J. 547, 609 (2001)).[13] By requiring a somewhat tight fit between the exaction and the external costs produced by the new development, *Dolan* helps assure that the exaction serves this cost internalization function. If the fit is loosened, the exaction no longer corresponds to the external costs of the development and becomes just another method of raising revenue. And, because land use exactions are so highly susceptible to leveraging and other abuses, they will inevitably be used for improper, cost shifting purposes.

This case vividly illustrates the concern. The obligation imposed on the McClungs did not mitigate the external costs produced by their new development. Their development had almost nothing to do with the need for the new stormwater pipe. Rather, the McClungs were arbitrarily selected to pay for the new pipe simply because they happened to apply for a building permit. *Cf. Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1274 (8th Cir. 1994) (arbitrary imposition of disproportionate share of cost for public drainage system is unconstitutional). Without the rough proportionality standard to police such abuse, monetary land use exactions can be transformed from a legitimate regulatory tool that

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[13] *See also, Upton v. Town of Hopkinton,* 157 N.H. 115, 119, 945 A.2d 670, 674 (2008); *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 685 (Minn.,1997) ("[K]ey to the concept of a true impact fee is that the amount assessed a developer must reflect the cost of infrastructure improvements necessitated by the development itself."); Jonathan H. Adler, MONEY OR NOTHING: THE ADVERSE ENVIRONMENTAL CONSEQUENCES OF UNCOMPENSATED LAND USE CONTROLS, 49 B.C. L. Rev. 301, 303-304 (2008).

compels developers to internalize externality costs into an abusive fund raising device the exploits the government's permit power monopoly.

Finally, if monetary exactions generally were exempt from *Nollan / Dolan* scrutiny, the exemption would swallow the rule. Government could effectively evade *Nollan / Dolan* scrutiny even for exactions of real property by first exacting money in any disproportionate amount (free from the shackles of *Nollan / Dolan*), then use the money to buy the land in a condemnation proceeding or otherwise. *Garneau v. City of Seattle*, 147 F.3d 802, 815 (9th Cir. 1998)(J. O'Scannlain *concurring and dissenting)*. *See also, Benchmark Land Co. v. City of Battle Ground*, 103 Wn.App. 721, 727, 14 P.3d 172, 175 (2000). In this way, the constraints of *Nollan / Dolan* could be avoided for any type of property – including real property. The ultimate result would be that heightened scrutiny would no longer be a requirement for any land use exactions at all.

The Court should grant certiorari to reverse the Ninth Circuit's alternative holding, make clear that monetary exactions are not *per se* exempt from *Nollan / Dolan* scrutiny, and rule that compensation is required where government requires the permit applicant to pay for new public facilities beyond what is necessary to mitigate the impacts of the applicant's new development.

C. THE NINTH CIRCUIT'S IMPLIED CONTRACT THEORY IS A SUBTERFUGE TO EVADE THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS AND SHOULD BE REVERSED.

The Ninth Circuit ruled that the McClungs relinquished their right to seek just compensation for upgrading the City's pipe from 12 inches to 24 inches because they voluntarily agreed to make that portion of the upgrade in exchange for a waiver of permit fees. App. A at 22a. This interpretation of the McClungs' permit conditions reflects a disturbing disregard of the facts, and appears to be simply a subterfuge to avoid the doctrine of unconstitutional conditions. That interpretation should be reviewed and reversed.

The doctrine of unconstitutional conditions "limits the government's ability to exact waivers of rights as a condition of benefits" because "[g]iving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections." *U.S. v. Scott*, 450 F.3d 863, 866-867 (9th Cir. 2006). Unless the nexus and proportionality requirements of *Nollan/Dolan* are satisfied, the doctrine prohibits government from conditioning a land use permit on a property transfer that would otherwise require just compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005); *Lambert v. City and County of San Francisco*, 529 U.S. 1045 (2000) (J. Scalia, *dissenting from denial of certiorari*).

To avoid the doctrine of unconstitutional conditions, the Ninth Circuit construed the terms of

the McClungs' building permit as consisting of two independent components: (1) a building permit that required the McClungs to install a 12-inch pipe, and (2) a separate, voluntary side-agreement in which the McClungs agreed to install an even larger 24-inch pipe in return for a waiver of permit fees. App. A at 10a. This voluntary side agreement, in the court's view, did not implicate the doctrine of unconstitutional conditions because it did not involve the coercive exercise of the City's permit power to gain the McClungs' assent to the bargain.

This "voluntary agreement" theory, however, is a complete fabrication which is directly at odds with the uncontroverted facts. The City's December 27, 1995 letter setting the terms of the McClungs' permit states unequivocally: "*a 24-inch diameter storm drain is to be installed as a condition of development*." App. E at 55a.[14] The Ninth Circuit's claim that "the McClungs were given the choice of either installing a 12-inch pipe and paying the usual fees, or installing a 24-inch pipe and receiving the fee waiver" (App. A at 21a) is not true and not supported by any facts in the record. There was no option for the McClungs to install a 12-inch pipe. The upgrade to 24 inches was mandatory. The McClungs' only choice was between installing a 24-inch pipe with a fee waiver or foregoing their permit. Because the 24-inch upgrade obligation, even with the fee waiver, was wholly disproportional to the impact of their new development, it was an

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[14] Especially in the context of summary judgment – where the facts are to be construed most favorably to the McClungs – the Ninth Circuit's disregard of the evidence is extraordinary. The December 27, 1995 letter means what it says: "a 24-inch diameter storm drain is to be installed as a condition of development."

unconstitutional condition for which the McClungs are entitled to compensation.

Rightful concerns have been expressed that lower courts may be seeking to evade the mandate of *Nollan / Dolan*. *See Lambert v. City and County of San Francisco*, *supra*. It is difficult to conceive of another explanation for the Ninth Circuit's clear disregard of the facts. Its voluntary agreement theory seems merely a subterfuge to evade the reach of the doctrine of unconstitutional conditions. If that subterfuge is permitted to stand, it will further undermine the uniform application of *Nollan / Dolan* principles and potentially undermine the doctrine of unconstitutional conditions in other contexts as well. If ancillary terms to a permit, license, or contract can be construed as creating separate, voluntary side-agreements whenever the underlying permit or contract implicates the doctrine of unconstitutional conditions, it is apparent that the scope and effectiveness of that doctrine in controlling government abuses will be greatly reduced.

CONCLUSION

The nexus and rough proportionality standards of *Nollan / Dolan* serve two complementary functions. First, they promote effective land use regulation by requiring that permit conditions actually address the externality impacts of proposed development. Without a tight linkage between the public burden created by a development and the mitigation burden placed on the developer, this regulatory purpose is lost. Second, *Nollan / Dolan* standards protect property owners from arbitrarily being selected to "bear public burdens which, in all fairness and justice, should be

borne by the public as a whole." *Armstrong v. United States*, *supra*. To clarify and promote the uniform application of *Nollan / Dolan* principles, the petition for writ of certiorari should be granted.

Respectfully submitted,

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