No. 97-1235

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

CITY OF MONTEREY,
Petitioner,

v.
DEL MONTE DUNES AT MONTEREY, LTD. AND MONTEREY-DEL MONTE DUNES CORPORATION,
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN PLANNING ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

"Can the reasonable proportionality standard established by *Dolan v. Tigard*, 512 U.S. 374 (1994), in the context of property exactions properly be applied to an inverse condemnation claim based upon regulatory denial?"

LIST OF PARTIES

The Petitioner is City of Monterey

Respondents are Del Monte Dunes at Monterey, LTD.
and Monterey-Del Monte Dunes Corporation

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Planning Association (APA) is a private nonprofit educational and research organization incorporated in the District of Columbia. The APA's purposes and objectives include the advancement of physical, economic, and social planning at local, state, and national levels. APA is the oldest and largest organization in the United States devoted to fostering liveable communities through effective comprehensive planning. The 30,000 members belonging to APA work in local government, federal and state agencies, private consulting firms, and universities. The APA has forty-six chapters representing all fifty states, including a California chapter. More than 4,200 of APA's members reside in California. Members of APA are routinely involved in comprehensive planning and its implementation with regulations dealing with land-use related resources.

Since the 1980's, the APA Board of Directors and its Delegate Assembly composed of State Chapter Presidents have periodically adopted policy guides on matters of national importance to planning and the planning profession. In 1995, APA adopted a policy guide on constitutional takings challenges in the context of land-use regulations designed to implement comprehensive plans. In this policy guide, APA supports the evolving takings law in this country that clearly balances protecting the public health, safety and welfare with protecting property rights. A major concern of APA, however, expressed in the policy guide is that placing this balance at risk by expanding constitutional takings law can impose severe penalties on the majority of our nation's citizens.

INTRODUCTION

All Parties have provided written consent regarding the American Planning Association's[1] filing of this *amicus curiae* brief. This *Amicus Curiae* Brief is confined to the following question certified by this Court in accepting the petition for *certiorari*:[2]

(3) "Can the reasonable proportionality standard established by *Dolan v. City of Tigard*, 512 U.S. 374 (1994) in the context of property exactions properly be applied to an inverse condemnation action based upon regulatory denial?"

The American Planning Association firmly believes that the answer is "No."

SUMMARY OF ARGUMENT

Three types of "regulatory takings" claims have been recognized by this Court: (1) a physical invasion (*Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982); (2) a title dedication or exaction claim in which a property owner is compelled as a condition of development approval to convey specific property or title (*Dolan v. City of Tigard*, 512 U.S. 374 (1994)); and (3) a general economic taking in which regulation restricts all or substantially all of the use of property. Robert H. Freilich and Elizabeth A. Garvin, *Takings After Lucas: Growth Management, Planning and Regulatory Implementation Will Work Better Than Before*, 22 Stetson L. Rev. 409, 411 (1993).

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[1] The American Planning Association and its counsel authored this *amicus curiae* brief. None of the parties, nor any other entity, contributed in any way to this brief. In addition, the American Planning Association, alone, made the monetary contributions necessary for the preparation and submission of the brief. This information is provided in accordance with Supreme Court Rule 37.6.

[2] *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *cert. granted*, 66 U.S.L.W. 3509 (U.S. March 30, 1998) (No. 92-212).

Economic takings, as distinguished from physical or title takes, constitute the vast majority of inverse condemnation claims based on regulatory takings and the rule adopted by this Court in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), stating that a land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land," *id*. at 260, is the general rule governing all regulatory takings and is based upon the rational basis test. The higher scrutiny test, rough proportionality, applies only to the narrow categorical exceptions spelled out in physical and title takes.

Since *Dolan*, state courts have applied the rough proportionality test solely to title dedications or exactions. *See, e.g., Sparks v. Douglas County*, 904 P.2d 738, 745-46 (Wash. 1995). Similarly, the federal courts of appeal have steadfastly refused to apply this heightened level of scrutiny to inverse condemnation claims based on an economic taking and have declared that this intermediate standard only applies to title dedication or exaction claims. *See, e.g., New Port Largo Inc. v. Monroe County*, 95 F.3d 1084, 1088, (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2514 (1997) (*Dolan's* rough proportionality test does not apply to county that rezoned landowner's beach front property from residential duplex use to private airport use); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578-79 (10th Cir. 1995) (*Dolan*'s rough proportionality does not apply to state regulations that limit the right to hunt surplus game on rancher's property).

In an economic taking case, hence in this case, the scope of legitimate state interest is extremely broad and challenged regulations will not be construed to effectuate a taking as long as the governmental entity has rationally concluded that "the health, safety,

morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125 (1978). Thus: (1) when "public purpose" is at issue this Court has held that any "conceivable" public purpose will satisfy this test. (See also *F.C.C. v. Beach Communications Inc.*, 508 U.S. 307 (1993)) (any "conceivable" public purpose will satisfy economic and social legislative action under constitutional scrutiny); and (2) when the relationship between the public purpose and the regulation is analyzed the Supreme Court has continuously held that a regulation "substantially advances" a legitimate state interest if the regulation is rationally related to the public interest. *Penn Central Transportation Co. v. New York City*, 438 U.S. at 125-127; *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984).

In this case, the Ninth Circuit's decision to apply the rough proportionality test to an inverse condemnation claim based on an economic taking appears to result from a misreading of *Nollan v. California Costal Comm'n*, 483 U.S. 825 (1987), that in a title dedication taking the government must demonstrate a rational nexus between the purpose of the regulation and the title condition imposed. Efforts to extend the *Nollan/Dolan* tests in these ways are without authority, and, if affirmed, would overturn every general economic taking case this Court has ever decided. *See Villas of Lake Jackson Ltd. v. Leon County*, 121 F.3d 610 (11th Cir. 1997). It would cause governmental entities to bear the burden of proving that each and every individual standard contained in their planning and zoning legislative policies were roughly proportional to the impact of regulation upon the property affected. Imposition of any such heightened standard would stifle governmental entities' police powers, thwart their ability to regulate private property for the public good, and undermine their ability to facilitate

land-use planning. In essence, the adoption of a heightened standard for inverse condemnation claims based on an economic taking would give the federal courts the responsibility to sit as the "super legislatures" of the nation on local issues of land-use planning and zoning--a concept at odds with our Constitution's respect for both federalism and separation of powers.

ARGUMENT

I. THIS COURT HAS NEVER APPLIED AN INTERMEDIATE STANDARD OF HEIGHTENED SCRUTINY TO INVERSE CONDEMNATION CLAIMS BASED SOLELY ON AN ECONOMIC TAKING

If affirmed, the Ninth Circuit's application of *Dolan*'s rough proportionality standard to inverse condemnation claims based on an economic taking (other than in the narrow categorical, title or exaction takings) would yield an outright assault on a governmental entity's police powers to plan and zone. Such a decision would undermine a governmental entity's ability to effectively engage in land-use planning and would jeopardize the health, safety, morals, and general welfare of the community. The Court recognized this in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922): "Government could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power." *Id.* at 413.

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125 (1978), the court articulated a comprehensive test for analyzing inverse condemnation claims

The Court stated that three factors should be considered in identifying a regulatory taking: the economic impact of the regulation on the claimant; the extent to which the regulation has interfered with distinct investment-backed expectations; and the character of the government action. *Id.* at 124; See Daniel R. Mandelker, *Investment - Backed Expectations in Taking Law*, 27 Urb. Law. 215 (1995). The *Penn Central* Court further noted that a taking may "more readily be found when the interference with the property can be characterized as a physical invasion by the government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.; See* Thomas E. Roberts, Karen E. Milner and Robert I. McMurry, *Land Use Litigation: Doctrinal Confusion Under The Fourteenth Amendment and Fifth Amendment*, 28 Urb. Law. 765 (1996).

Since *Penn Central*, this Court has recognized three types of regulatory takings - physical, title, and economic. *See* Robert H. Freilich & Elizabeth A. Garvin, *Takings After Lucas: Growth Management, Planning, And Regulatory Implementation Will Work Better Than Before*, 22 Stetson L. Rev. 409, 411 (1993). First, this Court has determined that a physical invasion or a regulatory activity that produces a physical invasion will sufficiently support an action for inverse condemnation. *See Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Second, this Court has found an inverse condemnation claim to lie where a regulation imposes title dedication as a condition of development approval without rational nexus or rough

proportionality to the need created by the development. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Third, in economic regulatory taking cases, this Court has long determined when a regulatory activity fails to substantially advance a legitimate state interest or denies a property owner all or substantially all economically viable use of an owner's land, it will give rise to an inverse condemnation claim. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

A. Physical Takings

A physical taking will be found when a governmental entity physically invades private property regardless of the extent of the diminution of the property value. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), a privately owned pond was made accessible to navigable waters by physical dredging, requiring public access to these navigable waters. *Id.* at 175-76. The Court explained that "[t]his is not a case in which the Government is exercising its regulatory power in a manner that will cause a substantial devaluation of [the landowner]'s private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina." *Id.* at 180.

Similarly, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), provided that any regulation - regardless of the government's interest - which authorizes a permanent physical invasion of a landowner's property constitutes a taking. *Id.* at 426. However, the Court specifically noted that this *per se* taking rule does not apply to

"appropriate restrictions upon an owner's use of property." *Id.* at 428, 441 (*i.e.* economic taking claims).

B. Title or Exaction Takings

Title or exaction takes do not result in physical invasion but result from government placing a title dedication, or a monetary exaction or payment in lieu of dedication. *See* Robert H. Freilich & Elizabeth A. Garvin, *Takings After Lucas: Growth, Management, Planning, And Regulatory Implementation Will Work Better Than Before*, 22 Stetson L. Rev. 409, 414 (1993). (a title take inquiry focuses solely where the government "acquires incidents of ownership or title to the property or an exaction in lieu of the dedication of land").

These title dedications or exactions are the result of the enormous national and local deficiencies in infrastructure resulting from the failure of government to require that new development pay its one-time fair share of capital costs generated by the development. *See* Joint Economic Committee of the United States Congress, *Hard Choices*: *Summary Report of the National Infrastructure Study* (1984); Nancy A. Rutledge, *Report of President Reagan's National Council on Public Works Improvement*, Volume 11, "*Public Infrastructure, A National Concern"* (recommending "developer financing of offsite infrastructure investments"); Arthur C. Nelson, *Development Impact Fees*: *The Next Generation*, 26 Urb. Law. 541 (1994); Franklin J. James, *Evaluation of Local Impact Fees As A Source of Infrastructure Finance*, 11 Municipal Finance J. 408, 411 (1990).

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court required that in cases involving permanent dedication of title, an "essential nexus" must exist

between the title condition imposed and the stated police power objective of requiring development to meet the needs created by the development. *Id* at 837. Under this test, the dedication must serve the same governmental purpose as the regulation. Hence, the Court employed a heightened level of scrutiny differentiating the *ad hoc* factual inquiry balancing test of an economic take as enunciated in *Penn Central*.

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court addressed the question of a second nexus required between the city's permit conditions of title or exaction and the projected impact caused by the proposed development. *Id.* at 388. To evaluate this question, the *Dolan* Court articulated a two-pronged test. First, as determined in *Nollan*, there must exist an essential nexus between legitimate state interests and the permit conditions. *Id.* at 386. Second, the exaction required by the permit condition must be roughly proportional to the projected impact of the proposed development. *Id.* at 391. Under this prong, the government bears the burden of proof and must show that the dedication or exaction is roughly proportional to the impact of the project. *Id.* The Court intended this two-prong test to function as a higher standard of review. Finally, the Court noted that traditional land-use planning tools such as dedications for streets, sidewalks and other public ways will generally be considered reasonable exactions. *Id.* at 395.

The *Dolan* Court recognized that the reasonable relationship test imposed by the majority of state courts would satisfy the dual nexus test. The Court found that the majority of the state courts already used an intermediate level of scrutiny in title or monetary exactions in lieu of dedication, referencing, among others, *City of College Station v. Turtle Rock Corp.*,

680 S.W.2d 802, 807 (Tex. 1984); and *Simpson v. City of North Platte*, 292 N.W.2d 297, 301 (Neb. 1980).

Imposition of land dedication or an exaction requirement differs significantly from application of general standards or conditions imposed on a development application. Typically, a development application is subject to uniform standards set forth in a municipality's comprehensive plan or zoning. In virtually every land development situation, the project must meet standards, such as height limitations or set-back requirements. In lieu of denial of a project, site specific additional conditions are frequently imposed (*e.g.*, preserving the environmental integrity of the subject property and surrounding land, or habitat restoration).[3]

Compliance with standards and conditions always involves some forbearance or performance on the part of the landowner. Meeting a height, setback or rear yard limitation on structures involves foregoing building to greater area or elevation. Mitigating environmental effects may require preservation of particularly sensitive lands and restoring habitat on other land, as was required in this case. Such collective limitations or requirements, however, do not involve dedication of land to the public, but establish the net development potential for the property. *See Presbytery v. King County*, 787 P.2d 907 (Wash.1990), *cert. denied* 498 U.S. 911 (1990) (overruling *Allingham v. City of Seattle*, 749 P.2d 160 (Wash.1988) that a rear yard setback constituted a severable title take). Such *collective* limitations form the basis of an economic taking challenge, not a physical or title taking challenge.

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[3] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

Under the Ninth Circuit's rough proportionality test, however, each and every standard or condition applied to a development proposal is subject to an individual "substantially advances" taking challenge, rather than a challenge to the *collective* limits imposed by the regulations on the exercise of property rights.[4] A standard height limitation might be challenged under the theory that it was not "roughly proportional" to the "nature and extent" of the proposed development. Municipalities would be faced with the prospect of modifying or defending each and every one of its regulatory standards on an *ad hoc* basis for every development project in order to avoid rough proportionality challenges.

C. Economic Takings

Economic takings, as distinguished from physical or title takes, constitute the vast majority of inverse condemnation claims based on regulatory takings. In economic taking claims, this Court, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), stated that a land-use regulation does not effect a taking it if "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land." *Id.* at 260.

Economic takings have been reviewed with great deference by the Supreme Court, specifically when it comes to what constitutes a state interest and the relationship required between the regulation and the public interest. As to the first prong of this test, the scope of legitimate state interest is extremely broad and will be given the widest latitude under the taking clause and the substantive due process clause. *See Concrete Pipe and Products, Inc.*

[4]Note that the Eleventh Circuit in *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610 (11th Cir. 1997) has soundly rejected the notion that there is a *Nollan* substantially advancing due process taking challenge for mere economic regulation, overturning *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir.1990).

v. Construction Laborers Pension Trust, 508 U.S. 602, 637 (1993); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954). The Court in *Hawaii Housing Authority*, made abundantly clear that the Court should not substitute its judgment for a legislature's judgment:

> When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings -- no less than debates over the wisdom of other kinds of socioeconomic legislation -- are not to be carried out in the federal courts. 467 U.S. at 241-242.

The Court has also found that governmental action is entitled to a presumption that it legitimately advances the public interest. *See, e.g., Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 637 (1993). Local governmental action will not be construed to effectuate a taking as long as the governmental entity has *reasonably* concluded that "'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125 (1978). In that case, the Court cited a long history of decisions by the judiciary that allowed state regulations that were "reasonable." *Penn Central Transportation Co. v. New York City*, 438 U.S. at 125-126.[5]

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[5] The only Supreme Court pronouncement to the contrary is the Majority's opinion in *Nollan v. California Coastal Commission*, in Footnote 3, in which the Court states, "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." *Nollan v. California Coastal Comm'n*, 483 U.S. at Footnote 3. However, even if not explicitly stated, this statement was made in the context of a title taking and the Court in *Dolan v. City of Tigard* clarified this when it expressly applied *Nollan* to the factual situation of title dedication. *Dolan v City of Tigard*, 512 U.S. at 377, 386.

Under the second prong of the test, a court must determine whether the property maintains any permanent beneficial value, when viewed as a whole. *See, e.g., Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Hodel v. Irving*, 481 U.S. 704 (1987). In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court concluded that unless the owner is denied all economically viable use of the land, then a court should return to the traditional *Penn Central* balancing of interests test. The viability of the land has traditionally been evaluated in its totality. *See, e.g., Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 at 643-44 (1993) ("to the extent that any portion of the property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question," thus resolving footnote 7 in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 2894 fn.7 (1992), which states, if, "for example, a regulation requires a developer to leave 90 percent of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.").

This principle of looking at the totality of the land has been a constant in economic takings jurisprudence. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

The federal and state courts have uniformly held that all substantial use of the property must be lost before an economic taking occurs. A *per se* taking occurs only if the regulation

denies the owner of 100 percent of the economically viable use of the land unless the regulation is establishing a common law nuisance principle. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). However, if the landowner has not been denied **all** economically viable use, the court returns to a balancing of interests as elucidated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), *reh'g denied* 439 U.S. 883 (1978). *See also Faux-Burhans v. Board of County Commissioners*, 674 F.Supp. 1172 (D.Md 1987), aff'd 859 F.2d 149 (4th Cir. 1988), *cert. denied* 488 U.S. 1042 (1989). *Terminals Equipment Co. v. City and County of San Francisco*, 221 Cal. App. 3d 234, 270 Cal.Rptr 329 (Cal.App. 1990) (restating rule that "all" reasonable use must be denied); *De Botton v. Marple Township*, 689 F. Supp. 477 (E.D. Pa. 1988) (finding no taking because "all" uses of property have not been denied); *City of Virginia Beach v. Virginia Beach Land Inv. Ass'n. No. 1.*, 389 S.E.2d 312 (Va. 1990) (downzoning of 403 acre parcel from PUD to agriculture was not a taking because no deprivation of "all" economically viable use).[6]

Economic takings cases since *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), have made clear that diminution in land value, absent a deprivation of all reasonable and substantial value, does not constitute a taking. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), (no taking despite a 78 percent reduction in land value); *Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (95 percent reduction in value no taking), *cert. denied* 445 U.S. 928, *reh'g denied* 446 U.S. 929 (1980);

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[6] The *Del Monte Dunes* case is also a total anomaly to other Ninth Circuit cases. In *Herrington v. County of Sonoma*, 834 F.2d. 1488 (9th Cir. 1987), *modified* 857 F.2d 567 (9th Cir. 1987) (the court interpreted *First English* to mean that a taking does not occur unless the property owner demonstrates that all or substantially all economically viable use of the property has been denied"), *cert. denied*. 489 U.S. 1090 (1989).

Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023 (3d. Cir. 1987) (90 percent reduction, $495,000 to $52,000, is not a taking), *cert. denied* 482 U.S. 906, *reh'g denied* 483 U.S. 1040 (1987); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (holding that a 91.5 percent reduction, $800,000 to $60,000, is not a taking).

These cases have been recently summarized by this Court in *Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), which reiterated that in economic takings the property must be viewed in its entirety and that diminution of value of 78 percent and 91.5 percent (citing *Euclid and Hadacheck*) are not takings.

II. THIS COURT HAS ADOPTED AN INTERMEDIATE STANDARD OF HEIGHTENED SCRUTINY SOLELY FOR THE NARROW CATEGORICAL EXCEPTIONS OF TITLE OR EXACTION TAKINGS AND THE LOWER COURTS HAVE USED THE ROUGH PROPORTIONALITY TEST SIMILARLY, SOLELY FOR TITLE OR EXACTION TAKINGS AND NOT FOR ECONOMIC TAKING CLAIMS

Numerous cases have properly declined to apply *Dolan*'s rough proportionality test to claims other than title or exaction takings. In *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11th Cir. 1996), *cert. denied* 117 S. Ct. 2514 (1997), the court rejected applying *Dolan*'s rough proportionality standard to an economic regulatory taking claim. *Id.* at 1088. In *New Port Largo*, a landowner sued the county for a temporary regulatory taking and deprivation of due process, after the county rezoned its beach front property from residential duplex use to private airport use. *Id.* at 1087.

The court in *New Port Largo* rejected using the heightened level of scrutiny required under the *Nollan/Dolan* paradigm. The Court explained:

> In [*Nollan* and *Dolan*] a state had demanded that a person open his or her property to public traffic, again without just compensation. That fact distinguished NPL's situation: the regulation in this case told NPL how it could use the property for profit, but did nothing to require NPL to open its property to the public for use just as the public wished.

Id. at 1088.

The Tenth Circuit, in *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995), also held that *Dolan*'s proportionality test did not apply to an economic regulatory taking. *Id.* at 1578. In *Clajon*, the issue before the court was whether Wyoming's two-license limit on supplemental hunting licenses issued to large landowners violated the takings and equal protection clauses of the Fifth Amendment. *Id.* at 1569. The landowners had alleged that they enjoyed a common law property right to hunt surplus game on their lands and that the Wyoming regulation constituted an inappropriate "leveraging of police power" which deprived them of their property rights without justly compensating them. *Id.* at 1576.

The court in *Clajon* declined to apply *Dolan*'s rough proportionality test to the landowners' claim. In so doing, the court recognized that *Dolan*'s rough proportionality does not apply to all regulatory takings, but is instead "limited to the context of development exactions where there is a physical taking or its equivalent." *Id.* at 1578. The court further argued that this test must be limited to development exactions "[g]iven the important distinctions between general police power regulations and developmental exactions [or] physical taking cases . . .." *Id.* The court concluded by noting:

> In our judgment, both *Nollan* and *Dolan* follow from takings jurisprudence's traditional concern that an individual cannot be forced to dedicate his or her land to public use without just compensation. That is *Nollan* and *Dolan* essentially view the conditioning of a permit based on the transfer of a property

> interest -- *i.e.*, an easement -- as tantamount to physical occupation cases to those situations in which the government achieves the same end (*i.e.*, the possession of one's physical property) through a conditional permitting procedure.

See also Springer, Grubb, & Associates v. City of Hailey, 903 P.2d 741, 747 (Idaho 1995), that held *Dolan* is limited to property exactions and does not apply to regulatory rezoning activities because:

> *Dolan* is distinguishable. It involved the reasonableness of conditions exacted on a property owner before the community would grant a building permit. One condition required the owner to dedicate a portion of his property for public use as a bicycle/pedestrian pathway. The United States Supreme Court's holding required the lower court to make a finding as to "proportionality" between the exactions required and the projected impact of the proposed development. Here there has been no exaction, nor a taking for all uses for any portion of the subject property.

Id at 747.

See also Pringle v. City of Wichita, 917 P.2d 1351, 1357 (Kan. Ct. App. 1996) (*Dolan*'s rough proportionality test does not apply to a challenge to a city's decision to close an intersection while completing a new four lane freeway); *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996) (*Dolan*'s rough proportionality test does not apply to challenge to city ordinance requiring mobile home park owners who close their parks to pay relocation costs to park residents).

III. THE COURT OF APPEALS ERRONEOUSLY APPLIED THE *DOLAN* ROUGH PROPORTIONALITY TEST TO INVERSE CONDEMNATION CLAIMS BASED ON ECONOMIC TAKINGS

A. Supreme Court Precedent

This Court has adopted the rough proportionality test to serve as a heightened standard of scrutiny only in inverse condemnation claims involving title takings or exactions in lieu of dedication. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). The Ninth Circuit erroneously applied this standard to an inverse condemnation claim involving solely an economic taking, without explanation or justification. Indeed, the Court did not cite one single case to support the validity of applying a heightened standard to an economic taking case. No dedication of land or exactions in lieu of dedication were imposed as project conditions by the City of Monterey. The Ninth Circuit's decision to apply this heightened standard to inverse condemnation claims involving an economic taking runs contrary to every takings case this Court has decided. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

In *Del Monte Dunes*, the landowner challenged the City's rejection of its applications to build 190 (or more) residential units on its property. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1499 (9th Cir. 1990). While the repeated rejections of the landowner's applications may warrant sympathy, they are **not** title takes or exactions. In *Del Monte Dunes*, the City did not mandate or authorize a physical invasion or a title dedication or exaction as a condition for development approval. The City never attempted to coerce Del Monte Dunes into yielding some incident of ownership connected with its land. Under its police power, a city has broad authority to regulate land as long as the governmental entity has reasonably ensured that "'the health, safety, morals, or general

welfare' would be promoted by prohibiting particular contemplated uses of land.'" *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 125 (1978).

Here, the City denied development approval causing an allegation that this resulted in an economic taking based on deprivation of all substantial economic value during the temporary period of the alleged take. This denial should be evaluated under the test established in *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

It would indeed be a dramatic leap for this Court to apply a heightened level of scrutiny to inverse condemnation claims based on an economic taking because there is no precedent for such a heightened level of scrutiny to be applied to an economic takings claim.

B. If *Dolan* Applies To Economic Takings, *Lochner*[7] Substantive Due Process Will Be Resurrected To the Substantial Detriment of the Public Health, Safety and Welfare

Assuming arguendo that the heightened scrutiny standard was extended to all inverse condemnation claims based on economic takings, the federal courts would be intruding upon local governmental entities' ability to utilize their police power to plan and regulate the character of their communities.

Justice Holmes, who wrote *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922) in 1922 at the height of the *Lochner* era, nevertheless noted that local governments must have the ability to effectively use their police power. To allow heightened scrutiny would run counter to this Court's long-standing notion that legislatures will be given the widest latitude in economic and social policy under the takings clause, substantive due process and equal

[7] *Lochner v. New York*, 198 U.S. 45 (1905).

protection clauses. *See, e.g., FCC v. Beach Communications Inc.*, 508 U.S. 307, 313 (1993); *Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 637 (1993); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). [8]

Imposing a heightened standard of scrutiny to economic regulations which merely diminish value would affect almost all land-use regulations as applied to every parcel of land and would: (1) revive *Lochner*-type substantive due process and empower the federal courts to sit as super legislatures; (2) as a practical matter, shift the presumption in land-use cases from validity to invalidity; (3) cause more litigation in the already overburdened federal court system; and (4) jeopardize the validity of all land-use regulations and the public health, safety and welfare that they protect. *See* Jonathan M. Block, *Limiting the Use of Heightened Scrutiny to Exaction Cases*, 71 N.Y.U. L.Rev. 1021 (1996).

The importance of effective land-use regulation was first recognized by this Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), which with farsighted vision stated:

> Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was

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[8] See *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1222 (6th Cir. 1992), in which the court summarized the positions of all eleven circuits on substantive due process to demonstrate that "local zoning actions would fall to substantive due process only if they shocked the conscience;" by its "shocks the conscience" terminology, it was referring to extreme irrationality. As recently as *Schenck v. City of Hudson*, 114 F.3d 590, 594 (6th Cir. 1997), the Court of Appeals recited the case holdings of all eleven circuits that federal courts won't sit as "super zoning boards" and that unless the legislative body was completely irrational, substantive due process will be met. *See Bituminous Materials, Inc. v. Rice County, Minnesota*, 126 F.3d. 1068, 1070 (8th Cir. 1997); *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992) (the theory of substantive due process is properly reserved for truly egregious and extraordinary cases).

> comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.

Since then, cities, counties, and states have utilized the opportunity to use planning and zoning to deal with the countless problems of urbanization. These entities have used planning to deal with the great crises and problems of our modern day era. State and local governments have used planning to reduce congestion and sprawl,[9] save historic districts,[10] foster affordable housing,[11] promote economic development,[12] protect the environment,[13] reduce infrastructure deficiencies,[14] and save agricultural land.[15] However, if a heightened

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[9] *Haviland v. Land Conservation and Development Commission*, 609 P.2d 423 (Or. 1980) (by establishing urban growth boundaries).

[10] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) *reh'g denied* 439 U.S. 883 (1978) (preserving historic landmarks and districts).

[11] *Southern Burlington County N.A.A.C.P. v. Mount Laurel Township*, 456 A.2d 390 (N.J. 1983) (promoting affordable housing and inclusionary zoning).

[12] *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1980) (upholding bonds for redevelopment and economic plan of city).

[13] *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (In passing upon a plan the city also will consider how well the proposed development will preserve the surrounding environment).

[14] *Palm Beach County v. Wright*, 641 So.2d 50 (Fla. 1994) (protecting the right of way of future transportation corridors).

[15] *Sierra Club v. Hayward*, 623 P.2d 180 (Cal. 1981) (upholding agricultural zoning and tax assessment restrictions to preserve agricultural land).

standard is employed by this Court, governmental entities will have great difficulty accomplishing these purposes for the public good.

This was stated well in *Associated Home Builders of the Greater East Bay, Inc. v. Livermore*, 557 P.2d. 473 (Cal. 1976), a decision known for its critical scrutiny of exclusionary local zoning as:

> Most zoning and land use ordinances affect population growth and density. As commentators have observed, to insist that such zoning laws are invalid unless the interests supporting the exclusion are compelling in character, and cannot be achieved by an alternative method, would result in wholesale invalidation of land use controls and endanger the validity of city and regional planning.

Finally, a heightened standard would reverse the fundamental constitutional policies in effect in this nation since its founding. Land-use policy has always been the domain of state and local government.[16] This Court has said repeatedly, perhaps no more important local government power and responsibility to the people exists than the determination of land-use governance and planning for the future of the community. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 72 (1976); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

To impose a heightened standard of review on land-use regulations would be to place federal court supervision over the truly most local activity of state and local government. It

[16] Henry M. Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 493 (1954).

is important to emphasize that there is no national land-use policy.[17] The underlying rationale is obvious: land-use policy is of local concern and is inherently dependent upon local political, economic, social, aesthetic, geographic, and environmental issues which are more effectively analyzed and resolved by those governmental entities which have intimate knowledge and understanding of those elements.[18] Especially is this true in light of the lack of any paramount preemptive, conflicting or intervening federal statutory policy. This Court has always adhered to the principle that state and local governments must have the ability to function as independent centers and laboratories for planning and economic policy. This principle has carried through the jurisprudence of this Court for over a century and a half, from *Anderson v. Dunn*, 19 U.S. 204, 226 (1821) ("the science of government ... is the science of the experiment") to *Roth v. United States* (Harlan J.), 354 U.S. 476, 505 (1956) ("It has often been said that one of the great strengths of our federal system, is that we have, in the forty-eight states, forty-eight experimental laboratories.") and *Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226, 264-265 (1982) ("Flexibility for

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[17] *See* H. Doc. No. 91-34 (91st Congress), National Commission on Urban Problems ("Douglas Commission Report"), *Building The American City* (1976); Advisory Commission on Intergovernmental Relations, *Urban and Rural America: Policies for Future Growth* (1968); Secretary of Housing and Urban Development, *1980 President's National Urban Policy Report* (1980).

[18] The importance of local involvement is emphasized by the concept of direct legislation: initiative and referendum powers in local zoning and planning. In upholding the constitutional validity of the zoning referendum, the Supreme Court, in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676 (1976), held that the electorate was free to control zoning so long as their decision was not "clearly arbitrary and unreasonable." Legislation affecting land use is no longer to be totally excluded from such a process than to abolish the entire initiative and referendum process because some argue that the people are selfish, ignorant, and parochial in their attitudes.

experimentation not only permits each state to find the best solutions to its own problems, it is the means by which each state may profit from the experiences and activities of all the rest.").

This Court should reject heightened scrutiny in economic regulatory taking claims based on faulty analogy to the *Dolan* standard.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed. Specifically, the answer to the third certified question ("Can reasonable proportionality standard established by *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in context of property exactions properly be applied to inverse condemnation action based upon regulatory denial?") should be "no."