NO. 02-0369

IN THE
SUPREME COURT OF TEXAS

TOWN OF FLOWER MOUND, TEXAS,
Petitioner,
v.

STAFFORD ESTATES LIMITED PARTNERSHIP,
Respondent.

On Petition for Review from the
Second Court of Appeals at Fort Worth, Texas

BRIEF OF *AMICI CURIAE* TEXAS MUNICIPAL LEAGUE, TEXAS CITY ATTORNEYS ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND AMERICAN PLANNING ASSOCIATION IN SUPPORT OF PETITIONER TOWN OF FLOWER MOUND, TEXAS

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Town of Flower Mound, Texas	Defendant; Appellant/Cross-Appellee; Respondent/Petitioner

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STATEMENT OF THE CASE

Amici hereby adopt the Statement of the Case in the Town of Flower Mound's Brief on the Merits.

STATEMENT OF JURISDICTION

Amici hereby adopt the Statement of Jurisdiction in the Town of Flower Mound's Brief on the Merits.

ISSUE PRESENTED

1. Does the rough proportionality standard established in *Dolan v. City of Tigard*, 512 U.S. 372 (1994) for adjudicatively imposed dedication requirements apply to a generally applicable, legislatively-imposed non-dedication requirement?

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Amici curiae respectfully submit this brief on the merits under Texas Rule of Appellate Procedure 11 in support of Petitioner Town of Flower Mound, Texas, on review of the decision of the Second Court of Appeals at Fort Worth in *Town of Flower Mound v. Stafford Estates Limited Partnership*, 71 S.W.3d 18 (Tex.App.-Fort Worth 2002).

INTEREST OF AMICI CURIAE

The Texas Municipal League is a non-profit association of approximately 1,065 Texas cities. The Texas City Attorneys Association, an affiliate of the Texas Municipal League, is an organization of more than 500 attorneys who represent Texas cities and local officials in the performance of their duties. The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA members include attorneys from more than 1,400 cities, and IMLA serves as the legal voice for the nation's local governments. The American Planning Association (APA) is a non-profit, educational research organization designed to advance state and local land-use planning. With more than 30,000 members who serve government agencies as well as landowners, the APA seeks to preserve the proper role of government in protecting our communities as well as constitutional protections for private property.

As noted by the Dolan Court, municipal officials and planners "have long engaged in the commendable task of land use planning * * *." *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994). Amici bring a vital perspective to regulatory takings issues and have a strong interest in ensuring that takings jurisprudence remains appropriately tailored so that it does not undermine legitimate planning and other community protections. The municipal amici on the instant brief supported the Town of Flower Mound's Petition for Review in this case. The APA now joins the municipal amici in support of Flower Mound on the merits.

STATEMENT OF FACTS

Amici hereby adopt the Statement of Facts in the Town of Flower Mound's brief on the merits.

ARGUMENT

I. *Dolan*'s Rough Proportionality Test Is Inapplicable to a Legislatively Imposed Road Improvement Requirement.

In its merits brief, Petitioner Town of Flower Mound demonstrates that: (1) the rough proportionality test set forth in *Dolan* applies only to compelled dedications of land and thus is inapplicable to the road improvement requirement at issue; (2) *Dolan* applies only to adjudicatively imposed permit conditions and thus is inapplicable here because the challenged road improvement condition is a generally applicable, legislatively-imposed requirement; and (3) even if *Dolan* were applicable, the appeals court erred in its application of the rough proportionality requirement. The Town shows that the overwhelming majority of courts refuse to apply *Dolan* to a legislatively imposed permit requirement that does not require the dedication of land to the public. Petitioner's Merits Brief at 18-34; Petitioner's Reply at 6-11.

In response, Respondent Stafford Estates Limited Partnership does not seriously contest Flower Mound's showing that *Dolan* is inapplicable to legislatively imposed permit conditions, nor could it. *Dolan* makes clear that special scrutiny under the rough proportionality test is appropriate only for "an adjudicative decision to condition [a permit] application." *Dolan*, 512 U.S. at 385.

In distinguishing generally applicable permit requirements, the *Dolan* Court stressed: "Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel." *Id*. at 391 n.8. Indeed, Stafford and its *amici* purport to rely on cases involving impact fees, but those very cases show that, "with near uniformity," lower courts have declined to apply *Dolan* to legislatively-imposed, non-dedication permit conditions. *Rogers Mach. Co. v. Washington County*, 45 P.3d 966, 977 (Or. Ct. App. 2002), *cert. pending*.

Perhaps sensing the futility of arguing that *Dolan* applies to legislatively imposed permit requirements, Stafford instead contends that the road improvement requirement at issue was not legislatively, but adjudicatively, imposed. Respondent makes this assertion notwithstanding the plain language of Section 4.04(b) of the Town's Land Development Code, which provides that "all builder/developers shall be required to construct concrete streets according to the Engineering Standards Manual" [CR 394, Par. 22]. Stafford contends that the requirement is not generally applicable because the Town previously granted three partial or limited waivers to other landowners. As shown by the Town, however, this tiny handful of waivers is easily explained by the facts of those cases, *i.e.*, an anomalously small frontage of the "Landing" subdivision; a countervailing concern at Immel Estates (not applicable here) to promote the rural character of the community by allowing asphalt road improvements; and the failure of two of the roads in question at Wright Estates to provide access to that subdivision.

Petitioner's Merits Brief at 28-29. Given that the Town's population exceeds 50,000, it is reasonable to assume that the three waivers constitute a small fraction of the overall number of subdivision permits subject to the generally applicable road improvement requirement.

Amici -- who represent the interests of planners and local officials across Texas and the country -- are deeply troubled by the suggestion that *Dolan*'s test for adjudicative dedications should apply simply because local officials have granted a small handful of variances or waivers from a general, legislatively-imposed obligation. Consider the dilemma faced by municipalities. On the one hand, *Dolan* and its progeny instruct that adjudicatively imposed dedication requirements warrant special scrutiny due to the risk of "leveraging" that attends such adjudications, as well as the heightened protection afforded to the owner's right to exclude others. On the other hand, blanket enforcement of legislatively imposed requirements, without any waiver for the inevitable hardship case, runs the risk that an individual landowner will suffer an unfair burden due to the distinctive features of the land.

As every first-year law student learns, land is unique. Although legislators may properly adopt generally applicable land-use controls, safety-valve provisions for unique situations are often essential if basic fairness is to be maintained. The first model planning statute, the Standard City Planning Enabling Act of 1928, recognized that variances are critical to reasonable land-use planning. *See*, *e.g.*, Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and*

Development Regulation Law 217 (2003). They are essential not only for permit conditions, but land-use controls across the board. *Id*. at 217-33.

Just last term, the U.S. Supreme Court reiterated the important role that variances and waivers play in land-use regulation, characterizing them as a "normal" part of the planning process. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1469 (2002). Waivers and variances are so ingrained in planning that takings challenges to land-use controls are not ripe until local officials have exercised their "full discretion" to grant available waivers or variances. *Id.* at 1488; *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21 (2001).

More to the point, regardless of how the three previous waivers of Flower Mound's road improvement requirement might be characterized, there was no adjudication in the case at bar, but instead the straightforward application of the generally applicable, legislatively imposed requirement. Just as the possibility of a variance does not alter the basic legislative character of generally applicable zoning, a very limited number of past waivers does not alter the legislative character of Flower Mound's generally applicable road improvement requirement.

The Town has proceeded exactly as we should want land-use officials to act. It has adopted a reasonable, generally applicable road improvement requirement in the public interest, improvements that ensure minimum safety design features such as sight distance, safer access points, expanded road shoulders, better traffic flow, and increased durability. [RR Vol. 4, pp. 61-64]. On rare occasion, it has relaxed the requirement to avoid unfairness to uniquely

situated landowners. Everyone benefits from this approach: developers, homeowners, community groups, and the public at large. It turns land-use planning on its head to suggest that municipalities should be penalized or otherwise discouraged from providing limited safety valves by allowing a small handful of waivers to trigger heightened scrutiny under *Dolan*'s rough proportionality test.

In our *amicus* brief in support of the Petition for Review, we showed that the appeals court improperly expanded *Dolan*'s application beyond the context of government-compelled dedications of land and ignored the U.S. Supreme Court's reaffirmation of these limits in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). We incorporate those arguments herein by reference.

Rather than re-plowing the same jurisprudential ground, and rather than repeating the excellent analysis presented in the Town's briefs, the balance of this submission describes the importance of impact fees, improvement requirements, and other development charges to land-use planning. An appropriate appreciation of the crucial role of these permit conditions in protecting and improving our communities counsels strongly against any ruling that would undercut their use. To be sure, these conditions are, and should be, subject to judicial scrutiny to prevent arbitrary government action. But if individualized "rough proportionality" determinations under *Dolan* are required whenever a generally applicable condition is subject to limited waivers, everyone loses. Local officials and planners would lose valuable time and resources, and developers would lose time,

be subject to higher permitting fees and more demanding showings, and suffer more frequent permit denials. Communities would lose either the benefit of new development or the protections necessary to ensure that new development promotes the public interest. Nothing in the Constitution's Takings Clause requires this lose-lose-lose result.1

II. Improvement Requirements and Other Development Charges Are a Key Tenet of Planning and Growth Management.

Municipal growth brings costs as well as benefits. Although new subdivisions might increase tax revenues, they also place new demands on streets, schools, parks, water and sewage facilities, police and fire departments, and other community services.

Local governments have few options for raising the necessary revenue to provide municipal services without raising property tax rates and straining existing

1 Space considerations preclude a comprehensive response to the mistaken reliance on case law by Stafford and its *amici*, but it bears repeating that their discussion of cases and commentary borders on the fanciful. For example, Stafford (Br. at 21) relies on a denial of certiorari by the U.S. Supreme Court as an indication of the Court's views, thereby violating the Court's express admonitions against such readings. *See, e.g.*, *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) ("Of course, '[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.' *United States v. Carver*, 260 U.S. 482, 490 (1923)."). *Amicus* National Association of Home Builders (Br. at 12-13) invokes Professor Bosselman's essay in TAKING SIDES ON TAKINGS ISSUES (Thomas E. Roberts ed., 2002), without noting that Professor Bosselman expressly avoids the issue of whether his views are a fair reading of the Constitution. *Id*. at 345 ("Whether [my views] can be interpreted from the Constitution, I leave for others to decide."). NAHB similarly fails to note that the TAKING SIDES collection includes a companion essay that concludes that *Dolan* should not be applied to impact fees and other non-dedication conditions. *Id.* at 357-370 (article by Julian C. Juergensmeyer & James C. Nicholas arguing against application of "the takings maze" to conditions that recover infrastructure costs caused by new development). Ignoring the plain language of *Dolan* itself, *amicus* Pacific Legal Foundation (Br. at 19) cites several cases as rejecting the legislative/adjudicative distinction, but Stafford (Br. at 27) cites these same cases as involving adjudications. Of course, both cannot be true. In fact, none of these cases holds that *Dolan* applies to a legislatively imposed, non-dedication requirement. *See, e.g., Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390 (Ill. Ct. App. 1995) ("The dedication requirement was clearly site specific and adjudicative in character."); *Schultz v. City of Grants Pass*, 884 P.2d 569, 572-73 (Or. Ct. App. 1994) (rejecting the adjudicative/legislative distinction for compelled dedications of land but evidently preserving the distinction for non-dedication conditions); *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360, 365 n.1 (Or. Ct. App. 1994) (same).

residents who have already contributed to the community's infrastructure. The result is increased pressure on governments to ensure that development "pays its own way." In response, many municipalities have addressed the costs of growth by adopting permit conditions to shift the costs of development from current residents to the developers themselves, who in turn may pass on many of the costs to new residents.

Dedications, improvement requirements, and other development charges are a common and well-established planning tool aimed at helping communities pay for the additional public services new development requires. They "require that developers provide, or pay for, some public facility or other amenity as a condition for receiving permission for a land use that the local government could otherwise prohibit." Vicki Been, *Exit as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 Colum. L. Rev. 473, 478-79 (1991). This concept of developer funding of infrastructure, embodied in improvement requirements and other development charges, has been described as "one of the key tenets of growth management law." Juergensmeyer & Roberts, *supra*, at 340.

Development charges have been part of the legal landscape as far back as colonial days. *See* Jerry T. Ferguson & Carol D. Rasnic, *Judicial Limitations on Mandatory Subdivision Dedications*, 13 Real Est. L.J. 250, 252 (1984) (stating that development charges existed "in colonial town ordinances, royal directories, and early state charters"). Beginning in the 1920s, it became customary for

municipalities to require subdividers to dedicate land for streets, sidewalks, and the like. *See* Juergensmeyer & Roberts, *supra,* at 340; Rutherford Platt, *Land Use and Society: Geography, Law and Public Policy* 297-98 (1996). During the housing boom that followed World War II, dedications requirements expanded to address the need for schools, parks, and other services. Requirements to widen existing streets adjacent to the subdivision, like those at issue here, also became widespread, as did impact fees for a variety of purposes. *See* Juergensmeyer & Roberts, *supra,* at 341.

Development charges thus embrace a wide range of permit conditions, including compelled dedications of land, impact fees, and improvement requirements. Some well-accepted permit conditions, such as impact fees for schools or parks, are applied toward improvements that may be a considerable distance from the new development. Other conditions are more exotic but still legitimate, such as the "art fee" upheld in *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996). But the road improvement requirements at issue here are considered to be at the core of municipal exaction authority because the improvements are directly adjacent to the new subdivision, and thus they directly and disproportionately benefit the residents of the subdivision.

Indeed, improvement requirements and other development charges are now a workaday tool of land-use planning. One recent national survey of cities and counties concluded "that at least 89% of all communities in the United States impose some form of dedication requirement (either of land or of facilities)."

Been, 91 Colum. L. Rev. at 481 & n.42. Courts across the country have recognized the importance of development charges to planning. *See, e.g., Krupp v. Breckenridge Sanitation Dist.,* 19 P.3d 687, 693 (Colo. 2001) ("Local governments often require various forms of development fees in order to apportion some of the capital expense burden they face to developers and new residents."); *Rogers Mach.*, 45 P.3d at 973 ("Local governments and municipalities often impose such charges on developers as a condition of zoning changes, building and development permits, or other governmental approvals necessary for new and, generally, more intensified development to occur.").

Impact fees and other non-dedication requirements in particular have become an increasingly common exaction device, "lauded by local governments in recent years as a welcome means to 'shift a portion of the cost of providing capital facilities to serve new growth from the general tax base to the new development generating the demand for the facilities.'" *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 684-85 (Minn. 1997) (citation omitted). Since 1987, Texas law has explicitly authorized impact fees "to generate revenue for funding or recouping the costs of capital improvements or facility expansions necessitated by and attributable to the new development." Tex. Local Gov't Code Ann. § 395.001(4).

The concern that development pay its fair share is especially acute in this age of "sprawl," with more development occurring far from central cities, thereby exacerbating the cost of providing new services. The American Planning Association has observed that residential development cost one rural county $1.22

in services for every tax dollar it created. *See* American Planning Association, Paying for Sprawl, *available at* http://www.planning.org/viewpoints/sprawl.htm (citing a 1996 study). Other studies show that the cost of providing services in outlying areas is at least twice the cost of servicing new development located near existing facilities. *See* Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 Penn. L. Rev. 873, 876 (2000) (citing studies). In response, cutting-edge "smart growth" initiatives are restricting government subsidies for new roads, sewers, and schools to areas that will support sustainable communities. *Id.* at 880. Improvement requirements and other development charges allow municipalities to ensure that developers pay their fair share for the higher costs imposed by sprawl, and they create incentives to direct new development back toward central cities and first-ring suburbs.

Another rationale for improvement requirements and other development charges is that it allows municipalities to recapture some of the value created by granting the permit to develop or subdivide property. *See* John J. Costonis, *Development Rights Transfer: An Exploratory Essay,* 83 Yale L.J. 75, 97-98 (1973) ("the most grievous consequence of the American property system's bias in favor of private property rights [is] government's failure to recoup for public use an appropriate measure of the values that it creates in privately held land.").

Development charges also lead to greater economic efficiency by forcing developers to internalize the costs of development. In the absence of development charges or where they only recover a portion of the costs of development, a

developer may build more than is efficient because he will not have taken into account all of the costs of development. *See* Been, 91 Colum. L. Rev. at 489; Abraham Bell & Gideon Parchomovsky, *Givings*, 111 Yale L.J. 547, 609 (2001) ("Essentially, exactions force developers to internalize the 'external cost' they impose on the surrounding community."). Making development pay for itself, at least in part, through improvement requirements and other development charges distributes costs among new and existing users, and allows communities to better manage the pace and impact of growth.

Most permits for new development do not place the full cost of new municipal services on developers. A growing amount of empirical evidence suggests that municipalities rarely come close to recovering the costs development imposes. Studies in Florida regarding impact fees found that "the cost of providing infrastructure averages more than $20,000 per new home, but impact fees average less than $3,000 per home." Been, 91 Colum L. Rev. at 511-12 & n.179 (citing Florida Advisory Council on Intergovernmental Relations, Impact Fees in Florida 9, 43, 89-90 (1986)); *see also* Robert Cervero & John Greitzer, *Money for Mobility: Lesson from California on Off-Site Road Financing*, Urb. Land, Aug. 1987, at 2, 4 ("No jurisdictions charge developers the total cost of necessary off-site improvements as a matter of policy * * *."). Indeed, in the case at bar, the applicable road impact fee recovers only about 32 percent of costs created by new development (Petitioner's Brief on the Merits at 4), and Stafford's fee left a shortfall of about $600,000 in unrecovered costs resulting from the 750

additional vehicular trips per day generated by its subdivision. *Id*. at 5.

CONCLUSION

Development charges like the road improvement condition at issue are playing an increasingly important role in ensuring that development "pays its way" by controlling the ill-effects of urban sprawl, promoting the public interest, and ensuring fairness in the land-use planning process. By inappropriately expanding *Dolan* beyond its proper limits, the appeals court ruling threatens the continued viability of this critical planning tool.

The *Dolan* Court described the Takings Clause as simply an "outer limit" on the ability of local officials to require land-use controls that advance the public interest. *Dolan*, 512 U.S. at 396. Courts, of course, have an essential role to play in ensuring that such protections comport with the Constitution. But they "should not assume the role of a super zoning board." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998). We urge this Court to preserve the legitimate role of improvement requirements and local discretion in land-use planning by limiting *Dolan* to adjudicatively imposed conditions that require the dedication of land to the public.

PRAYER

Amici respectfully request that this Court reverse the judgment of the court of appeals, enter a judgment in favor of the Town, and grant such other relief, general or special, at law or in equity, to which the Town of Flower Mound may be justly entitled.

Respectfully submitted,

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