Supreme Court of the United States.
JOY BUILDERS, INC., Petitioner,
v.
TOWN OF CLARKSTOWN and The Planning Board of the Town of Clarkstown, Respondents.
No. 08-1099.
February 27, 2009.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department

Petition for a Writ of Certiorari

Michael H. Donnelly, Dickover Donnelly, Donovan & Biagi, LLP, 28 Bruen Place, Goshen, NY 10924.Max Wild, 98 Distillery Road, Warwick, NY 10990.James Gerard Sweeney, Counsel of Record, One Harriman Square, P.O. Box 806, Goshen, NY 10924, (845) 291-1100, Counsel for Petitioner.

QUESTIONS PRESENTED

A government violates the doctrine of unconstitutional conditions when it grants a development permit conditioned upon the compelled dedication of land for municipal purposes if: i) it has not made an "individualized determination" that an exaction is required because of the project's impacts, and ii) the quantity of land compelled is not "roughly proportional" to those impacts.[FN1] More and more governments have been conditioning development permits upon the payment of a fee "in lieu of" the dedication of land. Nationwide there is a split as to whether monetary payments are to be judged by the same constitutional standards. The following questions are thus presented.

FN1. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) explained in *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 546-548 (2005).

1. Is a monetary fee imposed *in lieu of* a dedication of land held to *Dolan's* standard?

2. If so, does a fee imposed in lieu of the dedication of recreation land, based on a generic needs study not focusing on the project at hand and deliberately disregarding an array of available public and private recreational facilities because they are not controlled by the imposing government, meet this test?

***II** RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or no wholly owned subsidiaries.

***iii** TABLE OF CONTENTS

***v** TABLE OF AUTHORITIES

Cases:

***1** OPINIONS BELOW

The Order of the New York Court of Appeals dismissing the Petitioner's as of right appeal was entered in that court on December 2, 2008. It is officially reported at 11 N.Y.3d 863 (App. 1-a). The Order of the New York Appellate Division of the Supreme Court for the Second Judicial Department affirming the trial court's decision was rendered on September 9, 2008. It is officially reported at 54 A.D.3d 761 (App. 2-a). The Decision of the New York State Supreme Court for Rockland County dismissing the Petition was rendered on June 13, 2007 (Unreported, App. 7-a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257. The order of the New York Court of Appeals dismissing the Petitioner's as of right appeal on a finding that no substantial constitutional question was involved is an affirmance by the highest court of New York of the Appellate Division's order.[FN2]

FN2. See *R.J. Reynolds Tobacco Company v. Durham County*, 479 U.S. 130, 138-139 (1986).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment to the Constitution provides in relevant part: "… nor shall private property be taken for public use, without just compensation."

***2** STATEMENT OF THE CASE

The Petitioner ("Joy") applied for a 77-lot residential subdivision in the Town of Clarkstown, Rockland County, NY. Planning board approval was conditioned upon a $7,250.00 per lot fee, totaling $558,250.00, which Joy paid under protest and then sued to recover.

The fee resulted from a mix of legislative and administrative acts. Its amount was established by resolution of the town's legislative body, the town board. However, it was imposed only when the planning board determined that the plat did not contain sufficient land to satisfy the town's recreational requirements. It was imposed "in lieu" of those lands.[FN3]

FN3. This process is statutorily authorized in New York by NY Town Law (McKinney's) §277[4](c) explained in *Bayswater v. Planning Board*, 76 N.Y.2d 460, 468-472 (1990).

The town board's resolution was based on a community-wide recreational needs study. The study gave no consideration to the recreational needs generated by Joy's, or any other project, or to any project's impacts on existing recreational facilities.

The study made a theoretical calculation of the community's recreational needs and the facilities available to satisfy them. It then calculated the cost of providing adequate facilities to meet those needs and recommended a per lot fee to be; charged to ***3** developers. The study listed a rich array of recreational facilities available to the town's residents but which were not owned or controlled by the town. It then deliberately excluded those from the calculation of its recommend fee.

Joy sued arguing that the imposed fee violated the doctrine of unconstitutional conditions. Its argument was based on *Dolan's* requirement that the dedication of land for community use had to be based on an "individualized determination" of the project's impact and the amount of land to be dedicated be "roughly proportional" to that impact.

Joy further asserted that the fee based on a study which deliberately refused to consider recreational facilities available to the town residents but not owned or controlled by the town also violated the doctrine.

The New York Supreme Court dismissed Joy's petition holding that the fee imposed was reasonably based upon the recreation study and was thus constitutional.

The Appellate Division of the New York Supreme Court affirmed, holding that the fee requirement was rationally based and not an unconstitutional condition.

***4** Joy appealed to the New York Court of Appeals as of right on its constitutional claims.[FN4] That high court, after a preliminary review, dismissed the appeal finding that there was no substantial constitutional question directly involved.

FN4. Pursuant to NY CPLR (McKinney's) §5601(b)(1).

REASONS FOR GRANTING THE WRIT

1. IT IS ESSENTIAL THAT THE COURT RESOLVE THE NATIONAL DISORDER THAT HAS FOLLOWED *DOLAN*

Working with strained budgets and burdened by increased growth local governments have come to rely heavily on impact and in lieu of fees as a vital tool to cope with those budgetary short falls and the needs occasioned by that growth. A federal study has found that 60 percent of cities with more than 25,000 residents impose impact fees.[FN5]

FN5. General Accounting Office, *Local Growth Issues-Federal Opportunities and Challenges*, Government Printing Office, 2000.

Because there is little guidance as to whether *Dolan* applies to these fees they have become the norm and are now quite substantial. In California they average $19,552.00 per housing unit.[FN6] Nationwide, impact fees average over $10,000.00 per ***5** unit.[FN7] They can reach into the millions of dollars for a single residential project.[FN8] In the case at bar the fee was $558,250.00 - a significant sum by any measure.

FN6. Landis, et. al., *Pay to Play: Residential Development Fees in California Cities and Counties,* State of California Department of Housing and Community Development (2001).

FN7. "National Impact Fee Survey", Duncan Associates, Austin TX, August 22, 2007.

FN8. *City of Portsmouth New Hampshire v. Schlesinger,* 57 F.3d 12, 17-18 (1st Cir., 1995) involving a fee of $1,792,960.00.

Impact fees have come to have a broad and dynamic effect upon all facets of the housing stream and can seriously affect housing affordability, something that should not be lost sight of in the current economy.[FN9]

FN9. See Been, *Impact Fees and Housing Affordability,* 8 Cityscape, (an HUD publication) at pg. 139 (2005).

Since *Dolan* was decided 15 years ago the high courts of the states have become hopelessly divided on whether or not its simple rules apply to monetary exactions. Even the Circuits are conflicted on the question.

This post-*Dolan* disorder revolves around two unanswered questions: First, does *Dolan* apply to legislatively imposed development conditions, be they exactions of money or dedications of land, or is its rule confined to *ad hoc* "adjudicatory" conditions arising out the land use review process? Second, does *Dolan* apply to monetary exactions, i.e. "fees", at all, or is its reach limited to the compelled dedications of an interest in land only?

***6** A. The First Question: Does *Dolan* Apply to Fees Imposed by Legislation or Only to Those Imposed by "Adjudicatory" Action? Confusion Abounds.

There is a nationwide split on this question. The following states hold that development fees imposed by general legislation rather than as a result of administrative or "adjudicatory" action arising out of the planning process are not bound by *Dolan.* These states employ a deferential approach to the fee legislation.

- *Rogers Machinery, Inc. v. Washington County,* 181 Or. App. 369, 387-388, 45 P.3d 966, 976 (2002).
- *Home Builders Association of Central Arizona v. City of Scottsdale,* 187 Ariz. 479, 486, 930 A.2d 993, 999-1000 (1997).
- *Waters Landing Limited Partnership v. Montgomery County,* 337 MD 15, 40, 650 A.2d 712, 724 (1994).
- *Parking Association of Georgia, Inc. v. City of Atlanta,* 264 Ga. 764, 766, 450 S.E.2d 200, 203 (1994), cert. denied 515 U.S. 1116 (1.995).
- *Garneau v. City of Seattle,* 147 F.3d 802, 811 (9th Cir., 1998) and *McClung v. City of Sumner,* 548 F.3d 1219, 1225 (9th Cir., 2008) discuss the divergent opinions on this topic.

***7** On the other hand, the states listed below hold just the opposite rejecting any legislative-adjudicatory distinction.

- *Trimen Development Company v. King County,* 124 Wash.2d 261, 274, 877 P.2d 187, 194 (1994).
- *Twin Lakes Development Corp. v. Town of Monroe,* 1 N.Y.3d 98, 103-106, 801 N.E.2d 821 (2003), cert. denied 541 U.S. 974 (2004).
- *Town of Flower Mound v. Stafford Estates Limited Partnership,* 135 S.W.3d 620, 635-641 (TX, 2004).

The Texas Supreme Court in *Flower Mound* is the latest high court pass in the question. It reviewed this national discord at length and emphatically rejected any legislative-adjudicatory distinction when applying *Dolan.*

Because of the confusion in the high courts the situation in the lower courts - especially in jurisdictions where a state high court has yet to speak - is more confused.[FN10] Scholars and commentators have examined this ongoing nationwide confusion at length.[FN11]

FN10. Reznik, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, Note, 75 N.Y.U. L. Rev. 242 (2000).

FN11. E.g. Haskins, *Closing the Dolan Deal - Bridging the Legislative/Adjudicative Divide*, The Urban Lawyer, Vol. 38 Number 3 (Summer, 2006) at pg. 487.

***8** Even members of this Court are not in agreement on this issue. In *Parking Association of Georgia v. City of Atlanta*, 515 U.S. 1116 (1995) Justice Thomas, dissenting from the denial of certiorari, joined by Justice O'Connor, recognized then that there was conflict on this question that should warrant certiorari. "The lower courts are in conflict over whether *Dolan's* test for property regulation should be applied in cases where the alleged taking occurs through Act of the legislature."

Justice Thomas went on to note that "[t]he distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference."

The nation's courts are now more conflicted on this issue than when Justice Thomas first observed the emerging conflict - 14 years ago.

B. The Second Question: Is the Compelled Payment of Money Under Any Circumstance Controlled by *Dolan*? Confusion Abounds Especially After *Del Monte Dunes*.

The division between the state high courts on this question is just as conflicted.

***9** Four high courts have held that the compelled payment of money under any motif does not fall within *Dolan's* purview. These courts - listed below - hold that *Dolan's* taking analysis attaches only to compelled dedications of land and not to monetary payments by whatever name.
• *McCarthy v. City of Leawood*, 257 Kan. 566, 580, 894 P.2d 836, 835 (1995).
• *Home Builders Assn. v. City of Scottsdale*, 187 Ariz. 479 at 486, 930 A.2d 993 at 999-1000 (1997).
• *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, 695-696 (CO, 2001).
• *Sea Cabins on the Ocean IV Homeowners Association Inc. v. City of North Myrtle Beach*, 345 S.C. 418, 433 FN5, 548 S.E.2d 595, 603-604 (2001).

In contrast nine high courts and some of the Circuits - listed below - have specifically applied *Dolan's* rule to monetary exactions.
• *Northern Illinois Home Builders Association, Inc. v. County of DuPage*, 165 Ill.2d 25, 32, 649 N.E.2d 384, 388-389 (1995).
• *City of Portsmouth New Hampshire v. Schlesinger*, 57 F.3d 12 at 17-18 (1st Cir., 1995). The 1st Circuit simply assumed *Dolan* applied to monetary impact fees.
***10** • *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 874, 911 P.2d 429, 442-443 (1996), cert. denied 519 U.S. 929 (1996).
• *Garneau v. City of Seattle* (O'Scannlin conc.), 147 F.3d 802, at 815 (9th Cir., 1998).
• *Home Builders Assn. of Dayton and the Miami Valley v. City of Beavercreek*, 89 Ohio St.3d 121, 127, 729 N.E.2d 349, 355 (2000).
• *The Benchmark Land Company v. City of Battle Ground* (Sanders conc.), 146 Was.2d 685, 49 P.23d 860 (2002).
• *Dudek v. Umatilla County*, 187 Or. App. 514-515, 69 P.3d 757-758 (2003).
• *Town of Flower Mound v. Stafford Estates Limited Partnership*, supra, at 135 S.W.3d 635-641 (TX, 2004),
• *Twin Lakes Development Corp. v. Town of Monroe*, 1 N.Y.3d 98, 103-106, 801 N.E.2d 821 (2003), cert. denied 541 U.S. 974 (2004).

Both *Dudek* and *Flower Mound* discuss this dispute at length and chronicle the national disarray on the topic.

In 1999 the Court refused to apply *Dolan's* rough proportionality requirements to the denial of ***11** development permits in general.[FN12] The Court, however, gave no indication whether a compelled payment of money to the public fisc *in lieu of* a

compelled dedication of property to public use should be treated differently than a dedication. But after that decision the state high courts became even more conflicted.

FN12. *County of Monterey v. Del Monte Dunes at Monterey, LTD,* 526 U.S. 687, 702-703 (1999).

In 2001 in *Sea Cabins* the South Carolina Supreme Court was emphatic that after *Del Monte Dunes*, *Dolan* applied "only" to land dedications.[FN13] In 2003 the Oregon Court of Appeals was quite doubtful suggesting only that after *Del Monte Dunes*, *Dolan* "might not" apply to monetary exactions.[FN14] In 2004 the Texas Supreme Court in *Flower Mound* was as emphatic as the South Carolina Supreme Court but held just the opposite.[FN15] In 2008 the Ninth Circuit specifically rejected *Flower Mound's* thinking.[FN16] After *Del Monte Dunes* some high courts have had trouble ***12** reconciling their own decisions.[FN17] In short, *Del Monte Dunes* doesn't answer this question. It only begs it.

FN13. *Sea Cabins on the Ocean IV Homeowners Association Inc. v. City of North Myrtle Beach,* 345 S.C. at 433 FN 5, 548 S.E.2d 603.

FN14. *Dudek v. Umatilla County,* 187 Or. App. 504, 516, FN 10 (2003).

FN15. *Town of Flower Mound v. Stafford Estates Limited Partnership* at 135 S.W.3d 636.

FN16. *McClung v. City of Sumner,* 548 F.3d 1299 at 1225 (9th Cir., 2008).

FN17. Compare *City of Olympia v. Drebick,* 156 Wash.2d 289, 126 P.2d 802 (2005) with *The Benchmark Land Company v. City of Battle Ground,* 146 Wash.2d 685, 49 P.23d 860 (2002) and *Trimen Development Company v. King County,* 124 Wash.2d 261, 274, 877 P.2d 187, 194 (1994). As pointed out in the dissent in *Drebick* it is very difficult to reconcile these decisions.

Dolan and *Lingle* essentially hold that the constitutional test is whether the value of the exaction as consideration for the development permit is roughly equivalent to the project's impact. If not, it fails as an unconstitutional condition. It is not the form of the exaction - money vs. land - but its proportionality that is determinative. Whether money is constitutionally protected "property" is not part of this equation. In this respect the Court has not resolved the confusion created by Justice Kennedy's concurrence in *Eastern Enterprises.*[FN18] It should do so.

FN18. In *Eastern Enterprises v. Apfel,* 524 U.S. 498, 540-546 (1998) Justice Kennedy, concurring in part and joined by four members of the Court, reasoned that money is not "property" under the Fifth Amendment. But in *Brown v. Legal Foundation of Washington,* 538 U.S. 216 (2003) both the majority and the dissenting members of the Court employed a taking analysis to money in the form of earned interest in an attorney's trust fund that had been seized by the state for public purposes. These decisions seem to be in direct conflict with each other.

Quite recently the Florida District Court of Appeal, held that monetary exactions did fall within ***13** *Dolan's* preview. It observed the nationwide confusion on this topic and looked to this Court for guidance. Even the dissenting Justice noted that the law of exactions following *Dolan* is anything but settled and "somebody needs to get it fixed".[FN19]

FN19. *St. John's River Water Management District v. Koontz,* - So. 2d -, 2009 WL 47009 (Fla. 5th DCA 2009).

Dolan, and its importance, is a matter of federal constitutional law. It is wrong that it should lead to

one result in one state and something else in another. The Court should rectify that unfortunate situation by deciding this case.

2. IT IS IMPORTANT THAT THE COURT ADDRESS AN OPEN QUESTION ABOUT THE APPLICATION OF *DOLAN'S* "INDIVIDUALIZED DETERMINATION" CALCULUS

Assuming that *Dolan* applies to compelled fees in lieu of dedications, can a local government imposing such a fee unilaterally skew its fee determination to avoid *Dolan* by excluding from its calculations available recreational facilities that it does not want factored into those calculations?

Furthermore, may it base the fee on a needs study that is not specific to the project at hand?

The recreation needs study that was the basis of the in lieu of fee in this case identified a vast array of available public and private recreational facilities ***14** easily accessed by the occupants of the proposed development. These consisted of nearby state, county and school parks, playgrounds and other' recreational facilities and several private recreational facilities, such as golf courses and exercise centers accessible to the public on a fee or subscription basis.

These perfectly adequate facilities were deliberately excluded from this town's recreational needs calculus only because they were not owned or controlled by the Town and thus, so it says, there was no assurance that they would remain in existence or might not become overcrowded. For this town these recreational facilities simply didn't exist.

Do not these type of public and private recreational facilities count for anything in a *Dolan* calculus? Do they not offer some public value that must be counted?[FN20]

FN20. See *Ehrlich v. City of Culver City*, at 12 Cal.4th 874, 911 P.2d 442 in which private tennis courts were assigned a "public value" in a *Dolan* analysis.

The government argues that recreational facilities not under its direct control might evaporate for one reason or another. Feared budgetary constraints seems to be the most common reason. Potential future overuse by members of the public not within the community demanding the fee is another.

***15** Thus, so goes the argument, such facilities should never be used to relieve a developer from paying its in lieu of fee obligation even if there is a perfectly adequate county or state park immediately adjacent to the project in question when the fee is imposed. Does that comport with *Dolan?*

This, and whether or not a development fee can be based on a study that is not project specific, are important subordinate questions that this Court should address in conjunction with the nationwide confusion that now plagues the idea of impact fees in general.

CONCLUSION

Development fees have become a vital tool for local governments in meeting the burdens generated by new growth, especially recreation facilities. Yet such exactions can be outright extortionate if they are not tempered by *Dolan's* logical - and rather simple - constraints, i.e., does the exaction flow from the found need occasioned by the project at hand and is it roughly proportional to that need.

Yet the high courts of the nation have tied themselves in knots over whether or not this simple rule applies equally to money demanded by local governments "in lieu of" the dedication of land. They are also tortured over whether or not this basic rule applies when the requirement flows out of a general piece of legislation rather than from the administrative land use review process at hand. In divining what this Court meant in *Dolan* and *Del* ***16** *Monte Dunes* these state high courts clash seriously with each other.

It is only fair to the local governments of this nation that have come to rely on development and in

lieu fees and, as well, to the development community that is the object of these tools, and the nation's lower courts that must interpret *Dolan*, that the Court explain just how far *Dolan's* reach is.

It has been many years since *Dolan* was decided and there is still no national consensus on what it means. There is only confusion. Help is needed.

Joy Builders, Inc. v. Town of Clarkstown
2009 WL 559321 (U.S.) (Appellate Petition, Motion and Filing)

END OF DOCUMENT