Note

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Lines in the Dirt: *West Linn Corporate Park*, Exactions, and the Effort to Clarify Federal Takings Law

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INTRODUCTION

Ambiguity and uncertainty both typify and define federal takings law. Though inherently fact-specific, federal exactions jurisprudence often wants for clearly defined rules. From the instruction of the Fifth Amendment's Takings Clause that no "private property be taken for public use, without just compensation,"[1] the U.S. Supreme Court has produced an increasingly prolix body of tests and standards in an effort to keep federal takings jurisprudence abreast of expanding government regulations on development. One of the most widely debated forms of federal takings law concerns exactions of private property by government bodies.[2]

An exaction is a form of unconstitutional condition that occurs when a government body deprives a private citizen of a constitutionally protected right in exchange for a privilege that the government body may otherwise deny.[3] Classically, an exaction occurs if a government body approves development rights on the condition that a landowner dedicates private real property for public use. But the U.S. Supreme Court remains silent on how federal exactions law applies to obligations imposed as a condition on development rights that neither derive from a uniform fee schedule nor implicate the real property owned by the party that seeks the development right.

In this void, courts and scholars struggle to reconcile the tension between the power of the government to tax private citizens and the requirement that private parties receive just compensation when the

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1 U.S. CONST. amend. V.

2 *See* Ehrlich v. City of Culver City, 911 P.2d 429, 451 (Cal. 1996) (noting that "the task of making [the] blitz of opinions doctrinally coherent is daunting"); Michael B. Kent, Jr., *Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings*, 51 WM. & MARY L. REV. 1833, 1836 (2010).

3 *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005); Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

government takes their physical property.[4] This debate now centers on two issues: First, whether the federal exactions analysis applies to development fees assessed as a condition on development rights.[5] Second, whether the analysis of uniform development fees differs from *ad hoc* development conditions specifically tailored to the anticipated impacts of a single development that impact personal property rather than a real property interest.[6] As development fees become an increasingly common component of land-use planning at all levels of government,[7] these issues present serious implications for officials and landowners alike.[8]

A recent case out of Oregon, *West Linn Corporate Park v. City of West Linn*, proves illustrative of the need for greater clarity in exactions analysis with respect to *ad hoc* development obligations that do not implicate real property interests. The case began in state court and was removed to federal district court. The parties then appealed to the U.S. Court of Appeals for the Ninth Circuit, which certified several questions to the Oregon Supreme Court before the Ninth Circuit eventually decided the case. Subsequently, the petitioner, West Linn Corporate Park, filed a petition for certiorari asking the U.S. Supreme Court to address how the exactions analysis

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4 *See, e.g.*, McClung v. City of Sumner, 548 F.3d 1219, 1227 (9th Cir. 2008) (speculating that *ad hoc* monetary obligations may receive a different analysis under *Dolan* than uniform development fees); Daniel L. Siegel, *Exactions After* Lingle*: How Basing* Nollan *and* Dolan *on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L.J. 577 (2009); Lauren Reznick, Note, *The Death of* Nollan *and* Dolan*? Challenging the Constitutionality of Monetary Exactions in the Wake of* Lingle v. Chevron, 87 B.U. L. REV. 725, 756 (2007).

5 Kent, *supra* note 2, at 1838. While there exist subtle differences between development fees and impact fees, which may differ based on locale, for the purposes of this Note, development fees refers broadly to fees and charges created by statute or ordinance and assessed uniformly to all new developments.

6 *Id.* at 1838–39.

7 The ten largest cities in Oregon all require some development fee as part of new construction. *See* Office of Econ. Analysis, *U.S. Decennial Census and American Community Survey Results*, OREGON.GOV, http://oregon.gov/DAS/OEA/census_and_acs.shtml (last visited Feb. 20, 2012). Oregon law also specifies how cities may impose system development fees and development fees. *See generally* OR. REV. STAT. §§ 223.001–223.950 (2011).

8 Under the federal exactions analysis, the government bears the burden to justify conditions imposed on development, whereas landowners must show that a regulatory action reaches the level of a *per se* taking. *Compare* Penn Cent. Transp. Co. v. N.Y. City, 438 U.S. 104, 138 (1978), *with Dolan*, 512 U.S. at 391 (explaining that the government "must make [an] individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development").

applies to personal—as opposed to real—property.[9] The Supreme Court denied certiorari.[10]

This Note addresses the Oregon Supreme Court's opinion answering the questions certified from the Ninth Circuit. In particular, it looks to the Oregon Supreme Court's discussion of when and how courts ought to apply exactions analysis to evaluate conditions imposed on development rights.[11] Part I reviews current interpretations of the federal Takings Clause with a focus on the present uncertainty regarding the application of *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* to monetary obligations and *ad hoc* conditions imposed on development rights. Part II outlines the procedural history of *West Linn*. Finally, Part III examines how future courts may utilize *West Linn* to situate *ad hoc* development conditions in the context of federal exactions law. Part III also addresses how courts may usefully clarify the application of federal exactions law to *ad hoc* conditions with greater attention to the underlying property interest that the condition impacts.

First, it is useful to consider the broader landscape of federal takings law and to place exactions within that overarching structure of law.

I
FEDERAL TAKINGS LAW

The Takings Clause of the Fifth Amendment prohibits the government from seizing private land for public use without just compensation to a property owner.[12] From that premise, the U.S. Supreme Court has recognized three general forms of takings: physical occupation, regulatory restrictions, and exactions of property imposed as a condition of development.

A. Physical Takings

The classic taking occurs when government physically interferes with the property rights of a private landowner. Under the Fifth Amendment, any *per se* taking requires just compensation as a matter

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[9] Petition for Writ of Certiorari, W. Linn Corporate Park, L.L.C. v. City of W. Linn, 132 S. Ct. 578 (2011) (No. 11-299).

[10] W. Linn Corporate Park, L.L.C. v. City of W. Linn, 132 S. Ct. 578 (2011).

[11] *See* W. Linn Corporate Park, LLC v. City of W. Linn (*West Linn IV*), 349 Or. 58, 240 P.3d 29 (2010).

[12] U.S. CONST. amend. V.

of course.[13] A physical taking may occur in one of four circumstances when government action interferes with the right of a property owner to exclude others from private property: First, where the government directly occupies or appropriates private property for a public use;[14] second, where government action constructively encroaches on real property;[15] third, where the government requires payment of interest earned in a trust account to benefit a third party;[16] and finally, where the government authorizes or mandates a physical invasion of private property.[17]

B. Regulatory Takings

By contrast, no categorical *per se* taking occurs if the government does not seize physical property.[18] But a taking may still occur if a government regulation deprives a landowner of the right to utilize property in a legally permissible manner, even if the landowner knows about the potential restrictions on development.[19] In effect, a regulatory taking occurs when a government regulation deprives a property owner of an anticipated economic opportunity to such a great extent that it becomes "functionally equivalent to the classic taking."[20] Whether a government regulation reaches this level depends on "complex factual assessments of the purposes and economic effects of government actions."[21]

Based on that assessment, *Lucas v. South Carolina Coastal Council* established that a total regulatory taking occurs if a

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13 *See id.*; Yee v. City of Escondido, 503 U.S. 519, 522 (1992).

14 United States v. Pewee Coal Co., 341 U.S. 114 (1951) (finding that the federal government owed just compensation where it physically seized control of a mine to avoid a general strike).

15 United States v. Causby, 328 U.S. 256 (1946) (holding that a physical taking occurred where a U.S. military aircraft utilized the airspace above a property owner's land, constructively taking an air easement).

16 Brown v. Legal Found. of Wash., 538 U.S. 216, 240 (2003); Phillips v. Wash. Legal Found., 524 U.S. 156, 170, 172 (1998).

17 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (requiring just compensation where a state law authorized entry onto property to install cable television facilities and forced private property owners to endure a physical occupation of their property).

18 *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322–23 (2002).

19 *See* Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

20 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

21 Yee v. City of Escondido, 503 U.S. 519, 523 (1992).

government regulation deprives a landowner of "all economically productive or beneficial uses of land" that do not otherwise violate state nuisance or property law.[22] Even short of a total deprivation of all economically viable property uses, a regulatory taking may occur if regulations frustrate the "investment-backed expectations" of a landowner.[23] No bright-line rule determines when a partial taking occurs, but in *Penn Central Transportation Co. v. New York City* the U.S. Supreme Court did offer three considerations in the partial takings analysis: (1) the scale of the economic impact, (2) the degree to which the regulation interferes with investment-backed expectations, and (3) the nature of the regulation.[24]

C. Exactions of Property as a Condition on Development Rights

Finally, exactions are a form of taking that occurs when a government body grants a development right that it could otherwise deny but does so in exchange for conditions that would constitute a taking outside the development context.[25] The basic requirements of the exactions analysis emerged from the seminal cases of *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*.

In *Nollan*, the Supreme Court established that exactions lacking an "essential nexus" to the impact of development require just compensation.[26] In *Nollan*, a land-use commission approved development of a beachfront parcel on the condition that the property owners dedicate a strip of the property as an easement to allow public access to a nearby park.[27] The Court found that the easement lacked an essential nexus because it did not address the underlying impact of

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[22] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–31 (1992). In *Lucas*, a developer purchased a beachfront property that he intended to develop into a subdivision. *Id.* at 1008. After his purchase, the state legislature passed a law that prohibited all "occupiable improvements" along a stretch of coast, including the intended subdivision. *Id.* at 1008–09. Because this legislative action deprived the developer of all "beneficial uses" of the property, the Court deemed it a total regulatory taking absent a showing that the intended use of the property otherwise violated established nuisance law. *Id.* at 1031.

[23] Penn Cent. Transp. Co. v. N.Y. City, 438 U.S. 104, 124 (1978).

[24] *Id.* In *Penn Central*, a developer sought to build a fifty-story structure over Grand Central Terminal in New York City. *Id.* at 115–16. However, a city ordinance required preservation of historical landmarks, including the terminal, *id.* at 108, 115–16, and the city rejected the proposed development, *id.* at 117. Because the developer could still use the terminal and the city had not rejected all potential development, the Court held that no regulatory taking occurred under the partial regulatory takings analysis. *Id.* at 136–38.

[25] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005).

[26] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837, 842 (1987).

[27] *Id.* at 828, 838.

the development—limited visual access to the beach.[28] As such, the Court held that the commission had to provide just compensation if it "want[ed] an easement across the Nollans' property."[29]

Dolan further required "rough proportionality" between the scale of an exaction and the scope of the development impact it addresses.[30] While the Court did not mandate any "precise mathematical calculation," it called for some form of "individualized determination" of a development's anticipated impact to demonstrate the connection between a condition imposed and the impact addressed.[31] In *Dolan*, the City of Tigard allowed a storeowner to build a parking lot on the condition that the storeowner dedicate a strip of land for a public bike path to mitigate the anticipated impacts of runoff from the lot.[32] The Court agreed that the bike path possessed an essential nexus to the anticipated runoff, but it found that the city failed to establish the rough proportionality of the path because the city only asserted that the path "could offset some of the traffic demand."[33]

Later, in *City of Monterey v. Del Monte Dunes at Monterey*, the Court clarified that the rough proportionality test from *Dolan* did not extend "beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use."[34] The Court stated that *Dolan* only addressed whether "dedications demanded as conditions of development" fit the anticipated impact of development if the dedications themselves amounted to an exaction.[35] The Court concluded that *Nollan* and *Dolan* do not apply where the government refuses to allow development rather than imposing a condition on development.[36]

Finally, in *Lingle v. Chevron U.S.A. Inc.*, the Court declared that *Nollan* and *Dolan* only addressed the "unconstitutional condition" that arose when the government required a property owner to submit to a taking in exchange for a discretionary benefit.[37] The Court in

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28 *Id.* at 840–42.

29 *Id.* at 842.

30 Dolan v. City of Tigard, 512 U.S. 374, 391, 396 (1994).

31 *Id.* at 391.

32 *Id.* at 379–80.

33 *Id.* at 395–96.

34 City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999).

35 *Id.* at 703.

36 *Id.*

37 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005).

Lingle primarily sought to eliminate the "substantially advances" language that had infiltrated the takings analysis.[38] Still, it had occasion to opine that an exactions challenge under *Nollan* and *Dolan* can only exist where the condition imposed on development would otherwise constitute a *per se* taking if not imposed as a condition on development.[39]

Lingle did not disturb the holdings in *Nollan* and *Dolan*, nor did it alter how those cases apply to development conditions.[40] Rather, it clarified that those cases apply where government predicates development rights on a condition otherwise unconstitutional if not levied in exchange for the right to develop. This arguably narrows the scope of exactions law[41] and limits the application of *Nollan* and *Dolan* to instances where a development condition would constitute a *per se* taking independent of the development context.

D. Monetary Obligations, Ad Hoc *Development Conditions, and Federal Takings Law*

The Supreme Court has not established precisely when an *ad hoc* development condition amounts to a *per se* physical taking. To the extent that Supreme Court decisions offer guidance regarding the analysis of monetary and *ad hoc* obligations applied to a specific development, the decisions imply that whether the Takings Clause applies to government-imposed conditions depends largely on the specific property interest impacted.

For example, a uniformly assessed monetary obligation may nonetheless constitute a physical taking if the impact of the government action proves sufficiently discrete and specific.[42] In *Phillips v. Washington Legal Foundation*, the Supreme Court analyzed a state law that required payment of interest generated in lawyer trust accounts to a nonprofit corporation.[43] The Court determined that the interest amounted to physical property under the

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[38] *Id.* at 544–45 (concluding that the "substantially advances" test for takings improperly conflates a takings analysis with a due process test of the underlying policy reasons that justify government action) (overruling Agins v. City of Tiburon, 447 U.S. 255 (1980)).

[39] *Id.* at 547.

[40] *Id.* at 545.

[41] *See* Siegel, *supra* note 4, at 609 (recognizing that *Lingle* narrows the applicability of *Nollan* and *Dolan* to adjudicative decisions).

[42] Phillips v. Wash. Legal Found., 524 U.S. 156, 170, 172 (1998).

[43] *Id.* at 162.

Takings Clause because "property" for the purposes of a takings analysis involved more than economic value and included the right to possess, control, and dispose of property.[44] Yet the Court declined to reach the issue of whether a physical taking occurred.[45]

Later, in *Brown v. Legal Foundation of Washington*, the Court held that dedications of interest accrued in lawyer trust accounts may amount to a *per se* taking because they implicate a sufficiently discrete property interest—the specific funds located in an account subject to the required payments.[46] The Court ultimately concluded that no compensation was owed because the interest accrued by the owners of the accounts had not originally belonged to them.[47] As such, the owners had not actually lost any money as a result of the dedications.[48]

In contrast, the Court has declined to consider monetary obligations to be physical takings when the obligations at issue applied broadly and did not target specific funds.[49] In *Eastern Enterprises v. Apfel*, the Court considered retirement premiums imposed on coal producers by provisions of the Coal Act.[50] In a closely divided decision, a plurality held that excessive fees imposed on mining companies violated the Due Process Clause but did not rise to the level of a *per se* taking because they did not apply to a specific property interest. Likely casting the deciding vote on the takings issue, Justice Kennedy emphasized that the manner in which government action impacts a specific property interest dictates application of the Takings Clause.[51] Although the monetary burden imposed by the Coal Act effectively equaled an actual taking of physical property, it neither "target[ed] a specific property interest nor depend[ed] upon any particular property for the operation of its statutory mechanisms."[52] As such, Justice Kennedy concluded that it did not implicate the underlying concern of the Takings Clause: obligations related to a specific property interest.[53]

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44 *Id.* at 170.

45 *Id.* at 172.

46 Brown v. Legal Found. of Wash., 538 U.S. 216, 235 (2003).

47 *Id.* at 240–41.

48 *Id.*

49 *See* E. Enters. v. Apfel, 524 U.S. 498 (1998).

50 *Id.* at 517–19.

51 *Id.* at 543 (Kennedy, J., concurring).

52 *Id.*

53 *Id.* at 544.

Absent more definitive guidance from the Supreme Court, federal and state courts approach a consensus that *Nollan* and *Dolan* do not apply to uniformly assessed development fees. But the rationales of different courts vary widely, and courts remain ambivalent about the proper way to analyze *ad hoc* conditions on development rights. While not exhaustive, the following summary captures the indecision that currently plagues exactions law.

1. Interpretations of Nollan *and* Dolan *in Federal Courts*

In the aftermath of *Lingle*, federal courts have generally agreed that *Dolan* does not apply to uniform development fees imposed as part of a comprehensive fee schedule. For example, the Eleventh Circuit observed that "the takings analysis is not an appropriate vehicle to challenge the power of [a legislature] to impose a mere monetary obligation without regard to an identifiable property interest."[54] The Sixth Circuit noted that "all circuits that have addressed the issue [of monetary obligations] have uniformly found that a taking does not occur when the statute in question imposes a *monetary assessment that does not affect a specific interest in property*."[55]

But the lingering question of what qualifies as a "specific interest in property" leaves courts hesitant to announce how *Nollan* and *Dolan* apply to those *ad hoc* conditions on development rights that apply to a single landowner and a discrete property interest. In *McClung v. City of Sumner*, the Ninth Circuit held that a "generally applicable development condition" imposed in exchange for development rights did not amount to a *per se* taking under the Takings Clause.[56] But it also emphasized that the development condition applied to "all new developments," which set it apart from obligations imposed in exchange for approval of a specific permit.[57]

Despite suggestions that the analysis of *ad hoc* obligations may differ from an analysis of uniform development fees, federal courts have hesitated to address how *Nollan* and *Dolan* apply to *ad hoc* development conditions. The same holds true among state courts.

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[54] Swisher Int'l, Inc. v. Schafer, 550 F.3d 1046, 1056 (11th Cir. 2008).

[55] McCarthy v. City of Cleveland, 626 F.3d 280, 285 (6th Cir. 2010) (emphasis added).

[56] McClung v. City of Sumner, 548 F.3d 1219, 1225, 1227 (9th Cir. 2008) (refusing to consider a development condition under *Dolan* where the matter did not involve an *ad hoc* adjudicative decision).

[57] *Id.* at 1228 (citing United States v. Sperry Corp., 493 U.S. 52, 62 n.9 (1989)).

2. Federal Exactions Law in State Courts

Prior to *Lingle*, some state courts applied *Dolan* to fees assessed in exchange for development rights.[58] For example, in *Ehrlich v. City of Culver City*, the California Supreme Court determined that "when a local government imposes . . . discretionary permit conditions on development by individual property owners . . . *Nollan* and *Dolan* require that such conditions, whether they consist of possessory dedications or monetary exactions, be scrutinized under the heightened standard."[59] In that case, Culver City imposed a fee on a landowner in exchange for the authorization to construct a new office building.[60]

After *Lingle*, state courts increasingly distinguish between money taken under the power to tax and property appropriated for public use under eminent domain. However, they have done so for different reasons. In Illinois, a court upheld a surcharge on casino profits that exceeded a certain annual amount, explaining that "the takings clauses of the federal and state constitutions apply only to the state's exercise of eminent domain and not to the state's power of taxation."[61] Conversely, a Colorado court held that drainage fees imposed on all developers did not constitute an exaction that merited compensation under the *Nollan*/*Dolan* standard because the fee applied to all who sought to develop and not just "one landowner and one parcel of land."[62]

Yet state courts have primarily addressed development fees derived from a uniform fee schedule. They remain ambivalent about the proper classification of *ad hoc* obligations imposed on a single landowner in exchange for a specific development right.

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[58] *See, e.g.*, Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 639–40 (Tex. 2004) (concluding that *Dolan* applies to both "a dedication of property to the public and a requirement that property already owned by the public be improved"); *see also* BHA Invs., Inc. v. City of Boise, 108 P.3d 315, 319 (Idaho 2004) ("Money is clearly property that may not be taken for public use without the payment of just compensation." (citing Brown v. Legal Found. of Wash., 538 U.S. 216 (2003))).

[59] Ehrlich v. City of Culver City, 911 P.2d 429, 447 (Cal. 1996).

[60] *Id.* at 435.

[61] Empress Casino Joliet Corp. v. Giannoulias, 896 N.E.2d 277, 291 (Ill. 2008).

[62] Wolf Ranch, LLC v. City of Colo. Springs, 207 P.3d 875, 881 (Colo. 2008).

3. Federal Exactions Law in Oregon

In the aftermath of *Dolan*, the Oregon Court of Appeals heard a case involving an *ad hoc* development condition that combined elements of a physical taking and a monetary obligation. In *Clark v. City of Albany*, a condition specifically tailored to ameliorate the impact of a planned restaurant required the developers "to make road improvements on and extending beyond the affected property."[63] The court characterized the condition as an exaction, holding that there is little difference between requiring a developer to "convey title to the part of the property that is to serve a public purpose" and requiring a developer to "make improvements on the affected and nearby property and make it available for the same purpose."[64]

Yet less than a decade later, the Oregon Court of Appeals considered *Clark* "open to question."[65] Considering federal takings law, the court held in *Dudek v. Umatilla County* that "money is not the equivalent of real property under the Takings Clause such that a requirement to pay money should be treated as though it were a physical occupation or exaction of real property."[66] Finally, the Court of Appeals held in *Rogers Machinery, Inc. v. Washington County* that development or impact fees do not implicate the exactions analysis because such fees apply broadly to all who intend to develop and fall under the taxing power of the state.[67]

But both *Dudek* and *Rogers Machinery* involved uniformly assessed development fees, and *Clark* concerned dedications of real property owned by the landowner. By contrast, the exactions claim in *West Linn* involved only off-site improvements tailored to address impacts of a specific development.[68] Such conditions defy ready classification as a uniform development fee or a classic physical taking.

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63 Clark v. City of Albany, 137 Or. App. 293, 299, 904 P.2d 185, 189 (1995), *review denied*, 322 Or. 644 (1996).

64 *Id.* at 300, 904 P.2d at 189.

65 Dudek v. Umatilla Cnty., 187 Or. App. 504, 516 n.10, 69 P.3d 751, 758 n.10 (2003) (noting that *Del Monte Dunes* cautioned against use of *Nollan* and *Dolan* outside "land-use decisions conditioning approval of development on the dedication of property to public use").

66 *Id.* at 515 n.9, 69 P.3d at 758 n.9.

67 Rogers Mach., Inc. v. Wash. Cnty., 181 Or. App. 369, 395, 45 P.3d 966, 980 (2002), *review denied*, 334 Or. 492 (2002).

68 *West Linn IV*, 349 Or. 58, 61, 240 P.3d 29, 30 (2010), *cert. denied*, 132 S. Ct. 578 (2011).

II

WEST LINN CORPORATE PARK, LLC V. CITY OF WEST LINN

Protracted and suffering from "paucity of agreed material facts,"[69] *West Linn* arose innocuously enough from the construction of the West Linn Corporate Park (WLCP) in the City of West Linn, Oregon.[70] As part of the initial consideration of the development, the City conducted a traffic study to assess any impacts the development may have on the surrounding area.[71] Based on the study, the City approved the project early in 1998, on the condition that WLCP complete several off-site improvements.[72] This required WLCP to upgrade and widen streets, improve waterlines, install traffic signals, construct sidewalks, and create a bike path.[73]

Construction of the improvements began in 1998, and the relationship between the City and WLCP soured as the project progressed. First, a city ordinance vacated an intersection adjacent to the development site and subsequently recorded an easement for a bike path through the intersection.[74] The City then refused to release the bonds secured by WLCP for its off-site improvements because, it claimed, WLCP failed to complete the improvements as required.[75] Soon after construction concluded in 2000, WLCP filed suit against the City in Oregon circuit court.[76] The City then removed the matter to federal district court.[77]

In its court filings, WLCP asserted nine claims for relief under state and federal law.[78] These included exactions claims based on the off-site improvements, an unjust enrichment claim, a takings challenge based on vacation of the abutting intersection and

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69 W. Linn Corporate Park, LLC v. City of W. Linn (*West Linn I*), No. Civ. 01-1787-AS (D. Or. Aug. 6, 2004), 2004 WL 1774543, at *1.

70 *Id.* at *2.

71 *Id.* at *3. The city argued that the study established the conditions of approval for the office park; the developer claimed that the survey simply estimated the traffic that development might affect.

72 *Id.* at *4.

73 *Id.* at *5; W. Linn Corporate Park, L.L.C. v. City of W. Linn (*West Linn II*), 534 F.3d 1091, 1095–96 (9th Cir. 2008); *see also* Plaintiff's Trial Memorandum at 3–4, *West Linn I*, No. 01-1787-AS (D. Or. Aug. 23, 2004), 2004 WL 1774543.

74 *West Linn I*, 2004 WL 1774543, at *8.

75 *Id.* at *7.

76 *West Linn II*, 534 F.3d at 1093.

77 *Id.*

78 *West Linn I*, 2004 WL 1774543, at *1.

subsequent easement, two claimed violations of civil rights, an equal protection claim, and a challenge to a prior zoning agreement. This Note focuses on the federal exactions claim based on the off-site improvements required by the City. A summary of the arguments advanced by the parties in the district court and the Ninth Circuit provides context to the questions addressed by the Oregon Supreme Court.

A. District Court of Oregon

For its part, WLCP asserted that *Nollan* and *Dolan* applied to the off-site improvements because the improvements amounted to a taking of private property. It alleged that the required improvements violated *Dolan* because the City failed to assess rough proportionality in its initial traffic survey.[79] It also claimed that the off-site improvements lacked the rough proportionality required by *Dolan* because the City had also imposed development fees that "fully capture[d] all impacts from the development."[80]

Meanwhile, the City began to build what would become its theory on appeal: that neither *Nollan* nor *Dolan* applied because only the taking of real property can give rise to an exactions claim.[81] Under the view espoused by the City, no exaction occurred because WLCP "did not own, possess, or have any interest in the developed real property at the time of any alleged taking or at the time the conditions were imposed."[82]

In response, WLCP cited *Clark v. City of Albany* to support the proposition that *Dolan* extends to "conditions of approval requiring developers to construct public improvements."[83] It also argued that *Del Monte Dunes* did not apply because that case involved the total denial of development rights, as opposed to the conditional right to develop granted in *West Linn*. While WLCP admitted that "it is not possible to use the Dolan test" where no exaction occurs, WLCP

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[79] Plaintiff's Memorandum in Support of Amended Motion for Partial Summary Judgment at 9–12, *West Linn I*, No. 01-1787-AS (D. Or. Jan. 20, 2004), 2004 WL 1774543.

[80] Plaintiff's Trial Memorandum, *supra* note 73, at 3, 8.

[81] Combined Answering Brief and Reply Brief of Defendants-Appellants Cross-Appellees City of West Linn and Boris Piatski at 25, *West Linn II*, 534 F.3d 1091 (9th Cir. 2008) (Nos. 05-36061, 05-36062).

[82] Answer to Plaintiff's Amended Complaint at 2, *West Linn I*, No. 01-1787-AS (D. Or. Aug. 18, 2004), 2004 WL 1774543.

[83] Plaintiff's Response to Defendant's Motion for Summary Judgment at 27, *West Linn I*, No. 01-1787-AS (D. Or. Feb. 3, 2004), 2004 WL 1774543.

maintained that the off-site conditions gave rise to an exaction because "the payment of money is analyzed as a physical . . . taking,"[84] and money represents "private property" for the purposes of the Fifth Amendment.[85] Thus, it claimed, "takings occurred on the dates that WLCP constructed the improvements that the City demanded."[86]

After the district court declined to grant summary judgment for either party on the exactions claim,[87] the parties proceeded to trial. At trial, the district court found in favor of the City on the exaction issue and in favor of WLCP on several other claims.[88] Both WLCP and the City appealed to the Ninth Circuit.[89]

B. Ninth Circuit, Part I

In the time between the trial and the appeal, the U.S. Supreme Court decided *Lingle*. The briefs from both parties attempted to grapple with *Lingle*'s proclamation that *Nollan* and *Dolan* only applied to "unconstitutional conditions." The arguments of the parties focused on two central issues: (1) whether *Nollan* and *Dolan* applied to regulatory or physical takings, and (2) whether an *ad hoc* development condition of any kind could amount to a *per se* physical taking.

In its opening brief, WLCP claimed, "[T]he trial court misconstrued . . . relevant United States Supreme Court and Oregon appellate cases, when it ruled that the development conditions imposed by the City should be treated as a mere 'regulatory taking.'"[90] It also argued that the district court improperly construed exactions as regulatory takings rather than "physical appropriation[s] of property."[91] This proved critical because it deprived WLCP of its

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84 *Id.* at 28 (citing Brown v. Legal Found. of Wash., 538 U.S. 216 (2003)).

85 *Id.* at 29 (citing Phillips v. Wash. Legal Found., 524 U.S. 156 (1998)).

86 *Id.* at 9.

87 *West Linn I*, 2004 WL 1774543, at *13.

88 *West Linn II*, 534 F.3d 1091, 1093 (9th Cir. 2008); Brief of Defendants-Appellants Cross Appellees' City of West Linn and Boris Piatski at 2, *West Linn II*, 534 F.3d 1091 (9th Cir. 2008) (Nos. 05-36061, 05-36062).

89 Combined Opening Brief and Answering Brief of Plaintiff-Appellee/Cross-Appellant West Linn Corporate Park, LLC at 14, *West Linn II*, 534 F.3d 1091 (9th Cir. 2008) (Nos. 05-36061, 05-36062).

90 *Id.*

91 *Id.* at 31.

"categorical right to just compensation" for a physical taking.[92] WLCP then reiterated its argument that "the taking of money for a public purpose constitutes a *per se* physical taking."[93] It cited several state and federal decisions to that effect, but none decided in the short time after *Lingle*.[94]

In response, the City characterized the off-site improvements as "part of the City's SDC system" and posited that WLCP had used those improvements to satisfy "generally applicable SDCs imposed on the development."[95] The City did not necessarily disagree that the off-site improvements required WLCP to incur certain costs,[96] but it argued that the improvements were not subject to *Nollan* and *Dolan* because they did "not fit within the . . . definition of a 'physical taking.'"[97] The City also asserted that WLCP's federal exactions claims lacked ripeness because WLCP failed to seek just compensation through available remedies under state law.[98]

After considering the arguments of both parties, the Ninth Circuit determined that it could not reach the merits of the federal exactions claims because it needed to "resolve the[] state-law causes of action before reaching the merits of the federal takings arguments."[99] The court also expressed doubts about how to analyze the off-site improvements under exactions law and the validity of the vacation of the abutting intersection that gave rise to WLCP's other takings claim.[100] To address these concerns, the court stayed the proceedings and certified three questions to the Oregon Supreme Court:[101]

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92 *Id.* at 23. WLCP contrasted this "categorical right" with the regulatory takings analysis that depends on "the character of the governmental regulation, its economic effect on the landowner, the extent to which it interferes with reasonable investment-based expectations and/or whether it deprives the owner of all economically [sic] or productive use of the land." *Id.* at 23–24 (citing Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)).

93 *Id.* at 26.

94 *Id.* at 25 (citing Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996); Town of Flower Mound v. Stafford Estate Ltd. P'ship, 135 S.W.3d 620 (Tex. 2004); Benchmark Land Co. v. City of Battleground, 972 P.2d 944 (Wash. 1999)).

95 Combined Answering Brief and Reply Brief of Defendants-Appellants Cross-Appellees City of West Linn and Boris Piatski at 27, *West Linn II*, 534 F.3d 1091 (9th Cir. 2008) (Nos. 05-36061, 05-36062).

96 *Id.* at 23.

97 *Id.*

98 *Id.* at 18–23.

99 *West Linn II*, 534 F.3d at 1093 (citing Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)).

100 *Id.* at 1104.

101 *Id.* at 1105–06.

(1) Must a landowner alleging that a condition of development amounts to an exaction or physical taking exhaust available local remedies before bringing his claim of inverse condemnation in an Oregon state court?

(2) Can a condition of development that requires a landowner to improve off-site public property in which the landowner has no property interest constitute an exaction?

(3) Under Or. Rev. Stat. § 271.120, is a City Council's purported vacation of a street *ultra vires* when the petition for vacation does not comply with the landowner consent provisions of Or. Rev. Stat. § 271.120?[102]

The Ninth Circuit authorized the Oregon court to consider any issues that would aid in the interpretation of the law.[103] This Note analyzes the second question.

C. Oregon Supreme Court

In 2008, the Oregon Supreme Court accepted the questions certified from the Ninth Circuit.[104] In responding to the Ninth Circuit, the Oregon court first addressed the issue of administrative exhaustion for a claim of inverse condemnation under Oregon law. The court found no "significant difference between takings claims . . . based on regulations that limit the use of property and those that are based on regulations that place conditions on its development."[105] Thus, the court concluded that Oregon law required property owners to pursue local administrative remedies before bringing an inverse condemnation claim or a challenge to a condition on development, but it did not require exhaustion of all state remedies.[106] This rendered WLCP's claim ripe for review and relief.

Having deemed the exactions issue ripe for review, the court considered how *Dolan* would apply if the government conditioned development rights on a requirement that a "property owner construct off-site improvements."[107] The court disagreed with WLCP's argument that *Clark v. City of Albany* precluded consideration of *ad hoc* development conditions, and refused to follow "a Court of

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102 *Id.* at 1105.

103 *Id.* at 1105–06.

104 W. Linn Corporate Park, LLC v. City of W. Linn (*West Linn III*), 345 Or. 461, 200 P.3d 147 (2008) (reported in table).

105 *West Linn IV*, 349 Or. 58, 75, 240 P.3d 29, 38 (2010).

106 *Id.* at 76, 240 P.3d at 39.

107 *Id.* at 87, 240 P.3d at 45.

Appeals case that predated *Lingle*."[108] Thus, despite objections by the dissent that the court lacked authority to opine on federal law, the court decided to address both the state and federal exactions claims.[109] The court opted to consider the federal claims first—a departure from its usual practice to consider state takings law before federal claims—because WLCP relied on federal takings law as the "theoretical basis" for all of its exactions claims.[110]

Accepting that *Lingle* limits the scope of *Nollan* and *Dolan* to unconstitutional conditions imposed in exchange for a discretionary right, the court considered whether the off-site improvements independently constituted a *per se* taking.[111] The court focused its inquiry on the authority under which the City required the off-site improvements, noting that the power of eminent domain does not enable government to compel a party to construct improvements or to spend money.[112] "It does not make sense," the court emphasized, "to say that, although government has the power to impose a monetary obligation, it must repay the value received as just compensation."[113]

That said, the court reasoned that when a landowner pays a development fee "it does not relinquish existing property"; it merely "fulfills a newly imposed monetary obligation."[114] It distinguished these "new monetary obligations" from the "seizure of a discrete monetary fund" at issue in *Phillips v. Washington Legal Foundation* and *Brown v. Legal Foundation of Washington*.[115] From this conclusion, the court decided that absent a U.S. Supreme Court decision to the contrary, "a government's requirement that a property owner undertake a monetary obligation that is not roughly proportional to the impacts of its development does not constitute an unconstitutional condition under *Nollan*/*Dolan* or a taking under the

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108 *Id.* at 82, 240 P.3d at 42.

109 Writing for the dissent, Justice Kistler, joined by Justice Linder, urged that Oregon law did not allow the court to answer "whether [a] property owner would win or lose on its substantive federal claim" in an Oregon court. *Id.* at 105, 240 P.3d at 55 (Kistler, J., concurring in part and dissenting in part).

110 *Id.* at 77, 240 P.3d at 40 (majority opinion).

111 *Id.* at 81, 84–85, 240 P.3d at 41, 43–44 (citing Town of Flower Mound v. Stafford Estates P'ship, 135 S.W.3d 620 (Tex. 2004)) (dismissing the view that *Nollan* and *Dolan* do not apply to unconstitutional conditions).

112 *Id.* at 87, 240 P.3d at 45.

113 *Id.* at 93, 240 P.3d at 48–49.

114 *Id.* at 85, 240 P.3d at 44.

115 *Id.* at 93 n.22, 240 P.3d at 48 n.22.

Fifth Amendment, nor does it require payment of just compensation."[116]

The court concluded that requiring off-site improvements constituted the "functional equivalent of the imposition of a monetary obligation" because the government could accomplish the same end if it assessed a fee with which the government could construct improvements.[117]

However, the court opined that excessive *ad hoc* conditions on development rights could prove unconstitutional in two circumstances. First, a monetary obligation might fail for reasons of due process if it lacks a reasonable relationship to the impacts of development.[118] Second, an obligation may prove sufficiently onerous to require partial compensation based on *Penn Central* or full compensation under *Lucas*.[119] Indeed, burdens on development that amount to regulatory takings "require payment of just compensation without further inquiry."[120]

As for the remaining takings claims, the court found that the Oregon Constitution did not require any compensation for the off-site improvements because they did not deprive WLCP "of all economically viable use of the land."[121] It also determined that the City validly vacated the intersection abutting the development before the City recorded its easement through that land.[122]

D. Ninth Circuit, Part II

Based on the Oregon Supreme Court opinion, the Ninth Circuit rejected WLCP's exactions claims under both article I, section 18 of the Oregon Constitution as well as the Fifth Amendment of the U.S. Constitution. The Ninth Circuit recognized that "[t]he Supreme Court has not extended *Nollan* and *Dolan* beyond situations in which the government requires a dedication of private real property."[123] Absent further comment from the Supreme Court, the Ninth Circuit refused

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116 *Id.* at 86, 240 P.3d at 45.

117 *Id.* at 86–87, 240 P.3d at 45.

118 *Id.* at 87–88, 240 P.3d at 45–46.

119 *Id.* at 85–86, 240 P.3d at 44–45.

120 *Id.* at 86, 240 P.3d at 44.

121 *Id.* at 93, 240 P.3d at 49.

122 *Id.* at 101, 240 P.3d at 53.

123 W. Linn Corporate Park, LLC v. City of W. Linn (*West Linn V*), 428 F. App'x 700, 702 (9th Cir. 2011), *cert. denied*, 123 S. Ct. 578 (2011).

to apply the *Nollan*/*Dolan* test to the off-site improvements. But the Ninth Circuit did not elaborate on the analysis of federal exactions law offered by the Oregon Supreme Court.

Shortly after the decision of the Ninth Circuit, WLCP filed a petition for certiorari to the U.S. Supreme Court.[124] The Supreme Court denied the petition in November 2011.[125]

III

THE IMPACT OF *WEST LINN* AND THE AMBIGUITY OF FUNCTIONAL EQUIVALENCY

The impact of *West Linn* hinges on many factors beyond the text of the decision itself. For example, future Oregon courts may question the precedential value of the opinion.[126] As noted by the dissent in the Oregon Supreme Court, the questions certified from the Ninth Circuit potentially "ask[ed] for more" than Oregon law allows the court to announce.[127] Future courts may consider any answers to those questions dicta. Moreover, the Ninth Circuit offered its own brief analysis of the federal exactions claims, simply declining to extend *Nollan* and *Dolan* to cover monetary exactions absent further clarification from the U.S. Supreme Court. The subsequent denial of certiorari by the U.S. Supreme Court leaves uncertain the precedential effect of the Ninth Circuit's ambivalence.

Still, *West Linn* suggests a possible direction for future exactions decisions by Oregon courts and offers insight into the classification of monetary obligations—and more general *ad hoc* conditions on development rights—in the context of federal exactions law. Yet its analysis overlooks the proper inquiry to determine whether *Nollan* and *Dolan* apply to a condition on the right to develop: the specificity of the property interest implicated by the obligation.

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124 Petition for Writ of Certiorari, *West Linn II*, 534 F.3d 1091 (9th Cir. 2008) (No. 11-299).

125 W. Linn Corporate Park, L.L.C. v. City of W. Linn, 132 S. Ct. 578 (2011).

126 The Oregon Supreme Court has considered responses to certified questions as precedent. *See, e.g.*, McGanty v. Staudenraus, 321 Or. 532, 552, 901 P.2d 841, 853–54 (1995) (discussing Bratcher v. Sky Chefs, Inc., 308 Or. 501, 783 P.2d 4 (1989)). But those certified questions did not involve matters of federal law. *See Bratcher*, 308 Or. at 503–04, 783 P.2d at 4–5.

127 *West Linn IV*, 349 Or. at 103, 240 P.3d at 54 (Kistler, J., concurring in part and dissenting in part).

A. Establishing the Boundaries of Nollan *and* Dolan

Unless a condition imposed by government on the right to develop amounts to a *per se* taking, it should not receive scrutiny under *Nollan* and *Dolan*. To that end, the decision of the Oregon Supreme Court to categorize monetary obligations as regulatory actions coheres with the position of the U.S. Supreme Court in *Lingle* and follows the trend of state and federal courts in the wake of that decision. Such an approach also comports with scholarship cited in *West Linn* suggesting that *Lingle* places development fees and impact fees beyond the scope of *Nollan* and *Dolan*.[128]

Under current federal takings law, a government seizure of real property necessarily results in an unconstitutional taking. Yet regulatory actions only become unconstitutional if they are "functionally equivalent" to a physical taking as determined by "complex factual assessments of the purposes and economic effects of government actions."[129] *Ad hoc* conditions on development do not fit neatly into either of these categories. For example, a development fee closely resembles a tax, which government may constitutionally assess under its regulatory power.[130] However, monetary obligations differ from classic regulatory takings, which often involve decisions related to policy that peripherally impact a landowner's expectancy interests. And both *Phillips* and *Brown* support that a monetary obligation may actually constitute a taking of a private property interest if it directly involves a specific, preexisting pool of funds.[131]

Ultimately, the decision to classify monetary obligations as a matter of regulatory action best coheres with current exactions law. *Lingle* establishes that *Nollan* and *Dolan* apply to unconstitutional conditions imposed in exchange for a discretionary privilege.[132] While a *per se* taking proves unconstitutional on its face,[133] a regulatory taking provides no "categorical" right to compensation unless it amounts to a total or partial taking under *Penn Central* or

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128 *Id.* at 85, 240 P.3d at 44 (majority opinion); *see* Siegel, *supra* note 4.

129 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005); Yee v. City of Escondido, Cal., 503 U.S. 519, 523 (1992).

130 *West Linn IV*, 349 Or. at 93–94, 240 P.3d at 48–49.

131 *See* Phillips v. Wash. Legal Found., 524 U.S. 156, 170, 172 (1998); Brown v. Legal Found. of Wash., 538 U.S. 216, 222–23, 240 (2003).

132 *Lingle*, 544 U.S. at 547–48.

133 *See supra* note 13 and accompanying text.

Lucas.[134] Thus, a regulatory action only receives an exactions analysis if it amounts to the functional equivalent of a *per se* taking. But if a landowner can establish that a full or partial regulatory taking occurred, compensation follows as a matter of course and does not require further proof that a government body imposed the condition at issue in exchange for a right to develop.[135] As a practical matter then, *Nollan* and *Dolan* do not apply to monetary conditions imposed on development rights unless the property interest implicated amounts to the functional equivalent of a physical taking based on the specificity of the monetary interest impacted.

Second, the decision to exclude the off-site improvements from the *Nollan* and *Dolan* analysis preserves the evidentiary balance between government and private landowners. Under a regulatory takings analysis, landowners bear the burden to show that a government action merits compensation based on the degree to which the action interferes with investment-backed expectations for a property.[136] By contrast, *Nollan* and *Dolan* place the onus on government to justify its decision to impose a condition on development that would otherwise result in a *per se* taking.[137] Given these disparate burdens of proof, if monetary obligations that fall short of a physical taking may be analyzed under *Nollan* and *Dolan*, little incentive remains for a landowner to pursue compensation under *Penn Central*. Recognizing that *Nollan* and *Dolan* do not apply to monetary obligations preserves the current landscape of takings claims, maintains the efficacy of *Penn Central*, and respects the distinction between physical and regulatory takings.

Still, there remains a concern that "[a]d hoc individual monetary exactions deserve special judicial scrutiny" because they impose a burden on a specific landowner and evade the regular political process used to enact uniform development fees.[138] To some extent, *Nollan* and *Dolan* alleviate this concern because they impose a higher burden on government to justify its actions than under the more deferential regulatory takings analysis. Indeed, if a landowner cannot sustain a regulatory takings claim, most due process challenges will fail as a

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134 *Yee*, 503 U.S. at 522–23; *see also supra* note 19 and accompanying text.

135 *See West Linn IV*, 349 Or. at 85–86, 240 P.3d at 44–45 (recognizing that both *Penn Central* and the total regulatory takings analysis apply to monetary obligations).

136 *See supra* note 8 and accompanying text.

137 Kent, *supra* note 2, at 1844.

138 San Remo Hotel, L.P. v. City & Cnty. of San Francisco, 41 P.3d 87, 105 (Cal. 2002).

matter of course.[139] But rather than further complicating the takings analysis, this valid suspicion of *ad hoc* development conditions may find an adequate and expedient remedy if courts apply a more rigorous rational basis inquiry when they review *ad hoc* monetary obligations imposed in exchange for the right to develop a specific property.[140]

West Linn coheres functionally—if not neatly—with current federal exactions law. It reflects the proposition that the exactions analysis does not apply to a monetary condition unless the condition amounts to a *per se* taking outside the exactions context. Yet this approach places a burden on courts to assess the property interest at stake, and *West Linn* leaves undecided the proper means to determine whether an *ad hoc* development condition requires analysis under *Nollan* and *Dolan*.

B. Focusing on Burdens to Clarify Exactions

To determine whether *Nollan* and *Dolan* apply to an *ad hoc* development condition, courts should first assess the specificity of the property interest burdened. Both *Phillips* and *Brown* illustrate that the line between regulatory actions and *per se* takings is often blurred, and it defies any "clear distinction" between required monetary expenditures and dedications of physical property.[141] And scholars continue to propose new tests to decide whether a condition imposed on development rights must comply with *Nollan* and *Dolan*.[142] But rather than create further tests, the exactions analysis may find greater

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139 *See* Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 641 (1993) ("Given that [the] due process arguments are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violating the Takings Clause." (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 223 (1986))).

140 Courts have sometimes employed a more probing rational basis review in other constitutional contexts. *See* Kelo v. City of New London, 545 U.S. 469, 492 (2005) (Kennedy, J., concurring in judgment) (suggesting the use of a "meaningful rational-basis review" that affords greater scrutiny to certain government land use decisions); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985) (endorsing heightened rational basis review where there exists "a bare . . . desire to a politically unpopular group") (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 535 (1973))); *see also* Neelum J. Wadhani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801 (2006).

141 *West Linn IV*, 349 Or. 58, 85, 240 P.3d 29, 44 (2010).

142 *See, e.g.*, Kent, *supra* note 2, at 1876 (proposing a hybrid test "that combines the factor-balancing of *Penn Central* with the nexus and proportionality standards of *Nollan/Dolan*").

clarity from a return to the fundamentals of the Takings Clause and renewed attention to the specific property interest burdened by government action. This strategy finds a pragmatic articulation in the concurring opinion of Justice Kennedy in *Eastern Enterprises v. Apfel*.[143]

Eastern Enterprises involved a tax on coal production assessed against certain coal producers that created a financial burden "as great [as] if the Government had appropriated" physical property.[144] In a closely divided decision, four Justices held the tax unconstitutional as a taking under the Fifth Amendment.[145] Justice Kennedy concurred in the judgment that the tax was unconstitutional but noted that the tax should be invalidated based on due process concerns.[146] However, he opted not to classify the appropriations as the functional equivalent of a physical taking.[147] Emphasizing the need to establish an "outer boundary for application of the regulatory takings rule," Kennedy focused on the fact that the "character of the governmental action" did not impact any specific property interest.[148] Although his observations came in the context of a regulatory takings challenge, the rationale behind his analysis offers two useful approaches for future courts to determine the scope and applicability of *Nollan* and *Dolan*.

First, the analysis of exactions claims must focus initially on the specific property interest affected. Neither new nor unprecedented,[149] this approach takes on heightened importance—and places a heavier burden on government to justify its actions—if *Nollan* and *Dolan* only apply to conditions on development that amount to a *per se* taking. Some construe the exactions analysis to apply *Nollan* and

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143 *See* Reznick, *supra* note 4.

144 *E. Enters.*, 524 U.S. at 542 (Kennedy, J., concurring in judgment and dissenting in part).

145 *Id.* at 538–39 (plurality opinion).

146 *Id.* at 539 (Kennedy, J., concurring in judgment and dissenting in part) (concluding that the offending provisions "must be invalidated as contrary to essential due process principles").

147 *Id.* at 542 (Kennedy, J., concurring in judgment and dissenting in part). The Court echoed this position in *Lingle*, where it emphasized the absurdity of requiring a district court to weigh the merits of opposing economic theories to decide takings claims. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 544–45 (2005).

148 *E. Enters.*, 524 U.S. at 542 (Kennedy, J., concurring in judgment and dissenting in part).

149 Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910). In a decision more than a century ago, Justice Holmes recognized that the operative inquiry in any takings claim is "what has the owner lost." *Id.*

Dolan to any condition imposed in exchange for a development right because the right to develop represents a specific property interest in itself.[150] But that position conflates the development right granted with the conditions exacted in exchange for that right; *Nollan* and *Dolan* only apply to independently unconstitutional conditions imposed in exchange for a discretionary privilege. *Del Monte Dunes* supports this view and makes clear that a mere denial of the right to develop does not amount to a deprivation of property sufficient to trigger *Nollan* and *Dolan*.[151] Only if the imposed condition—whether uniform or *ad hoc*—impacts a specific property interest should *Nollan* and *Dolan* apply. Thus, the nature of the property interest impacted by government action provides the operative variable in the exactions equation.

But in holding that *Nollan* and *Dolan* did not apply to the off-site improvements in *West Linn*, the Oregon Supreme Court focused instead on the governmental power invoked by the City to require the off-site improvements.[152] Of course, the government may validly exact money from private parties through its taxing power, and the power under which a government body acts may justify adverse economic impacts.[153] Yet any analysis of the power invoked by government to impose a development condition best applies after a court finds that the condition does not implicate a specific property interest and receive scrutiny under *Nollan* and *Dolan*.

As the Oregon Supreme Court suggests, just compensation would be required as a matter of course for any government action that creates the functional equivalent of a physical taking, even if pursued under the guise of the government's police power.[154] Government-imposed conditions on development that implicate a sufficiently specific property interest—such as the interest payments in *Phillips* and *Brown*—may also become a *per se* taking. And *Nollan* and *Dolan* both reflect an underlying concern that government will use its regulatory authority to condition development rights on obligations

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150 *See, e.g.*, Reznick, *supra* note 4, at 756; *see also* Siegel, *supra* note 4, at 589 (discussing and disagreeing with the view of property rights advocates that *Nollan* and *Dolan* may still apply to *ad hoc* monetary obligations).

151 *See supra* note 35 and accompanying text.

152 *West Linn IV*, 349 Or. 58, 87, 240 P.3d 29, 45 (2010).

153 Penn Cent. Transp. Co. v. N.Y. City, 438 U.S. 104, 124–25 (1978) (noting that the nature of the government power behind a regulation factors into the regulatory takings analysis).

154 *West Linn IV*, 349 Or. at 86, 240 P.3d at 45.

"so onerous that, outside the exactions context, they would be deemed *per se* physical takings."[155] Given that a development condition may result in a *per se* taking regardless of the government power invoked, the specificity of the property interest implicated—rather than the power used to extract the condition—should dictate whether *Nollan* and *Dolan* apply.

Second, courts should pay greater attention and offer more precise holdings in regards to the property interest implicated by a condition on development. While differences may certainly exist between a monetary obligation and a paradigmatic physical taking of real property, not all monetary obligations "function" in the same way. For one, *ad hoc* monetary obligations required in exchange for development rights apply differently and may implicate more discrete property interests than uniformly applied development fees.[156] And as noted above, both *Brown* and *Phillips* suggest that some forms of monetary obligation may amount to physical takings if they involve a discrete source of funds in the possession of a private party.[157]

Thus, to assess whether the exactions analysis applies, it proves insufficient to conclude that a condition imposed on development amounts to the "functional equivalent" of a monetary obligation.[158] Rather, courts should focus on whether a condition imposed impacts a property interest—real or personal—specific enough that its seizure would otherwise constitute a physical taking. If it does, *Nollan* and *Dolan* should apply; if not, a challenge remains to the regulatory action under *Penn Central* or the Due Process Clause.

But ultimately, this approach would not change the outcome of the exactions claim in *West Linn*. While the City required WLCP to make extensive improvements to public property, the obligations imposed on WLCP arguably did not implicate any discrete property interest. For one, services rendered may carry some value, but unless highly specialized or based on unique expertise, they lack the "specificity" to amount to the functional equivalent of physical

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155 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005).

156 The Oregon statute creating a statewide system development fee provides that the charge "does not include any fees assessed or collected as part of a local improvement district or a charge in lieu of a local improvement district assessment, or the cost of complying with requirements or conditions imposed upon a land use decision, expedited land division or limited land use decision." OR. REV. STAT. § 223.299(4)(b) (2009).

157 *See supra* note 146 and accompanying text.

158 *See Lingle*, 544 U.S. at 539; Kent, *supra* note 2, at 1842.

property.[159] Moreover, the future dedication of supplies to improve sewer lines and streets implicates a different and less specific property interest than the direct appropriation of presently held monetary funds.[160] If an *ad hoc* condition on development rights does not amount to a direct physical taking, it finds no remedy under *Nollan* and *Dolan* and should proceed under a theory of regulatory takings or due process.

CONCLUSION

The decision of the Oregon Supreme Court in *West Linn* offers a useful analysis of how the exactions analysis may apply to off-site conditions on development, yet its lasting effect and influence remains uncertain. The decision also provides little guidance to future courts on how to determine whether the exactions analysis applies to a given development condition. Yet Oregon is not alone in this regard. Courts across the country struggle to determine whether and when to apply the exactions analysis to *ad hoc* development conditions. As both development fees and *ad hoc* development conditions become increasingly common, courts must clarify the scope of the *Nollan* and *Dolan* analysis.

Although the U.S. Supreme Court denied certiorari in *West Linn*, the scope and nature of the exactions analysis still demand clarification. Specifically, the exactions analysis should be confined to conditions that impact a property interest—whether real or personal—specific enough that its seizure constitutes a physical taking outside the exactions context. This approach would provide a comprehensible standard for government bodies trying to develop land use strategies, guide landowners seeking to challenge development conditions, comport with the principles of *Penn Central*, and respect the distinction between physical and regulatory takings.

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159 In general, the U.S. Tax Code recognizes the inherent monetary value of goods and services. *See* I.R.C. § 61(a)(1) (2006); s*ee also* George James Bagnall, Comment, *Notes of the 1991 Advisory Committee for the Amendment of Federal Rule of Civil Procedure 45: Is the Compulsion to Testify of an Unretained Expert Witness a Taking?*, 83 OR. L. REV. 763, 766–73 (2004) (noting that whether compelled expert testimony constitutes a taking depends on the specialty of the testimony provided).

160 *West Linn IV*, 349 Or. 58, 83, 240 P.3d 29, 43 (2010) (distinguishing "the imposition of a new monetary obligation from the acquisition of accrued interest on an existing account" at issue in *Brown* and *Phillips* (citing McClung v. City of Sumner, 548 F.3d 1219, 1228 (9th Cir. 2008))).

Most importantly, it would bring some measure of clarity to federal exactions law.