20-1447, 20-1466

United States Court of Appeals for the Sixth Circuit

F.P. Development, LLC,

Plaintiff-Appellee/Cross-Appellant,

v.

Charter Township of Canton, Michigan.

Defendants-Appellant/Cross-Appellee,

On Appeal from the United States District Court
for the Eastern District of Michigan
Case No. 3:18-cv-13690

BRIEF OF *AMICUS CURIAE* LIBERTY JUSTICE CENTER IN SUPPORT OF PLAINTIFF-APPELLEE/CROSS-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

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INTEREST OF THE AMICI CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation center located in Chicago, Illinois that seeks to protect economic liberty, private property, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g., Janus v. AFSCME,* 138 S. Ct. 2448 (2018).

This case interests *amicus* because the protection of private property rights is a core value vital to a free society. To that end, the Liberty Justice Center represents property owners in a variety of cases around the country. *See, e.g. Leibundguth Storage & Van Serv., Inc. v. Vill. of Downers Grove*, 939 F.3d 859, 860 (7th Cir. 2019); *Mendez v. Chicago*, Cook County Illinois Chancery Court No. 16 CH 15489; *United States v. Ford*, Southern District Of New York No. 7:19-cv-09600-KMK.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Supreme Court precedent holds that, before a local government can take an exaction without compensation, the burden is on the government to demonstrate that the imposition is roughly proportional to the specific impact the government wishes to mitigate. This rough proportionality can only be identified through an individualized assessment of the particular property at issue, and the site-specific

[1] Fed. R. App. P. 29 statement: All parties consented to the filing of this brief, and no counsel for any party authored any part of this brief, and no person or entity other than *amicus* funded its preparation or submission.

impacts of the owner's use of that property. Not only can the Township in this case not show a site-specific proportionality that justifies its exaction, it has not even attempted to do so.

The district court correctly found that the Township's lack of any case specific analysis doomed their attempt to take property from F.P. Development. In doing so, the court below properly relied on *Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74, 95-96 (Tex. App. 2013), which applied the correct rule under the takings clause to a similar tree-removal ordinance. As in *Mira Mar*, the government in this case is attempting to foist onto a property owner the cost of unrelated projects that bear no reasonable relationship to the impacts of the specific land use at issue. *Amicus* submits this brief to explain that the court below, like the Court in *Mira Mar*, properly applied the teaching of existing Supreme Court precedent. For this reason, the portion of the judgment below that found the Township's ordinance to be an unconstitutional exaction should be affirmed.

ARGUMENT

The Fifth Amendment Places the Burden on the Government to Demonstrate Reasonable Proportionality Via an Individualized Determination Specific to the Property at Issue.

The takings clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Government actors are therefore barred from putting the private property of an

individual to a public use without first providing that individual compensation for the exaction—it is neither right nor just to single out individuals to bear the cost of fulfilling the public good.

But neither have courts been willing to prevent government from imposing regulations on the use of property. Indeed, general zoning and similar ordinances have long been upheld against challenge under the takings clause. *See generally Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). What is needed therefore is a criteria for determining which impositions courts will and will not find require compensation.

Under current precedent the Supreme Court has developed a test that sorts the compensated takings from the uncompensated. In *Nollan v. California Coastal Commission*, 483 U.S. 825, 836-37 (1987), the Court held that conditions on the use of property must show a "essential nexus" between the condition and the legitimate government interest the government wishes to further by the condition. The Nollans wanted to build a house on some beachfront property; the government would only allow it if they granted an easement to the beachgoing public. As the Court explained, "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion." *Id.* at 837. Since the justification for the restriction—California argued the house would block the ocean view—was not ameliorated by the condition imposed—an easement for the public to access the beach—the condition was a taking that required compensation.

A few years later, the Court elaborated on the nexus requirement in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Dolan sought to expand her retail store and pave its parking lot, but the City would only allow it if she dedicate some of her land—partly to a floodplain "greenway" and partly to a bike path. The court held that in order to show a *Nollan* nexus, there must be a "rough proportionality" between the restriction and the government interest. *Id.* at 392. In order to pass muster under *Dolan* therefore, "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* Two aspects of this test bear emphasis: first, "the city," or here the Township, must make the determination—the burden is on the government to show the nexus. Second, it must be an "individualized determination" focused on the "proposed development"—that is, the government's burden is demonstrate that nexus via individual assessment of the specific use to be carried out at the specific site.

Nor can the government meet this burden with perfunctory rationalizations. The City in *Dolan* argued that the larger store would add *some* amount of stormwater to the greenway's floodplain, and the new parking lot would mean *some* sort of increase in traffic that could justify the bike path. The court rejected both the greenway—"[i]t is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems"—and the bike path—"the city must make some effort to quantify its findings in support of the dedication for the

pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated." *Id.* at 394-96. The Court was clear that the burden to make these showings is on the government. *See id.* at 395 ("the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement.")

More recently, in *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013), the landowner sought to build a home on three acres of wetlands he owned, and as mitigation agreed to cede a conservation easement of eleven acres of adjacent wetlands. *Id.* at 601. The government rejected *Koontz* proposal, instead demanding that, in order to get his permit, he pay for improvements to 50 acres of unrelated government owned wetlands miles from his property. The Court rejected the argument that these sorts of nontangible fines or fees are somehow immune from takings clause scrutiny, holding that "that so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*." *Id.* at 612.

In interpreting this line of precedent, the court below relied on *Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74, 95-96 (Tex. App. 2013)—and for good reason, since *Mira Mar* property applied the *Nollan/Dolan* test to a tree ordinance like the one at issue in this case. *See F.P. Dev., LLC v. Charter Twp. of Canton*, 456 F. Supp. 3d 879, 894-95 (E.D. Mich. 2020). The city in *Mira Mar* imposed "tree redistribution fees" in order to "promote urban forestation." *Mira Mar*, 421 S.W. 3d

at 95. It therefore demanded that the developer in that case pay per-trunk-inch of the trees removed from the subdivision, and the city would take that money and use it to plant trees on public property, purchase woods for conservation, and fund outdoor nature education. *Id.*

The court found that once the developer proved the trees were an exaction, the burden shifted to the City to prove a nexus and rough proportionality. *Id.* "The City assert[ed] it proved the rough proportionality of the fees by proving the fees were based on the trees appellant removed from the property," *Id.*, more or less the same argument the Township makes in this case. *See* Township Br. at 24-26. But the "proportionality" required by *Dolan* is not a calculation of the cost exacted per unit of development undertaken. This is not the excessive fines clause, where one might compare the cost of the offense to the fine imposed. *See*, *e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682 (2019). Rather, the imposition must be "related *both in nature and extent* to the *impact* of the proposed development." *Dolan*, 512 U.S. at 391 (emphasis added). In other words, the exaction must in some substantive way mitigate the *specific impact* of the development on the public interest.

The court in *Mira Mar* recognized this and found that funding nature preserves and outdoor education was not a mitigation of the specific impact of removing trees to build the subdivision at issue—while these might be valuable government initiatives, the need for these nice things was a preexisting desire unrelated to the development. 421 S.W. 3d at 96 (the evidence "does not explain how the removal of trees on appellant's private property created such a need that

did not exist before the trees were removed"). As in *Koontz,* the city wanted to require the landowner to shoulder the burden of improving or preserving some completely unrelated property by paying for projects of the city's preference. The ordinance in *Mira Mar* therefore met the standard for a taking without just compensation. *See also Greater Atlanta Homebuilders Ass'n v. DeKalb Cty.*, 277 Ga. 295, 306 (2003) ("nor does the tree ordinance provide for an individualized determination of that proportionality").

This basic understanding—that the burden is on the government to make a site-specific inquiry, is not unique to *Mira Mar*, or to this case. Rather, it is the consistent holding of courts around the country applying the principles of *Nollan* and *Dolan*. *See, e.g.*, *Horne v. USDA*, 750 F.3d 1128, 1144 (9th Cir. 2014) ("At bottom, Dolan's individualized review ensures the government's implementation of the regulations is tailored to the interest the government seeks to protect"), reversed on other grounds, 576 U.S. 350, 135 S. Ct. 2419 (2015); *Goss v. City of Little Rock*, 151 F.3d 861, 863 (8th Cir. 1998) ("Little Rock argues that the land it required Goss to dedicate is worth less than Goss maintains. Whether or not this is true, it does not show that the value of the land is proportionate to the impact that rezoning would have on traffic"); *Hensler v. City of Glendale*, 8 Cal. 4th 1, 10 (1994) ("An individualized assessment of the impact of the regulation on a particular parcel of property and its relation to a legitimate state interest is necessary in determining whether a regulatory restriction on property use constitutes a compensable taking"); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696

(Colo. 2001) ("Colorado's regulatory takings statute has codified the *Nollan/Dolan* test . . . [applying it to] charges that are determined on an individual and discretionary basis") (internal quotation marks omitted); *Cheatham v. City of Hartselle*, No. CV-14-J-397-NE, 2015 U.S. Dist. LEXIS 25360, at *12-14 (N.D. Ala. Mar. 3, 2015) ("The sole consideration for the defendant's approval is the division of the land. Therefore, the court looks only to the impact of dividing one parcel into two, for the purpose of selling one of those parcels, for the degree of connection the law requires"); *see also Schneider v. Cal. Dep't of Corr.*, 345 F.3d 716, 721 (9th Cir. 2003) (in a suit over prisoner funds, explaining that "[f]or takings purposes" "the relevant inquiry is not the overall effect on fund administration but whether any of the individual inmates themselves have been deprived of their accrued net interest"); *Roop v. Ryan*, No. CV 12-0270-PHX-RCB (JFM), 2013 U.S. Dist. LEXIS 86864, at *9 (D. Ariz. June 19, 2013) (applying *Schneider*).

The Township's arguments on this point at best misunderstand, and at worse ignore the relevant standard. In defense of proportionality, they argue that, well, a Township employee showed up and counted the trees. Township Br. at 24. They then argue that the cost imposed per tree was about market rate for trees. *Id.* at 24. Finally, they argue that they use the funds to replace trees, and a 1:1 ratio for replacement of removed trees is obvious proportional, because, well, 1 is proportional to 1. *Id.* 26-27. It's just math.

Yet *Dolan* cautions us that "[n]o precise mathematical calculation is required," 512 U.S. at 391, and for good reason: the question is not whether the

trees planted equate with the trees removed. The question is whether the *specific harm* caused by the tree removal *on F.P. Development's property* is somehow abated by exaction imposed. The Township isn't using the money to, say, repair environmental damage to the property of F.P.'s neighbors. Rather, they use the money to plant trees elsewhere in the town: "It's a goal to create a tree canopy on our major streets," according to the testimony quoted in their brief, "we replace those trees [removed] elsewhere within the community to re-establish that canopy". Township Br. at 23. They ground this interest in "the legitimate governmental interest . . . [in] preservation of aesthetics". *Id* at 22.

But however beneficial the beautification of Canton may be, F.P.'s brush-clearing can't be a basis for the Township to extract this benefit. The takings clause is, at bottom, a protection for the individual against being forced to pay for the benefit of the collective. *Armstrong*, 364 U.S. at 49. For this reason, Courts require that the burden imposed be addressed to the assessment of individual responsibility for some impact—it is not the job of a property owner to personally fund projects that should depend on tax dollars. *Mira Mar* captures the point well: it was not the responsibility of the developer in that case to pay for nature preserves somewhere else to earn the privilege of putting its property to a legal and beneficial use. So too here: if the Township cannot meet its burden to show how and to what extent the tree removal detracted from the aesthetics of Main Street, they cannot force F.P. to shoulder the burden of making Main Street pretty again.

CONCLUSION

For the reasons stated above, and those given by Appellee/Cross-Appellant in its own brief, the portion of the decision below that found an impermissible taking should be affirmed.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2451 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Word 2016 and uses a proportionally spaced typeface, Century Schoolbook, in 12-point type for body text and 11-point type for footnotes.

December 11, 2020

/s/ Brian K. Kelsey

CERTIFICATE OF SERVICE

On December 11, 2020, I filed this *Brief of Amicus Curiae Liberty Justice Center*, using the CM/ECF System, which will send a Notice of Filing to all counsel of record.

December 11, 2020

/s/ Brian K. Kelsey