ORAL ARGUMENT
March 5, 2003
02-0369 – Town of Flower Mound v. Stafford Estates

BROWN: Approximately four months ago I stood before this court in Sheffield v. the City of Glenn Heights on behalf of Glenn Heights and local governments across the state and asked this court to bring a principled and reasoned means of determining what is a taking in the context of a rezoning of land. Today I have the privilege of once again requesting this court to provide much needed guidance to local governments to determine what is a taking in the context of development with conditions. Specifically the two-pronged test in *Dolan* and to adopt a clear standard that can tell Texas Jurisprudence when *Dolan* applies, how *Dolan* applies and at what point of time must *Dolan* challenge under the law. To that end I would like to argue four basic propositions today.
PHILLIPS: You're not making any argument that the Texas Constitution should be interpreted differently than the United States Constitution in this area.

BROWN: No your Honor. There are no Texas cases on this.

PHILLIPS: And you haven't come up with a creative solution?

BROWN: We are not arguing that it should be provided any broader. The recent jurisprudence from this court tends to indicate at least to me that the Texas Supreme Court is in essence federalizing its land use practice that is cotermitus with the United States Constitution.

ENOCH: Let me ask you also question . . . are we arguing about whether the city can require the developer to build a road adjacent to its development, or are we simply talking about whether the city can require them to replace the road with concrete road as opposed to repairing the asphalt road? Do you understand my question?

BROWN: I believe so Justice Enoch. *Nolan* to my knowledge has challenged the basic right of cities to require development improvements either on site or immediately adjacent. This case obviously deals with a requirement that a border road be improved with an expenditure of money uh without the dedication of land. As a practical matter I will submit that if the Court of Appeals ruling is not overturned it will effectively reduce the ability of local government to require needed developments uh needed improvements off site . . .

HECHT: Why is that?

BROWN: Simply because the standard that has been applied is so broad. What the Court of Appeals said is that *Dollan* applies to any exaction which they define very broadly is any condition of approval placed upon development.

HECHT: But as long its proportionate you shouldn't have to worry about it.

BROWN: Well the problem is not the proportionality. The problem is the process by which you get there. The most fundamentally difficult proposition that came out of the *Dollan* case from the local government prospective is not the rough proportionality standard. It's the fact that the traditional presumption of validity that is afforded to legislative determinations and that says that it is the landowner who must challenge and who must bare the burden of proof of striking down a condition as unconstitutional has been shifted. That is a dramatic rewriting of the way land development and regulatory aspects have had that have been undertaken.

HECHT: Apart from the burden . . . apart from who has to prove it there's nothing wrong with the standard is there? I mean why should a city be able to impose a condition that is more onerous than the benefit that's being converted to the development?

BROWN: There's nothing wrong with the standard as long as the standard is applied properly. And that standard must be applied in conditions where there is a dedication of land, and only conditions that are applied on an ad hoc adjudicative format. Remember even on the traditional takings jurisprudence just under any land use regulation, whether it's zoning, there is always an ability of a property owner to challenge that standard. Under this court's decision in Mayhew this court said the first prong is that there has to be a substantial advancement of a legitimate governmental means. But that prong is presumed valid, and the landowner or owner has - the developer bears the burden of proof.

It's important to remember looking back at both the Nolan case and the Dolan case how these cases arose. Both of those cases involved dedications of land.

HECHT: But is all this about the burden of proof? Is that what it boils down to?

BROWN: The burden of proof is clearly one of the most important aspects of the case. Because if the CA's decision is upheld as it stands now, and the government has the burden of proving on every condition that imposes upon a developer, potentially in advance of imposing a condition that it's roughly proportional, then what you do is you force governments to spend an inordinate amount of money to prepare studies to possibly defend a standard that may or may not ever be challenged. It makes it completely proactive. I mean every conceivable development conditions could apply under this.

HECHT: It just seems it's hard to argue that any government should impose a condition on land use that is more onerous than the benefit _____.

BROWN: And I agree with that. And this court in City of College Station v. Turtle Rock back in the 80's looked at that issue in terms of parkland dedication, and said that a government as a condition of approval of a subdivision could require a developer to give land for parks or money in lieu of land for parks. And they came up with a reasonable relationship standard and said there has to be a relationship. You can't go out and just have an all out land grab. If the impact of the development is this small, you can't get this much park land. And they said you use studies. But the

important thing there is they said that whatever the government comes up with we presume to be valid, and that if an applicant or a landowner does not agree with it, they have to sue to challenge it. The Turtle Rock case didn't say that the government in advance had to do an individualized study on every particular condition. And that's the real evil from the local government perspective is that this shifts this dramatic burden on local governments to in advance come up with the studies to defend against conditions that may or may not ever be challenged but the initial burden is on the municipalities.

O'NEILL: But don't they have to gather get that information anyway in anticipation of a suit that might result? Whether they did it at the front-end or the back-end isn't it better to have them do that at the front-end?

BROWN: The problem is that there are certain things that are almost inherently presumed to be proportional. For example, there's nothing in the CA's decision that would not apply Dolan to a traditional requirement that a subdivider provide internal streets within their subdivision. Now I think sitting here we all know that if you're going to develop land, you need streets within your subdivision. But typically those streets are connected to other subdivisions so that all of the traffic inside an internal subdivision is not 100% attributable to that subdivision, but a good majority will be. Probably 80-85% depending on the circulation system. Under the CA's decision, however, the city would have to do a study and spend taxpayer money to prove this in advance, because if they didn't do it some developer might come in after they received plat approval, after they had gotten all the benefits of subdivision development...

O'NEILL: But doesn't that go more to the waiver piece? If there is no waiver here, then under the 10 year statute, the landowner could do that anyway, so wouldn't the city want to gather that information for a possible suit in the future? What's wrong with requiring them to quantify the proportionality analysis beforehand?

BROWN: The problem is is a pragmatic - local governments can't afford to do that.

O'NEILL: I don't see how the burden of proof is going to affect that.

BROWN: The burden of proof affects that simply because if the government has the burden of doing tests in advance in anticipation of a challenge, then they are going to have to in essence do studies on every single condition. The limited financial resources of government are better suited for use on studies when they know there will be a challenge. A challenge is made, and then they have a chance to respond to it.

ENOCH: It's your position that the city can arbitrarily decide to require a homebuilder to rebuild an access street and then make the homebuilder try and prove that that's not reasonable. It seems to me that if the city has no reason for requiring that to be done, then it seems to me you violate the takings clause. If the city just says, builder you are going to build that house over there, and I want $500,000 to rebuild this street over here adjacent to it. You lose, because you're saying

you can't build your house without doing it. You agree that you have to have some reason for doing this. So why wouldn't you have the burden to come forward with establishing that you had valid reasons for imposing these kinds of costs on the builder?

BROWN: The question is the standard that applies. If a city has a regulation that says you have to build your houses out of brick verses wood, because that's our community standard. We believe that the brick is more resistant, more fire retardant. That's a standard that's a condition of the development. But the question is under the CA's opinion would we have to do a rough proportionality study there, or if that standard was so out of whack a developer could sue that and say that standard doesn't pass minimum constitutional standards of rationality.

And J. Enoch you said a city could arbitrarily impose. I agree with you that if there's an arbitrary imposition, an ad hoc imposition of a standard where an individual is singled out for conditions that are imposed upon them that are not legislatively created conditions, but are in essence conditions designed to leverage a land use deal, that's one of the aspects that Dolan was concerned with.

HECHT: Is that the Ehrlich case?

BROWN: Yes. The Erlich case out of California. That is the way California courts have interpreted Dolan. They have said that Dolan does apply to fees, not just land. And we respectfully disagree with that aspect. But they have recognized the other limitation placed by the US SC, that the condition has to be one that's not legislative, but one that in essence is an ad hoc adjudicative decision.

O'NEILL: Can you walk me through how you think this opinion should be written? Dolan doesn't apply because it doesn't involve a dedication of land would be step 1.

BROWN: That's right.

O'NEILL: Now what? What do you do then? Is it an absolute _____?

BROWN: If Dolan doesn't apply, then the standard to be applied to any condition is the standard that this court has articulated in Mayhew v. The Town of Sunny Vale, and many other cases which is I look at the zoning standard, and I ask first does it substantially advance a legitimate governmental interest? And then I look at the regulation and I look at the impact of that regulation on the totality of the property interest owned by the property owner.

O'NEILL: And I guess my question is, how is that different from the rough proportionality analysis if it is?

BROWN: It's much different. Because under a traditional takings analysis, first of all you don't just look at the individual property segment that's impacted by the regulation. You look at the

property owner's property as a whole.

O'NEILL: So you're saying that the analysis of how we assess this exaction, whether it's property or fees, if Dolan doesn't apply the analysis is going to fundamentally change between rough proportionality, a d what you're saying is established Texas law that has a different test?

BROWN: What we're saying is established Texas law to follow what the SC has done to date, which is apply Dolan only to situations that involve the dedication of land.

O'NEILL: I understand that. What I'm trying to get at is if Dolan doesn't apply, I'm trying to figure out how the test is different than the rough proportionality test that the US SC advanced in Dolan?

BROWN: If Dolan doesn't apply this court should apply its already established law in College Station v. City of Tigard.

O'NEILL: What is the difference between those two tests? Rough proportionality verses what we did there.

BROWN: Rough proportionality basically looks at the stint and the nature - it's an undefined test. If you don't use rough proportionality what do you use?

O'NEILL: Yes.

BROWN: You use the test that's set forth in Mayhew and Agans(?) and Penn Central. The first question is does it substantially advance a legitimate governmental interest? The burden however is on the property owner to establish that. Then you look at the impact of the regulation on the property owner taking all their properties as a whole, and you look at the character of the governmental action, the extent of diminition in value.

O'NEILL: That sounds like rough proportionality to me. It' just a different burden of proof you're saying under our jurisprudence?

BROWN: I would suggest they are dramatically different for a number of reasons, not the least of which is that under traditional takings analysis the Mayhew example, for example, you look at - you don't just look at the segment of property that's being impacted. You look at the entirety of the interest. For example, a setback requirement that says you can't build a house within 20 feet of your home...

O'NEILL: Take me through this opinion as you would have it written given Dolan doesn't apply?

BROWN: Dolan doesn't apply, therefore, the requirement at issue here is a monetary

requirement that the developer provide money towards the financing of a street. We look at the street assessment costs - how much that street cost, and then you say - it's basically a $500,000 cost, taking that cost and applying it to the totality of the property, the subdivision in its entirety, is that cost so severe that it made all of the property that the property owner owned no longer economically viable? Is the reduction in the fair market value of the totality of the property interest so severe that it is a taking similar to the issues that we discussed in Glenn Heights.

WAINWRIGHT: Why do you contend that Del Monte Dunes resolved the question that Dolan does not apply unless there's a dedication of property. Del Monte Dunes only says we have not extended the test from Dolan to the situation of exactions. What's your argument that Dolan doesn't apply here?

BROWN: I believe that the SC was keenly aware of the debate going on on Dolan and how it applied. If the court goes to the web site in Westlaw and looks at Del Monte Dunes, and looks at all of the amicus briefs, one of the central issues that was argued there is what does Dolan apply? Should it only be limited to land dedication cases in an adjudicative fashion? And the SC I don't believe causally or carelessly used the words when they said that Dolan has never been extended beyond exactions, which they then defined as dedications. And dedications always involve land. To say that the SC didn't know the message they would be sending by that language to me does not give that court enough credit.

WAINWRIGHT: Why couldn't the court have just been saying that we haven't had the case to address exactions under Dolan yet?

BROWN: They didn't say that. I think they could have clearly said...

WAINWRIGHT: What they said was, we have not extended the rough proportionality test of Dolan beyond the special context of exactions. That's all it says. It didn't say it doesn't apply. It says we have not extended it beyond there. It could have meant yet. Perhaps they meant never will. But they didn't say do not do it, and they didn't say they never will.

BROWN: No it didn't. But if you will read other cases, such as the recent Tahoe(?) Sierra case, which has a number of different opinions. The justices for example on the Akins(?) substantially advances test, went out of their way to say that well we are offering no opinion as to whether this test applies or not. In my opinion, had the court meant to leave open this question they certainly could have done that saying we are not deciding whether Dolan applies in another context. To date they have never gone beyond this particular context. And once again...

WAINWRIGHT: So you don't think the SC left open that question in Del Monte Dunes? You think they answered it?

BROWN: In my opinion they closed it. And the SC's of Colorado and South Carolina in two cases cited in our brief have answered that and have determined that language has closed that

question.

ENOCH: You raised this notion about the Mayhew test being a governmental interest and then you look at the whole package and is it out of relationship. But there was an example used in Dolan about the notion that you could probably restrict somebody from yelling fire in a crowded theater, but you couldn't then accept them from yelling fire if they could pay you $100. What happens with your argument if well the developer can afford to pay us $500,000 so we can go rebuild this street, because you know it's just 10% of the total cost of this development. But what about an individual who lives next to that street and wants a permit to build some sort of artist studio or a garage, and then can't do that because they can't afford to pay the money to go rebuild this street. Is your land use restriction being kind of discriminatory based on sort of that example that some can do the development because they've got the cash to rebuild part of the street and some can't do the redevelopment because they don't have the cash to rebuild this other street? This isn't dedicating some parkland out of the property they already own. This is coming up with cash out of their pocket not to develop that property, but to rebuild some street next door.

BROWN: Obviously that's no more discriminatory than just quite frankly the standard realities of land development. Many communities say, you want to build here, you have to build on a big lot, and you've got to build a big house, and it's got to be a nice, big house. By definition, that excludes a lot of people from that market. It's certainly not discriminatory.

ENOCH: If I own the land it seems to me there's a different economic mix if I'm being restricted on what I do with my land. But it seems to me an entirely different question if my ability to do with my land as I please depends on my paying the city to go do something on somebody else's property. I can't contribute land for that. I have to actually come with cash out of my pocket.

BROWN: I would submit that's fundamentally fair. When land is developed the impacts of the development go beyond the parameters of a subdivision. I mean they impact roads that go way beyond the subdivision itself. So to take the position that government shouldn't have the right to require some mitigating conditions to address the impacts of development on the rest of the town's water, sewer, fire systems would be an unreasonable limitation. And I submit that not only does that happen all the time. It's entirely constitutional. And it's entirely lawful. And it's entirely fair if the system is one that is applied equally across the board and that everybody basically has to bear the same rough burden in terms of paying fees or impacts.

JEFFERSON: If we decide that Dolan does apply, and we also decide that the city has the burden of proof on individualized findings, is the case over for you under this record?

BROWN: No, not at all. At trial the court allowed us to put evidence in the record to establish rough proportionality. The very last comment the judge made as he left the bench and we quoted it in our reply brief is that he said he considered all the evidence submitted in all the bills and making in ultimate determination for liability. We believe the evidence does show that this impact was roughly proportional once you properly consider the function of impact fees, the amount of impact

fees paid verses the amount of impact that the impact fee studies showed that this development had on the road system in its entirety. We believe that we clearly met the rough proportionality standard, and that if it applies, that the court erred in not considering impact fees, and more importantly erred in trying to dissect the fee, the standard of saying you didn't justify concrete verses asphalt under rough proportionality. We believe that is fundamentally flawed that you take a regulation under Dolan and you analyze it as a whole, that it's not designed to break into constituent parts the legislative judgment of whether a community says I want concrete verses asphalt or I want a 10 foot road verses a 15 foot road. You just look at what the government has imposed and its impacts in relation to the impacts of the subdivision.

SMITH: One issue about Stafford being barred from challenging the city's street improvement requirement because they didn't bring suit to challenge the requirement prior to obtaining to find a plat approval. Could the city require the waiver of Stafford's right to sue over the street improvement requirement as a condition of the plat approval basically to protect themselves that way? Settle it before the plat's approved?

BROWN: You're asking whether Flower Mound had the power in essence to pass a local rule or regulation that would have required the developer to challenge the conditions or identify any challenges prior to the approval?

SMITH: I was thinking more on a case-by-case basis. If there is some concern of the city of getting sued for the 10 years following this could they say we're not going to approve anything unless we discuss it and we agree there's not a problem and you waived any challenge you might have based on this type of suit?

BROWN: Well the town could say that. And the CA certainly in their language tend to imply that perhaps the town had the ability to require that. I'm not sure personally that we do. I mean the town is a home rule city. They can pass those laws not inconsistent with state law. But our state laws on platting in subdivisions basically set out the parameters of approval. It's nondiscretionary. The problem I would suspect that had we just before plat approval, let's say we had some suspicion that we were going to be sued here, I suppose that the town could have gone into court and asked for a declaratory judgment. But the problem there is do we actually have a controversy. And unless the landowner is willing to stipulate that there is a controversy we may not get past the basic test of having justiciable controversy. So it's very pragmatic given the law of the day to say that cities have the ability to go out in advance. And more problematically we have no way of knowing because practically every developer that goes through the development process will stand up at some part of the process and say, I don't like this standard, I don't like that standard, I'll do it, but I'm doing it under protest. For nine out of every ten that complain only one will go to the next step and even try to make some demand, and of that group, even a smaller few will actually take you to court.

So unless we are going to take the position that local governments are going to have to take their limited resources and judicially, in advance, get determinations every one of their standards are constitutional because like in this case if we wait till the road is completed, the only remedy for the

government is to take unfunded money from the treasury and pay it back to the landowner. Had the landowner brought challenge before the plat was approved, which is the exact factual circumstance in both Dolan and Nolan, Mrs. Dolan specifically challenged the condition on her building permit because she was afraid that if she complied with it she would be deemed to waive that. Nolan and Dolan are not damages cases. They are unconstitutional condition cases designed to provide a framework on which a landowner can challenge a condition before complying with the condition to see if it's struck down.

O'NEILL: Under the Mayhew analysis that you're saying applies here absent Dolan, I'm not sure what that looks like when we're talking about money as opposed to property. Because typically those cases revolve around diminished access and what that does to the development as a whole, the value of the development as a whole. If we try to apply that test to cash what does that test look like, that the project is then not as profitable to the developer and at what point that becomes a taking, and is that what we're addressing in Glenn Heights?

BROWN: Both in the Glenn Heights case and this case, they both involve money. That's why developers sue for the most part is money.

O'NEILL: At what point do you determine that you've substantially reduced the value of the property when it's money?

BROWN: Using the Mayhew standards and the US SC standard, what the court has said is if the restriction, and the restriction can be "I can't use my land," or the restriction can be "I had to pay money," if the restriction is such that looking at the totality of the interest involved it reduces the value of the property so severely that it...

O'NEILL: How do you determine that? If it's going to be little less profitable or does it have to be so severe that it precludes the development?

BROWN: It has to be extremely severe. What the Lucas case told us and what the Tahoe Sierra case told us is that basically...

O'NEILL: Look. I don't want to reargue Glenn Heights. Is that what we're going to be answering in Glenn Heights?

BROWN: Yes we are. The issue in Glenn Heights is the degree of economic impact that's so severe to constitute a taking. That also applies here. But we're not talking about land. We're talking about money.

PHILLIPS: Did the developer have some expectation that you would waive these requirements?

BROWN: I can't speak for the developer's expectations. To my knowledge nothing in the record would indicate that they had that expectation. They certainly came in and applied. They

requested to be relieved from 50% of this road cost, and they were denied that. But, no, there was no allegation. This suit is certainly not about the denial of a variance. Obviously the denial of a variance doesn't implicate Dolan. Denial of a variance would be under traditional arbitrary and capricious standard.

Now they are arguing that because a variance was denied, that somehow takes the broad spectrum of legislative standards that apply across the board and converts it to an administrative one. Their argument in essence is that the exception swallows the rule. And one of the things that this case has troubled myself and other local governments, particularly the American Planning Association in their amicus brief, is the proposition that general applicable legislative standards which are not subject to Dolan, and which are subject to a more deferential view of the public interest, can be converted into the heightened Dolan standard by virtue of having a waiver in a variance procedure. Because every piece of land is unique. And because of that, every land development regulation for the most part has some kind of variance procedure. And that procedure is designed to protect the landowner, not the government. If this case stands as it sits right now the practical import will be that local governments for the most part I suspect will simply come up with a broad category of regulations that apply to everybody, and they will not provide any variances or any exceptions even those variances and exceptions could and would help the landowner. For fear that if they go down that trail they run the risk of converting their legislative standard into administrative ones and thus subjecting themselves to the Dolan rough proportionality test which requires them to bear the burden of proof and the exorbitant cost of running that Dolan gauntlet on every condition attached to the development of land.

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RESPONDENT

STANDERFER: I am here on behalf of Stafford Estates in support of a very well reasoned and very detailed CA opinion on the nature of this case that applied Dolan. We believed it properly applied Dolan to the facts of this case.

I want to address initially with the very last part of Mr. Brown's argument, which is that Dolan applies only to ad hoc adjudicative decisions rather than those of a generally applicable legislative ordinance.

I don't necessarily disagree with the argument. I've got a chart that gives you kind of the path to follow, at least in our opinion on this case. It's important to note however that in Dolan there was a generally applicable ordinance subject to an exception. And what the court essentially held was exactly what Robert admitted. The exception follows up the rule. What it allows is a city by means of an exception process to apply the ordinance only to certain limited types of development, for certain limited types of applicants. That is the very heart of Dolan.

HECHT: But Dolan is limited. You would agree with that?

STANDERFER: I do agree that Dolan is limited.

HECHT: Where is the limit?

STANDERFER: There is a fairly bright line test that's been adopted, not necessarily in the cases within the first few months of Dolan. There are several of those that don't make the legislative verses adjudicative distinction. But most of the cases within the last 3, 4, or 5 years make a very bright line test, and that is, first of all we've got two types of regulatory takings. Actually there's a third which is an actual invasion. The town actually drives a bulldozer through your property and installs a road. But that's not an issue in this case.

We have denials of development which is a differential review. It's the SC case of Del Monte Dunes. It's this court's case of Mayhew v. City of Sunnyvale. And it also deals with a case of Sheffield v. Glenn Heights, which is before the court.

O'NEILL: This left prong here under development exactions. You're saying that's the Mayhew prong, and the right one is the Dolan prong?

STANDERFER: Yes. The left one is denial of development...

O'NEILL: I'm sorry. Under development exactions. The left case under development exactions would be Mayhew, that the other side is arguing we apply, and the right case would be Dolan?

STANDERFER: That is correct. In part. It is clear that we do not have a denial of development case in this case. Our plat was approved. It was approved subject to a condition, which is, at least in the essence of the decision, is the Dolan test. The cases following Dolan have subdivided the applicability of Dolan. If you have a legislatively enacted, uniformly applied formulaic, and nondiscretionary fee, Dolan doesn't apply. Because the dangers inherent in Dolan of singling out a single individual or developer are not present. You don't have the danger of a plan of out and out extortion to quote Dolan.

We've cited the court to San ____ Hotel. The Rogers Machinery case has an excellent discussion of when Dolan applies and when it does not, and HBA _____ is not quite as concise, but it does have that discussion.

O'NEILL: Would you also engage in the same split, not just on the legislative adjudicative piece, but also on the real property verses cash piece.

STANDERFER: Although Nolan and Dolan both dealt with real property dedications or forced dedications, the cases that have come down subsequent to Dolan do not make that distinction. Their distinction is not the nature of the exaction...

O'NEILL: But they are sort of split.

STANDERFER: They are really not. The ones that talk about when Dolan doesn't apply are really legislative uniform, formulaic and nondiscretionary fees. The ones that apply Dolan - there hasn't been a case that I have seen that applies Dolan to a land take yet. The cases following Dolan from a broad array of areas in the country, broad number of states, they say it's not the nature of the exaction - real property verses non real property - it's the manner in which it's applied. If we have an adjudicative individualized or nongenerally applicable ad hoc and discretionary imposition, no matter what it is Dolan is going to apply. This division of the cases it harmonizes virtually every case that's come down since Dolan.

O'NEILL: How do you address the sky's falling argument that all the amicus have filed, that okay requiring brick homes rather than wood homes...

STANDERFER: An excellent question. My view is Dolan doesn't apply to those standard types of development ordinances and replace standard building codes. Brick verses wood. If you've got an internal subdivision street - concrete verses asphalt - as long as there...

O'NEILL: But aren't those subject to the homeowner's association ability to waive on a home-by-home basis? Can't they decide whether you're going to enforce or not enforce?

STANDERFER: There's another distinction that you're getting at, and one is, is it requiring a public improvement, or is it requiring an improvement that you make to your own land for your own use and benefit? I would argue that a requirement that there be a 10 foot setback or 30 foot setbacks instead of 10 foot setbacks, or that you use asphalt shingles instead of wood or brick instead of wood, or that you have a concrete driveway as opposed to an asphalt driveway, those are not Dolanesque and tight because there is nothing being taken for public benefit. A huge distinction that Mr. Brown has not addressed in his argument.

HECHT: So your argument boils down to because there were three other exceptions or variances or whatever to the requirement this is really a discretionary enforcement?

STANDERFER: It's not necessarily that there were only three of them. The town was unable to come up with a single other subdivision at trial that they had imposed the abutting street improvement ordinance against. Not one. Now there may have been some, but the town didn't offer any of that evidence.

HECHT: But I'm thinking of other cities. And there have been lots of subdivisions, and some got exceptions and some didn't, and so we're just going to have a jury trial over whether it was discretionary or not.

STANDERFER: What the SC says is that if you have an exception procedure, which essentially swallows the rule because it is completely discretionary, then that is one of the issues to be considered under Dolan. And that is, it turns what Mr. Brown argues is a legislative enactment into a purely ad hoc...

HECHT: But you think you've got to have some exception procedure. Very few rules in this area that would just be applicable across the board.

STANDERFER: I do. And that is because let's look at the town's ordinance. It would apply the same abutting roadway improvement requirement to a - we have 90 acres and 247 homes - the same public improvement requirement for 247 homes as it would have had the same development if it had been developed with 10 homes, 10 acre lots. Even though the impact of the two developments is clearly vastly different. It does not make a difference to the town at least in the development ordinance whether it's a 10-home, 500 acre development, or a 500 home, 500 acre development. They all have the same obligation. It does have the variance procedure. Unfortunately when it has complete discretion in the variance procedure, that is the exact circumstance under Dolan that said, Listen. This is ripe for abuse because particular landowners can be singled out for improper treatment.

HECHT: But you don't claim that you were singled out.

STANDERFER: Yes we do.

HECHT: Not like Erlich?

STANDERFER: Well it was much like Erlich. Erlich is a very similar case. In Erlich the developer was required to construct a drainage-wide drainage system that served more properties than just his own. His argument by the way, he made the improvements under protest and then sued to recover damages for the excess over that which was roughly proportional, and prevailed.

The importance is, what we've got is an obligation to make a public improvement that is imposed without certainty, without definite definitive guidelines that can tell the developer or the landowner in advance what's going to happen to me in this process...

HECHT: The concern is that you're asking for more definiteness than anybody can give without looking at the particulars like whoever the city official is that would do that sort of thing.

STANDERFER: We believe this case is very analogous to this court's case of Haines v. City of Abilene. It's an abutting roadway improvement case. In that case, and we cite it in our supplement brief, there was no development application. There was a subdivision and the town improved a road outside the subdivision. And it assessed the property owners that abutted that roadway despite the fact that they had no access to that road directly from their subdivision. They had to go out a different entrance and come around. What the court said is that (and this has been the law in Texas for over 100 years, since 1899 was the first SC case that dealt with abutting roadway assessments) if you're going to have an abutting roadway assessment nobody disputes the town's power to impose the taking. Same here. We don't dispute that the town has the power to require that an abutting roadway be improved under an ordinance. The issue is one of compensation. And what Haynes v. Abilene said was that you must look at these special benefits given to the property owner as a result of the take and determine whether or not the assessment for that improvement exceeds the special benefit attributable to the landowner. And what special benefit really means is value.

It also answers a second huge question in this case, which Mr. Brown makes his argument, that you've got to look at the roadway and our impacts on the town's complete infrastructure, the complete roadway system of the entire town. Haynes v. City of Abilene has answered that specifically with respect to abutting roadway assessments. It was not in the context of a development application. And what it said is, we know that special benefit can exceed a 3/4 mile radius. Because that's what the SC said in Haynes v. Abilene. It is a very localized review. Although it doesn't have to be specific to a particular piece of property. It can benefit all the property owners along the road. But what you can't have is a benefit that is in common with the benefit to all property owners within a city.

ENOCH: The city makes "the sky's falling" argument, as I understand it, that because all development conditions have exceptions to them, then this all swallows the rule. But I thought I

heard you say that Dolan only gets involved if whatever the condition that's imposed is a condition for public use as opposed to private. So if there was a variance for using slate instead of composition roof, that's not the type of thing that would subject the city. It's only if the city proposes a condition for developing your property that is a contribution to some public purpose elsewhere.

STANDERFER: We believe that's exactly right. In each one of the cases that have followed Dolan and applied Dolan to a non-land dedication - Stafford, Erlich, which was a recreation fee, Benchmark v. Battleground, which was an abutting roadway improvement case, and Christopher Lake, which was the entire watershed case. In each of those there was a requirement that the developer contribute something of benefit to the public, to the government. The government demanded that something be paid and exaction be contributed to the public good. There have been a number of cases that have come down, and they are cited in our brief, that talk about if it's not something exacted by the government to public good, then we don't believe that Nolan and Dolan applies. We believe at most that would be a differential review either under Del Monte Dunes, or under the San ___ Hotel...

ENOCH: Let me ask you on that point. We're talking about abutting street. You don't disagree that to the extent that that street meets the needs of your development, that they might require you to pay something for that. But to the extent that the money that's being paid is to rebuild the street, which then serves the public beyond what the service would be to your development, they have to demonstrate a benefit for that additional?

STANDERFER: That is in essence correct. (SIDE 2) **Side B does not start off where Side 1 ends, also volume is very low and hard to understand all of the questions.** ...would be a Dolan type of play if we had to build a pubic road through someone else's property to get to the main public street. However, the rough proportionality issue would clearly be established because we had to have it to serve our development. And that's where I think the town's argument completely falls apart. They had a road. The road was less than 18 months old. The CA said it had been rebuilt within 12 months. We said it had been resurfaced within 18 months. But clearly we stipulated that it had been recently redone, it was not in a state of disrepair. The town came back and said, you know what. We wanted it rebuilt because of things like site distances, we take out a couple of hills, we wanted a 3 foot shoulder on either side of the road. Our argument was, listen number 1, the Nolan argument the first step in Nolan which we've lost on is not before this court today, because we didn't appeal that decision from the CA, we argued under Nolan wait a minute. We don't doubt that there is a need for making better site distances or for shoulders. But you're asking us to completely tear out the road and replace it. We could do that with additions to the existing roadway. The town's expert in the record has admitted to everyone of those. Everyone of those conditions that they sought to remedy just like the conditions in Nolan was, we want people to be able to see the ocean and to know that there's a public beach. The court said that's a laudable goal, but that doesn't give you the right to connect it to an easement across someone's property. You could have dealt with those issues simply by controlling building height, fencing types, setbacks so that you maintain view _____. The same here.

We argued in the CA and prevailed at the TC that there was no connection between the increase in site distances and having shoulders and making us tear out a perfectly good brand new road and replace it with another one. We lost on that issue because the CA held there is a reasonable relationship. There is an essential nexus between having concrete last longer. Well I don't think that the town was satisfied with that argument.

ENOCH: You're real argument is that you were required to do more to that road than was the benefit to your property?

STANDERFER: That is exactly right.

ENOCH: Because you have to pay 100% of rebuilding as opposed to a proportionality...

STANDERFER: And it would be different - if our subdivision was - let's assume it was a 1000 homes instead of 200, and the two lane road would be insufficient to carry the traffic from our subdivision, if there had been a requirement for additional capacity due to our subdivision, that would be an entirely different argument. If they wanted us to install say a turn lane so the people could move off of the main portion of the road to turn in and out of the subdivision, or to put in an acceleration lane for a few hundred feet on the road, that would be different. But in this case the town did not increase the capacity of the road at all. It held both before and after our subdivision went in that the two lane road had all the capacity necessary. We didn't impact the ability of that road to carry the traffic. It was purely an ad hoc determination that they wanted a new road because that's what they thought they had the right to essentially extort from this developer. It had nothing to do with capacity.

If it had to do with capacity, for instance if they wanted us to build a four-lane road and we didn't believe that our additional car trips from 200 homes would be enough to justify a full four-lane road, we could have done what towns and developers do all the time in development cases. If my subdivision only needs an 8 inch sewer line to serve, but there are going to be other subdivisions up and down the road and they want a 24 inch sewer line, ordinarily the developer will install a 24 inch sewer line under an agreement that as other people tap on we get reimbursed for part of that expense. We offered that expense. We offered a number of things in this case to try and get to that proportionality.

SMITH: If the city had required you to waive your takings claim as a condition of approval of the plat what would be your client's legal reaction? Do you have a right to force approval without such a waiver?

STANDERFER: In this case, I believe that we do because in the context of plat approvals, this court has held and the statute requires that if your plat application meets the conditions for plat approval, then plat approval is a ministerial act. That's one of the additional issues in this case, is there was no discretion to deny our plat. The plat met the plat conditions without variance and state law requires that that plat be approved. However, I think there's a different way to get at what you're

after. I disagree with Robert. I do think that if the town had enacted a prior or contemporaneous challenge requirement, that to the extent that you disagree with an imposition of an exaction by the town council, you have 30, 60, 90 or 180 days to file an administrative claim or to file a suit, you must challenge that before you accept the benefit of the plat. I think that's possible. Robert Brown in his brief has cited to cases from three different states - Minnesota and California are two of them, I can't remember the third, every case they cite for the proposition that one waives his taking argument if he doesn't challenge it prior to constructing the asset comes from states that have statutory prior or contemporaneous challenge statutes. Texas does not. And the CA wrote in great detail. I don't think that they could require that we waive it. I do think that they can impose a judicial challenge obligation _____. And that gets to the same place.

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REBUTTAL

BROWN: The conditions that were placed in Dolan are not like the conditions placed on the town of Flower Mound. If you will look at the Dolan requirement, what the city of Flower Tigard's adopted rules, it didn't apply city wide, they only applied to the central business district. They required dedication of "sufficient open space area for greenway and flood protection" and it required the provision of an undefined and unlocated bicycle pathway. The determination of how much land was needed and where this bikeway was going to go was not made by the legislative body, but was made by the city's planning commission, the administrative body. That is a far cry from this situation where we have a legislatively created standard that said in Flower Mound all subdivisions will take access to and from concrete roads. Because concrete roads are more durable. They are community standards. They appeal to the aesthetics of the community.

O'NEILL: The variance requirements were the same weren't they?

BROWN: What they are saying is that there was a variance requirement in Dolan and Mrs. Dolan unsuccessfully - she was not given the variance.

The actual language of Flower Mound's variance requirement doesn't actually say hardship per se. It says you can provide a variance from the standards if the council finds that it works a hardship on the basis of utility relocation costs, right-of-way acquisition costs, and other related factors. But the difference is the actual standard itself was legislatively determined and applied. There is a fundamental difference between the creation of a legislative standard with a variance procedure and the creation of a standard at the local adjudicative level. And that's what happened in Dolan. In the Dolan case on that case-by-case basis it was determined you need to give us this land, you already have to give us 15% of the land as open space, but you have to give more. And that's one of the things the court was concerned about in Dolan is you're making them give you land, which fundamentally is a problem because our jurisprudence. And if you look at the spectrum of takings claims, at the far end, the one that is given the most significant constitutional protection from day 1 has been the right to exclude people from your land. A per se taking

O'NEILL: Are there any cases that have relied on that principle to go with the left half of this _____ as opposed to the adjudicative legislative?

BROWN: Oh yes. We've cited a number of them in our reply brief. There's an entire section in there on the land only and how South Carolina and Colorado SC's just in 2001 both held that the Del Monte Dunes case limited this to land only and adjudicative.

O'NEILL: My question is, did they do it because they thought Mayhew required it, or did they do it because the right to exclude people was _____?

BROWN: I'm not sure the courts...

O'NEILL: I mean did they ever use that as a reason to go...

BROWN: They've used it as one of the two reasons. I'm not aware of a court that said just the right to exclude it and not the adjudicative. Typically if they shoot it down they say it doesn't involve land, and it's a legislative standard. California courts say well we're skipping over the land question. The courts in Washington, the lower courts at one time said it still applies to land. But the most recent from the Washington SC benchmark case cited the issue of the street improvement requirement on nonstatutory grounds, and simply said we're not going to get to the issue of the constitutionality based on land only.

WAINWRIGHT: Do you agree with Mr. Standerfer philosophically about when Dolan applies and when it doesn't?

BROWN: No I do not. I believe that Dolan is deeply rooted in the doctrine of unconstitutional condition. And what both Nolan and Dolan, the SC was concerned about where they said look. In any other context that didn't have development involved in it, if the government went out and said, you have to give me land, you have to pay for it. There are no if's, and's or but's there. We don't share about the economic impact on the owner. We don't care about how laudable your public purpose is. If you're going to take somebody's land because that implicates the most fundamental of the bundle of rights that implied property rights was the right to exclude, they said you can't do that. And it's because of this extreme circumstance they said, if you're going to try to take land under the guise of the development this heightened scrutiny is going to apply because it is only in the context of land and the right to take land that is a per se taking. And that's what the unconstitutional conditions doctrine is all about.

WAINWRIGHT: Does the takings clause say that we look at it differently depending on whether the asset is money or property?

BROWN: The SC's only looked at it in the context. There are some cases we cited in there. Justice Kennedy in one case made it very clear, and I think at least four justices who followed him if you line up the votes, that the takings clause shouldn't be applied purely to a monetary interest

unless that monetary interest is somehow intimately related to land. Because what they were concerned is if we open up a takings clause of things like taxes, filing fees, and do we have to have rough proportionality when someone submits a 50 page brief here there's a filing fee, and there's a same filing fee for a five page brief.

WAINWRIGHT: You think whether or not Dolan applies, the rough proportionality test is applicable here is dependent at least in part on the nature of the private asset?

BROWN: Correct.

WAINWRIGHT: Whether it's real property or money makes a difference?

BROWN: Not just property or money, but whether it is a taking of property in the sense that you impair somebody's right to exclude from the property, not just regulating the land, but basically saying that this regulation in essence takes that most fundamental right from the property owner without compensation, that is the right to exclude somebody from my property.