IN THE SUPREME COURT OF FLORIDA

Case No. SC 09-713
LT Case No. 5D 06-1116

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ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Petitioner,

v.

COY A. KOONTZ, JR., as Personal Representative of
The Estate of Coy A. Koontz,

Respondent.

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# BRIEF OF AMICUS CURIAE ASSOCIATION OF FLORIDA COMMUNITY DEVELOPERS, INC., IN SUPPORT OF THE RESPONDENT

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On Discretionary Review
From the District Court of Appeal, Fifth District

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## STATEMENT OF INTEREST

The Association of Florida Community Developers, Inc. (“AFCD”) is an incorporated Florida not-for-profit association of landowners, developers, and professionals involved in the planning, design, licensing, construction, marketing, and management of large, master-planned communities with multiple land uses. AFCD’s membership includes 67 companies which are developing approximately 60 master-planned communities throughout Florida.

Projects by AFCD members are regulated by local governments pursuant to the Local Government Comprehensive Planning and Land Development Regulation Act, Chapter 163, Part II, F.S. ("Planning Act"), which requires each local government to adopt a comprehensive plan and land development code. These measures can result in on-site and off-site land use exactions. AFCD members are also regulated by water management districts pursuant to the Florida Water Resources Act of 1972, Chapter 373, F.S. (“Water Act”).

As a trade association representing those engaged in real estate development throughout Florida, AFCD can provide this Court with a unique and informed perspective on the practical implications of the lower court’s holding with respect to landowners and developers who are confronted by land use exactions demanded by the government, similar to the ones at issue here.

## SUMMARY OF THE ARGUMENT[1]

It has long been accepted that negotiations between a developer and government play an important role in Florida's system for regulating land development, but these negotiations take place among parties with unequal bargaining power. The potential for abuse that arises from governmental "leveraging of the police power" in such situations was the underlying reason for the *Nollan / Dolan* doctrine announced by the United States Supreme Court.

Ad hoc, project-specific land use exactions are most contentious in the context of mitigation for off-site transportation improvements, not for wetland mitigation. Given the cost of road construction, these exactions also tend to be the most expensive for a developer. Over the years, a substantial share of the cost of providing road improvements has fallen on developers through land use exactions relating to transportation concurrency, imposed during local government development review. This burden-shifting is exactly the kind of regulatory "leveraging" that *Nollan* and *Dolan* were intended to address.

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[1] AFCD will address only points I. B and I. C. in Respondent's Answer Brief on the Merits, corresponding to points I C-E of the Petitioner's Initial Brief on the Merits.

The Petitioner St. Johns River Water Management District will be referred to as the "District". The Respondent Coy A. Koontz, as personal representative of the Estate of Coy A. Koontz, will be referred to as "Koontz".

All citations to the Florida Statutes (2009) will be abbreviated to "F.S."

The Legislature has authorized a number of mitigation techniques to make transportation concurrency more practical. The most beneficial of these involve proportionate share payments by developers for needed improvements. These techniques confer limited discretion and flexibility for creative and principled regulators, but they also create an opportunity for regulatory "leveraging", leading to abuses. Thus, the compelling logic of *Nollan* and *Dolan* must apply with the same force to ad hoc, project-specific monetary exactions as it does to exactions for real property for other public purposes.

The Fifth District correctly concluded that Koontz could take the permit denial and challenge the constitutional validity of the rejected off-site exaction on which the denial was grounded. To require a developer to accept the condition and proceed under it before challenging the exaction would be "completely unworkable." It could force a developer to proceed with a project that is economically unfeasible or that does not coincide with his analysis of market conditions in order to challenge the very condition that made the project unfeasible or unmarketable.

The Fifth District's decision should be affirmed in all respects.

## ARGUMENT

### I. THE FIFTH DISTRICT CORRECTLY APPLIED *NOLLAN* AND *DOLAN* AND DETERMINED THAT THE DISTRICT'S CONDITIONING OF PERMIT APPROVAL RESULTING IN A TAKING UNDER FLORIDA STATUTES SECTION 373.617.[2] (Restated)

The District and the amici curiae in support of its position are generally correct in describing the nature of the regulatory process involved in obtaining land use approvals as a "negotiation." *E.g.,* Florida Dep't of Envtl. Protc., *et al.* Brief in Support of District at 10. This perspective has been well-accepted at least since the First District Court of Appeal referred to "the centrality of negotiation" under Florida's modern system of land use regulation originating with the Florida Land and Water Management Act of 1972. *Gen. Dev. Corp. v. Div. of State Planning, Dep't of Admin.*, 353 So. 2d 1199, 1206 (Fla. 1st DCA 1978).

And yet the District's initial brief and those of its supporting amici fail to give a full understanding of the nature of the "negotiation" process in land use approvals and the impetus for the constitutional doctrine regarding land use exactions announced in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The District and amici

[2] The takings provision of the Florida Constitution is considered co-extensive with the takings provision of the United States Constitution. *Florida Canners Ass'n v. Dep't of Citrus*, 371 So. 2d 503, 513 (Fla. 2d DCA 1979), *aff'd sub nom., Coca-Cola Co. v. Dep't of Citrus*, 406 So. 2d 1079 (Fla. 1981), *appeal dismissed sub nom., Kraft, Inc. v. Dep't of Citrus*, 456 U.S. 1002 (1982).

fail to explain that the "negotiation" takes place at a bargaining table which is tilted distinctly in favor of the government and against the applicant. Thus, it might be more accurate to describe this process as haggling or begging than to leave the impression that it is a negotiation among parties with equal bargaining power.

And nowhere do the District and its supporting amici discuss the Supreme Court's rationale for the heightened scrutiny of ad hoc land use exactions, as explained in *Nollan* – namely, the potential for abuse that arises from governmental "leveraging of the police power" in individual cases. *Nollan*, 483 U.S. at 837 n. 5. It was to address this regulatory "leveraging" during a "negotiation" among public and private parties with unequal bargaining power that the Supreme Court promulgated the *Nollan / Dolan* doctrine.

## B. *NOLLAN* AND *DOLAN* ARE NOT LIMITED TO DEVELOPMENT CONDITIONS REQUIRING THE DEDICATION OF LAND FOR PUBLIC USE.

In the experience of AFCD members, the most compelling situation in which regulatory "leveraging" can arise for a complex project is not in the context of wetland protection under the Water Act. Florida law requires an applicant first to avoid wetland impacts and, if impacts are unavoidable, to minimize those impacts. *See* § 373.414(1)(a), F.S. Only after complying with these statutory commands must an applicant mitigate wetland impacts as addressed in the decision

below. *See* § 373.414(1)(b), F.S. Thus, the nature and extent of the ad hoc exactions that can arise in the context of wetland permitting under the Water Act are limited, even though an exaction may be egregious in a particular case, like the one involving Koontz here.

In the experience of AFCD members, the ad hoc, project-specific land use exactions that are most contentious arise in the context of mitigation for off-site transportation impacts. Almost by definition, a new master-planned community will have extensive off-site impacts with the possibility that those impacts can be minimized only to the extent allowed by regulators through their power to approve the methodology for quantifying off-site transportation impacts, by down-sizing or re-designing the project, or by all of those techniques. Or the impacts can be accommodated by construction of off-site improvements to public roads.

Given the cost of road construction, these exactions also tend to be the most expensive for a community developer (or any developer, for that matter). Although amici curiae Florida Association of Counties, Inc., and Florida League of Cities, Inc., do not mention it in their brief, the imposition of off-site transportation exactions by cities and counties under the Planning Act amounts to many millions of dollars each year. It is in the context of these particular land use

exactions that AFCD members believe the constitutional principles affirmed by the Fifth District Court of Appeal below are most relevant, justified, and necessary.

The heart of the issue is when and how a government may bargain away its discretionary authority to deny a development altogether in exchange for some public good. *See St. Johns River Water Mgmt. Dist. v. Koontz,* 5 So. 2d 8, 9-10 (Fla. 5th DCA 2009). Thus, the threshold question is the government's authority under the police power to prohibit a developer from undertaking a project.

In Florida, the mandate for cities and counties to adopt and implement an adequate public facility requirement for transportation, also known as transportation concurrency, § 163.3180(1), F.S., provides a legal basis under the police power for a city or county to deny development approval because a project would cause an off-site road to fail to meet an adopted level-of-service ("LOS") standard.[3] As a general rule, a development may proceed only if the "transportation facilities needed to serve new development shall be in place or under actual construction within 3 years after the local government approves a building permit or its functional equivalent that results in traffic generation." § 163.3180(2)(c), F.S.

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[3] An LOS standard is "an indicator of the extent or degree of service provided by, or proposed to be provided by, a facility based on and related to the operational characteristics of the facility. Level of service shall indicate the capacity per unit of demand for each public facility." Fla. Admin. Code r. 9J-5.003(62) (2001).

This general availability standard is a statewide minimum and may be satisfied by a road improvement in a planned and funded five-year capital improvements schedule in the local government's comprehensive plan or by a developer-funded improvement that provides the additional road capacity.

Transportation concurrency was intended to be only a "timing" mechanism to coordinate planned development with the availability of adequate roads. Thomas G. Pelham, *Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth*, 19 Fla. St. Univ. L. Rev. 973, 982 (1992). It was never intended to be a revenue source for state and local road programs. And yet Florida's transportation system has been chronically under-funded, a fact which was documented again by the Florida Department of Transportation and the Florida Department of Community Affairs in a recent report to the Legislature on a potential alternative funding source.[4] *Joint Report on the Mobility Fee Methodology Study* [hereinafter *Joint Report*], Dec. 1, 2009, at 13-17, *available at* www.dca.state.fl.us./fdcp/dcp/MobilityFees/index.cfm. As report concludes: "The cost of providing facilities to maintain adopted standards is well

[4] The report documents the extent to which local governments have not fully utilized their existing authority to raise revenues to fund transportation programs. Only 18 of 67 counties have fully exercised their authority for local option fuel taxes. Some 41 of 67 counties have adopted transportation impact fees while 71 of 408 municipalities have done so. *Joint Report, supra*, at 13.

beyond the abilities of existing transportation funding mechanisms." *Joint Report, supra*, at 16.

It should be no surprise then that over the years a substantial share of the cost for providing road improvements to achieve and maintain adopted LOS standards has fallen on developers through land use exactions imposed during development review.[5] Indeed, the shift has been so pronounced that twice in recent years, the Legislature has attempted to curtail the prohibited practice of compelling a developer to pay "mitigation" to remedy existing backlogs on the road system in addition to mitigating his own off-site impacts. Ch. 09-85, § 5, at 998, Laws of Fla. (codified at § 163.3180(12)(b), F.S. and § 163.3180(16)(i), F.S.); Ch. 07-204, § 3, at 1468, 1470, Laws of Fla. (codified at § 163.3180(12)(a), F.S. and § 163.3180(16)(c), F.S.). This burden-shifting for funding Florida's transportation system represents the very regulatory "leveraging" that the Supreme Court warned about in *Nollan*. It is part of the real world in which AFCD members seek development approvals for their complex projects.

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[5] This phenomenon was noticed almost from the inception of concurrency because "the State uniformly imposed this planning and regulatory standard on an already overburdened and deficit-ridden service system without a strategy to cure past neglect and accommodate new needs." Robert M. Rhodes, *Concurrency: Problems, Practicalities, and Prospects*, 6 J. Land Use & Envtl. L. 241, 244 (1991).

In an effort to make compliance with local transportation concurrency programs more practical, the Legislature has authorized a number of mitigation techniques to facilitate the "negotiation" between a local government and a developer who must address deficiencies in the road system in order to develop land. For most developers, the most practical of these techniques are predicated on the developer paying a proportionate share of the cost of the road improvements necessary to accommodate a project's impacts.

Where the local government's adopted five-year capital improvements schedule does include the needed road improvement, the developer may rely on that improvement to demonstrate concurrency if the improvement is scheduled to begin within the first three years. *See* § 163.3164(32), F.S. and § 163.3180(16)(b), F.S. If the improvement is scheduled during years four or five, the developer of right may pay her proportionate share of the improvement cost in order to accelerate its construction. *See* § 163.3164(32), F.S. and 163.3180(11), F.S.

Where the capital improvements schedule does not include a road improvement necessary to accommodate project impacts, the local government may deny the development application. Or the developer may agree to pay the entire cost of the needed improvement, even though her project will consume only a portion of the capacity added to the road by the improvement. In those instances

where the developer pays the entire cost of the needed improvement while only consuming a portion of the added capacity, the public typically receives the benefit of the added capacity that is not needed to accommodate project impacts with no obligation to compensate the developer for this windfall.

Alternatively, the developer may negotiate with the local government to exercise its legislative discretion to add the needed improvement to the five-year capital improvements schedule, thus providing a basis for the developer to pay a proportionate share of the cost of that improvement, with the public or someone else paying the rest of the cost. § 163.3180(16)(b)1., F.S. The local government may add the improvement to the five-year schedule "if additional contributions, payments, or funding sources are reasonably anticipated" during the next 10 years. § 163.3180(16)(b)1., F.S.

Where the local government does not reasonably anticipate additional moneys to pay the remaining cost of the partially funded road improvement, the local government may use the proportionate share funds "for one or more improvements which will, in the opinion of the government entity or entities maintaining the transportation facilities, significantly benefit the impacted transportation system." § 163.3180(16)(f), F.S. Given the chronic shortfall of

transportation funding in Florida, this proportionate share option has become widely relied upon in addressing off-site transportation issues.[6]

At their best, these techniques confer limited discretion and flexibility on local governments for the kind of negotiated problem-solving of transportation issues that can and often does take place during development review. They are a valuable tool for creative but principled regulators. But the proportionate share techniques have a dark side. This discretion and flexibility are a welcome mat for the regulatory "leveraging" that the Supreme Court warned about in *Nollan*.[7]

A local government gains vast leverage over a developer in "negotiations" if the needed improvement must be added to the capital improvements schedule in

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[6] To be sure, this application of proportionate share mitigation begs the question as to whether a "significant benefit" improvement to the "system" would comply with heightened scrutiny under *Nollan* and *Dolan*. On the other hand, while the constitutional limitations no doubt apply, the legal issue typically will not be reached if the developer can bear the costs -- and she is willing to pay them as the price for getting the project approved and underway.

[7] While AFCD members rely upon these techniques in some situations, they are frequently subject to a different proportionate share technique expressly authorized for a development-of-regional-impact ("DRI"). § 163.3180(12), F.S. Under it, a DRI developer may negotiate an agreement to take the proportionate share cost of all improvements needed to address both local transportation concurrency and DRI regional transportation impacts and direct the funds to "one or more required mobility improvements that will benefit a regionally significant transportation facility[.]" § 163.3180(12)(b), F.S. The same practical and constitutional issues that can arise with other proportionate share techniques can also arise when this technique is applied to a DRI-scale project.

order to qualify for proportionate share funding.[8] The local government also gains this leverage if there is not adequate public or private funding "reasonably anticipated" to pay the remaining cost of the improvement, § 163.3180(16)(b)1. F.S., and the local government must decide whether to agree to the developer's proposal to pay for an alternative improvement that would "significantly benefit the impacted transportation system." § 163.3180(16)(f), F.S.

As beneficial as proportionate share mitigation can be for practical problem-solving, it can lead to abuses. For example, AFCD members have sought development approvals in a number of local jurisdictions where regulators have calculated total mitigation amounts for off-site transportation impacts based in part on improvements to bring a constrained road up to the adopted LOS standard <u>even though the local government had no intention of improving the constrained road</u>.[9] In other words, the local government dunned the developer for the proportionate share cost of a road improvement which the local government never intended to

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[8] Although we do not devote attention to it here, it must be noted that the Florida Department of Transportation may participate in the negotiation of a proportionate share agreement if the road is on the Strategic Intermodal System, § 163.3180(16)(e), F.S., or if it has maintenance authority an impacted road to be improved. § 163.3180(16)(f), F.S. *See also* § 163.3180(12)(a)4., F.S. So, in some cases, that agency also has leverage in these "negotiations."

[9] The Florida Department of Transportation describes a constrained road as a road that "will not be expanded by the addition of through lanes for physical, environmental, or policy reasons." Fla. Admin. Code r. 14-93.003(1) n.4 (2006).

make, so it could re-direct the "mitigation" funds to some other desired but unfunded improvement.

In such situations, the Supreme Court's concerns about regulatory "leveraging" are profoundly implicated, but the practical problem for the developer is that she faces a Hobson's Choice -- either "pay exorbitant up-front service costs far exceeding their fair share, or walk away from the project." Rhodes, *supra*, at 244. Thus, *Nollan* and *Dolan* can provide important constitutional protections in the real world of ad hoc, project-specific transportation exactions in Florida.

The District and its supporting amici argue that heightened scrutiny under *Nollan* and *Dolan* is required and appropriate only with respect to ad hoc, project-specific exactions of real property. As ably argued by Koontz, Respondent's Answer Brief at 19-28, the compelling logic of *Nollan* and *Dolan* applies with the same force to ad hoc, project-specific monetary exactions as it does to ad hoc, project-specific exactions of real property -- if for no other reason than that governments can resort to regulatory "leveraging" to exact money for improvements to an off-site public road just as readily as they can for land to serve other public purposes.[10] Appellate courts in other jurisdictions have reached that conclusion, and their reasoning should inform the judgment of this Court. *Town of*

[10] We have no reason to address here the distinctly different issue of whether *Nollan* and *Dolan* would apply to legislatively adopted impact fee schedules that are ministerially applied to all applicants of the same class.

*Flower Mound v. Stafford Estates Ltd. P'ship,* 135 S.W. 3d 620 (Tex. 2004); *Benchmark Land Co. v. City of Battle Ground*, 14 P. 3d 172 (Wash. Ct. App. 2000) *affirmed on other grounds by* 49 P.3d 860 (Wash. 2002); *Ehrlich v. City of Culver City*, 911 P. 2d 429 (Cal. 1996); *Clark v. City of Albany*, 904 P. 2d 185 (Or. Ct. App. 1995).

As the Oregon Court of Appeals reasoned in one case involving an off-site transportation exaction in that state:

> [T]he fact that *Dolan* itself involved conditions that required a dedication of property interests does not mean that it applies only to conditions of that kind. … For purposes of takings analysis, we see little difference between a requirement that a developer convey title to the part of the property that is to serve a public purpose, and a requirement that the developer himself make improvements on the affected and nearby property and make it available for the same purpose. The fact that the developer retains title in, or never acquires title to, the property that he is required to improve and make available to the public, does not make the requirement any the less a burden on his use and interest than corresponding requirements that happen also to entail memorialization in the deed records.

*Clark*, 904 P. 2d at 189 (emphasis in original).

## C. THE REQUIREMENT THAT KOONTZ PROVIDE ADDITIONAL MITIGATION FOR PERMIT ISSUANCE CONSTITUTED AN EXACTION.

The District and its supporting amici argue that Koontz should not have been allowed to contest the land use exaction in this case without the permit being issued. District's Initial Brief at 25-28. They contend that a

developer must first accede to an unconstitutional condition in order to contest it. Such a rule – while perhaps workable in some situations – would not be realistic in the context of a master-planned community like those undertaken by AFCD members.

The Fifth District reached the correct conclusion by holding that it was permissible -- under a constitutional takings claim brought pursuant to Section 373.617, F.S. -- for Koontz to take the permit denial, then challenge the constitutional validity of the rejected off-site exaction on which the denial was grounded. A developer must have that option in order to have a viable remedy if the dispute involves "a condition that materially alters the design, density or economic feasibility of the project." *Koontz*, 5 So. 3d at 12 n. 4. An understanding of the behind-the-scenes business planning involved in a complex project demonstrates the soundness of the Fifth District's reasoning.

A complex project typically requires iterative planning and financial analysis throughout the development review process. This on-going process is intended to ensure the overall plan of development will satisfy various regulatory requirements – natural resource protection, mitigation of off-site transportation impacts, and provision of affordable housing, among others – and achieve the developer's business objectives. The budgeted amount of exactions and the timing for when

the exactions are provided by the developer prior to project completion are important factors that the developer must build into her business model in order to determine if the project will "pencil out" on her pro forma, i.e., achieve a return on invested capital adequate to justify the necessary business risk.

If the project will "pencil out" with the demanded exactions, the developer can accept the permit even if she has a legal basis to challenge the constitutional validity of a particular exaction later, as in *Town of Flower Mound, supra*.[11] In that event, a rule requiring the developer to accept the permit with the contested exaction in order to be able to challenge its validity may be workable. (An obvious exception would be if the permit itself prohibited the developer from engaging in actual physical development under the permit if she was challenging a particular condition of permit approval. In that event, the developer would be forced to accede to the disputed exaction, seek to re-negotiate the permit, or forgo the project altogether.)

On the other hand, if the project will not "pencil out" when a disputed exaction is taken into account, then forcing the developer to accept the permit as a condition precedent to challenging the disputed exaction would truly force the

[11] It is worth noting, however, that the local government in *Town of Flower Mound* objected to the developer installing the off-site road improvements required by the exaction and then successfully suing for recovery under *Nollan* and *Dolan* because the town might not have wanted the improvements if it had known it would have to pay for them itself. *Town of Flower Mound,* 135 S.W. 3d at 624.

developer to accept an approval for a project she would not build in order to challenge the condition which rendered it infeasible. In that circumstance, the rule urged by the District would indeed be "completely unworkable."

For these reasons, the Fifth District reached the correct result by holding that Koontz could contest the validity of the off-site mitigation exaction even though the permit was denied by the District when Koontz failed to accept that exaction as a condition on the requested permit.

Finally, the District and its supporting amici should not be heard to argue that the rule applied by the Fifth District in this case would stifle the "negotiation" process over land use and regulatory approvals. For example, amici supporting the District go too far by arguing that, if the Fifth District's decision is affirmed, "government agencies will be unable to discuss or negotiate mitigation measures with property owners without fear that such discussions or negotiations will serve as the basis of a constitutional claim for compensation." Florida Ass'n of Counties, Inc., and Florida League of Cities, Inc., Brief in Support of District at 18. This argument overlooks the fact that the basis for any claim must be the final decision by the governmental decision-maker, not the "negotiations" leading up to it by staff. *E.g.*, § 373.617(2), F.S. ("circuit court review shall be confined solely

to determining whether final agency action is an unreasonable exercise of the state's police power constituting a taking with just compensation").

Here, it was the District Governing Board's final agency action on Koontz's application which gave rise to liability, not the staff permit-reviewer's preliminary discussions with Koontz's engineer. There is every reason to believe that the normal give-and-take between applicants and agency staff will continue albeit with appropriate recognition of the constitutional limits on the exactions which the government may demand from the developer. After all, in its decision below, the Fifth District did not invalidate the judicial doctrines requiring ripeness for a takings claim.

## CONCLUSION

Wherefore, Amicus Curiae Association of Florida Community Developers, Inc., respectfully requests that this Court affirm the decision below by the Fifth District Court of Appeal and grant such other relief as is just and proper.

Respectfully submitted on this 11th day of January, 2010.

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I hereby certify that the foregoing complies with the font requirements of the Florida Rules of Appellate Procedure, and that on this 11th day of January, 2010, a true and correct copy was provided by pre-paid United States Mail to:

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