IN THE SUPREME COURT OF THE STATE OF FLORIDA

No. SC09-713
(L.T. No. 5D06-1116)

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Petitioner,

v.

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

Respondent.

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

BRIEF OF AMICI CURIAE FLORIDA HOME BUILDERS ASSOCIATION & NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

Federal Court Decisions

Florida Court Decisions

Court Decisions of Sister States

Statutes

Other Sources

STATEMENT OF INTEREST

The Florida Home Builders Association ("FHBA") and the National Association of Homebuilders ("NAHB") are trade associations whose members are in the housing construction industry. FHBA is a not-for-profit Florida corporation, with more than 10,000 members statewide, aiming to "serve, advance and protect the welfare of the home building industry in such manner that adequate housing will be made available by private enterprise to all Americans." Founded in 1942, the Washington, D.C.-based NAHB is a federation of more than 800 state and local home builder associations.[1] As the voice of America's housing industry, NAHB promotes policies that will keep housing a national priority.

FHBA and NAHB appreciate the opportunity to present the citizen views of their members on the importance of enforcing the constitutional safeguards established by state and federal courts to curb abusive leveraging of government regulatory authority via the conditioning of land development approval. Without these safeguards, the provision of housing is threatened by the potential imposition of unrelated or unfairly burdensome exactions of land, money, or performance from those who would seek to develop quality housing for the nation.

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[1] One-third of NAHB's 200,000 members are home builders and/or remodelers, and its members construct about 80 percent of the new homes built each year in the United States.

SUMMARY OF ARGUMENT[2]

Naturally, the District and supporting amici (several other regulatory agencies and a pro-regulatory environmental interest group) argue to limit the scope of judicial review of discretionary government control over the use of private property. Where both Florida and federal courts have established rules of fair play in the land development field – imposing no more than the reasonable requirements that development exactions be related and proportional to the impacts of a proposed development – these agencies strain to limit the holdings of *Nollan* and *Dolan* so strictly to their facts that any meaningful judicial review, short of denying all or substantially all of a landowner's economically viable use, could be evaded.

The artificially narrow interpretation of the *Nollan / Dolan* rule advanced by the District and its supporters ignores the United States Supreme Court's pronouncements that landowners do *not* have the burden of proving denial of virtually all use of their property before having the protection of the Fifth Amendment in the government-leveraged context of land use exactions,[3] as well

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[2] This brief will refer to Petitioner, St. Johns River Water Management District, as the "District" and to the Respondent estate as "Koontz."

[3] Exactions typically represent only a portion of the property or economic worth of a property. *See, Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005)

as similar state jurisprudence pre-dating *Nollan* and *Dolan.* The legal position they advance would practically eviscerate the salutary policy of this important state and federal jurisprudence.

If the minimum constitutional requirements of nexus and proportionality operated only where the government *grants* approval and happens to exact land instead of some other form of property or performance in exchange, regulatory agencies, intelligent as they are, could easily circumvent the *Nollan / Dolan* rule by simply demanding money instead of real property (which it could then spend to quickly convert private land into the same public asset) or coercing private citizens to actually build the desired public infrastructure. Under such a rubric, regulators would be able to wield the debilitating threat of outright denial (with no recourse for an applicant other than to mount expensive litigation with the heavy burden of proving a loss of substantially all economically viable use of a whole tract in order to obtain any relief whatsoever) as a sword to obtain free public benefits for which the government would otherwise have had to pay compensation under the Fifth Amendment. What petitioner urges would effectively immunize government from exactions claims and chill development through the imposition

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(setting forth the non-deferential test for unconstitutionally uncompensated exactions, in clear contrast to the deferential *Penn Central* test for total regulatory takings.)

of excessive and cost-prohibitive conditions.

The lower tribunals reviewing this case readily recognized a *Nollan / Dolan* violation and have wisely rejected the petitioner's attempt to eviscerate the rule with meaningless distinctions among the forms of exaction or based on the unprincipled difference between a improperly conditioned approval and a denial resulting from a citizen's refusal to accede to improper conditions. This Court should do likewise and enforce both the *Nollan / Dolan* doctrine (as the federal constitutional baseline) and similar state jurisprudence established even before the federal doctrine. As did the lower courts here, this Court should affirm the award of compensation as an essential enforcement tool.

ARGUMENT

I. Both federal and state precedent support the application of *Nollan* and *Dolan* principles to adjudicatory decisions which condition development approval upon the exaction of real property interests, money, or performance.

The District's contention that the nexus and proportionality principles of the *Nollan / Dolan* rule apply only to exactions of real property is utterly without merit. Both the federal and Florida constitutions have been judicially interpreted to prohibit the conditioning of land use approval on requirements which are either unrelated or disproportionate to the impact of proposed development. Particularly

in the context of *ad hoc*, adjudicatory approvals (such as the one presented in this case)[4] federal and Florida courts have applied this rule of fairness regardless of whether disputed exactions have been monetary or non-monetary in form.

The federal exactions doctrine (the minimum baseline of constitutional protection)[5] was crystalized in the sequel United States Supreme Court decisions, *Nollan vs. California Coastal Comm'n,* 483 U.S. 825, 831-842 (1987) and *Dolan v. City of Tigard,* 512 U.S. 374 (1994). *Nollan* requires that exactions bear an essential "nexus" to the impacts of proposed land use, and *Dolan* added the refinement that they must also be "roughly proportional" to those impacts.[6]

The principles of nexus and proportionality are also imbedded in Florida

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[4] Outside of Florida, there is a split of authority on the issue of whether the *Nollan / Dolan* principles extend to uniformly imposed, legislatively adopted exactions. This Court need not wrestle with that question, both because this case involved an *ad hoc* adjudicatory exaction and, as evinced by the state cases cited *infra*, legislatively imposed exactions have been subjected to heightened judicial scrutiny in Florida since before *Nollan* and *Dolan.*

[5] As in all other areas of constitutional law, states may provide greater property rights protection than that required by federal constitutional baselines. *Kelo v. City of New London,* 545 U.S. 469, 488 (2005).

[6] As one commentator aptly put it, the *Nollan / Dolan* doctrine imposes "a logic and metrics for constitutionally permissible exactions that require concessions to have an 'essential nexus' and be 'roughly proportional' to the harms a proposed development is expected to cause." *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Cal. L. Rev. 609, 611 (2009)

law (reference to which is conveniently omitted by the District and supporting amici). Florida's exactions doctrine formed well before *Nollan* and *Dolan* were rendered, and actually began with challenges to monetary exactions, not land dedications. As early as 1976, the Florida Supreme Court pronounced that monetary payments required of developers should be based on a "fair share" of infrastructure costs. *See, Contractors & Builders Ass'n v. City of Dunedin*, 329 So.2d 314 (Fla. 1976). State jurisprudence in this area soon evolved into the "dual rational nexus" test, recently summarized by the Second District Court of Appeal as follows:

> In determining whether the imposition of an impact fee is constitutionally permissible, the Florida Supreme Court has adopted the "dual rational nexus test," which requires the local government to demonstrate "a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision" and "a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision." *St. Johns County v. N.E. Fla. Builders Ass'n*, 583 So.2d 635, 637 (Fla.1991) (citing *Hollywood, Inc. v. Broward County*, 431 So.2d 606, 611-12 (Fla. 4th

DCA 1983).

Save Our Septic Systems Committee, Inc.v. Sarasota County, 957 So.2d 671, 673 (Fla. 2d DCA 2007).[7]

Florida courts have also required a showing of rational nexus for land dedications and performance requirements (*i.e.,* required construction of improvements or infrastructure) since before *Nollan*'s rendition. *See, e.g., Hollywood, Inc. v. Broward County,* 431 So.2d 606, 611-12 (Fla. 4th DCA 1983), *rev.* den. 440 So.2d 352 (Fla. 1983) (applying rational nexus principles to ordinance requiring either dedication of land or fees in lieu of dedication); *Lee County v. New Testament Baptist Church of Ft. Myers*, 507 So.2d 626 (Fla. 2nd DCA 1987) *rev. den.* 515 So.2d 230 (Fla. 1987) (invalidating land dedication requirement); *Paradyne Corp. v. D.O.T.*, 528 So.2d 921 (Fla. 1st DCA 1988), *rev. den.* 537 So.2d 244 (Fla. 1988)(invalidating requirement to construct a road).

The United States Supreme Court undeniably extended its *Nollan / Dolan* doctrine to adjudicatory monetary exactions in the summary reversal and remand chronicled in the California *Ehrlich* litigation. *See, Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994), *on remand* at 911 P.2d 429 (Cal 1996), *cert den.* 519 U.S.

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[7] Similar to the federal *Nollan / Dolan* rule, Florida affords heightened scrutiny to exactions by placing the burden on the government (not the challenger) to demonstrate rational nexus and fair share.

929 (1996) and detailed discussion in Respondent's Answer Brief, pp. 21-23. Both before and after the Supreme Court's reiterative summary of federal takings law in the 2005 *Lingle* decision, federal and state courts have applied the *Nollan / Dolan* test to non-dedicatory exactions of money and performance.[8] *See, e.g., Trimen Dev. Co. v. King County*, 877 P. 2d 187 (Wash. 1994); *Northern Illinois Homebuilder Assoc. v. County of Dupage*, 649 N.E. 2d 384 (Ill. 1995); *Homebuilders Assoc. v. City of Beaver Creek*, 729 N.E. 349 (Ohio 2000); *Benchmark Land Co. v. City of Battle Ground*, 49 P.3d 860 (Wash. 2002). *See also*, post-*Lingle* monetary exaction cases such as: *Sefzik v. City of McKinney*, 198 S.W.3d (Tex. App. 2006); *Ocean Harbor House Homeowners Ass'n v. California Coastal Comm'n*, 163 Cal. App. 4th 215 (Cal. Ct. App. 2008); *Toll Bros., Inc. v. Board of Chosen Freeholders of County of Burlington*, 944 A.2d 1 (N.J. 2008); *Wolf Ranch v. City of Colorado Springs*, 207 P.3d 875 (Colo. App. 2008), *cert granted* 2009 WL 1383826 (Colo. 2009); *Building Industry of Central Cal. v. City of Patterson*, 171 Cal.App.4th 886 (Cal. App. 2009). *See also*, the post-*Lingle* discussion of a performance exaction by the 9th Circuit in *McClung and Tapps Brewing v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008) *cert. denied*,129

[8] The District's Initial Brief represents an inability to locate any cases post-*Lingle* which apply the *Nollan / Dolan* test to non-dedicatory exactions at pp. 24-25.

S.Ct. 2765 (2009) (discussing nexus analysis that would have applied, but for waiver of issue by landowner, to requirement that developer install pipes twice the diameter required by code.)

The plethora of cases, in Florida and nationally, applying nexus and proportionality principles to development exactions other than physical dedications of land refutes the myth advanced by the District and supporting amici that the decision below is somehow a novel, "expansive" view of the *Nollan / Dolan* rubric. The District's attempt to elevate form over substance in unprincipled distinctions among exactions of land, money, or performance flies in the face of longstanding Florida jurisprudence and the routine application of the *Nollan / Dolan* rule around the country in *ad hoc* conditioning cases such as this one. The decision below should be affirmed in its recognition that the potential for extortive leveraging without enforcement of *Nollan / Dolan* type parameters exists whether the improper demand would exact land, money, or performance from an applicant.

II. The principles of *Nollan* and *Dolan* should apply with equal or greater force where an applicant's refusal to accede to an unconstitutional condition results in a denial.

The District and supporting amici also inaccurately assert that application of the *Nollan / Dolan* test to a permit denial is novel or will "vastly expand" the scope of the doctrine. (*See, e.g.*, Brief of Amicus League of Cities, et al., pp. 12-

17). Here again, the District and supporting amici elevate form over substance in a way courts have rightly declined to do.

The panel majority in the Fifth District's decision below appropriately kept in mind the policy of the doctrine to protect against extortive government conduct in the permitting process and recognized the constitutional insignificance of any distinction between an approval conditioned upon an improper exaction or a denial resulting from a landowner's refusal to accede to one. *Id. St. Johns River Water Management District v. Koontz,* 5 So.3d 8, 11-12 (Fla. 5th DCA 2009).

While improper government leveraging inhabits both fact patterns, the policy of *Nollan / Dolan* and similar state jurisprudence arguably should apply *a fortiori* to a permit denial. Using the classic gun-to-the-head metaphor for extortion, fatally pulling the trigger upon refusal of the threatened party is more repugnant than a mere threat that succeeds in coercing the victim.

This common sense view has not been lost on the courts. Contrary to the representations of the District and some amici (see, e.g., Petitioner's Initial Brief, pp. 28-29; Brief of Amici, League of Cities, et al., pp. 14-17), courts have frequently recognized the viability of exactions claims where approval is denied or otherwise withheld because of an applicant's refusal to accede to conditions. *See, e.g., B.A.M. Development LLC v. Salt Lake County,* 196 P.3d 601 (Utah 2008)*;*

Amoco Oil Co. v. Village of Schaumberg, 661 N.E. 2d 380 (Ill.App 1995), *app. den.* 667 N.E.2d 1055 (Ill. 1996), *cert. den.* 519 U.S. 576 (1996); *William J. Jones Ins. Trust v. City of Fort Smith*, 731 F.Supp. 912, 914 (W.D. Ark. 1990). Notably, such precedent also exists right here in Florida. *See, Lee County v. New Testament Baptist Church of Ft. Myers, Florida, Inc.*, 507 So.2d 626 (Fla. 2d. DCA 1987), *rev. den.* 515 So.2d 330 (Fla. 1987) (reaching merits of unconstitutional exactions claim upon denial of development approval due to landowner's refusal to dedicate right of way, despite County's post-filing attempt to moot claim by granting approval without the offending condition during the litigation); *Paradyne Corp. v. D.O.T.*, 528 So.2d 921 (Fla. 1st DCA 1988), *rev. den.* 537 So.2d 244 (Fla. 1988)(applying *Nollan* after revocation of permit to hold that proposed performance condition was unconstitutional.)

The unreasonableness of the District's assertion that a *Nollan / Dolan* challenge cannot be maintained in the wake of a denial is underscored by the unjust dilemma such a rule would create for landowners. In most jurisdictions, including Florida, an objection or some form of protest is often necessary to succeed in an unconstitutional exaction challenge, if not to preserve one. Failure to protest a condition during the approval process or refraining from a challenge until after proceeding with permitted activities (accepting the benefits of the permit) can

pose substantial risk to the viability of an exactions claim. *See, e.g., New Testament Baptist Church Incorporated of Miami v.* D.O.T., 993 So.2d 112, 117 (Fla.4th DCA 2008), *rev den.* 6 So.3d 52 (Fla. 2009); *Sarasota County v. Ex*, 645 So.2d 7 (Fla. 4th DCA 1994); *Cf. D.O.T. v. Heckman*, 644 So.2d 527 (Fla. 4th DCA 1994). *See also, Meredith v. Talbot County*, 560 A.2d 599 (Md.App. 1989); *Trimen Dev. Co. v. King County*, 877 P.2d 187 (Wash. 1994); *McClung and Tapps Brewing v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008) *cert. denied*,129 S.Ct. 2765 (2009); *Greeneville Concerned Citizens, Inc. v. Floyd County Planning Comm'n*, 914 N.E. 2d 866 (Ind. App. 2009).[9]

In light of the risks of acceding to conditions in order to gain approval (which may waive or otherwise defeat an exactions claim),[10] a rule denying the protection of the *Nollan / Dolan* doctrine to citizens who, like Koontz, suffer a

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[9] Courts may excuse the requirement of a record objection if a plaintiff can demonstrate duress, but reliance on a duress claim presents substantial risk, since courts have recognized they are subject to competing government defenses of waiver (by acceptance of benefits of an approval) and/or equitable estoppel (government reliance on the absence of objection in granting approval). *See, e.g., Sarasota County v. Taylor Woodrow Homes*, 652 So.2d 1247, 1250-1251 (Fla. 2d DCA 1995), *McClung, supra.*

[10] Aside from the legal risks associated with acceding to a condition, forcing an applicant to accept onerous permit conditions in order to have the benefit of the *Nollan / Dolan* rule is practically unworkable in many instances, as ably explained at pp. 16-17 of the Brief of Amicus, Association of Florida Community Developers.

denial for their candor in standing on their constitutional rights, would be patently unjust. In advancing such a rule, the District and supporting amici in essence contend citizens should be placed in the procedural trap of potentially waiving a claim in the process of preserving one. This would create an obvious *Nollan / Dolan* loophole for regulatory agencies, allowing them to evade the doctrine by either denying the permit or claiming an owner waived any claim by garnering conditional approval through concession.

Amici (such as the League of Cities, et al) attempt to mask the injustice of their position by offering up a *Penn Central* claim as the remedy for a permit denial resulting from an applicant's refusal to accede to regulatory demand. Because a landowner may obtain no relief under *Penn Central* absent demonstrating devastating economic impact and denial of investment backed expectations, etc., as to his or her *whole* ownership, a *Penn Central* claim would be a predictably futile pursuit in the vast majority of exactions cases, which by nature typically involve an exaction of only part of a tract (land dedication) or only part of the economic worth of a development (monetary or performance exactions).

Presumably, this is precisely why the government-deferential standards of *Penn Central* are advocated by the District and supporting amici. It would be

every regulator's dream-come-true if the *Nollan / Dolan* rule applied only to exactions claims arising from approvals (to which the government typically has the formidable defenses of waiver and estoppel) and if the *Penn Central* test applied to denials (which imposes a virtually hopeless liability standard given the nature of exactions as partial interests or partial economic impacts). This would position the government to threaten a remediless denial in every case unless the owner ultimately "agreed" to a condition. Simply stated, the rule advocated by the District would, from every practical standpoint, put a silver bullet in the proverbial gun-to-the-head by rendering the *Nollan / Dolan* rule (and state counterparts) practically toothless.

Equally evident, however, is the Supreme Court's understanding of this very problem. By fashioning the heightened scrutiny test of *Nollan / Dolan* in the first place, the Court apparently recognized that the deferential standards of *Penn Central* are inadequate to police the special context of exactions. The *Penn Central* doctrine was well developed by the time the Court issued its *Nollan* decision, and a majority of the Court clearly rejected *Penn Central* as the applicable test. (*Compare* Justice Brennan's dissent advocating application of the *Penn Central* factors to deny relief, *Nollan* at 853-860). In restating its takings jurisprudence in *Lingle,* the Court again took pains to segregate *Penn Central* from

its discussion of *Nollan / Dolan* as the operative test for the constitutional validity of partial development exactions. *Lingle* at 539, 546.

As did the Fifth District, this Court should reject the District's contention that *Nollan / Dolan* principles are inapplicable in the wake of a permit denial. Given the intentionality of the Supreme Court in creating the *Nollan / Dolan* doctrine separate and apart from *Penn Central*, the reality that the anti-extortion policy underlying the doctrine is equally relevant to excessive government demands whether they form the basis of conditional approval or lead to a denial, and the many Florida and other cases applying *Nollan / Dolan* principles to permit denials, the decision below should be readily affirmed.

III. The lower courts fashioned the proper remedy for the District's long adherence to an unconstitutional regulatory position.

The efficacy of remedies often determines whether constitutional protections are more than theoretically meaningful to citizens and whether they genuinely proscribe government power. Essential to meaningful enforcement of constitutional takings doctrines is the award of compensation for any period of time that a constitutionally invalid regulatory position interfered with the otherwise proper use and enjoyment of real property. Both Florida and federal

courts recognize this. *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987) and *Tampa-Hillsborough County Expressway Authority v. A.G.W. S. Corp.*, 640 So.2d 54 (Fla. 1994).[11]

The compensation awarded below was consistent with this substantive law and the procedural terms of the implementing statute under which the case was brought. *See*, § 373.617(3)(b) Fla. Stat. (providing that a court may determine "appropriate monetary damages" upon finding a takings violation, absent moderation of the regulatory position by the agency.)

As correctly argued by Koontz, the trial court properly awarded damages on a temporary takings theory for the period of time that the District adhered to its

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[11] The District's reliance on the cases cited at the Initial Brief, pp. 34-36 (particularly at note 22) is misplaced. The cited authorities actually support affirmance of Koontz's compensation award insofar as they acknowledge the circumstances in which the *First English* remedies doctrine continues to apply. Where there is a constitutional takings claim directed to the regulatory position itself, the period of adherence to the unconstitutional position is compensable, in contrast to "normal delays" associated with other types of development approval disputes. The circumstances here clearly fall within the *First English* category. *Compare, e.g., Landgate, Inc. v. California Coastal Comm'n*, 953 P.2d 1188, 1197 (Cal. 1998) (constitutional takings challenge directed to permit denial) and *Mandelstam v. City of South Miami*, 685 So.2d 868 (Fla. 3d DCA 1997) (dispute over the meaning of the word "school" in zoning ordinance).

unconstitutional position, a circumstance that prevented Koontz from proceeding with any development of his land lest he waive his constitutional rights.

The District maintained an unconstitutional regulatory position for many years, even after being informed by a judicial pronouncement (which remains factually undisputed) that the conditions for approval lacked essential nexus and proportionality. The District's contention that this type of interference with the use and enjoyment of property should go uncompensated reflects yet another attempt to render the *Nollan / Dolan* rule (and state equivalents) practically meaningless. Absent the right to compensation for the period of unconstitutional imposition, agencies could leverage their permitting demands with the additional threat of attrition. What would deter agencies from imposing excessive conditions if they knew they could skate even after a landowner is vindicated in court after years of appeals? The government would never have anything to lose by making extortionate demands and adopting a "sue me" stance with any owner who objects.

Such concerns are especially apropos here, where the District had the *benefit* of a statutory mechanism that allowed it the opportunity to moderate its position after a judicial review of the exactions challenge.[12] Despite the fact that

[12] This robs much of the moral force from the District's (incorrect) contention that the exactions claim should have had been determined by a Chapter 120 appeal. The remand provisions of F.S. § 373.617(3) are similar to the

the District has never disputed the factual findings of the trial court concerning the lack of nexus and proportionality, *Koontz* at 10, it chose to adhere to its original regulatory position. After ignoring such clear judicial warning, the District should not be heard to complain about compensating the affected citizen (or unfortunately, now his estate).

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recommended order of an administrative law judge under Chapter 120 insofar as they permit the agency an opportunity to moderate its regulatory position after the benefit of a ruling on the merits of a challenge by an impartial fact-finder.

A more extensive discussion of the legislative history of § 373.617 appears at Respondent's Answer Brief, pp. 14-19, but we note the Legislature apparently recognized the traditional role of the courts in determining as-applied constitutional claims which are not properly lodged in an administrative appeal. *See, e.g.*, *Nostimo Inc. v. City of Clearwater*, 594 So.2d 779, 782 (Fla. 2d DCA 1992) and *Lost Tree Village Corp. v. City of Vero Beach*, 838 So.2d 561 (Fla. 4th DCA 2002)(the proper forum for as-applied constitutional challenges is an original action in circuit court). Yet, it created the escape hatch of sub-section 373.617(3) for agencies before the imposition of monetary liability. Few losing litigants are afforded the option of choosing or mitigating their penalty in this way.

CONCLUSION

This Court should affirm the Fifth District Court's decision below in all respects, and in so doing, affirm the efficacy of the safeguards for citizens in the land use permitting context well established in Florida and federal law.

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