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IN THE

Supreme Court of the State of Delaware

GOLF COURSE ASSOC, LLC AND TOLL BROS., INC.,
Petitioners-Below, Appellants,

v.

NEW CASTLE COUNTY, NEW CASTLE COUNTY DEPARTMENT OF LAND USE, AND NEW CASTLE COUNTY BOARD OF ADJUSTMENT
Respondents-Below, Appellees

NO. 200, 2016

BRIEF OF THE AMERICAN PLANNING ASSOCIATION AND THE DELAWARE CHAPTER OF THE AMERICAN PLANNING ASSOCIATION AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an important issue of first impression under Delaware law. Specifically, whether the unlawful exaction doctrine, as set forth in *Nollan v. California Coastal Comm'n*,[1] *Dolan v. City of Tigard*,[2] and *Koontz v. St. Johns River Water Mgmt. Dist.*[3] (the "*Dolan* Trilogy"), should be extended as a means to review application of legislatively adopted land-use laws where, as here, the land-use authority neither demands an interest in real property (e.g. an easement) nor mandates a payment. The answer is that it should not. The argument advanced by Golf Course Assoc, LLC and Toll Bros. Inc. (collectively "Toll") (that generally applicable concurrency laws[4] may – in certain cases – constitute an unlawful exaction and a taking under the *Dolan* Trilogy (OB 27-35)) is not constitutionally sound, makes no public policy sense, and threatens responsible land-use planning.

The unlawful exaction doctrine precedent plainly does not apply to generally applicable land-use laws, and extending it to apply to statutes and ordinances would be constitutionally unwise. Extension of the doctrine would also, for the

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1 483 U.S. 825 (1987).

2 512 U.S. 374 (1994).

3 133 S. Ct. 2586, 2599 (2013).

4 "'Concurrency' requirements address the link between public investment in infrastructure, particularly roads and highways, and private land development." 3 Dwight H. Merriam and Sara C. Bronin, *Rathkopf's The Law of Zoning and Planning* § 36:28 (4th ed.). "The[ir] purpose is to ensure the local government's public facility or system of facilities have sufficient available capacity to serve development at a predetermined level of service (LOS)." American Planning Association, Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change Chapter 8, Part 4 (Stuart Meck, ed., 2002), available at https://www.planning.org/growingsmart/guidebook/.

first time, constitutionalize a developer's right to public infrastructure for development under a theory that requiring adequate infrastructure creates an unconstitutional condition.[5] It would also change the settled presumption of constitutionality for statutes and ordinances. And it would likely prevent enforcement of statutes and ordinances that protect the public from inadequate infrastructure and uncontrolled growth. This Court should reject the request to extend application of the *Dolan* Trilogy to code-based standards that do not require dedications of the developer's land or mandate the payment of money.

STATEMENT AND IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE

The American Planning Association ("APA") is a not-for-profit educational organization with 38,000 members in over 100 countries and 47 chapters in the

[5] "Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference." *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 147 n.125 (Del. 2016). An unconstitutional condition, however, cannot arise without an underlying constitutional violation. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) ("It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed."); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 286 (1998) ("While the Court of Appeals accepted respondent's rubric of 'unconstitutional conditions,' we find it unnecessary to address it in deciding this case. In our opinion, the procedures of the Authority do not under any view violate the Fifth Amendment privilege."); *see also Koontz*, 133 S. Ct. at 2598 ("A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what [the government] attempted to pressure that person into doing."). The County law at issue here does not mandate surrendering any constitutional right. Although the developer may wish to build a 263-lot subdivision, no constitutional principles operate to guarantee the right to do so. *See Salem Church (Delaware) Assocs. v. New Castle Cnty*., 2006 WL 4782453, at *16 (Del. Ch. Oct. 6, 2006) (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)) (any argument that developers "may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.").

United States, including the Delaware chapter. The APA seeks to provide leadership in community development and provides advocacy resources, including policy guides, for use in local communities. As the APA supports and empowers planning professionals to advocate for smart and sound planning laws and regulations within their local communities, the APA has a significant interest in the constitutional land-use questions presented in this case. The Delaware Chapter has similar interests, and its Delaware land-use planning initiatives could be impacted by the ruling in this case, particularly because this Court has not before had the occasion to address *Koontz* or the unlawful exaction doctrine under Delaware law.

STATEMENT OF FACTS

Toll seeks to build a 263-lot subdivision on the former Delaware National golf course. The proposed subdivision is a major subdivision application under the County Code. For all major subdivisions, the County Code imposes a general requirement for developers to submit a traffic impact study ("TIS") showing acceptable levels of traffic service at nearby roadway segments or intersections (the "LOS Requirements").[6] Toll's TIS shows that two of the nearby intersections would not operate at acceptable levels of service under future conditions.

The County Code provides Toll several options to remedy the levels of service at these intersections, including: (1) proposing "additional traffic mitigation

[6] NCC Code § 40.11.150B; NCC Code § 40.11.210.

measures necessary to maintain acceptable levels of service";[7] (2) submitting a "plan with a lower maximum intensity and density that does not exceed adequate levels of service";[8] (3) providing "a declaration of restrictions that would prohibit development until such time as an adequate level of service can be achieved";[9] (4) phasing "construction to coincide with the completion of programmed transportation construction projects which are identified in DelDOT's six (6) year capital improvements program";[10] or (5) requesting a level of service waiver.[11]

These options do not require Toll to dedicate any easements or other property to the County, nor do they in any way mandate that Toll pay any money to the County. Toll avers (incorrectly) that the Code option of proposing and ultimately providing additional traffic mitigation measures is an unlawful legislative exaction which violates the Fifth Amendment.[12] OB 23-34.

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7 NCC Code § 40.11.150B; NCC Code § 40.11.220A.

8 NCC Code § 40.11.150B2; NCC Code § 40.11.220A1.

9 NCC Code § 40.11.150B2.

10 NCC Code § 40.11.220A2.

11 NCC Code § 40.11.220C; NCC Code § 40.11.230.

12 The parties have not raised an important prerequisite that protects the government and planners from premature takings claims – the ripeness requirement. Before a takings claim can be ripe, a developer must pursue "any variances or waivers allowed by law." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 339-40 (2002). A developer, therefore, must seek a variance or apply for a level of service waiver to ripen an unlawful exaction challenge. New Castle County's beneficial use appeal statute, NCC Code § 40.31.600, is an additional "necessary precursor to the filing of a takings claim . . . against the County." *Salem Church*, 2006 WL 4782453, at *8. The failure to seek a variance, a level of service waiver, or a beneficial use appeal prior to asserting a takings claim divests this Court of jurisdiction. *Warren v. New Castle Cnty.*, 2008 WL 2566947, at *12-14 (D. Del. June 26, 2008); *Bebchuck v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006) ("Ripeness, the simple question of whether a suit has

ARGUMENT

I. EXACTION LAW DOES NOT APPLY TO LEGISLATIVELY ADOPTED CONCURRENCY REQUIREMENTS

A. Concurrency Requirements Are Constitutionally Permissible

For nearly ninety years, it has been settled that zoning and subdivision laws, like the LOS Requirements, place permissible limitations on the uses of private property.[13] In Delaware, counties and municipalities are delegated the responsibility for zoning and subdivision control.[14] Of particular import to this matter, the statutory delegation of land-use authority to counties requires, *inter alia*, adoption of regulations that lessen "congestion in the streets."[15]

LOS Requirements are one method by which the County fulfills its statutory mandate to adopt regulations that lessen congestion in the streets. These

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been brought at the correct time, goes to the very heart of whether a court has subject matter jurisdiction.").

[13] *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) ("comprehensive zoning laws and ordinances, . . . in their general scope, [are] valid under the federal Constitution. . . . State Legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts, unless clearly arbitrary and unreasonable."); *Village of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365, 387-89 (1926) (holding that zoning ordinances are constitutional).

[14] In Delaware, zoning and subdivision control has been exclusively delegated to counties and municipalities to be exercised in accordance with State statutory standards. *Del. Dep't of Natural Res. & Envtl. Control v. Sussex Cnty.*, 34 A.3d 1087, 1090 (Del. 2011).

[15] 9 *Del. C.* § 2603(a) ("Regulations adopted by the County Council, . . . shall be designated and adopted for the purpose of . . . the lessening of congestion in the streets or roads or reducing the waste of excessive amounts of roads, . . . [and shall] . . . facilitate and provide adequate provisions for public requirements, transportation, water flowage, water supply, drainage, sanitation, educational opportunities . . ."); 22 *Del. C.* § 303 (holding that municipal zoning and subdivision regulations "shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets . . . [and shall] . . . facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements").

requirements ensure that development and attendant population growth does not outpace the availability of adequate roads by requiring adequate traffic capacity infrastructure for proposed developments. Concurrency standards akin to the LOS Requirements have long been deemed valid exercises of the legislative power that protect the public against the harms of unfettered and uncontrolled growth.[16]

B. *Nollan, Dolan,* And *Koontz* Address Only Adjudicative Demands And Not Ordinance Requirements

Although Toll does not directly challenge the validity of the County Code's traffic concurrency requirements, it avers that applying those requirements to its subdivision application amounts to an unlawful exaction. OB 32.[17] A plain reading of the *Dolan* Trilogy of cases, however, makes clear that the unlawful exaction[18]

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[16] Concurrency standards prevent "deteriorating neighborhoods and a future drain on the municipal purse." 3 Dwight H. Merriam and Sara C. Bronin, *Rathkopf's The Law of Zoning and Planning* § 89:2 (4th ed.)). Concurrency standards have long been held constitutional. *See Golden v. Planning Bd. of Town of Ramapo*, 285 N.E.2d 291, 304-05 (N.Y. 1972) ("[W]here it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires . . . the challenged ordinance is not violative of the Federal and State Constitutions.").

[17] While Toll refers to its challenge as an "as applied" challenge to the LOS Requirements, its challenge functions as a facial one. Toll contends that because its proposed development will only exacerbate the surrounding the intersection at issue, requiring it to improve the impending failure before building is an unlawful exaction. OB 22. In virtually every situation, however, new development will only make a "smaller than the whole" incremental impact on street congestion, sewer service, schools, water service and other public infrastructure. If Toll's argument were successful, the government would be subject to "as applied" Fifth Amendment challenges except in the relatively few cases when only minimal upgrades to roads, sewers, and schools are required to achieve an adequate level of service. When the challenge seeks to effectively strike down the effectiveness of the statutory scheme, the challenge is better viewed as a facial challenge.

[18] By definition, an exaction conditions approval of development on the dedication of property to public use – such as an easement. *See City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702 (1999).

doctrine is not intended to supplant the County Council's legislative ability to adopt ordinances containing concurrency requirements and is not a means for review of the impact of concurrency laws.

The United States Supreme Court's decision in *Nollan*[19] is the Court's first articulation of the unlawful exaction doctrine. In *Nollan*, the equitable owner of a beachfront parcel in California sought a permit to demolish the lot's existing bungalow and replace it with another structure. The California Coastal Commission granted the Nollans' permit application, but conditioned the permit on an *ad hoc* requirement, namely that the Nollans accede to a permit-specific demand to record an easement permitting public access to the beach via their property.

The Supreme Court held that absent a permit request, the easement demand by the Commission "would have been a taking."[20] While making clear that land-use regulation will not affect a taking where the condition imposed "substantially advance[s] legitimate state interests,"[21] the Court held that absent an "essential nexus" between the adjudicative condition and the justification, the requirement for a public easement was an impermissible grant of an interest in real property without just compensation.[22]

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19 *Nollan*, 483 U.S. at 837.

20 *Id*. at 831.

21 *Id*. at 834 (quoting *Agins v. Tiburon*, 447 U.S 255, 260 (1980)).

22 *Id*. at 837 (finding no nexus as it was "impossible to understand how [the easement] lowers any 'psychological barrier' to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house").

Seven years later in *Dolan*, the Court revisited the unlawful exaction doctrine. In *Dolan*, the City's Community Development Code ("CDC"), *inter alia*: (1) required any new development to facilitate a planned pedestrian and bicycle path; and (2) limited commercial building in the city's floodplain.[23] The owner of a supply store located in the city's floodplain applied for variances in order to expand the size of the store and its paved parking lot. In rejecting the store owner's requests for variances from these regulations, the City Planning Commission found that the CDC's regulations were "reasonably related" to the CDC's twin goals of reducing traffic congestion through the use of pathways and preventing flooding by limiting impervious surfaces within the floodplain.[24]

The Supreme Court agreed that an essential nexus did exist between the CDC's regulations, which were designed to mitigate increases in traffic and impervious surfacing, and the store owner's planned expansion. The Court observed, however, that the *ad hoc* permit conditions imposed, which required the store owner to, among other things, "deed portions of the property to the city," were "circumscribed by the Fifth and Fourteenth Amendments."[25] The Court held that "[u]nder the . . . doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right – here the right to receive just

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23 *Id*. at 377-78.
24 *Id*. at 382.
25 *Id*. at 385.

compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit sought has *little or no relationship* to the property."[26] Adopting a "rough proportionality" test, the Court determined that the governmental entity must make "some sort of *individualized* determination that the required dedication is related both in nature and extent to the impact of the proposed development."[27]

Recently in *Koontz*, the Supreme Court reiterated *Dolan*'s application of the unconstitutional conditions doctrine in the land-use/exactions context, finding that a government's adjudicative demand for payment in lieu of an easement or other property interest, such as a "'monetary exaction[,]' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*."[28] In *Koontz*, the parcel proposed for development was subject to a Florida statute that required "reasonable assurance" that "proposed construction on wetlands [was] 'not contrary to the public interest.'"[29] The local water management district required any "permit applicants wishing to build on wetlands offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere."[30] In response to Koontz's proposal to develop, the district provided Koontz with two options: (1) reduce the extent of his planned development and dedicate the remainder of his

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26 *Id*. (emphasis supplied).
27 *Id*. at 391 (emphasis supplied).
28 *Koontz*, 133 S. Ct. at 2599.
29 *Id*. at 2592.
30 *Id*. at 2592.

land through a conservation easement to the district; or (2) build as planned, dedicate the remainder of the land to a conservation easement *and* improve offsite district-owned wetlands.[31]

Focusing on the second option (funding of improvements to public wetlands as a proposed permit condition), the majority disagreed with the district that its money demand did not relate to an identified property interest.[32] Rather, the "fulcrum" of the case was "the direct link between the government's demand and a specific parcel of real property."[33] The Court found that "[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation." [34]

C. The Superior Court Correctly Held That The *Dolan* Trilogy Standards Are Inapplicable

Under the *Dolan* Trilogy, as described above, there are three major guideposts to assess whether the unlawful exaction doctrine applies. **First,** there must be adjudicative action – a discretionary, *ad hoc* request by a governmental

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31 *Id*. at 2593.

32 *Id*. at 2599.

33 *Id*. at 2600 ("[T]his case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and *discretion* in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.") (emphasis supplied).

34 *Id*. at 2596.

permit official.[35] For this reason, as many courts have wisely held, the unlawful exaction doctrine does not apply to legislative acts (such as statutes and ordinances)[36] because land-use permit officials lack discretion to ignore statutory commands.[37] **Second,** the alleged unlawful exaction must be directed at "ownership of a specific parcel of land."[38] "[A] generally applicable ordinance" that impacts the use of property, is not a "payment requirement [that] targets a

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[35] As the Supreme Court made clear in *Lingle v. Chevron*, "*Nollan* and *Dolan* involved Fifth Amendment . . . challenges to adjudicative land-use exactions-specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005).

[36] *Action Apartment Ass'n v. City of Santa Monica*, 166 Cal. App. 4th 456, 469-70 (Cal. App. Ct. 2009), *cert denied*, 556 U.S. 1237 (2009); *Conklin Dev. v. City of Spokane Valley*, 448 F. App'x. 687, 689 (9th Cir. 2011) ("The applicability of the *Nollan/Dolan* framework is limited, however, to *adjudicative* land-use exactions 'requiring dedication of private property' where a *per se* physical taking has occurred."); *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 930 P.2d 993, 999 (Ariz.1997) ("In *Dolan*, the Chief Justice was careful to point out that the case involved a city's *adjudicative* decision to impose a condition tailored to the particular circumstances of an individual case. . . . Because the Scottsdale case involves a generally applicable *legislative* decision by the city, the court of appeals thought *Dolan* did not apply. We agree . . . .") (internal citation omitted); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001) ("Unlike the landowners in *Nollan* and *Dolan*, whose conditions for development were determined on an individualized adjudicative basis, the Krupps were charged a fee that was assessed on all new development within the District. The PIF assessment on the Krupps' development, then, is different from the exactions subject to *Nollan* and *Dolan*, both in its creation and in its reach."); *Harris v. City of Wichita, Sedquick Cnty., Kan.*, 862 F. Supp. 287, 294 (D. Kan.1994)) (holding that the *Dolan* doctrine does not apply to legislative acts); *Parking Ass'n of Georgia v. City of Atlanta*, 450 S.E.2d 200, at 203, n. 3 (Ga. 1994), *cert. denied*, 115 S. Ct. 2268 (1995) (holding that the City of Atlanta had made a "legislative determination" with regard to many landowners, thus placing the case outside the reach of *Dolan*).

[37] *Christiana Town Ctr. LLC v. New Castle Cnty.*, 2003 WL 22368856, at *1 (Del. Super. Ct. Oct. 10, 2003) (holding, in a mandamus action, that if "Petitioners[']application meets all the requirements of the County Building Code, a permit must be issued."); *see also Moore v. Oregon State Penitentiary*, 519 P.2d 389, 389 (Or. Ct. App. 1974) ("The elementary proposition that an agency of government must follow its own rules requires no citation of authority."); *Jones v. Cleland*, 466 F. Supp. 34 (N.D. Ala. 1979) ("Due process of law requires an agency of the government to follow its own rules and regulations.").

[38] *Koontz*, 133 S. Ct. at 2599.

'specific parcel of land.'"[39] **Third,** as the Superior Court appropriately recognized, the unlawful exaction doctrine requires an adjudicative demand for money or property that is a condition of the permit or approval.[40] Indeed:

> Nothing in *Koontz* suggests that the unconstitutional conditions doctrine under *Nollan* and *Dolan* would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval. It is the governmental requirement that the property owner convey some identifiable property interest that constitutes a so-called "exaction" under the takings clause and that brings the unconstitutional conditions doctrine into play.[41]

Because none of the hallmarks are satisfied, neither the *Dolan* Trilogy nor the unlawful exaction doctrine applies here. There was no *ad hoc* demand. The County merely applied the County Code's LOS Requirements. These requirements are generally applicable, not directed to a specific parcel of land, and are not contingent on any particular development proposal. And, importantly, the LOS Requirements do not require the developer to dedicate any land to the County, nor do they mandate the payment of money to the County.[42]

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[39] *Willie Pearl Burrell Trust v. City of Kankakee*, 2016 WL 3215673, at *10 (Ill. App. Ct. June 10, 2016). The *Koontz* holding squarely rests on the "direct link between the government's demand and a specific parcel of real property." *Koontz*, 133 S. Ct. at 2600.

[40] *Golf Course Assoc., LLC v. New Castle Cnty.*, 2016 WL 1425367, at *16-18 (Del. Super. Ct. Mar. 28, 2016) (noting the repeated references to "demand" and "extortion" in *Nollan*, *Dolan*, *Koontz*, and *Lambert v. City and Cnty. of San Francisco*, 529 U.S. 1045 (2000) (mem.) (Scalia, J. dissenting from denial of certiorari)); *id*. at *18 ("[T]he record amply supports the Board's findings . . . [that] there was never a demand made upon Toll Bros.").

[41] *California Bldg. Indus. Ass'n v. City of San Jose*, 351 P.3d 974, 990 (Cal. 2015).

[42] The developer has the option of waiting until the DelDOT improvements to the roadway segments are underway, seeking an LOS waiver or a variance, paying for the improvements, or to building a smaller project. "[S]o long as a permitting authority offers the landowner at least

II. THE COURT SHOULD REJECT TOLL'S ATTEMPT TO EXPAND THE UNLAWFUL EXACTION DOCTRINE

Although the United States Supreme Court has never applied the unlawful exaction doctrine to laws or ordinances of general application,[43] the developer seeks to expand the doctrine to undermine the County's concurrency laws. OB 33. Expansion of the unlawful exaction doctrine to generally applicable laws is ill-advised and should be rejected as unsound public policy.

A. Application Of The Unlawful Exaction Doctrine To Legislative Acts Changes The Burden Of Proof

For starters, expansion of the unlawful exaction doctrine to legislative acts (such as ordinances) would alter settled precedent regarding the presumption of constitutionality of statutes and the burden of proof where their constitutionality is challenged. It is axiomatic that generally applicable laws, like the LOS Requirements, are presumed constitutional.[44] Courts have long recognized that when "evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an

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one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition." *Koontz*, 133 S. Ct. at 2598.

[43] On at least three occasions, the Supreme Court has refused to grant certiorari to review cases holding that the unlawful exaction doctrine does not apply to legislatively adopted Code standards. *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting), *denying cert. to* 450 S.E.2d 200 (Ga. 1994); *Action Apartment Ass'n v. City of Santa Monica*, 556 U.S. 1237 (2009), *denying cert. to* 166 Cal. App. 4th 456, 469-70 (Cal. App. Ct. 2009); *California Bldg. Indus. Ass'n v. City of San Jose*, 136 S.Ct. 928 (2016) (Thomas, J., concurring in denial of certiorari), *denying cert. to* 351 P.3d 974 (Cal. 2015).

[44] *Mathews v. de Castro*, 429 U.S. 181, 185 (1976); *Downs v. Jacobs*, 272 A.2d 706, 707 (Del. 1970) ("Courts presume every legislative act constitutional and indulge every intendment in favor of validity.").

arbitrary regulation of property rights."[45] Under the *Dolan* Trilogy, by contrast, the government must make an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." The burden of proof is on the government to demonstrate that the rough proportionality requirement is satisfied for unlawful exaction claims.[46]

If the *Dolan* Trilogy burden of proof is applied to generally applicable land-use laws, the government (for the first time) will bear the burden of demonstrating that generally applicable zoning and subdivision laws are constitutional. The Supreme Court has rejected previous requests to impose a "heightened means-ends review of virtually any regulation of private property" under the takings clause.[47] "[T]he reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are . . . well established,"[48] and this Court should reject any doctrinal expansion of the *Dolan* Trilogy that would undermine such well-settled precedent and shift the burden of proof.

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45 *Dolan*, 512 U.S. at 391 n.8.
46 *Id*.
47 *Lingle*, 544 U.S. at 544.
48 *Id*. at 545.

B. The Court Should Not Create A Constitutional Right To Public Infrastructure

At present, a developer has no constitutional right to taxpayer-funded level of service improvements for water, sewer, or traffic.[49] Therefore a developer has no constitutional right to any County or State-funded level of service improvement required to serve a proposed 263-lot subdivision. That right is created, however, if the government could not deny a development proposal due to inadequate public facilities. If Toll's "legislative exaction" argument were adopted (OB 33), public infrastructure improvements would be elevated to a constitutional right because the government could not deny the application under concurrency laws without violating the takings clause.

Sound public policy counsels against constitutionalizing any right to public infrastructure. The public should not be required to bear the burden of funding such infrastructure (or suffering from the impacts of the lack of infrastructure) merely because a developer seeks to profit from a proposed housing development. The Fifth Amendment should not be a vehicle to obtain "takings" damages if the government and taxpayers have chosen to not allocate precious public dollars to specific infrastructure improvements.

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[49] *See Warren*, 2008 WL 2566947, at *18 (quoting *Ransom v. Marazzo*, 848 F.2d 398, 411–12 (3d Cir.1988)) ("[t]he provision of water and sewer services, whether by a municipality or by a private utility company, is not . . . a federally protected right.").

C. Expansion Of The Unlawful Exaction Doctrine Would Result In The *Ad Hoc* Application Of Zoning And Subdivision Laws

The foundation of the *Dolan* Trilogy's "rough proportionality" requirement is to protect against unreasonable, parcel-specific, adjudicative demands by the government in the land-use approval process.[50] The requirement prevents "out and out extortion that would thwart the Fifth Amendment right to just compensation."[51] Ironically, if the exactions doctrine were to be applied to concurrency laws, government officials would be required to make frequent *ad hoc* judgments as to whether generally applicable Code requirements can be enforced. This may very well empower development interests to engage in extortionate demands for approvals of applications that do not meet Code standards on a theory that Code-based standards that cost a developer more money constitute an unlawful exaction.

As an example, if the LOS Requirements are held to be an "as applied" unlawful exaction, the next developer that desires to build near an intersection that does not meet the acceptable level of service will demand that the LOS Requirements be waived. The land-use official then has a Hobbesian choice: either (1) ignore the requirements of the Code; or (2) face constitutional liability for an unlawful exaction under the Fifth Amendment.

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[50] *See Dolan*, 512 U.S. 391; *see also Koontz*, 133 S. Ct. at 2608 (in dissent).

[51] *Koontz*, 133 S. Ct. at 2595.

It makes no sense that a land-use official would be required, on a case by case basis, to evaluate and determine whether a County Code requirement is an unlawful exaction and violates the Fifth Amendment.[52] Heretofore, application of the Code does not allow for discretion by the land use official.[53] But the *Dolan* Trilogy, if applied to statutes or ordinances, requires an "individualized determination" of enforceability in each case. Land-use officials are not judges, and case-by-case evaluation would lead to variable judgment calls and random enforcement of land-use laws. This result should be rejected as unwise and contrary to Delaware's public policy of predictability and stability in land use.[54]

D. The *Penn Central* Test Should Govern Challenges To LOS Requirements

For decades, the United States Supreme Court and the Delaware Courts have reviewed Fifth Amendment challenges to land-use laws – either facial challenges or as applied challenges – under the familiar regulatory takings test set forth in *Penn Central*.[55] The *Penn Central* standard should remain the sole standard for review of takings claims concerning statutes and ordinances. To eliminate future

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[52] *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (holding that "a matter of constitutional law . . . is beyond the Secretary's competence"); *Johnson v. Robison*, 415 U.S. 361, 368 (1974) ("'(a)djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies").

[53] *See infra* n. 37.

[54] *See Sterling Prop. Holdings Inc. v. New Castle Cnty.*, 2004 WL 1087366 at *4 (Del. Ch. May 6, 2004).

[55] *Penn Central*, 438 U.S. at 124; *Salem Church*, 2006 WL 4782453, at *16; *Wilmington Hospitality, LLC v. New Castle Cnty.*, 2005 WL 1654024, at *3 (Del. Super. Ct. May 24, 2005).

confusion, the APA requests a bright line rule. Specifically, if an *ad hoc* government demand – either for an easement or a specific sum of money – relates to a specific parcel of land, the *Dolan* Trilogy test applies. But for Fifth Amendment challenges relating to generally applicable land use laws (either facial or as applied), *Penn Central* provides the framework for judicial review.

CONCLUSION

The APA respectfully requests that the Court reject the request to extend the *Dolan* Trilogy as a means to challenge concurrency laws facially or "as applied."

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