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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

APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF DELAWARE, C.A. No. 15A-02-007 JAP

OPENING BRIEF OF APPELLANTS

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NATURE OF PROCEEDINGS

This matter arises from a hearing before the New Castle County Board of Adjustment (the "Board" or the "Board of Adjustment") that was conducted over two meetings in the summer of 2014. At these meetings, Golf Course Assoc, LLC, the owner of the subject property ("GCA"), and the proposed homebuilder, Toll Bros., Inc. ("Toll")[1] appealed from the January 7, 2014, final decision of the New Castle County Department of Land Use (the "Department") to reject the required Traffic Impact Study ("TIS") for the project and therefore expire the pending residential subdivision plan for a portion of the former Hercules Golf Course. The Board, by a vote of 4-2, sustained the Department's position on September 25, 2014 and denied the appeal. A written decision attesting to the same was issued on January 26, 2015. (A184-99).[2]

Toll and GCA filed an appeal of that decision on February 20, 2015. (A200). The Court below approved the Parties' stipulated briefing schedule on April 6, 2015. Following the completion of briefing in this matter, the Court below considered the Parties' positions at oral argument on December 21, 2015. The parties, at the request of the Court below, supplemented the record below with additional correspondence directed to inquiries raised during oral argument. (A441-565). Following receipt of this material, the Court below, on March 28, 2016, issued its opinion ("Opinion") sustaining the decision of the Board.[3] On April 22, 2016, Appellant filed its Notice of Appeal.

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[1] Toll and GCA are collectively referred to herein as "Appellant".

[2] Citations to the Appellant's Appendix to Opening Brief are denoted by "A-" followed by the relevant page number(s).

[3] Citations to the Superior Court's Opinion below are denoted by "Op. at" followed by the relevant page number(s).

SUMMARY OF ARGUMENT

I. The Department's Rejection Of The TIS And Expiration Of The Exploratory Plan Is Invalid As It Directly Contradicts The UDC And The Direction The Department Provided To The Appellant.

II. The Rejection Of The TIS And Expiration Of The Exploratory Plan Was Invalid Because It Constituted An Unconstitutional Condition Under *Koontz v. St. Johns River Management District,* 133 S.Ct. 2586 (2013).

STATEMENT OF FACTS

This matter arises from an application for approval of a two hundred and sixty three (263) lot subdivision to be known as Delaware National (the "Project"). The Exploratory Sketch Plan (the "Plan"), the initial step in the two-step development approval process, was submitted in May of 2010. The Department issued its first review letter on June 8, 2010. (A012-019). It is from this date, pursuant to New Castle County's Unified Development Code ("UDC") §40.31.390, that the three (3) year clock for the submission of the Record Plan commenced. (A012). As noted in the review letter, "DelDOT's approval of the Traffic Impact Study ("TIS") [was] required to be obtained prior to the submission of the Record Plan." (A019). As part of the TIS process, a scoping meeting was held between Appellant, the Department of Transportation ("DelDOT") and the Department on April 13, 2010. (A007-011). The resultant scope designated a number of intersections to be studied as part of the TIS. (A008). Included was the intersection of Route 48/Centerville Road (the "Intersection"). *Id.*

Following its submittal to the Department, the Plan proceeded along dual paths in the land use process. One path involved securing approval of the Exploratory Plan and Construction Plans from the Department. This included attendance at a New Castle County Planning Board public hearing on September 7, 2010, for purposes of eliciting public comment on the project. As the Department's review letters indicate, the Exploratory Plan was deemed "Acceptable" by April 19, 2012 (A077). and the Construction Plans were deemed conditionally approved by August 29, 2012. (A103). Per the Department's August 29, 2012 "3rd Record Plan Check Print Review Report",

Appellant was reminded of two things: (1) the Record Plan submission needed to be made by June 8, 2013 or the Plan would expire, and (2) DelDOT's approval of the TIS was required prior to the Record Plan submission. (A103, 109). This submission deadline was extended until December 8, 2013, pursuant to UDC §40.31.390, to allow for the TIS to be "approved by DelDOT". (A110).

The concurrent path focused on the TIS, which was first submitted to DelDOT on or about October 6, 2010. (A038). On March 30, 2011, DelDOT advised the Department that it required additional time to complete its review of the TIS. *Id.* This request was based, in part, on a desire to discuss further with the Appellant the results of the TIS as it pertained to the Intersection. *Id.* Further submissions to DelDOT demonstrated that improvements could be made to the Intersection that would address any Level of Service ("LOS") concerns revealed by the TIS (the "Developer's Improvement"), LOS concerns that were driven primarily (if not exclusively) by other anticipated development.[4] (A094-095). DelDOT, however, sought a broader improvement at the Intersection.[5] As such, a second improvement was designed that would solve the future LOS problems and was acceptable to DelDOT (the "DelDOT Improvement"). (A118-19). This improvement, however, represented a cost of over $3.6 million. (A095). Given that the traffic generated by the proposed community accounted for approximately 1.5% of the projected traffic at the Intersection, this cost

[4] In its letter, DelDOT opines that many of the developments slated to be on-line by 2016, and thus would cause LOS at the Intersection to fail, were unlikely to be fully occupied prior to 2016 (the out-year for the TIS). (A118).

[5] The court below suggests that the Appellant merely offered to contribute the cost of its Improvement to DelDOT (Op. at 12), however, the record is clear that it was prepared to implement this Improvement as part of its initial response to the TIS. It was DelDOT that pushed for a different alternative. (A118).

would disproportionally place the burden for alleviating this (anticipated) problem on this project and the Appellant.

DelDOT, on December 6, 2013, issued its TIS Approval Letter. (A116). In this letter, DelDOT acknowledged the potential LOS difficulties at the Intersection, the project's minimal contribution to traffic at the Intersection, the Intersection's presently acceptable LOS, the design of an improvement which would maintain LOS, and the fact that the DelDOT Improvement carried with it "an estimated cost far out of proportion to the measurable impact that this development proposal [plan] has on [the Intersection], either now or after full buildout". (A117-19). Thus, DelDOT concluded that the Appellant should contribute the cost of the Developer's Improvement (approximately $1.1 million) toward the design and construction of the DelDOT Improvement. (A119, 126). This was one of twelve recommendations contained in the TIS Approval Letter. (A121-29). This Letter was also accompanied by DelDOT's December 6, 2013 Letter of No Objection to Recordation of the Plan (the "LNO"). (A113-14).

Having received the TIS Approval Letter and the LNO, the Record Plan was submitted to the Department on December 6, 2013, prior to the expiration of the Plan. (A051). The Department responded to this submittal on January 7, 2014. (A176). In its letter, the Department opined that the TIS had not been approved in accordance with UDC §§40.11.150 and 40.31.113 as LOS difficulties identified at the Intersection were, in the Department's opinion, unresolved. (A176-77). As such, the Department "disapproved" the TIS and rejected the submittal of the Record Plan. (A177). Due to the fact that the expiration deadline for the Plan had passed as of the date of the Coun-

ty's response, that Plan was deemed "expired". *Id.*

Appellant filed a timely appeal of the Department's decision to reject the TIS and expire the Plan to the Board (A179), which was considered by the Board on August 14, 2014 meeting. At this hearing, Appellant argued that the decision of the Department was contrary to (1) the written instructions and guidance that it provided during the plan review process, (2) the manner in which the UDC directs that traffic matters be addressed, and (3) the U.S. Supreme Court's ruling in *Koontz v. St. Johns River Water Management Dist.,* 133 S.Ct. 2586 (2013). In response, the Department argued that the UDC mandated the rejection of the TIS, thus making the submission of the Record Plan premature, and that its requirement to mitigate LOS concerns at the Intersection, regardless of their cause, did not violate the decision in *Koontz.*

The Board, on September 25, 2014, rejected the appeal by a vote of 4-2, concluding that the Department properly applied the UDC to this project as the TIS, in the Board's opinion, did not address the LOS difficulties at the Intersection in accordance with the requirements of the UDC. (A184-99). In addition, although acknowledging that the Department's review letters repeatedly directed Appellant only to secure DelDOT's approval of the TIS, it nevertheless concluded that Appellant should have been aware that the Department's final approval of the TIS was a necessary component to advance to the Record Plan stage of the review process. Finally, the Board, in a summary paragraph (A197), dismissed Appellant's arguments rooted in *Koontz* as no "negotiations" took place between the parties regarding the needed road improvements. This position was formalized in the Board's written decision dated January 25, 2015, and was affirmed by the Superior Court in its March 28, 2016 decision.

ARGUMENT

I. THE COURT BELOW ERRED IN SUSTAINING THE BOARD'S DETERMINATION THAT THE DEPARTMENT CORRECTLY APPLIED THE UDC TO THE TIS AND THE EXPLORATORY PLAN

A. Question Presented

Did the court below err in concluding (1) that the Department was obligated to disapprove the TIS pursuant to the UDC and (2) that such disapproval of the TIS and expiration of the Exploratory Plan were supported by substantial evidence? This question was preserved in the Board's Opinion (A187-96) and in the briefing below (A250-60, 351-58).

B. Standard Of Review

When reviewing the Board's decision, this Court applies the same deferential scope of review as the court below.[6] While the Court reviews the record for substantial evidence to support the decision, the lower court's legal conclusions are reviewed *de novo.*[7] Where "the issue is one of [statutory] construction and the application of [that] law to undisputed facts, the court's review is plenary."[8] "It is well settled that zoning ordinances must be construed in case of doubt in favor of the land owner."[9]

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[6] *CCS Investors, LLC v. Brown,* 977 A.2d 301, 319-20 (Del. 2009).

[7] *Id.* at 320.

[8] *Cheswold Aggregates, LLC v. Board of Adjustment of the Town of Cheswold,* 2000 Del. Super. LEXIS 393 at *7 (Del. Super. Nov. 1, 2000).

[9] *Id.*

C. Merits Of The Argument

1. The Court Below Erred In Sustaining the Board's Conclusion That The Plan Expired Because The Department Had Not Approved the TIS.

The underlying facts framing this dispute are largely uncontroverted. The parties do not dispute the record before the Board, agree that the only action preventing the submission of the Record Plan was the Department's rejection of the TIS, and agree that DelDOT had both approved the TIS, with Appellant's commitment to fund a substantial portion of the cost of the DelDOT Improvement, and issued its LNO. Where the parties differ is whether, in light of such uncontroverted facts, the Department's rejection of the TIS and expiration of the Exploratory Plan was proper.

The Court concluded that it was, noting the Department was compelled to reject the TIS (and thus expire the Plan) because the UDC not only vested it with authority over land use matters, it also placed in the Department's hands the "final call" with regard to traffic. (Op. at 22-36). In reaching its conclusion, the Court held that there was no ambiguity with respect to whether the UDC requires that the Department, as opposed to DelDOT, to determine whether a TIS is acceptable for purposes of record plan submission. Respectfully, Appellant contends that the court below erred in its conclusion because neither § 40.31.113, nor the other sections of the UDC relied upon by the court below and the Department, explain which entity must approve a TIS before a record plan can be submitted.[10] The Court rejected the Appellant's contentions

[10] A statute is ambiguous if it is reasonably susceptible to different conclusions or interpretations or if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature. *Newtowne Vill. Serv. Corp. v. Newtowne Rd. Dev. Co., Inc.* 772 A.2d 172, 175 (Del. 2001). It is hard to fathom a clearer example of statutory ambiguity than one that indicates an approval is required, but fails to explain from whom such approval is to be obtained.

that the UDC is ambiguous with respect to the process for approval of a TIS and that the canons of statutory construction require that significant weight be placed on the Appellant's reliance on the multiple review letters authored by the Department which consistently interpreted the UDC as placing in DelDOT's hands the responsibility to approve the TIS. (Op. at 27-29) The Court also rejected Appellant's argument that the proper interpretation of the UDC was that it was DelDOT's approval that was required to advance this plan to the next stage. (Op. at 30-35) The Appellant will address each of these arguments in turn.

a. The Department's Interpretation of the UDC Directed Appellant that it was DelDOT's Approval that was Required to Advance the Exploratory Plan.

At the outset, it should be noted that the Appellant does not disagree that the County has authority over land use matters within its jurisdiction[11], just as it cannot be debated that such authority is subject to review. At issue in this appeal is whether the Department exercised its authority in accordance with applicable law.[12] With regard to traffic, the Department delegates to DelDOT the responsibility to provide (the only) formal analysis of the TIS.[13] Such a delegation is appropriate, given that DelDOT,

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[11] 9 *Del. C.* §3001 delegates to the County the authority to regulate subdivisions within its boundaries.

[12] This authority, of course, is exercised in concert with the State's involvement. 29 *Del. C.* §9206(a). In that vein, the court below's reliance on §28.01.004 of the County Code (Op. at 23-24) is somewhat confusing as that section relates to record plan or rezoning approval, something not relevant in the present matter as no rezoning was sought and the record plan stage had not yet been entered into.

[13] UDC §40.11.140. The language in the LNO is actually consistent with this delegation of authority. As the LNO notes, while DelDOT is offering its approval on matters within its expertise (transportation), it is deferring to the County on the matters typically entrusted to its control, noting that there "may be other reasons (environmental, historic, neighborhood composition, etc.) which compel [the County] to modify or reject the proposed plan even though DelDOT has established that these enumerated transportation improvements are acceptable." (A113-14). In other words, while

pursuant to State law[14], retains the "absolute care, management and control" over roadways within its jurisdiction (including the Intersection).

A central issue before both the Board and the court below was the instruction provided to the Appellant during the Department's review of the Plan. The UDC provides for an extended give and take between the Department and an applicant during the planning process. In response to each plan submission, the Department issues a review letter which details, among other things, deficiencies with the prior plan submission. This "back and forth" process continues until the plan is deemed acceptable.[15] In the present matter, this Plan received no fewer than nine (9) review letters over a two (2) year period. While addressing a myriad of topics with regard to the Plan, these letters were remarkably consistent when it came to the TIS.

Starting with the October 21, 2010 letter, which provided that "the Major Subdivision Plan may not advance to the Record Plan level until the [TIS] is completed and approved by DelDOT" (A030), these letters repeatedly reminded the Appellant that it was DelDOT's approval that was required to advance the Plan to the next stage of the process. The review letters dated January 26 (A037), April 11 (A044), June 7 (A050), and October 5, 2011 (A076) all directed that the "TIS must be approved by DelDOT" before advancing to Record Plan and that the Department would advise it as to what, if any, notes would need to be added to the Plan as a result of this approval. *Id.* Indeed, the October 5, 2011 letter closed its transportation comments with

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DelDOT is not passing on final approval of the plan, it is establishing, as its jurisdiction provides (17 *Del. C.* §132), the limits of the required road improvements to its roadway.

[14] 17 *Del. C.* §131

[15] UDC §§40.31.113 & 114.

"DelDOT's approval of the TIS is required to be obtained prior to the submission of the Record Plan." (A076). None of these letters suggested that the Department's approval of the TIS was a prerequisite to submitting the Record Plan.

By April 19, 2012, the Plan was deemed "Acceptable", thus leaving the TIS and the Construction Plans as the outstanding items. (A077-083). The final review letter advised the Appellant that the Construction Plans were conditionally approved and that the Record Plan could be submitted in accordance with the UDC, however, "the TIS must be approved by DelDOT prior to the submission of the Record Plan", (A103-04, 108). Indeed, Appellant was directed, upon DelDOT's approval, to revise the plan to reference "the TIS, DelDOT's approval of it, and to include a description of the various items for which the developer will be responsible and their required timing of commencement or completion". (A108). The letter also notes that the Department's Transportation Section's approval is required "prior to recordation". *Id.*

The Department's direction was clear in this correspondence – the Record Plan could not be submitted until DelDOT approved the TIS, which it did on December 6, 2013. (A116). In accordance with this direction, the Record Plan was submitted with Note 40 revised to reference DelDOT's approval of the TIS and all of DelDOT's recommendations for improvements on the Plan. (A052, 177). As this was the last outstanding item from the review letter, Appellant satisfied the requirements for Record Plan submittal and, as such, its Record Plan submittal was timely.

The court below rejected Appellant's reliance on these letters. First, citing *Warren v. New Castle County*[16] and *Toll Brothers, Inc. v. Wicks,*[17] the court noted that

[16] 2008 U.S. Dist. LEXIS 49051 (D. Del. 2008).

Toll's experience alone was reason enough to reject this claim. In *Warren,* Toll was chastised for claiming it had not been advised of its right to appeal, while, in *Wicks,* Toll was penalized for prematurely pursuing litigation prior to the time that the County, which was not a party to the action, made a final decision regarding the pending plan.[18] In each case, the court noted that Toll, as a sophisticated developer, should have been aware of the administrative options in the UDC available to it without requiring additional direction from the Department. The present matter, however, presents a much different question as it focuses not on an alleged omission in the Department's direction to Toll, but instead on the Department's affirmative interpretations and direction regarding specific provisions of the UDC.

In this case, over the course of nine (9) letters, the interpretation of the §40.11.150 advanced by the Department repeatedly directed the Appellant that it was DelDOT's, not the Department's, approval of the TIS that was required to advance the plan to the Record Plan stage. Despite this, the court below, relying on *Trans-Americas Airlines, Inc. v. Kenton*[19], concluded that the Department's interpretation of

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[17] 2006 Del. Ch. LEXIS 122 (Del. Ch. Jun. 21, 2006).

[18] This case presents the question unanswered by *Wicks.* In *Wicks,* the Court dealt with DelDOT's refusal to approve a TIS, thus preventing a plan from advancing in the land use process. The Court, in rejecting Toll's arguments, noted that the County had yet to make a final decision as the record plan had not yet been submitted for approval. The Court noted that, depending upon what action the County took following submission, its action could be challenged in the same manner in which the Appellant has proceeded in this case. 2006 Del. Ch. LEXIS 122 at **21-23. Here, DelDOT took the step Toll sought in *Wicks* and approved the TIS. The Department, which was not a party in *Wicks*, has, in turn, rejected DelDOT's approval of the TIS in this instance, placing before the Board the question Chancellor Chandler alluded to but did not reach in *Wicks*, namely, whether the Department is within its rights to withhold its approval of a plan on the issue of traffic after DelDOT has approved the TIS and provided its LNO, steps which meet (or exceed) the requirements for plan advancement given to Appellant by the Department in its review letters.

[19] 491 A.2d 1139 (Del. 1985).

the UDC offered in its review letters should not have been relied upon by the Appellant – i.e. that Appellant was too sophisticated to be confused and should have known better.

In *Kenton,* the Court concluded that *ad hoc* comments offered by an Administrator of the Division of Corporations could not alter the plain meaning of a statute.[20] The present matter is fundamentally different than *Kenton.* Here, as opposed to casual sympathies that contradicted the language in a governing statute offered by an administrator in *Kenton*, the review letters relied upon by the Appellant were affirmative (and official) pronouncements from the Department, the entity directed by both the UDC and state law to administer and interpret the UDC[21], regarding outstanding items or corrections required to be made with each plan submission. As the UDC provides, these review letters "identify[] any concerns relating to Chapter compliance or other factors that the applicant must consider."[22] As such, these reports are not informal opinions on the status of the submitted plan; they are formal, official pronouncements evaluating the plan against the requirements of the UDC. These reports, authored by the professionals tasked with reviewing the plans against the specific criteria in the Code, control the advancement of the plan in the County's process. Thus, when these reports repeatedly advise the Appellant that it is DelDOT's approval that is required to advance the plan to the next stage of the process, the Appellant should not be held to a higher standard simply because it is a regular consumer of the Department's services,

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[20] *Id.* at 1143.

[21] 9 *Del. C.* §1301; UDC §40.30.410.

[22] UDC §40.31.113.D.

as opposed to a mere property owner entering the land use process for the first time.[23] The Department, at all times, was in control of the process and should not now be allowed to back away from its guidance simply because it does not like the result that this guidance has obtained.

b. The UDC does not require the Department's Approval of the TIS to Advance the Plan to the Record Stage.

The Department's review letters establish that it was DelDOT's approval that was required before the Record Plan could be submitted. This is particularly relevant given the UDC's lack of clarity on this point. Indeed, a review of §40.11.150, §40.31.113 and Appendix 1 of the UDC each indicate that while approval of the TIS is required, they fail to provide which entity's approval it is referencing. In this vein, the Department's direction, through its review letters, as to which agency it is relying on to make this approval should control the discussion and resolve the ambiguity.[24]

The Court suggested that it was caught "between a rock and a hard place" because the UDC expressly provided for a path forward when LOS was being main-

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[23] The interpretation of UDC §§40.11.150 and 40.31.113 provided in these reports is, in fact, consistent with the statutory language. The UDC is virtually silent with regard to the approval necessary to advance to the next stage of the process. Indeed, none of the sections cited by the court below identify whose approval is necessary to move the plan to the record plan stage. The Department's correspondence (which provided its interpretation of the Code to the Appellant) supports the conclusion that it is DelDOT's approval that is required to move to the next stage of the process.

[24] The Department (A300) suggested that, to the extent there is any ambiguity on this issue, the Court should defer to its interpretation of the issue, as outlined in their briefs. *See, e.g., Christiana Town Center, LLC v. New Castle County,* 2009 Del. LEXIS 615, *6 (Del. Dec. 1, 2009). Of course, the Department's interpretation of the UDC, as expressed to the Appellant in its review letters (as opposed to its briefing before the court below), supports the position that the Appellant is advocating here, namely that it was DelDOT's approval that was needed to advance this Plan to the next stage of the process.

tained and for when a project itself triggered a LOS failure, while leaving open the question of what to do when there is an LOS failure not the result of the project.[25] The Appellant, however, should not be penalized for this ambiguity, particularly when the governmental body tasked with managing land development in the County (the Department) has interpreted the UDC and operated in a manner indicating that it relies on DelDOT for this approval at this stage of the process.[26]

When construing ambiguity in a zoning ordinance, deference should lie toward an interpretation that favors the free use of land.[27] In the case of a zoning ordinance, it is the government, and not the property owner, that bears the consequences of drafting incongruities.[28] This is particularly true where, as here, the government consistently provided the Appellant with one interpretation of the UDC as it is moved through the process, only to reverse field and reach a contrary conclusion when its original inter-

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[25] This position is puzzling, particularly in light of *Koontz* and its requirement for nexus and proportionality between a government's need for infrastructure improvement and the proposed project's impact on that same infrastructure. 133 S.Ct. at 2598-99. In decisions adhering to the unconstitutional conditions doctrine, including *Cheatham, infra, Town of Flower Mound, infra* and *B.A.M. Development, infra,* government action applying an ordinance (as drafted) to a pending project was nevertheless scrutinized and, in some cases, overturned for exceeding permissible limits on exactions. To suggest that the government is limited in how it can react when confronted with potential infringements of constitutionally protected property rights is contrary to the holding of *Koontz*.

[26] The Court's interpretation of the UDC violates the canon of statutory construction providing that a legislature is presumed to be aware of administrative interpretations of a statute, and when the legislature fails to modify relevant language of the statute following such interpretation, it is presumed to have acquiesced to the interpretation. *Office of the Chief Med. Exam'r v. Dover Behavioral Health Sys.*, 976 A.2d 160, 166 n.29 (Del. 2009). The Court below erred in not giving due weight to the Department's interpretation of the UDC with respect to the required TIS approval (as reflected in its numerous letters to Appellant).

[27] *Cardillo v. The Council of South Bethany,* 1991 Del. Super. LEXIS 222, at *8 (Del. Super. May 24, 1991); *Dewey Beach Enterprises v. Board of Adjustment of Dewey Beach*, 1 A.3d 305, 310 (Del. 2010)

[28] *Norino Properties, LLC v. Mayor and Town Council of the Town of Ocean View, Delaware,* 2011 Del. Ch. LEXIS 55, *7 n.9 (Del. Ch. Mar. 31, 2001).

pretation is detrimentally relied upon by the Appellant.[29] In this vein, the caution that the "project shall not be approved if ***it*** will result in an unacceptable [LOS]" (emphasis added) in §40.11.150, or the prohibition against a project moving forward if "the proposed development exceeds the [LOS] standards" in §40.11.000 must be measured against the review letters and the uncontroverted fact that this proposal did not cause the LOS failure sought to be addressed. (A117-19).

This reading of the UDC is not "out of context", as the Court suggests. (Op. at 32) There is no dispute that the project was not the cause of the anticipated LOS failure. Moreover, as noted by the Appellant and DelDOT, the Appellant was more than willing to either construct its original improvement or contribute its fair share towards the DelDOT Improvement. (A052, 116-19). Either alternative would further the UDC's goal, as noted by the Court (Op. at 34), to reduce congestion on area roads.[30] Instead, the rejection of the TIS, and thus the Plan, leaves an anticipated LOS failure unaddressed for the foreseeable future.[31]

The Court's conclusion that the UDC prohibited approval of the TIS, and thus

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[29] A claim of ambiguity does not protect the Board's decision in this instance. As *Cardillo*, provides, since "zoning ordinances are in derogation of one's common law right to use [one's] property as [it] sees fit, they must be construed in case of doubt in favor of the unrestricted use of land." 1991 Del. Super. LEXIS 222 at * 8. To that end, "any ambiguity or uncertainty must be decided in favor of the property owner". *Id; see also Dewey Beach Enterprises,* 1 A.3d at 310. If a statute is ambiguous, and two reasonable interpretations of the language exist, then "the interpretation that favors the landowner controls" *Norino Properties, LLC,* 2011 Del. Ch. LEXIS 55, at *7 n.9. Thus, even if it could be argued that this section is ambiguous, such ambiguity, particularly in light of the Department's contradictory position in its review letters, must favor Appellant.

[30] UDC §40.01.015.D.

[31] The court below's concern regarding the timing of the proposed traffic improvement seems misplaced. The DelDOT review letter and Note 40 of the Record Plan required Appellant's contribution for an improvement designated for the Intersection. (A052, 116-119). While the final design was left to DelDOT, the contribution level from the Appellant and where these funds were to be used were not.

the Exploratory Plan, cannot withstand scrutiny. While the County undoubtedly possesses the authority to make final decisions on plans pending before it, such decisions remain subject to scrutiny. In the present matter, the Department consistently advised the Appellant that it was DelDOT's approval that was required to advance the plan to the next stage of the process. There is no dispute that this approval was provided by DelDOT. This approval, based upon the language in the review letters and the UDC should have been all that was necessary to advance this plan to the next stage of the process. The Department's decision to the contrary cannot be sustained.

II. THE COURT BELOW ERRED IN SUSTAINING THE BOARD'S CONCLUSION THAT THE DEPARTMENT'S REJECTION OF THE RECORD PLAN SUBMISSION DID NOT VIOLATE THE U.S. SUPREME COURT'S HOLDING IN *KOONTZ v. ST. JOHNS RIVER MANAGEMENT DIST.*

A. Question Presented

Did the Court below err in concluding that the Department's rejection of the TIS and the Record Plan did not exceed the U.S. Supreme Court's limits on unconstitutional exactions as described in *Koontz v. St. Johns River Management Dist.*? This question was preserved in the Board's Opinion (A197) and in the briefing below (A261-76, 359-67).

B. Standard Of Review

When reviewing a decision of the Board, this Court applies the same deferential scope of review as the court below.[32] While the Court reviews the record for substantial evidence to support the Board's decision, the Superior Court's legal conclusions are reviewed *de novo.*[33]

C. Merits Of The Argument

The United States Supreme Court issued its opinion in *Koontz v. St. Johns River Management Dist.*[34] while the TIS was still under review by DelDOT. This case was the third in a line of Supreme Court cases that established limits upon a government's ability to require the dedication of property or the payment of funds to address the impacts of proposed development. In issuing the TIS approval letter, DelDOT acknowl-

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[32] *CCS Investors, LLC,* 977 A.2d at 319-20.

[33] *Id.* at 320.

[34] 133 S.Ct. 2586 (2013).

edged the import of *Koontz,* noting that that the DelDOT Improvement carried with it "an estimated cost far out of proportion to the measurable impact that this development proposal has on [the Intersection], either now or after full buildout". (A116-19). Accordingly, it (1) required that the Appellant make a substantial contribution to the DelDOT Improvement (equal to the cost of the Developer's Improvement), (2) issued its approval letter and (3) issued its LNO.

The Department, despite DelDOT's approval, rejected the TIS and expired the Plan. The sole basis for this conclusion was its opinion that the LOS issues at the Intersection, notwithstanding DelDOT's report, remained unresolved. Before the Board, the Appellant's reliance on *Koontz* was dismissed in one paragraph. (A197). In sustaining the Board, the court below strayed from the Board's conclusion,[35] holding instead that because the Department never imposed a demand regarding an Intersection improvement, it could not have violated the prohibitions in *Koontz.* (Op. at 36-52).

The court below (Op. at 39-44) provided a concise summary of the decisions in *Nollan, Dolan* and *Koontz*, the trilogy of Supreme Court opinions that form the basis of the "unconstitutional conditions" doctrine. In *Nollan*, the Court concluded that a demand for an easement to benefit the general public constituted an exaction as it did not substantially advance a legitimate state interest tied to the requested permit.[36] This

[35] A requirement for there to be "negotiation" in order for an exaction to have occurred is not supported by case law. Putting aside that *Koontz* did not require negotiation as a prerequisite to advance a claim that the actions of a government agency unconstitutionally infringed upon an applicant's rights, this position is particularly problematic when balanced against the Board's conclusion that the mandatory language in the UDC prohibited it from negotiating the resolution of this matter with the Appellant. (A197). If both positions were correct, an applicant could find itself with no recourse to combat the unconstitutional actions of the land use authority. Fortunately, a number of cases that have examined this issue since *Nollan* have held that negotiation is not a required element of an exaction analysis. *See, e.g., Town of Flower Mound, infra; Levin, infra.*

[36] *Nollan v. California Coastal Comm.,* 483 U.S. 825, 834-37 (1987).

concept was advanced further in *Dolan*, where the government arguably requested more "traditional" exactions as part of the approval process for the expansion of a retail center. These requests, a public greenway and a pedestrian/bike path adjacent to a creek, however, were "unconstitutional conditions" attached to the permit, despite being rooted in statute, as they did not bear "rough proportionality" to the permit requested by the property owner.[37] In rejecting the government's position, the Supreme Court held that while "no precise mathematical calculation is required, the [government] must make some sort of individualized determination that the required dedication is related in both nature and extent to the impact of the proposed development."[38]

The issue in *Koontz* was the government's request that the developer, as a condition of the approval of a land development plan, make improvements to "offset" impacts that its proposal could have on local wetlands.[39] In an effort to meet this request, the applicant offered to place a conservation easement on 11 acres of land it owned that contained wetlands, thus protecting these areas from future disturbance. The agency, not satisfied with this offer, directed the applicant to either (1) reduce the size of its proposed development and place a conservation easement on the undeveloped portion of its property, or (2) develop as proposed, provide the conservation easement, and perform enhancement projects on agency-owned lands that would improve off-site wetlands.[40] The applicant, unhappy with either alternative, filed suit, arguing that either exaction grossly exceeded its potential impact on area wetlands.

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[37] *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

[38] *Id.*

[39] *Koontz*, 133 S.Ct. at 2592-93.

[40] *Id.*

In siding with the developer, the Supreme Court reminded local government that conditions on development approvals must bear a "nexus and rough proportionality between the property the government demands and the social costs of the applicant's proposal".[41] It noted that its precedents in this arena were designed to "enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding government from engaging in out-and-out extortion that would thwart the Fifth Amendment right to just compensation."[42] However, government may not "leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts."[43]

Against this backdrop, the Appellant, pursuant to the UDC, completed a TIS to evaluate the project's traffic impact. The TIS, while finding the potential for future LOS failure at the Intersection, a failure which would occur with or without the project (A117)[44], revealed that the potential problem was capable of being solved by the Developer's Improvement. (A118). While DelDOT acknowledged that the Developer's Improvement solved the future LOS problem, it sought a broader, alternative approach to this improvement. (A117-19). DelDOT, in recognition of the Appellant's minimal impact on the anticipated traffic at the Intersection, concluded that the Appel-

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[41] *Id.* at 2595.

[42] *Id.*

[43] *Id.* at 2598-99. The Supreme Court also noted that monetary exactions must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan,* while rejecting the argument that the government's offer to permit the plan to move forward in a reduced scale in exchange for no offsite mitigation insulated it from this cause of action as that offer still denied the property owner the ability to utilize the majority of the developable land absent constitutionally improper limitations.

[44] Indeed, in response to questioning from the court below, the Appellant provided additional information to support the position that the addition of the Delaware National community to the existing traffic at the Intersection (absent additional background traffic) would not cause the Intersection to move beyond LOS "D." (A443-44).

lant should contribute the cost of the Developer's Improvement toward the DelDOT Improvement, an improvement which, like the Developer's Improvement, would address the anticipated LOS concerns. *Id.*

Key to DelDOT's conclusion, and the analysis under *Koontz*, was the realization that to have Appellant solely responsible for correcting LOS at the Intersection "***would carry an estimated cost far out of proportion to the measurable impact that the development proposal [would have] on this intersection, either now or after full buildout.***" (A119) (emphasis added). The estimated $3.6 million cost to completely revise the Intersection as DelDOT desired, compared with the Project's minimal contribution to the traffic moving through it (less than 2.0%), made the improvement "prohibitively expensive for the Developer to construct on its own", particularly where the Intersection presently operated at LOS D (passing) and where the development seen as the main culprit of the Intersection's expected failure was unlikely to be completed during the period covered by the TIS. (A117-19). The Department, however, rejected this approach, noting that because LOS concerns had not been addressed, the TIS was "disapproved" and the project expired. (A177). In their review of this decision, neither the Board nor the court below addressed the issue of the substantial nexus and rough proportionality required by *Koontz,* instead concluding that the Department's rejection of the TIS did not constitute a "demand" under the unconstitutional exactions analysis. (Op. at 44-49). The court below also concluded that even if the Department's rejection of the TIS was a demand it was protected as a "legislative exaction". (Op. at 49-52). Both conclusions are inconsistent with the Supreme Court case law.

1. The Department's Rejection of the TIS Satisfies any Requirement for a Demand under *Koontz.*

The need for government action in the context of an exaction is not something new to this litigation. Exactions are typically defined as a "requirement that a developer provide or do something as a condition to receiving municipal approval."[45] The caselaw that has evolved since the Supreme Court's pronouncement in *Nollan* addresses exactions in two forms – (1) cases, such as *Koontz,* where the government works within its regulatory limits to gain something more that it might otherwise entitled to and (2) actions taken pursuant to statute which, while arguably within a municipality's jurisdiction, nevertheless exceed the constitutional requirement for an essential nexus and rough proportionality between a project's impact and the exaction sought by the government. Thus, in *Cheatham v. City of Hartselle*[46] (road dedication), *Levin v. City and County of San Francisco*[47] (rent control), *B.A.M. Development, L.L.C. v. Salt Lake County*[48] (road dedication), *Town of Flower Mound v. Stafford Estates L.P.*[49] (road improvements), and *Dolan v. City of Tigard, supra* (open space and bicycle path) the reviewing court, in most cases[50], struck down government action on the basis that the requested exaction, even if directed by statute, exceeded the limits

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[45] *Town of Flower Mound, Texas v. Stafford Estates L.P.,* 135 S.W.3d 620, 625 (Tex. Supr. 2004); *see also, B.A.M. Dev., L.L.C. v. Salt Lake County,* 282 P.3d 41, 45 (Utah 2012).

[46] 2015 U.S. Dist. LEXIS 25360 (N.D. Ala. Mar. 3, 2015).

[47] 71 F.Supp.3d 1072 (N.D.Ca. 2014).

[48] 282 P.3d 41 (Utah 2012).

[49] 135 S.W.3d 620 (Tex. 2004).

[50] In *B.A.M. Dev.,* the court sustained the actions of the municipality in requiring a statutory road dedication, noting that the government had satisfactorily shown that the value of the dedication was more than dwarfed by the impact of the project on the neighboring roadway. 282 P.3d at 43. In the present matter, of course, the opposite is the case. (A094-095, 117-19).

established by *Koontz*. Thus, the method of securing the exaction, be it legislative or administrative, is inconsequential so long as the result of it fails the substantial nexus and rough proportionality analysis outlined in *Koontz*.

The parties agree that, but for the rejection of the TIS, the Plan would have advanced to the record plan stage. As the record reflects, the Appellant identified two methods by which this LOS failure could be addressed. DelDOT, which has exclusive authority for the care, maintenance and control of the State's roadways[51], rejected the Developer's Improvement, which it acknowledged solved the LOS concerns but did not, from a design standpoint, meet with DelDOT's operational desires, in favor of the DelDOT Improvement, which it acknowledged was beyond the financial means or project-related obligations of the Appellant. (A116-19). As such, DelDOT approved a contribution toward the DelDOT Improvement and signed off on traffic–related issues by both approving the TIS and providing its LNO. (A113-14). With that, its involvement in the traffic process for this plan concluded.

In rejecting this approach, the Department concluded that the Appellant's contribution toward the DelDOT Improvement was insufficient because LOS at the Intersection was, in its opinion, unresolved. It is this action by the Department that constitutes the "demand" that the court below was seeking. By rejecting DelDOT's accepted path forward, the Department was giving the Appellant only two choices: fully repair the Intersection, despite its disproportionate impact on it, or abandon the plan.

As noted below[52], there are only three (3) ways under the UDC to mitigate LOS

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[51] 17 *Del. C.* §§131 and 132.

[52] The court below (Op. at 36) suggests that there was no evidence that the Appellant sought a LOS Waiver or Traffic Mitigation Agreement under the UDC to address this issue, however, as the Ap-

problems such that a project can move forward.[53] The first, reduce the size of the development, would not work as the future LOS issue would be present "with or without" the Delaware National project. (A117). The second, tie the project to improvements in the DelDOT's Capital Improvement's Program ("CIP"), was also unavailable as no project existed in the CIP to address this issue. That left the third option – repair LOS to LOS "D" or better. That is what the Appellant proposed to do, with DelDOT's concurrence, a path rejected by the Department. Thus, the only alternative available to the Appellant, if it was to develop the Property, was to bear the entire $3.6 million cost to implement the DelDOT Improvement. Absent that, the Department was content to prevent the Plan from moving forward. Thus, if the Property was to be developed, the Appellant was required to repair an Intersection that would fail with or without its Project, at its sole cost. As the Department has acknowledged, there was no other option.[54]

This case bears more similarity to *Town of Flower Mound* or *B.A.M. Development.* In each of these cases, the government acted, not in an *ad hoc* fashion, but through the implementation of an ordinance, the exact situation at issue in this matter

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pellant noted (A363-64), such a path forward was not available to this project as these remedies are geared toward office development. UDC §40.11.230.

[53] UDC §40.11.220.

[54] Indeed, it seems that the sole basis for the court below's conclusion that the Department did not make a "demand" in this case is the fact that its representatives did not specifically require payment of $3.6 million for the fix to be implemented in exchange for the ability to move the Plan forward. If that is the standard to be applied, then it seems unlikely that a government could ever be found to have violated the limitations established by *Koontz.* Its actions could be forever insulated by simply shrugging its shoulders as opposed to affirmatively approving or denying an application. Of course, in this matter, the Department's actions resulted in a denial of the TIS and the Plan (solely based on LOS issue unrelated to its project). In that vein, *Koontz* held that whether government's action was couched as an approval or a denial made no difference to the constitutional analysis. 133 S.Ct. at 2595-96.

with respect to the TIS. The "demand" was not a negotiation tactic; it was simply the act of requiring an applicant to comply with the government's interpretation of what its ordinances required. This action, however, is still encumbered by the constitutional restrictions imposed by *Koontz*. Thus, when it reviewed the TIS and assessed LOS concerns and the means to address them, the Department was still bound by *Koontz*. DelDOT, the state's transportation authority, in its review of the TIS, clearly appreciated this, as it evaluated the Intersection, the scope of the improvement required to address LOS concerns, and balanced the Appellant's minimal contribution to the traffic at the Intersection with the ultimate cost of the DelDOT Improvement.[55]

In rejecting this approach, the Department penalized the Appellant for its unwillingness to bear, on its own, the cost of the DelDOT Improvement. In other words, DelDOT's conclusion that Appellant's $1.1 million contribution to the cost of the DelDOT Improvement, was deemed insufficient by the Department because it did not solve the LOS issue, despite DelDOT's conclusion that this was an adequate path forward. The only path forward for this project, based on the Department's rejection of the TIS, was for the Appellant to shoulder the entire burden for this Improvement.[56] It is the requirement to fully address LOS at the Intersection without balancing the proposed subdivision's impact on it that is the constitutional failure under *Koontz*.

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[55] It is interesting to note that *B.A.M. Development* highlighted the cooperative relationship between the county and UDOT regarding road improvements. In Utah, much like in New Castle County, the state is in charge of roadway improvements while the county controlled land use permits and exactions. 282 P.3d at 47. In that case, the court noted that the county was in a "unique position to act as an intermediary ... between developers and [UDOT which] that bears the cost of development." A similar relationship would appear to exist between DelDOT and the County, save for the County's rejection of DelDOT's solution for its own roadway.

[56] Indeed, as the Department noted, "if an acceptable strategy for the improvement of the [Intersection to repair LOS] is determined", a new plan could be submitted. (A-177).

2. Classifying the Department's Action as a "Legislative Exaction" does not Immunize it from *Koontz*.

As an alternative basis for its decision, the court below held that the Department did not violate *Koontz* because its action was taken pursuant to a general statutory restriction applicable to all property owners.[57] As support for this position, the court below pointed to *Action Apartment Ass'n v. City of Santa Monica*[58], while the Appellee relied on *California Bldg. Industry Ass'n v. City of San Jose*[59], each case rebuffing a challenge from developers to a requirement for the inclusion of affordable housing units in a project. In each case, however, the courts were facing facial challenges to the constitutionality of the statute as opposed to examining whether a statute was proportionately, fairly and constitutionally applied in a particular instance.[60] The current matter challenges the Department's exercise of authority pursuant to an ordinance as opposed to a facial challenge to the ordinance itself.

Town of Flower Mound is more applicable to this case. In *Town of Flower Mound,* the municipality required a developer to reconstruct an abutting roadway pursuant to an ordinance that mandated upgrades when existing streets were not con-

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[57] Justice Thomas has maintained, for some time, that the distinction between so-called administrative and legislative takings is a distinction without a difference. "It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. ... The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Parking Ass'n of GA, Inc. v. City of Atlanta, Ga*, 515 U.S. 1116, 1117-18 (1995).

[58] *Action Apartment Ass'n v. City of Santa Monica* 82 Cal. Rptr.3d 722 (Cal. App., 2008).

[59] 2015 Cal. LEXIS 3905 (Cal. Jun. 15, 2015), *cert. denied,* 136 S.Ct. 928, No. 15-330 (Feb. 29, 2016). Indeed, this case distinguished those cases which addressed specific exactions tied to a particular project, such as the present matter, from those which dealt with general limitations on use. *Id.* at *10.

[60] *Action Apartment Ass'n,v. City of Santa Monica,* 82 Cal. Rptr. 3d at 730-32 ('[t]he two-pronged *Nollan/Dolan* test does not apply to [a] facial challenge to [the] Ordinance"). Based on the courts holding in *Levin, supra,* however, this conclusion, as well, seems to be in doubt.

structed to current codes.[61] The plaintiff balked at the nearly $500,000 price tag, arguing that there was no evidence that the existing road was in disrepair or that the cost of this replacement was proportionate to the impact of its project on the road.[62] The court rejected the argument that legislatively-based exactions were insulated from the *Nollan/Dolan* analysis, noting that, while an "ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could "gang up" on particular groups to force exactions that a majority of constituents would not only tolerate but applaud, so long as the burdens they would otherwise bear were shifted to others."[63] In essence, "the few" should not be compelled to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole". [64] As government should be well aware of the impacts on development on surrounding infrastructure, "the burden should be on the government to make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[65]

In the present matter, the Department pointed to the projected deficiencies in LOS as the basis for its rejection of the TIS. As noted by the TIS review letter, how-

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[61] 135 S.W.3d at 622-23.

[62] *Id.* at 624.

[63] *Id.* at 641 .

[64] *Id.* at 642. *Cheatham v. City of Hartselle,* 2015 U.S. Dist. LEXIS 25360 (N.D. Ala. 2015) is also instructive in this regard. In that case, the court concluded that a statutory requirement for the dedication of additional right of way satisfied nexus portion of the *Koontz* analysis, however, the government's reliance on a nearby RV park as the justification for the exaction was insufficient when the pending project proposed a single lot. Likewise, in the current matter, while the upgrade of an intersection is a legitimate governmental pursuit, the imposition of the entire $3.6 million cost of that project on a project generating less than 2% of the anticipated traffic at the Intersection cannot survive the proportionality prong of the *Koontz* analysis.

[65] *Id* at 643.

ever, while this problem could be addressed through a proposed intersection improvement, the $3.6 million price tag was beyond the proportionate impact of the Project on the Intersection. Despite this, the Department would only permit the Plan to move forward if the Appellant was prepared to bear the entire cost of the improvement, despite the Project's negligible impact on it.

The requirements of UDC§40.11.150 do not constitute general restrictions on use, such as those discussed in *California Bldg. Industry Ass'n*, impacting each property in the same manner or proportion.[66] In that case, a requirement to set aside 15% of total units in a project for affordable housing was likened to common zoning restrictions such as height, setback or use.[67] In contrast, the impacts of UDC §40.11.150 are far from uniform, varying significantly across both zoning classifications and areas of the County. The impacts are more often dependent less on what is proposed to be constructed in a project than on the nature of an intersection deficiency and what needs to be done to alleviate it. Thus, similar projects, impacting different intersections with the same level of traffic, may be faced with wildly differing infrastructure improvements tied not to the impact of its project but, instead, to what needs to be done to correct the problem.

Likewise, the present matter does not confront an out and out denial to develop a property such as that addressed in *City of Monterey v. Del Monte Dunes at Monterey.*[68] There, as noted in *Town of Flower Mound,* the issue was not an exaction being

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[66] 2015 Cal. LEXIS 3905 at **37-38.

[67] *Id.* at **62-63.

[68] 526 U.S. 687 (1999) (takings analysis based upon a position that the City, regardless of what was to be done on the property, would never approve a development plan).

sought by the City, but the actions taken by the City to prohibit any development of the property.[69] In that instance, the discussion of the *Nollan/Dolan* limits on exactions was immaterial to the case before the Court, which distinguished matters involving exactions from those directly challenging the government's unconditional denial of a permit.[70] In the present matter, the Department had approved all aspects of the project save for the TIS (A103, 177), which it rejected despite DelDOT's approval of the same, because of Appellant's unwillingness to accede to a disproportionate demand to upgrade the Intersection. In this context, the requirements of *Nollan, Dolan, and Koontz* must be respected.

Levin v. City and County of San Francisco is perhaps most instructive in this regard. In *Levin*, the Court was tasked with the review of an ordinance that required payments from landlords to tenants if the landlord wished to withdraw its property from the available rental stock. Instead of examining each withdrawal independently (or establishing regulatory safeguards to ensure that the ordinance addressed this issue in a proportionate fashion), the schedule developed pursuant to the ordinance simply created a multiplier based on the year the tenant commenced occupancy.[71] The court found that the impact of the ordinance implicated the *Nollan/Dolan* analysis, noting that the obligation for payment was triggered by a desire to change the use of the property.[72] Critical to the court's analysis was the fact that there was no showing that the decision to remove a property from the available rental inventory had any impact

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[69] 135 S.W.3d. at 635-36.

[70] *Id.*

[71] 71 F.Supp.3d at 1077-78.

[72] *Id.* at 1083.

of the rent disparity a tenant now confronted.[73] In striking down the ordinance, the court found no proportionality between the "infinitesimally small impact" that the withdrawal of a unit had on the rental gap now faced by the tenant and the "enormous payout untethered in both nature and amount to the harm actually caused" that a property owner was required to make.[74] Citing *Koontz's* prohibition against requiring a single property owner to solve a broad public problem not of its making, the court struck down the ordinance, finding that the mandate it imposed saddled a property owner with the burden of solving a problem that evolved, not from its decision to remove a property from the rental market, but from the historical impact of high market rental rates and prior rent controls enjoyed by a tenant.[75]

Similarly, in the present matter, the rejection of the TIS and the Department's interpretation of UDC §40.11.150, has left it to the Appellant to fully implement the DelDOT Improvement, despite DelDOT's conclusion, unrebutted by the Department, that the proposed project has very little impact on the Intersection. (A119). Consistent with the holding in *Levin,* this position cannot be sustained under the analysis required by *Koontz.*[76] In its application of §40.11.150, and its conclusion that the Plan could move forward only if the LOS concerns were fully addressed, the Department was basing its action solely on the Appellant's unwillingness to singlehandedly solve an infrastructure deficiency unrelated to its Project. This lack of proportionality

[73] *Id.* at 1084-85.

[74] *Id.* at 1085.

[75] *Id.* at 1085-86.

[76] Of course, the Appellant has not argued that it should not have to participate in any upgrade to the Intersection. Indeed, it agreed to contribute a sum that far exceeded, on a percentage basis, the Project's impact on the Intersection, committing to fund approximately $1.1 million toward the anticipated $3.6 million cost of the DelDOT Improvement.

between the cost of the improvement and the Appellant's impact on the infrastructure is what *Koontz* directed must be examined by the government before such an expenditure can be required. The fact that the Department's action was rooted in an ordinance that, on its surface, applies to all property owners in the same manner, is of no moment where the impact of that ordinance, as in *Levin*, fails to account for the disproportionate impact that may result in a particular instance.

In this case, the Appellant is not arguing that UDC §40.11.150 is invalid on its face; indeed it has likely evaluated the impacts of development and the responsibility for improvements in a manner that has avoided confronting the issue presented by this case. In the present matter, however, DelDOT, as the entity that is tasked with (1) the ownership, control and maintenance of the Intersection[77], and (2) the responsibility to "lay out, open, widen, straighten, grade, extend, construct, reconstruct and maintain [the Intersection] for the purpose of the improvement of state highways"[78], concluded that, while the Developer's Improvement addressed the Intersection from a LOS standpoint, a more significant improvement was ultimately needed to address the projected deficiencies at the Intersection. (A118-19). Most important in the context of this case, DelDOT's evaluation of both the desired improvement to the Intersection and the Appellant's role in the generation of traffic at it, concluded that while a substantial improvement was necessary, it was improper to place the burden for this solely on Appellant's shoulders. (A118-19).

In short, while the TIS demonstrated the likelihood that the Intersection would

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[77] 17 *Del. C.* §131(a).

[78] 17 *Del. C.* §132(c)(3).

fail under future development scenarios, the Appellant's project was not the cause of, and did not significantly impact, this failure. Instead, the failure was rooted in the existing traffic at the Intersection and the anticipated future growth. Under the analysis outlined in *Levin,* while it would be appropriate to seek the participation of the Appellant in the solution, the Department simply took the position that, absent the Appellant's ability to solve the problem, its project could not move forward. In so doing, the Department employed UDC §40.11.150 without an eye toward the relationship between the Project and the public infrastructure to be upgraded. Attempting to insulate this decision by classifying it as a "legislative exaction" cannot withstand scrutiny. The Department's reliance on the language of the UDC ignores the tenets of *Koontz* and instead fulfills the prediction offered by *Town of Flower Mound,* namely that legislative enactments can be utilized to "gang up" on particular groups (in this case, developers) to secure infrastructure improvements that a "majority of constituents would not only tolerate but applaud, so long as the burdens they would otherwise bear were shifted to others."[79]

[79] 135 S.W.3d at 641.

CONCLUSION

For all of the reasons set forth above, this Court should reverse the judgment of the court below and direct entry of judgment in favor of Appellants.

Respectfully submitted,

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