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IN THE

Supreme Court of the State of Delaware

GOLF COURSE ASSOC, LLC
Petitioner-Below, Appellant,

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

REPLY BRIEF OF APPELLANT

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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.

While enveloping itself with the embrace of the text of the UDC (AB at 13)[1], the Appellees continue to both overstate the meaning of that text while, at the same time, ignoring the very direction that it offered to the Appellant in the review of its plans. The Appellant adhered to the guidance offered by the Department's review letters, conducting a TIS and securing DelDOT's approval of the same, a process which, pursuant to these review letters, satisfied the requirements in the UDC to submit the Record Plan. In countering the Department's rejection of its Record Plan submission, the Appellant is not suggesting that the Department is not entitled to review the TIS submitted to and approved by DelDOT. Rather, the question is (a) whether the Department's rejection of the TIS was appropriate under the UDC, particularly in light of DelDOT's approval of the TIS, and (b) whether the Department should have accepted the submission of the Record Plan in accordance with its interpretation of the UDC.

The record is clear that DelDOT and the Appellant were engaged in an over three (3) year process with regard to traffic review. The Department, from all indications, was not an active participant in this process. At the conclusion of this process, DelDOT approved the TIS with specific direction regarding the remedy for the LOS concerns at the Intersection. First, DelDOT acknowledged that the Appellant designed an improvement which would solve the LOS issue, however, it

[1] Citations to Appellees Answering Brief are denoted by "AB at" followed by a page number.

was a solution that DelDOT wanted to expand. (A118) This same letter also acknowledged that the Appellant designed an improvement, at DelDOT's direction, that would solve the LOS concerns but which would be prohibitively expensive, in light of a number of factors, for the Appellant to construct. (A118-19) As a result, this letter directed the Appellant to make a substantial contribution toward the larger improvement as part of the overall improvement package that DelDOT recommended to accommodate this project. (A119) On the basis of the recommended improvements contained in its approval letter, DelDOT also issued its LNO, which noted that, while deferring to the County on the final land use decision, the transportation improvements contained therein "are based on an analysis of the proposed project, its location, and its estimated impact on traffic movements and densities." (A113) Despite this guidance, however, the Department nevertheless rejected the TIS and the submission of the Record Plan.

This scenario presents the question left unresolved by the court in *Toll Brothers v. Wicks*,[2] namely, did the Department err in rejecting the Record Plan submission following DelDOT's approval of the TIS. The County, which had accepted the developer's exploratory and preliminary plan submissions in that matter,[3] was not a party in *Wicks*. The failure of the developer in *Wicks*, and the undoing of much of its case, was its lack of a record plan submission to prompt the County to make a decision on its application.[4] The Court concluded that while, in its opinion, DelDOT's role in the land use process was advisory, it was the devel-

[2] 2006 Del. Ch. LEXIS 122 (Jun. 21, 2006).

[3] At that time, the County employed a three-step review process (Exploratory, Preliminary and Record Plan). *Id.* at *5. The current process requires only an Exploratory and a Record Plan submission.

[4] A fair reading of *Wicks* contains no suggestion that the developer was misled by anything that the County did or did not do with regard to its plan.

oper's obligation to present the County with a record plan submission for it to take action on, following which, the developer could, if need be, take advantage of the myriad of administrative and legal options available to it under the law.[5] In the present matter, of course, the Appellant did exactly that. It secured DelDOT's TIS approval, it secured DelDOT's LNO and it submitted the Record Plan to the Department. Upon the Department's rejection of that plan submission, the Appellant proceeded as outlined by Chancellor Chandler in *Wicks*, appealing the Department's decision in accordance with UDC §40.31.510. In rejecting DelDOT's conclusions and the submission of the Record Plan, the Department has made ripe the question Chancellor Chandler found unripe in *Wicks.*[6]

The Appellees have never disputed the fact that the direction given to Appellant during the processing of its Exploratory Plan was that it was DelDOT's approval that was necessary to advance to the Record Plan stage. Indeed, as the Appellant noted, all nine (9) of the Department's review letters advised it that it was DelDOT's approval that was necessary to advance the plan to the Record Plan stage, direction that gained import when these same letters advised the Appellant that, while DelDOT's approval of the TIS was required prior to the submission of the Record Plan, the Department's Transportation Section's Approval was required before recordation of the plan[7]. (A083, 093, 108). Indeed, the Department's final Review Letter noted that (1) "the TIS must be approved by DelDOT prior to the submission of the Record Plan per Section 31.113.C.2 of the UDC" (A104), that

[5] *Id.* at *22-23.

[6] The issue in *Wicks* was not the Department's role in the approval of the TIS, it was DelDOT's refusal to issue a LNO and the developer's failure to submit its Record Plan to the Department for review.

[7] Pursuant to UDC §40.31.390, upon submission of the Record Plan, an applicant would have up to 10 months to secure recordation of Record Plan.

the plan should be revised to accommodate all of DelDOT's required improvements in Note 40 (A108) and that the Transportation Section's approval was "required prior to recordation." (A108) Thus, while the letter notes that the TIS must be approved before record plan submission (A108), that approval, as communicated to the Appellant by the Department four pages earlier, was DelDOT's. (A104)

While the court below's reliance on *Trans-America Airlines, Inc. v. Kenton*[8] is, perhaps, understandable, the Appellees fail to present any response of merit to the basic premise, as noted by the Appellant, that the administrative action reviewed in *Kenton* was an offhanded comment offered by a staffer within the Division of Corporations. In dismissing reliance on such comments, the *Kenton* Court noted that such offhanded comments of sympathy or support cannot alter the plain meaning of the statute that otherwise governs the question.

In the present matter, however, no such offhanded comments were offered and the Department's position, as communicated to the Appellant, is consistent with the text of the UDC. The Department, on nine (9) separate occasions, conveyed the same information to the Appellant, namely that before the plan could advance to the Record Plan stage, DelDOT's approval of the TIS was required. As noted in Appellant's Opening Brief, these communications were not flippant platitudes intended to placate an applicant but the Department's official review letters regarding the project, letters intended to "identify[] any concerns relating to Chapter compliance or other factors that the applicant must consider."[9] Given the Department's role as the entity directed by both the UDC and state law to administer

[8] 491 A.2d 1139 (Del. 1985).

[9] UDC §40.31.113.D.

and interpret the UDC[10], its communiques to the Appellant are not comparable to the offhanded sympathies offered by the clerk in *Kenton*.[11] It is clear that the Department interpreted the UDC as requiring DelDOT's approval of the TIS prior to the submission of the Record Plan for review. (A104, 108) This was completed by the Appellant in a timely fashion. As such, the court below erred in sustaining the rejection of the TIS and, thus, the rejection of the Record Plan submission.

With regard to the impact of UDC §40.11.150, the Appellees, as well as the court below, acknowledged that the projected Intersection LOS failure was not the result of the Delaware National project. This was confirmed by the results of the TIS, which not only showed that the failure would occur "with or without" the Delaware National project (A117), but also that, standing on its own, the project would not cause the anticipated failure (absent other development). (A443)[12] Despite its infinitesimal impact on the traffic utilizing the Intersection, the Appellant was willing to contribute a substantial portion of the estimated cost to restore the LOS at the Intersection, a requirement of DelDOT's ultimate approval of the TIS. The Department rejected this approach.

Against this backdrop, the Appellant fails to see how the approach endorsed by DelDOT does not satisfy the requirements of UDC §40.11.150 or the intent of the UDC to protect infrastructure. The notion that this proposal would degrade

[10] 9 *Del. C.* §1301; UDC §40.30.410.

[11] The Appellees, interestingly enough, remind the Court that it should defer to the "judgments of an administrative agency as to the meaning or requirements of its own rules," (A23), yet they seek to distance themselves from the very interpretation of these rules that the Department repeatedly offered to the Appellant during the processing of its plans.

[12] The Appellees argue, in footnote 2 of their Answering Brief (AB at 20), that "the UDC does not say that the project must 'cause' an unacceptable LOS, but rather that the project need only result in an unacceptable LOS". The Appellant fails to see the significance in this distinction between a project that is "causing" an LOS deficiency or "resulting" in an unacceptable LOS; the Delaware National project, as the evidence demonstrates, did neither.

LOS is muted by the fact that the projected LOS of "F" will occur regardless of whether this project moves forward. Moreover, the TIS approval letter established a path forward to address the LOS concerns, based on the designs provided by the Appellant (at DelDOT's direction). While the DelDOT letter states that an "appropriate fix" for LOS has not been identified (A118), the same letter notes that the Conceptual Plan put forward by the Appellant could be constructed within the limits of the existing right of way and *would* solve the anticipated LOS concerns. (A118) Further, DelDOT was skeptical that the development anticipated to cause the LOS failure would be online when projected. (A118) For these reasons, DelDOT concluded that a monetary contribution from the Appellant toward the ultimate improvement at the Intersection was appropriate.[13]

As noted in Appellant's Opening Brief, the questions before this Court are two-fold: (1) was the Department correct in rejecting the TIS even though it was clear that the Delaware National project was not the cause of the LOS failure and DelDOT had endorsed a path forward to ensure the Appellant participated in the ultimate solution,[14] and (2) was the Department, despite its guidance to the Appellant in its review letters interpreting the UDC, correct in rejecting the submission of the Record Plan following DelDOT's approval of the TIS. The Appellant has maintained that the TIS Approval letter and the LNO from DelDOT satisfied the requirement of UDC §40.11.150.B as its project was neither degrading the LOS at the Intersection nor was it the cause of the Intersection's failure. Beyond that, however, the Department's review letters reaffirm that it was DelDOT's approval that was required before the Record Plan could be submitted. Given the lack of

[13] This, of course, was within DelDOT's purview pursuant to 17 *Del. C.* §§131 & 132.

[14] UDC §40.11.150.B.

clarity on this point from UDC §40.11.150, §40.31.113 and Appendix 1, the Department's direction, through its review letters, should control the discussion and resolve the ambiguity.[15]

The notion that the Department was prohibited from approving the TIS, in light of the pronouncements in *Koontz,* cannot be sustained.[16] This is particularly true where none of the options trumpeted by the Appellees as avenues to resolve LOS (AB at 22) are available to the Appellant. As Appellant noted in its argument, the option to "down size" the project or tie the project to the DelDOT capital improvement program was not available, nor was the option to seek a LOS waiver. If, as the court below suggested, the Department would be prohibited from allowing a project to proceed, despite the fact that it is not the cause of the failure that needs to be addressed, the County is permanently insulated from any requirement to ensure that its demands for infrastructure improvements have both a sufficient nexus and rough proportionality to the projects impacting that infrastructure.

[15] The Appellees continue to argue that to the extent that there is any ambiguity, the Court should defer to its interpretation of the Ordinance. (AB at 22-23) As the Department's interpretation of the UDC, as expressed to the Appellant in its review letters (as opposed to its briefing before this Court and the court below), supports the position that the Appellant is advocating here, it should be that interpretation which controls the outcome in this matter.

[16] Curiously, the Appellees appear to take solace in the notion that the "TIS was not the cause of any unaddressed failures [of LOS] in the foreseeable future." (AB at 22) Of course, the TIS does not "cause" an intersection to fail; it is the vehicle by which the operation of the Intersection is studied to determine LOS both at the time of the TIS and in the future. In the present matter, the TIS determined that the "present" LOS at the Intersection was "D" and that the anticipated LOS at the Intersection was "F", regardless of whether the Delaware National project moved forward. The Department's rejection of the TIS and the Record Plan submission, and thus DelDOT's recommendations regarding the appropriate manner by which to address the projected failure ensured that the failure would remain unaddressed for the foreseeable future.

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. The Department's Requirement That Appellant Solve LOS At Its Sole Expense In Order To Advance Its Plan Was An Unconstitutional Condition Under *Koontz.*

Appellees resist the requirement, rooted in the *Dolan/Nollan/Koontz* trilogy, for there to be a substantial nexus and rough proportionality between a project and a required infrastructure improvement on three fronts. First, echoing the court below, they endorse the conclusion that the Department placed no demand on the Appellant. Second, they assert that the unconstitutional conditions doctrine does not apply where the exaction takes the form of a "legislative" exaction. Finally, they argue that even if the requirements of the *Dolan/Nollan/Koontz* trilogy apply to this matter, the Appellees' rejection of the TIS and the Record Plan nevertheless satisfies the requirement for rough proportionality between the impact of the proposed project and the exaction demanded by government. None of these defenses can be sustained.

As noted in the Appellant's Opening Brief, there can be no way to classify the actions of the Department in this matter as anything other than an impermissible "demand". DelDOT, acting in its role as the responsible agency for the ownership, control and maintenance of the State's roads,[17] concluded that the original improvement proposed by the Appellant, at an estimated cost of $1,100,000, while addressing the LOS deficiencies, did not work from an operational standpoint. As

[17] 17 *Del. C.* §§131(a), 132(b) and 146(a).

such, it requested that the Appellant design a revised, larger improvement to address these issues. (A118) While DelDOT found the revised improvement to be "acceptable," it acknowledged that it would be unfair to place the sole responsibility for this improvement on the Appellant. (A118) As such, it approved the TIS with a requirement for the Appellant to, among other things, contribute $1,100,000 toward the estimated $3,600,000 cost of the larger improvement. It also issued its TIS Approval Letter and LNO, thus concluding its participation in this matter.

In rejecting DelDOT's conclusion, the Department determined that DelDOT's approach left the LOS concerns at the Intersection unresolved and rejected both the TIS and the Record Plan submission. In reliance on its interpretation of the UDC, the Department took the position that in order for the Appellant's project to move forward, it was up to the Appellant to solve the LOS problem at the Intersection. Absent such resolution, it would refuse to accept the Record Plan submission. Herein lies the demand – the Appellant was left with the Hobson's choice of either abandoning its project[18] or repairing the LOS problem at its sole expense, a project that carried with it an estimated cost of $3,600,000, which DelDOT concluded would be unfair for the Appellant to exclusively bear. The Appellant's position that this conclusion constitutes the necessary demand has been consistent throughout this matter, from the Board of Adjustment through argument before the court below.

The cases applying the unconstitutional conditions doctrine have recognized two general methods to satisfy the requirement for a governmental demand. The

[18] The TIS had concluded that the Intersection would fail with or without the Delaware National project, meaning no major subdivision plan could be approved for this Property absent addressing the LOS concerns.

first, as seen in *Nollan v. California Coastal Comm'n*,[19] addresses the scenario where government exceeds the bounds of its permitting authority by attaching a condition to its approval of a permit. The second method arises in cases such as *Dolan v. City of Tigard*,[20] *Town of Flower Mound v. Stafford Estates, Ltd.*,[21] and *B.A.M. Development, L.L.C. v. Salt Lake County*,[22] all of which involved challenges to the government's application of an ordinance or statute to a project before it. In these cases, the courts examined the government's demand for an exaction (monetary or real property) by balancing the nexus between the exaction and the developer's impact on infrastructure against the proportionality of the demanded exaction.[23] This is true regardless of whether the exaction consists of the dedication of property to the public or a requirement for the developer to improve property already owned by the public.[24]

Where it is found that a developer is being compelled to disproportionately shoulder the burden of addressing infrastructure concerns, reviewing courts have not hesitated to strike down an exaction. In many cases, the act of requiring an exaction pursuant to a statutory directive has not insulated governmental action where the exaction is disproportionate to the impact of the project. Nor is the decision of the government insulated merely because it is structured not as a condi-

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[19] 483 U.S. 825 (1987).

[20] 512 U.S. 374 (1994).

[21] 135 S.W.3d 620 (Tex. 2004).

[22] 282 P.3d 41 (Utah 2012).

[23] An "exaction" is generally defined as "any requirement that a developer provide or do something as a condition of municipal approval." *Town of Flower Mound*, 135 S.W.3d at 625. The *Town of Flower Mound* court found no distinction between the classification of the governmental action as a "dedication" or an "exaction. *Id.* at 635.

[24] *Id.* at 640.

tioned approval of the application, but as a denial of the application because the landowner's refusal to yield to the request.[25] Thus, the Department's rejection of the TIS and the Record Plan submission, because the Appellant would not shoulder alone the responsibility to restore LOS at the Intersection, is an exaction subject to the requirements of *Koontz.*

The Appellees, in arguing against this conclusion, resort to a familiar refrain of government in resisting these claims – namely that requiring it to demonstrate the proportionality of its zoning decisions would cause its land use activities to grind to a halt. (AB at 27) This suggestion, however, has been raised and rejected by other courts for two reasons. First, the vast majority of zoning regulations fall far short of demanding an exaction that could run afoul of *Koontz.*[26] Secondly, in those cases where an exaction, such as the one in the present matter, is reviewed, courts have failed "to see any reason why limiting a government exaction … to something roughly proportional to the impact of the development … will bring down the government."[27] Indeed, where the government demands an exaction, placing the burden on the government to satisfy the *Nollan/Dolan/Koontz* analysis is "essential to protect against government unfairly leveraging its police power over land-use regulation to extract from landowners concessions and benefits to which it is not entitled."[28]

California Bldg. Industry Ass'n. is an odd case for the Appellees to rely up-

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[25] *Koontz,* 133 S.Ct. 2586, 2591.

[26] *See, e.g., California Bldg. Industry Ass'n v. City of San Jose,* 2015 Cal. LEXIS 3905, *37-38 (Cal. 2015); *Town of Flower Mound,* 135 S.W.3d at 639 ("Clearly, the cited examples of routine regulatory requirements do not come close to the exaction imposed by the Town in this case").

[27] *Town of Flower Mound,* 620 S.W.3d at 639.

[28] *Id.*

on. (AB at 27) The issue in that case was a facial challenge to an ordinance designed to incorporate moderately priced housing into proposed development projects. In that vein, the ordinance required that a certain percentage of the units in a new project be set aside for those earning no more than 120% of the area median income. The impact of this ordinance on the home building community, however, was mitigated in a variety of ways, including density bonuses, reduced parking, reduced setbacks, modified unit types, and financial assistance from the city in selling the affordable units.[29] In rejecting this facial challenge, the court compared the impacts of the ordinance to traditional limitations, such as use, density, setbacks or lot size and thus rejected the need to analyze the matter through the *Koontz* prism.[30]

Of course, the present challenge is not a facial challenge to the validity of the UDC or concurrency. Instead, the present matter focuses on the Appellees demand that the Appellant completely solve, at its sole expense, the LOS concerns at the Intersection before its project could move forward. The Appellant's plan does not seek a rezoning and otherwise complies with the requirements of the "Suburban" zoning attached to the Property. In addition, the parties agree that the only action that the Department relied on to reject the submission of the Plan was the Department's approval of the TIS, which it would not grant absent Appellant's commitment to solve the LOS problem. The Department does not disagree with the fact that the proposed project makes a minimal contribution to the LOS problem and acknowledges that the agency tasked with control over the Intersection (DelDOT) endorsed a path forward that directed the Appellant to contribute to the

[29] 2015 Cal. LEXIS 3905 at *27-28.

[30] *Id.* at *37-38.

ultimate solution at the Intersection. Against this backdrop, the desire to withhold approval of the Appellant's TIS and Plan until the anticipated LOS issues are resolved must be considered an unconstitutional condition forbidden by *Koontz*.[31]

B. The Application Of UDC §40.11.150 To The Appellant's Plan And TIS Was An Unconstitutional Condition Prohibited By *Koontz.*

The Appellees challenge Appellant's reliance of *Town of Flower Mound* as an outlier in the arena of unconstitutional conditions by noting that it should be disregarded because the court declined to rule that all legislative exactions are subject to the limitations established by the *Nollan/Dolan/Koontz* trilogy. This is a curious place to make their stand. Appellant has never suggested that each aspect of the UDC is subject to this review, nor has it mounted a facial challenge to either concurrency (in general) or to UDC §40.11.150's validity.[32] Instead, consistent with cases such as *Town of Flower Mound* and *B.A.M. Development, L.L.C.*, the Appellant has maintained that the Department's application of UDC §40.11.150 to the present matter exceeded the boundaries established by *Nollan/Dolan/Koontz* and their progeny.[33] In this vein, the matter before this Court is consistent with both

[31] This decision is not insulated by the fact that the Appellees' action is couched as a denial of a plan as opposed to an approval with conditions. (AB at 28) As noted in *Koontz*, the requirement for rough proportionality remains present regardless of whether the actions of the government are rooted in an approval or a denial. *Koontz*, 133 S.Ct. at 2595.

[32] *Levin v. City and County of San Francisco*, 71 F.Supp.3d 1072 (N.D. Cal. 2014), suggests that such a challenge could be maintained under the unconstitutional conditions doctrine.

[33] The Appellees cite *Homebuilders Ass'n of Metro Portland v. Tualatin Hills Park & Rec. Dist.*, 62 P.3d 404 (Or. Ct. App. 2003) and *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 296 (Minn. Ct. App. 1996), for support of their position that so-called legislative exactions are not subject to review as potential unconstitutional exactions. However, unlike the present matter, these cases involved facial challenges to the ordinances under review. Indeed, in *Arcadia Dev. Corp.*, 552 N.W.2d at 286, the court noted that the *Dolan* line of cases was best left to "adjudicative land-dedication situations or to 'classic subdivision exaction' cases," such as that present in the current matter.

Town of Flower Mound and *B.A.M. Development*, where the reviewing courts evaluated the actions of government in seeking road improvements (*Town of Flower Mound*) or right of way dedication (*B.A.M. Development*) under the unconstitutional conditions analysis. In each case, the action taken by government, pursuant to statute, was examined not for purposes of striking down the ordinance as a whole, but rather, to confirm that the exaction sought in accordance with the ordinance was proportional to the impact of the development proposal.

In *Town of Flower Mound* and *B.A.M. Development*, as in the present matter, there was no allegation that the governmental demand did not bear a sufficient nexus to the project before it; instead, the focus was on whether what was demanded from the applicant was proportional to its impact on the surrounding infrastructure. Thus, in *Town of Flower Mound*, the court concluded that while upgrading abutting roads was a laudable goal, requiring the developer to do so without determining whether the cost was proportional to its impact violated the unconstitutional conditions doctrine.[34] Similarly, in *B.A.M. Development*, the court found that not only did the nexus exist between the project and the requested dedication of right-of way, but that the value of the dedication was actually less than the impact of the project.[35] By comparison, in the present matter, the Appellant is not challenging the nexus between its project and the need for an upgrade to the Intersection; instead, it is arguing that the requirement it be solely responsible for this upgrade violates the limits established in *Koontz*, particularly where its impact on the

[34] 135 S.W.3d at 643-45.

[35] 282 P.3d at 46; *see also, Cheatham v. City of Hartselle*, 2015 U.S. Dist. LEXIS 25360, *12 (N.D. Ala. Mar. 3, 2015) (the city "identified a legitimate state interest in the regulations in question, namely the safe and efficient flow of traffic on all roads within its planning jurisdiction" (citing *Koontz*) but there was no proportionality shown to support the exaction).

Intersection (less than 2% of total traffic) is dwarfed by the estimated cost to solve the problem.

The Appellees take issue with the Appellant's reliance on *Levin v. City and County of San Francisco, supra,* as support for the position that the application of UDC §40.11.150 to this project exceeded the limits established by the unconstitutional conditions doctrine.[36] Despite their protestations to the contrary, however, this case is instructive in the present matter.[37] While, in *Levin,* the ordinance addressed the compensation of tenants living in properties that were being converted (by the property owner) from rental housing to owner-occupied housing, the court likened its operation and impact to a land use regulation, thus making the application of the *Nollan/Dolan/Koontz* trilogy appropriate.[38] In *Levin*, the payment to the tenant was triggered by the property owner's desire to convert the property to another use, thus tying that payment to a particular piece of property.[39] Critical to the analysis was the element of choice – the property owners burdened by the ordinance challenged in *Levin* could avoid paying the fee if they kept their unit on the rental market; similarly the plaintiff in *Dolan* would not have been required to dedicate property to the government if she did not make changes requiring governmental approvals to her store.[40] Similarly, the Appellant could have left the Prop-

[36] The Appellees suggest that this case was first discussed in Appellant's Opening Brief (AB at 31). However, a review of the record below demonstrates that this case was cited in Appellant's Opening Brief (A270, 276), Appellant's Reply Brief (A361) and in its January 13, 2016 correspondence to the court below. (A445)

[37] It is also worthy of note that it struck down a compensation scheme that was more than similar to that sustained in *Arcadia Dev. Corp., supra.*

[38] 71 F.Supp.3d at 1082-83.

[39] *Id.* at 1083.

[40] *Id; see also, Cheatham,* 2015 U.S. Dist. LEXIS 25360 at *13 (had plaintiffs merely sought to continue to rent the existing house, as opposed to subdivide the property and sell it, the City "would have no basis to demand the 15 foot dedication on [the existing road]).

erty as a shuttered golf course and thus avoided any contribution to any improvement at the Intersection.

Like *Levin,* the exaction challenged in the present matter is tied to a specific piece of property (the Delaware National Property). While the Appellees take solace in the fact that the challenged action is routed in an ordinance that applies to the County as a whole, reliance on this position has been viewed with increasing skepticism as a defense to a claim of an unconstitutional exaction.[41] Indeed, Justice Thomas has noted that whether the exaction is the result of an *ad hoc* decision or legislative action is a distinction without a difference.[42] A review of the present matter underscores that fact. The ordinance in question regulates LOS within the area of influence for a particular project. The obligation to address LOS is not triggered, however, unless a project requiring a TIS is proposed for the property. Once the TIS is completed, the project is not permitted to advance absent the commitment of the developer to solve a LOS problem. Undoubtedly, this process has worked well in the past, requiring developers (on their own or in combination with others) to contribute to or complete road improvements to mitigate the impact of their project(s).

The present matter, however, presents a starkly different scenario. There is no dispute that the Delaware National project is not the cause of the failure at the Intersection, yet, the only way for the project to advance, the "change of use" referenced in *Levin,*[43] is for the Appellant to single-handedly solve the problem. This

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[41] *Town of Flower Mound, supra, B.A.M. Development Corp. supra; Levin, supra.*

[42] *Parking Association of GA, Inc. v. City of Atlanta,* 515 U.S. 1116 (1995) (THOMAS, J, dissenting from a denial of *certiorari*); *CA Bldg. Industry Ass'n v. City of San Jose,* 136 S.Ct. 928 (2016) (THOMAS, J, dissenting from a denial of *certiorari*).

[43] 71 F.Supp.3d at 1083.

is where the Appellees run afoul of the *Nollan/Dolan/Koontz* trilogy.

As a last line of defense, the Appellees suggest, as they did before the Board, that rejecting this project for its failure to single-handedly solve the LOS concerns was nevertheless a proportional response under the unconstitutional conditions doctrine. They argue that, regardless of the project's impact on the Intersection, the developer must either solve the problem on its own or wait until the government elects to solve it.[44] This is exactly the scenario that *Town of Flower Mound* cautioned against. In pointing to its refusal to establish a "bright-line" test for legislative exactions, the court noted that the "touchtone" of such constitutional protections "is that a few not be forced … to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[45] This is particularly true because "local government is constantly aware of the exactions imposed on various landowners" and it is "aware of the impact of … development[] on the community over time."[46]

The required analysis is straightforward, namely, is the "imposition on the community of a proposed development … roughly equal to the cost being extracted to offset it."[47] Here, the TIS demonstrated the impact of development on the Intersection. It demonstrated that an anticipated LOS failure would occur with or without the Delaware National project and that the project's contribution to the an-

[44] The Appellees point to the fact that the UDC offers several options that a developer may pursue when confronting a LOS failure (AB at 32-33) while failing to acknowledge the reality that none of these options were available to the Appellant in this case (A363-364).

[45] 135 S.W.3d at 642.

[46] *Id.*

[47] *B.A.M. Development, L.L.C.*, 282 P.3d at 46.

ticipated failure was less than 2% of the total traffic – an infinitesimal amount.[48] (A095, 118-19) DelDOT concluded that the appropriate path forward was for the Appellant to contribute the cost of the original improvement it designed toward the global improvement DelDOT supported (A118), something the Appellant consented to, as noted in Note 40 of the submitted Record Plan. (A052)

In rejecting this approach, the Appellees have lent credence to the court's warning in *Town of Flower Mound*, endorsing the prediction that it would be "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."[49] The Appellees' argument, taken at face value, is that the Department did not compel the Appellant to make improvements to public infrastructure, and, therefore its actions should be insulated from the reach of the *Nollan/Dolan/Koontz* trilogy. That position ignores the second part of that equation, namely that if the Appellant does not improve the Intersection at its exclusive expense, the project cannot move forward because there are no options otherwise available to it under the UDC to resolve the LOS issue. The Department's conclusion, made without balancing the impact of the project on the Intersection, runs afoul of the unconstitutional conditions doctrine and cannot be sustained.

[48] *See, e.g. Levin,* 71 F.Supp.3d at 1085 (ordinance struck down where "the infinitesimally small impact of the withdrawal on the rent differential gap [faced by the tenant] … [is disproportionate to the] enormous payout untethered in both nature and amount to the social harm actually caused by the property owner's action")

[49] *Id.* 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 Appellant.

Respectfully submitted,

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