No. 11-1447

In the

Supreme Court of the United States

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COY A. KOONTZ, JR.,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

♦

ON WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

♦

BRIEF AMICUS CURIAE OF HILLCREST PROPERTY, LLP IN SUPPORT OF PETITIONER

♦

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Hillcrest Property, LLP (Hillcrest) respectfully submits this amicus brief in support of the Petitioner, Coy A. Koontz, Jr.[1]

Hillcrest owns property in Pasco County, Florida, a suburb of Tampa. Hillcrest has endured blatant, extortionate leveraging of the police power in connection with securing development approval for a commercial shopping center. The County conditioned its approval of Hillcrest's proposed shopping center upon Hillcrest dedicating to the County, at no cost to the County, 4.23 acres (or 28%) of its commercially zoned property.[2] The County required the dedication pursuant to a legislatively-adopted local ordinance that mandated such dedication: (1) without payment of compensation for the land taken or damages to the remaining untaken land; (2) without regard to the traffic impact of Hillcrest's proposed development; and (3) without the County first being required to make an individualized determination that the

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[1] Pursuant to Rule 37.2, all parties have consented to the filing of this brief and have received notice of amicus curiae's intent to file this brief. Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or part. Other than amicus curiae, its agents, and its counsel, no person made a monetary contribution to fund the preparation or submission of this brief.

[2] *Hillcrest Prop., LLP v. Pasco Cnty.,* Hillcrest's Motion for Summary Judgment [MSJ], Case No. 8:10-CV-819-T-23TBM (M.D. Fla. 2012) (Doc. 112 at 11). All parenthetical citations in this brief are to this docket, e.g. ((Doc. __ at __).

required dedication was related in both nature and extent to the traffic impact of Hillcrest's proposed development.

That a local government feels free to enact and enforce an ordinance that flies in the face of this Court's exactions jurisprudence underscores the need for this Court to reign in local government exaction practices.

SUMMARY OF ARGUMENT

Although a government may regulate the ownership of property under its police power, this Court has found it necessary to develop outer limits so that the power does not swallow property rights. This Court developed exactions law to protect property owners from a government's extortionate leveraging of the police power to obtain benefits for which the government would otherwise have to pay for. The unconstitutional conditions doctrine provides this protection through both the Takings Clause and the Due Process Clause.

The Florida Supreme Court ignored this doctrine, which underlies this Court's exactions jurisprudence—even though the lower appellate court extensively discussed it. *See St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220 (Fla. 2011) [*Koontz V*]; *St. Johns River Water Mgmt. Dist. v. Koontz,* 5 So. 3d 8 (Fla. 5th DCA 2009) [*Koontz IV*]). Instead, with little critical analysis, the Florida Supreme Court took a simplistic flawed view of exactions that led the court to conclude that the need for government regulatory "authority and flexibility" trumps the protections of the Fifth Amendment. It

held that Mr. Koontz could only challenge an unconstitutional condition related to a land use permit if he first gave in to it, and even then that only an illegitimate demand for real property could be challenged.

In response, this Court should hold that: (1) a government is liable when it refuses to issue a land use permit because the landowner refuses to accede to a permit condition that would have violated the test set forth in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. Tigard*, 512 U.S. 374 (1994); and (2) the protections of *Nollan* and *Dolan* apply to all types of governmental demands that a permit applicant dedicate money, services, labor, or any other type of personal property to a public use.

Because local government exaction practices have become so widespread, Hillcrest respectfully suggests that this Court should take this opportunity to clearly and comprehensively address the constitutional limitations governing exactions and the remedies available to landowners faced with extortionate leveraging of the police power. Experience since *Nollan* and *Dolan* strongly suggests that such guidance is necessary to ensure that government compliance with the Fifth Amendment is "more than an exercise in cleverness and imagination." *Nollan*, 483 U.S. at 841.

ARGUMENT

I. Exaction Law Protects The Property Owner From Being Required By Government To Contribute More Than His Or Her Fair Share Of The Costs Of Eliminating Or Reducing Public Burdens

Over 400 years ago, Sir Edward Coke, Chief Justice of the Court of Common Pleas, invalidated a general gross tax upon a town by the King's commissioners for necessary drainage and sewer repairs. *The Case of the Isle of Ely*, Mich. 7 Jac. 1 (1609). In doing so, he applied the "basic natural and common law principle that no person should be required to contribute more than his or her fair share toward eliminating or reducing public burdens." B. H. Seigan, *Economic Liberties and the Constitution* (2d ed. 2006).

This principle is enshrined in the Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation, and is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893); *see also Norwood v. Baker*, 172 U.S. 269, 279 (1898) ("In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public

use without compensation.").

This Court has applied the principle to land use exactions [3] as a special application of the "unconstitutional conditions" doctrine. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005); *Dolan*, 512 U.S. at 385; *see also Nollan*, 483 U.S. at 837. In the exactions context, this doctrine prohibits the government from requiring that a person give up the constitutional right to receive compensation when property is taken for a public use in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property taken. [4] This limit is necessary

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[3] Exactions are "land-use decisions conditioning approval of development on the dedication of property to public use." *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999). Exactions mitigate adverse impacts the development may have on the surrounding area and shift the burden of providing public facilities from the government to the developer. V. Been, "*Exit" As a Constraint on Land Use Exactions: Rethinking The Unconstitutional Conditions Doctrine*, 91 Colum. L. Rev. 473, 482-83 (1991).

[4] Generally, the unconstitutional conditions doctrine forbids the government from imposing, in exchange for a discretionary benefit, any conditions that "are repugnant to the constitution and laws of the United States." *Barron v. Burnside*, 121 U.S. 186, 200 (1887). It indicates that the means by which valid ends are achieved matter: "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end, and a constitutional power cannot be used by way of condition to attain an unconstitutional result." *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 598-99 (1926); *see* M. Merrill, *Unconstitutional Conditions*, 77 U. Penn. L. Rev. 880, 889 (1929) (Doctrine serves as "a barrier against subversive attacked by the government, state or federal, upon the privileges vouchsafed by the Constitution.").

because, as this Court has observed, "the natural tendency of human nature is to extend the [police power] more and more until at last private property disappears." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Land use exaction practices are particularly susceptible to this tendency because they promote the use of government monopoly power to extract or extort illegitimate or unreasonable concessions from developers and landowners, who have no real choice in the matter, in order to facilitate uncompensated takings of private property, thereby enabling government to avoid politically unpopular taxation. *Been,* 91 Colum. L. Rev at 484-506; S.A. Haskins, *Closing The Dolan Deal—Bridging The Legislative/Adjudicative Divide*, 38 Urb. Law. 487, 491 (2006).

Because exactions present the "heightened risk that the [government's] purpose is avoidance of the compensation requirement, rather than the stated police-power objective," *Nollan*, 483 U.S. at 841, this Court requires the government to make an individualized determination that: (1) an "essential nexus" exists between the exaction and a legitimate public purpose for which the exaction is being imposed; and (2) the exaction is "roughly proportionate" in nature and extent to the impact of the proposed development. *Id.* at 837; *Dolan*, at 391. For the nexus to be "essential," the exaction must "substantially advance the same government interests that would furnish a valid ground for denial of the permit." *Lingle*, 544 U.S. at 547. For an exaction to be "roughly proportionate," no precise formula is required, but the government "must make some sort of individualized determination that the

required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391.

Nollan and *Dolan* provide the necessary check against the government's natural tendency to expand the police power and ensure "against the State's cloaking within the permit process an out-and-out plan of extortion." *Lambert v. San Francisco*, 529 U.S. 1045, 1048 (2000) (Scalia, Thomas, and Kennedy, JJ., dissenting from denial of certiorari) (citing *Nollan*, 483 U.S. at 837).

Nollan and *Dolan* both involved adjudicatory decisions requiring dedication of land as a condition of permit approval that were challenged as violating the Takings Clause. That meant this Court did not squarely address legislatively-mandated or non-dedicatory exactions, or the situation where the government elects to deny the permit because of the landowner's refusals to agree to the imposition of the exaction. These questions were left to the lower federal courts and state courts. The results have been inconsistent and conflicting, leaving the law confusing, chaotic, and uncertain. This confusion and uncertainty encourages just the sort of extortionate leveraging of the police power *Nollan* and *Dolan* were intended to prevent, while impaling property owners like Mr. Koontz on a Morton's Fork.[5] Their choice is between either unreasonable

[5] "The expression Morton's Fork originates from a policy of tax collection devised by John Morton, Lord Chancellor of England in 1487, under the rule of Henry VII. His approach was that if a subject lived a life of luxury, then clearly he spent a lot of money and, therefore, had sufficient income to spare for the king. However, if the subject lived frugally, and did not display signs of wealth, then apparently he had substantial savings and could

delay in the permit approval process followed by years or decades of litigation, or acquiescence in an uncompensated taking—both of which may jeopardize the economic feasibility of the proposed project. *See Koontz IV*, 5 So. 3d at 12 n.4. The Florida Supreme Court's decision will only encourage such leveraging, while leaving Florida property owners without an effective remedy to combat extortionate leveraging of the police power by state and local governments.

II. The Florida Supreme Court's Decision Ignores The Purpose of the Unconstitutional Conditions Doctrine, Which Underlies *Nollan* and *Dolan*

The underlying purpose of the "essential nexus-rough proportionality" test is to ensure that government does not use the discretionary approval process to extort property having little or no relationship to the impacts of the proposed development, and by so doing, single out individual landowners to bear the burden of the government's attempt to remedy problems that they had not contributed to any more than other landowners. *Dolan*, 512 U.S. at 384. This purpose is universally applicable, regardless of the character of the government decision-making process, the type of exaction imposed, when in the development review and approval process to the extortionate demand is made, or whether the landowner resists or acquiesces

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then afford to give it to the king. These arguments were the two prongs of the fork and regardless of whether the subject was rich or poor, he did not have a favorable choice." *Ill. Cent. R. Co. v. Broussard*, 19 So. 3d 821, 827 (Miss. Ct. App. 2009).

in the extortionate demand. *See Parking Ass'n of Ga., Inc. v. Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas and O'Connor, JJ., dissenting from denial of certiorari); Haskins, 38 Urb. Lawyer at 496-500 (citing numerous cases). *Cf. San Remo Hotel v. San Francisco*, 41 P. 3d 87, 105 (Cal. 2002); *Ehrlich v. Culver City*, 911 P. 2d 429, 457 (Cal. 1996) *on remand from* 512 U.S. 1231 (1994); *with Flower Mound v. Stafford Estates, L.P.,* 135 SW. 3d 620, 641 (Tex. 2004).

As Justices Scalia, Thomas, and Kennedy have explained, "[t]here is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than as a condition subsequent should make a difference." *Lambert*, 529 U.S. at 1048. The intermediate appellate court below reached the same conclusion, affirming the trial court's award of compensation for a temporary taking, and noting that, "[e]ven an attempt to exact improper concessions supports an inference that the affected property owner's land is over regulated," and that the government has gone too far. *Koontz IV*, 5 So. 3d. at 12 n.4.

The District did not challenge below the trial court's determination that the off-site mitigation violated the essential nexus and rough proportionality requirements of *Nollan* and *Dolan*. The Florida Supreme Court, however, concluded that Mr. Koontz's situation was not within the "express parameters" of *Nollan* and *Dolan* because the District demanded that Mr. Koontz spend money making offsite improvements to the District's land; not that he dedicate his own land. According to the Court, even if *Nollan* and *Dolan* applied, Mr. Koontz's

challenge would fail because the District did not issue permits, Mr. Koontz never expended any funds towards the performance of off-site mitigation, and nothing was ever taken from him. *Koontz, V*, 77 So. 3d at 1230.

These are all distinctions without constitutional difference that ignore the purpose of the unconstitutional conditions doctrine and the teachings of *Nollan*, *Dolan*, and *Lingle*. *See Smith v. Mendon*, 822 N.E.2d 1214, 1227 n.4 (N.Y. 2004) (Read, J., dissenting) (attacking majority's narrow interpretation of exactions law that refused to apply *Nollan-Dolan* test to a conservation easement exaction).

The Florida Supreme Court did not discuss the unconstitutional conditions doctrine because it concluded that this Court had not applied the doctrine in the land use exaction setting to property other than real estate. Nothing in the Fifth Amendment, or the unconstitutional conditions doctrine, or *Nollan* and *Dolan* limit the type of property protected to real estate or interests in real property. This Court has consistently interpreted the Fifth Amendment to protect a wide variety of property interests, real and personal, tangible and intangible.[6] Nor is there a principled basis for such a

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[6] "Property" under the Takings Clause comprises both tangible and intangible property. *See, e.g.*, *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 170 (1998) (accrued interest); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (trade secrets); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980) (money); *Armstrong*, 364 U.S. at 44-46 (1960) (materialmen's liens); *Lynch v. United States*, 292 U.S. 571 (1934) (contracts); *Norwood*, 172 U.S. at 279 (money). *See also Frost*, 271 U.S. at 583 (unconstitutional conditions doctrine

limitation. Indeed, this Court has suggested that *Nollan* and *Dolan* apply to exactions of money. *See Ehrlich*, 512 U.S. 1231 (remanding in light of *Dolan*). Whether the government improperly exacts land, improvements, or money, ***property*** is confiscated-either permanently or temporarily-without payment of compensation in violation of the Fifth Amendment. To hold otherwise is the moral equivalent of criminalizing certain trespasses upon land while excusing all forms of larceny.

Furthermore, contrary to the implication of Florida Supreme Court's decision, this Court has never shackled the unconstitutional conditions doctrine to the Takings Clause, or to adjudicatory exactions requiring dedication of land. *See Nollan*, 483 U.S. at 835 n.4 (considering possibility of doctrine's use in equal protection context), 837 (analogizing doctrine's application in the exactions context to the First Amendment context); *Dolan*, 512 U.S. at 385 (citing applications of doctrine in the employment law context that, in turn, apply the doctrine to denials of public employment, tax exemptions, unemployment benefits, and welfare payments); *see also* R. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent,* 102 Harv. L. Rev. at 11 (noting the varied uses of the doctrine).

The Florida Supreme Court's conclusion that Koontz's exaction challenge failed because no permit was issued imposing the offsite mitigation requirement fails to recognize that the purpose of the

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applied to state's attempt to condition privilege of using highways for commercial transportation purposes upon private carrier's dedication of personal property to public use).

unconstitutional conditions doctrine is to prevent extortionate leveraging of the police power ***in the first instance***. Leveraging occurs, and the landowner's rights violated the moment the government seeks to impose an exaction that fails to satisfy *Nollan* or Dolan. The integrity of the doctrine's protection should not depend on whether the government is successful in forcing the landowner to accede to its extortionate demands. Otherwise, government, which has superior bargaining power in the development permitting process, will have little incentive to refrain from extortionate leveraging of its police power if it government believes it can ultimately avoid paying compensation by eventually backing down from its improper demands when and if the property refuses to acquiesce in the extortionate demand. As this Court and the intermediate appellate court below have concluded:

> One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not justify the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice.

Nollan, 483 U.S. at 837 n. 5 (quoted by *Koontz IV,* So. 3d at 12 n. 4).

In the final analysis, "[a]n attempt by government to extort is no less reprehensible than *a fait* accompli." *Koontz IV*, 5 So. 3d at 12, n.4. *Id.* Indeed, it is arguably more reprehensible. At least in the case of accession to the extortionate demand that does not make the project economically unfeasible, the landowner can elect to accept the conditions, obtain development approval and seek compensation for a taking of the exacted property.

True, a landowner who refuses to acquiesce in the demand can contest the government action. *Koontz IV*, 5 So. 3d at 20. However, this remedy does not adequately address the practical realities faced by a landowner seeking to make legitimate economically beneficial use of his or her property. A landowner who challenges an extortionate demand will have to forego otherwise permittable development of his or her property until the challenge is finally resolved in the courts and will incur substantial costs and delay in the meantime. In Mr. Koontz's case, that challenge took 11 years, from the time in 1994 when he first applied for a permit, until 2005, after the offsite-mitigation condition was judicially determined to violate *Nollan* and *Dolan* and the District finally issued the permit without the condition.

The Florida Supreme Court, like the cases it relied upon, failed to critically engage with the doctrine of unconstitutional conditions.[7] By failing to

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[7] *See McClung v. Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008) (refusing to "raise the concern of judicial interference with the

ground its decision on consideration of the unconstitutional conditions doctrine, the Florida Supreme Court decision will have the effect of encouraging the very extortionate leveraging of the police power that the unconstitutional conditions doctrine is designed to prevent, while effectively denying landowners a meaningful remedy to combat such leveraging except in cases of exactions of land. Indeed, by grounding its decision on the need to preserve governments' "authority and flexibility to independently evaluate permit applications," *Koontz V*, 77 So. 3d at 1230, the Florida Supreme Court gave state and local governments a green light to attempt to use the land use permitting process to leverage illegitimate concessions from landowners, safe in the knowledge that the Florida Supreme Court considers such land use regulatory "authority and flexibility" to trump the Fifth Amendment's proscription against extortionate leverage of the police power. This Court has previously cautioned: "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle." *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

The Florida Supreme Court's decision giving exclusive significance to whether the District ultimately imposed the off-site mitigation

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exercise of local government police powers"); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1579 n.21 (10th Cir. 1995) (dismissively noting that the unconstitutional conditions doctrine limits exactions law); *Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. N. Myrtle Beach*, 548 S.E.2d 595, 602 (S.C. 2001) (no mention of doctrine, and only cursory discussion of police powers). The cases the Florida Supreme Court declined to follow, however, considered and applied the unconstitutional conditions doctrine. *See Flower Mound*, 135 S.W.3d at 639 (discussing in terms of the police power, as *Nollan* did); *Ehrlich*, 911 P.2d at 444 (1996).

requirement, and whether Mr. Koontz spent money on the off-site mitigation, also runs afoul of this Court's temporary takings precedent. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) this Court held that that compensation, even for temporary takings, was required by "the self-executing character of the [Fifth Amendment] with respect to compensation." *Id.* ("[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."). [8] In many situations, improper demands by government for land, improvements or money that are properly resisted by the landowner will result in unreasonable delay in development approval, and are, from the landowner's perspective, the practical equivalent of temporary governmental deprivation of all use of land. In this case, Mr. Koontz was deprived of economically beneficial use of his property by the District's unreasonable demands for 11 years. Delay occasioned by extortionate leveraging of the police power should not be considered a "normal delay" in the development approval process that would avoid a temporary taking claim. The Florida Supreme Court's decision cannot be squared with this precedent, which require

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[8] *See also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 339 (2002) ("[W]e do not hold that the temporary nature of a land-use restriction precludes a finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.").

payment of compensation for temporary takings even where the government eventually withdraws the regulation in question.

Justice Holmes warned, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Mahon*, 260 U.S. at 416. Extortionate leveraging of police power to obtain landowner concessions that the government would otherwise have to pay for, is just the sort of governmental "shortcut" Justice Holmes cautioned against. Hillcrest respectfully requests that this Court heed Justice Holmes admonition and hold that constitutional shortcuts such as that attempted by the District in this case do not pay off by quashing the Florida Supreme Court's decision.

III. Extortionate Leveraging Of The Police Power Government Is Not Isolated, Has Become Increasingly Widespread, And Should Be Addressed Clearly And Comprehensively By This Court Under Both The Takings And Due Process Clauses

A. The Unconstitutional Conditions Doctrine Applies To Both The Takings And Due Process Clauses

It does not follow from the Florida Supreme Court's decision that Mr. Koontz was not entitled to be compensated under the unconstitutional conditions doctrine for the "temporary" 11-year deprivation of property he suffered as a result of the District's demands. This is because, as a limitation on

the police power, the unconstitutional conditions doctrine is also grounded in due process. *See Frost* 271 U.S. at 595 (holding demand that a private carrier become public for the benefit of using roads was violation of due process); *La. Pac. Corp. v. Beazer Materials & Svcs., Inc.*, 842 F. Supp. 1243, 1254 (E.D. Cal. 1994) (considering doctrine of unconstitutional conditions in terms of due process, where government makes a demand of "your money or your life."). Not rooted in "any one substantive vision of the Constitution," it "guards against a characteristic form of government overreaching and thus serves a state-checking function." K.M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1506 (1989).[9]

Although *Nollan* and *Dolan* were decided under the Takings Clause, rather than the Due Process Clause, the relevant considerations underlying each are expressly bottomed on preventing the government from extortionately leveraging its police power to obtain concessions from a landowner that the government would otherwise have to pay for itself. *W. Linn Corp. Park, L.L.C. v. W. Linn*, 240 P.3d 29, 41 (2010) (interpreting *Lingle* as not restricting *Nollan* and *Dolan* to the takings clause). *Lingle* highlighted the uniqueness of the exactions analysis, and explained that the "essential nexus" test, when compared to the traditional "substantially advances" due process test, seeks to determine whether the exaction advanced the ***same*** interest that would be served by the permit's denial. This suggests that the

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[9] The doctrine is especially applicable to land use problems, where the police power has significant breadth. R. Epstein, 102 Harv. L. Rev. at 61.

"essential nexus" test requires a stricter or heightened form of judicial scrutiny when testing an exaction under both the Due Process and Takings Clauses. This conclusion is entirely consistent with this Court's holdings that the police power rationales deemed adequate to sustain government regulation under the Due Process Clause are coextensive with those deemed sufficient to satisfy the public purposes requirement of the Takings Clause. *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 240 (1984) citing *Berman v. Parker*, 348 U.S. 26 (1954). It is also consistent with the unconstitutional conditions doctrine, which "trigger[s] a demand for an especially strong justification by the state." Sullivan, 102 Harv. L. Rev. at 1419.

Other courts have held that extortionate leveraging of the police power in the land use context is a violation of due process. *See Roma Constr. Co. v. aRusso*, 96 F.3d 566, 574-76 (1st Cir. 1996) (municipal policy, custom and practice of extorting outsiders, businessmen and developers, if proven, constitutes violation of due process actionable under 42 U.S.C. § 1983); *Hillside Prods., Inc. v. City of Macomb*, 2008 WL 268888, *3-4 (E.D. Mich. 2008) (where record provided a sufficient basis from which jury could find that government unreasonably withheld its consent and revenues under contract and extortionately attempted to force party to negotiate from position of weakness, Plaintiff had a colorable claim for violation of substantive due process).

Nollan is therefore best viewed as holding that the unconstitutional conditions doctrine requires heightened judicial scrutiny under both the Takings and Due Process clauses in order to ensure that the

government is not cloaking within its permit process an outright plan of extortion. *Id.* at 547. And indeed the trial court below invalidated the District's denial of Koontz permit application on Due Process grounds as "an unreasonable exercise of the police power," and then awarded damages for a temporary taking for the 11-year period that Koontz was deprived of use of his land. Pet. Cert App. D-11, App. C-1.

B. Hillcrest's Experience With Pasco County's Legislatively-Enacted Outright Plan Of Extortion

As members of this Court have recognized, the problem of extortionate government demands are "more than a local and isolated phenomenon." *Lambert*, 529 U.S. at 1048. The lengths to which local government will go to exact concessions from landowners that it would otherwise have to pay for is exemplified by the Ordinance applied to Hillcrest by Pasco County.

Known as the Right-of-Way Corridor Preservation Ordinance, the Ordinance's express intent is to "provide for the dedication and/or acquisition of right-of-way and transportation corridors. § 319.1(B), Pasco County, Florida Land Development Code [LDC] (Doc. 39 at 45). The purpose of establishing the corridors is to save future right-of-way acquisition costs. [10] County officials candidly acknowledge that the Ordinance "saves the County millions of dollars each year in right of way acquisition costs, business damages and severance

[10] *See* MSJ (Doc. 112-3 at 15-16).

damages."[11] The corridor widths have little if any relationship to projected future traffic volumes and were not based on the particular traffic impact of any particular proposed development at any particular location in the County at or over any particular time period.[12] Instead, the County staff estimated the future number of lanes and corresponding right-of-way widths required for the future roadway network needed to maintain the adopted roadway level-of-service upon complete build-out of the County in 2050.[13]

The Ordinance requires any landowner seeking development plan approval of a development site lying wholly or partially within a corridors to depict the lands lying within a corridor on their development plans as a clear zone, free of permanent structures. The Ordinance further requires the landowner to dedicate such lands to the County, at no cost to the County, as a condition of development approval. §§ 319.3.A, 319.6, 319.8.A, LDC (Doc. 39 at 46, 52).[14] The lands required to be dedicated under

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[11] *See* MSJ (Doc. 112-2 at 3).

[12] *See* MSJ (Doc 112-3 at 11-12, 15-17, 22-28).

[13] *See* MSJ (Doc. 112-3 at 13, 19-21).

[14] Use of the areas set aside and dedicated is precluded or severely restricted to temporary, non-structural "interim" uses. Interim uses are conditioned upon the landowner's written agreement to: (i) make adequate upfront provision for the future relocation of the use on the remainder property; (ii) obtain a right-of-way use permit from the County; (iii) cease the use and demolish the improvements at his or her expense upon the County's demand; and (iv) waive the right to be compensated for such improvements and for the cost of their demolition. The written agreement must be recorded. §§ 319.6.A-F, LDC (Doc. 39

the Ordinance include: (1) the lands within the corridors located on the development site; (2) additional lands located nearby or contiguous to the development site that are within corridors and are owned by the same person or entity that owns the development site but that are not sought to be developed; (3) additional lands for new arterial and collector roadways for which corridors have not been previously adopted but which the County requires as a condition of development plan approval; and (4) additional lands for the drainage/retention, wetland mitigation, floodplain compensation, frontage roads, sidewalks, bike paths and other roadway related improvements associated with the roadway improvements for which right-of-way is required to be dedicated. The dedication must be made before the approved development may commence. § 319.8.A, LDC (Doc. 39 at 52-53).

The right-of-way is exacted without the County having first made an individualized determination that the land required to be dedicated is reasonably related both in nature and extent to the traffic impact of the proposed development. § 319.8, LDC (Doc. 39 at 52-53). Indeed, dedication is required regardless of: (1) the magnitude or traffic impact of the proposed development; (2) the level of traffic congestion on the adjacent road network; (3) the lack of present need to widen the road; (4) whether widening of the road is required to accommodate the traffic impacts of the proposed development; (5) whether the road is scheduled for widening; (6) whether the roadway is ever even built; and (7) whether adequate capacity

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at 49-52).

exists on the roadway to accommodate the proposed development.

The Ordinance purports to cure its obvious constitutional infirmity by providing that landowners, who believe that such dedication is not "roughly proportionate" to the traffic impacts of his or her proposed development, and who wish to be compensated for any such excessive dedication requirement, that ability to pursue a discretionary "dedication waiver" procedure before the same administrative tribunals that impose the dedication requirement in the first place. § 319.9 LDC (Doc. 39 at 53-58). The dedication waiver process is time-consuming, [15] costly, [16] onerous, [17] unfair in numerous respects, [18] and unlikely to result in

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[15] The landowner is potentially subject to multiple costly, time-consuming administrative hearings before the Development Review Committee (DRC) and the County's Board of County Commissioners (BCC).

[16] The dedication waiver remedy requires landowners to prepare and file, at their own expense, an application that includes costly real estate appraisals and traffic studies. The estimated costs ranged exceeds $85,000. (Doc. 104 at 6).

[17] Resort to the dedication waiver remedy before development plan approval results in substantial delay in such approval. Resort to this remedy after development plan approval prevents the landowner from proceeding with further development and subjects the previously approved development plan to re-review and possible revocation or modification. §§ 319.9.A, 319.9.F.1-2, LDC (Doc. 39 at 53-54, 57-58).

[18] The BCC and the DRC retain the ultimate, unbridled discretion to approve or deny such relief without payment of full or just compensation, even where the County determines that the set aside or dedication is excessive. §§ 319.9.C-E, LDC (Doc.

meaningful compensation.[19] Its remedial protections

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39 at 56-57). The methodology prescribed under the Ordinance for determining whether and the extent to which "compensation" should be awarded: (1) applies different, more onerous transportation exaction assessment standards to individuals whose property lies within a corridor as compared to similarly situated persons whose property does not lie within such corridor; and (2) requires that the value of any excess set aside or dedication be determined without regard to legislatively and judicially mandated principles of "full" or "just" compensation.

In arriving at the excess dedication amount for which a landowner may be "compensated," section 319.9: (1) excludes from consideration the value of the property based on the development approval sought or obtained, § 319.9.C, LDC (Doc. 39 at 56); (2) requires that the property be valued based on the Property Appraiser's most recent valuation for ad valorem tax purposes without regard to the development approval sought or obtained, §§ 319.9.B.2-3, LDC (Doc. 39 at 54-55) ; (3) employs the "before and after" appraisal method, § 319.9.B.2.(a)-(b), LDC (Doc. 39 at 54); (4) allows for enhancement of the "after" value (i.e., reduction in compensation) by the increase in the value of the property that is shared in common with neighboring landowners resulting from the market's knowledge of the roadway project for which the dedication was required. § 319.9.B.2.(a)-(b), LDC (Doc. 39 at 54); and (5) makes no provision for either severance damages to the remaining property or interest on any excess dedication that may have previously been made. §§ 319.9.D-E, LDC (Doc. 39 at 56-57).

[19] The "compensation" potentially awardable is capped and, at the discretion of the County, any such award can take the form of non-fungible, non-monetary benefits. "Compensation" is limited to: (1) cash payment of no more than 115% of the value of the excess land required to be dedicated as determined by the County property appraiser prior to the plan or permit/order for the property which is being dedicated, less the value of any density transfer; (2) transportation impact fee credits subject to the eligibility, timing and other requirements of the County's transportation impact fee ordinance; (3) design and construction

are illusory.[20] In short, the Ordinance's purported cure is worse than its constitutional disease. Nevertheless, the Ordinance further expressly requires exhaustion of this administrative remedy before the landowner may seek judicial relief from an excessive dedication requirement. §319.9.F.2, LDC. (Doc. 39 at 58).

Pasco County applied the Ordinance to Hillcrest to require as a condition of development plan approval that Hillcrest set aside and dedicate 4.23 acres (28%) of its commercially zoned property for the future widening of a state highway which its property. Report (Doc. 168 at 8-9).[21] Because the Ordinance mandated dedication without requiring the County to first make the individualized determination required by *Nollan* and *Dolan*, dedication was required even though the existing roadway was adequate without widening to handle the traffic projected to occur as a result of Hillcrest's proposed development. (Doc. 77-1 at 2)

As a practical matter, Hillcrest had no meaningful choice in the matter because County zoning regulations required Hillcrest to apply for

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by the County of the transportation improvements the landowner would otherwise be required to construct having a value equal to or greater than the excess dedication amount; (4) credit against any transportation mitigation or proportionate share payments required under the County's transportation concurrency management regulations; (5) or some combination of the above. § 319.9.D.1-5, LDC (Doc. 39 at 56-57).

[20] Report (Doc. 168 at 29 n. 31).

[21] This did not include lands for off-site drainage, floodplain compensation, wetland mitigation facilities associated with that future expansion, and demands by other federal, state, or local government agencies. *Id.*

development plan approval in order to preserve its commercial land use entitlements. Its plan submittal triggered the Ordinance's mandatory dedication requirement forcing Hillcrest to choose between compensation for the taking of its property and development of its property. (Doc. 105 at 2-5). Hillcrest was forced to acquiesce in the County's dedication requirement, and attempted to negotiate compensation with Pasco County for three years without success. Report (Doc. 168 at 10, 21). After negotiations broke down Hillcrest filed suit in federal court, alleging takings, due process, and equal protection claims under the United States and Florida Constitutions. Report (Doc. 168 at 2-3). The case is presently awaiting rulings on various cross-motions for summary judgment.

The County's legislatively enacted outright plan of extortion applied to Hillcrest underscores the need for clear, strict and comprehensive limits on government land use exaction practices. In that regard, the Federal Magistrate Judge William McKoun has recommended that Pasco County's ordinance be declared facially unconstitutional under federal due process because Hillcrest and others are "compelled to surrender private property without compensation as a condition of development approval or permitting" allowing the County "to leverage its police powers to extract private property without any individualized consideration of need and wholly without consideration of the matter of compensation when such works a taking. Report (Doc. 168 at 26-27). The Magistrate reasoned that because the "dedication provision is no mere regulation of land use but rather a calculated measure by the County to

avoid the burdens and costs of eminent domain and take private property without just compensation," it was "an abuse of government power by whatever label: arbitrary, capricious or oppressive." Report (Doc. 168 at 26-27).

In so ruling, the Magistrate cited the Florida Supreme Court's decision in *Joint Ventures, Inc. Florida Department of Transportation*, 563 So. 2d 622, 623 (Fla. 1990), wherein the Florida Supreme Court struck down on due process grounds a similar law purporting to authorize the Florida Department of Transportation to record maps reserving private property for future use as road right-of-way and precluding issuance of development permits within the reserved area, all in order to save right-of-way costs. The Court concluded that the statute was not an appropriate regulation under police power because, "[r]ather than supporting a "regulatory" characterization, these circumstances expose the statutory scheme as a thinly veiled attempt to "acquire" land by avoiding the legislatively mandated procedural and substantive protections of chapters 73 and 74." *Id.* at 625.[22] The Magistrate then concluded that no different result is required under federal law: "[t]he County cannot consistent with the Fifth and Fourteenth Amendments and Article X, section 6 of the Florida Constitution, employ its police powers to extort property from private landowners and avoid the obligations inherent in these constitutional

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[22] In *Tampa-Hillsborough County Expressway Authority v. A.G.W.S Corp.*, 640 So. 2d 54, 58 (Fla. 1994), the Florida Supreme Court clarified that its decision was bottomed on due process grounds).

provisions." Report (Doc. 168 at 28).

And while the Magistrate Judge concluded that *Nollan* and *Dolan* helped "inform the due process analysis," Report (Doc. 168 at 25), he rejected Hillcrest's argument that Nollan's "essential nexus" test required heightened as-applied due process scrutiny, and recommended judgment against Hillcrest on its as-applied federal due process claim. In so doing, the Magistrate accepted the arguments that *Nollan* and *Dolan* only applied to exactions challenged under the Takings Clause and that the substantive component of the Due Process Clause does not apply to adjudicative exactions requiring dedication of land as a condition of development approval. Report (Doc. 111 at 23-25; Doc. 117 at 14-16; Doc. 168 at 24-25, 30).

This conclusion appears legally incongruous for a number of reasons, and it once again underscores the need for this Court to comprehensively address the full Due Process contours of the unconstitutional conditions doctrine in the land use exaction setting. In so doing, Hillcrest suggests this Court consider the following.

First, as previously discussed, the unconstitutional conditions doctrine is not limited to a requirement that an individual give up his or her right to be compensated for any excess exaction under the Takings Clause. The doctrine protects a wide variety of constitutional rights, including substantive due process. Nor should it be limited to adjudicatory exactions. And while the cases are not all in agreement, the better reasoned cases have seen no reason to refrain from applying *Nollan* and *Dolan* to legislative acts. *See Parking Ass'n of Ga., Inc.*, 515

U.S.,at 1118; *Flower Mound*, 135 S.W.3d at 641; *Amoco Oil Co. v. Schaumburg*, 661 N.E.2d 380, 390 (Ill. App. Ct. 1996); *see also* J.S. Burling & G. Owen, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 399 (2009).

Second, there is no principled basis for doing so. Extortionate leveraging of the police power, regardless of ultimate purpose of the extortion, is the height of arbitrary, oppressive government and is precisely the sort of governmental conduct the Due Process Clause intended to and should protect against.

Third, the underlying purpose of the unconstitutional conditions doctrine is to prevent government from forcing individuals to give up constitutional rights in exchange for discretionary governmental benefits having little or no relationship to the benefit sought. Because the doctrine protects the constitutional rights of individuals against forced relinquishment of such rights by the government, it should not matter for due process analysis purposes whether the leveraging is accomplished legislatively or through case-by-case adjudication.

Fourth, a landowner faced with extortionate leveraging of the police power has the right to elect his or her remedies. Those remedies would be either: (1) to seek invalidation of the exaction under either the Due Process or Taking Clauses and *Nollan* and *Dolan* and compensation for a temporary taking during the time period the government insisted upon the unconstitutional exaction; or (2) to accept the propriety of the exaction, and seek compensation for the taking of the excess exacted property.

♦

CONCLUSION

This Court developed the unconstitutional conditions doctrine as a calculated and limited check on government discretion. It applied the doctrine to exactions because the realities of modern land use regulation had resulted in constant expansion of the police power. The Florida Supreme Court summarily disposed of this check on government power–going so far as to base its decision on the grounds that government needs more power, not less. Now beyond merely making adjudicative permitting decisions that occasionally cross constitutional lines, governments will brazenly legislate around the Constitution. The Pasco County ordinance that Hillcrest has endured will be a mere precursor. This Court should take this opportunity to put an end to such chicanery.

Respectfully submitted, November, 2012.

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