No. 11-1447

IN THE
Supreme Court of the United States

COY A. KOONTZ,

Petitioner,

-v-

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

On Writ of Certiorari to
the Supreme Court of the State of Florida

BRIEF OF *AMICUS CURIAE* THE LAND USE INSTITUTE, LTD. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The Land Use Institute, Ltd. ("LUI") is a non-profit think tank that studies land use planning and regional land use policies in order to better educate both policy makers and the public as to market-oriented land use policies and the importance of legal rules that respect and support property rights.

LUI believes that a properly functioning real estate market is integral to a community's successful growth. Government's proper role in the workings of a well functioning real estate market is to preserve and protect property rights, allowing growth and adaptation to changes in the use of real property in the community. However, where governments act outside legal constraints, they interfere with the natural progress of real estate development and land use in general.

LUI views this case as an important opportunity for this Court to further establish appropriate boundaries for the conduct of land use agencies when evaluating land use applications. This case will establish whether or not land use agencies may coerce improper concessions from property owners as a condition to their exercising their property rights. The outcome of this case will have significant implications for both personal liberty and the integrity of the real estate markets.

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Florida Supreme Court raises the specter that, were Petitioner's temporary takings claim to prevail, government agencies will simply deny development approvals outright in order to avoid claims of compensable exactions under the Fifth Amendment Taking's Clause. *St. Johns River Water Management District v. Koontz*, 77 So. 3d 1220, 1230-31 (Fla. 2011). The Florida Supreme Court's assertion is wrong. This policy consideration is stated without any support whatsoever, and the Florida Supreme Court fails to acknowledge that the purported specter has no application to most land use approvals and that government agencies are quite capable of acting within constitutional limitations.

Nollan v. California Coastal Commission, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) recognized that governments can seek to impose conditions on development permits, which could otherwise be denied, provided the permit conditions sought to be imposed satisfy the very workable minimal constitutional requirements of "essential nexus" and "rough proportionality."

The specter offered by the Florida Supreme Court is wrong for several reasons First, the opportunity for a land use agency to impose conditions only arises in a small portion of land use applications. In most circumstances, a property owner can make a record which supports approval as of right. Under such circumstances, there is no opportunity for the imposition of conditions or the seeking of an exaction. Thus, there is no risk of takings liability for the agency, and development proceeds. It is only those

more narrow circumstances where the record does not support approval that the imposition of conditions even arises. Thus, any risk of liability arises only in a small portion of development use situations.

Further, agencies can and do rationally and methodically adapt to new land use rules. Development can present considerable public benefit, and agencies have a strong incentive to develop reasonable and lawful land use conditions that would mitigate adverse impacts and therefore allow an otherwise objectionable development to proceed.

Empirical studies demonstrate that this is exactly what happens. In the wake of *Nollan* and *Dolan*, planners developed improved procedures and engaged in more thoughtful and systemic planning than before those rules were imposed by this Court. The result has been superior planning and enhanced behavior by governments.

The *Nollan* and *Dolan* standards afford ample and substantial leeway within which government agencies can constitutionally act, and will want to act, to approve desired development, which could otherwise be denied. The standards level the playing field for a property owner *vis-a-vis* government and prohibit government from seeking to impose coercive and confiscatory conditions in the narrow circumstances where government has the discretion to impose conditions in approving development it could otherwise deny.

ARGUMENT

IF THE JUDGMENT BELOW IS REVERSED, THERE IS NO SIGNIFICANT DANGER OF PERMITTING AUTHORITIES ARBITRARILY DENYING PERMITS WITHOUT NEGOTIATION

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development, which could otherwise be denied. The standards level the playing field for a property owner *vis-a-vis* government and prohibit government from seeking to impose coercive and confiscatory conditions in the narrow circumstances where government has the discretion to impose conditions in approving development it could otherwise deny.

A. Potential Takings Liability from a Compensable Exaction Could only Arise from Certain Land Use Applications Where an Applicant Fails to Make a Record Justifying an Approval as of Right.

As an initial matter, it is important that the issues before the Court be placed in the proper context with respect to the universe of land use applications. Generally speaking, land use applications are subject to objective standards. If an applicant makes a sufficient record, an applicant is typically entitled to approval as of right. See, e.g., *Broward County v. Narco Realty, Co.*, 359 So. 2d 509, 511 (Fl. Ct. App. 1978) (if applicant meets all legal requirements for subdivision approval, county has no discretion to refuse the approval); *Pizzo Mantin Group v. Randolph*, 645 A.2d 89, 96 (N.J. 1994) (planning board must approve subdivision unless it fails to comport with requirements in subdivision or zoning ordinances); *Boxell v. Planning Commission of City of Maumee*, 225 N.E. 2d 610, 616 (Ohio Ct. App. 1967) (" . . . if the plaintiffs' proposed subdivision without plat was not contrary to the subdivision ordinance and zoning ordinance of the City of Maumee, and not contrary to any state statutes, and full compliance was shown by plaintiffs with such ordinances

and statutes, it was then unreasonable and unlawful for the Planning Commission of Maumee to disapprove the subdivision without plat"); *Vick v. Bd. of County Commissioners*, 689 P.2d 699 (Colo. Ct. App. 1984), *overruled on other grounds, Board of County Comm'rs v. Conder***,** 927 P.2d 1339 (Colo. 1996), (subdivision plat may not be disapproved if subdivision regulations have been complied with).

Further, state law typically provides that land use determinations not based on clear objective standards are void as arbitrary and capricious. *See*, *e.g.*, *Powers v. Common Council of the City of Danbury,* 222 A.2d 337, 339 (Conn. 1966) ("The portion of the zoning regulations which allows a special permit without appropriate standards is void"); *In re Handy,* 764 A.2d 1226, 1236 - 1239 (Vt. 2000) (statute which provided no standards which constrained board's decision was unconstitutional); *Wakelin v. Town of Yarmouth,* 523 A.2d 575 (Maine 1987) (ordinance which lacked standards to constrain board's discretion was void).

Thus, where an owner of real property seeks to develop his property, and that development requires a permit or an approval by a government agency, such a determination will be made upon a record created in the course of the developer's application, and the decision of the agency must be based on objective standards provided by law. If the record supports an approval, the applicant having demonstrated compliance with the standards, the approval must be given, and an improper denial will typically be subject to review and reversal by a court of competent jurisdiction.

Such is the case with the typical land use determination. Where the applicant makes a sufficient record, approval is available of right, and there is neither any room nor any place for conditions to be imposed for the exaction of either real property, money, or other thing of value from the applicant by the agency.[2] This entire category of proceedings is immune to the dire prediction of the Florida Supreme Court.

It is only where the record is insufficient to require an approval, that is, where the agency has the right to deny the application, that conditions which could bloom into exactions resulting in takings liability might arise. In such a case, though the agency could deny the application because of some adverse impact from the development, it may nevertheless, in its discretion, seek instead to approve the development and impose one or more conditions to the approval which serve to mitigate the adverse impact. That is, the condition is intended to eliminate or mitigate the impact and in a manner of speaking "cure" that aspect of the application which would otherwise justify a denial.

Such is illustrated in *Nollan*. In *Nollan*, the property owners had applied for a permit to demolish a small bungalow and replace it with a three bedroom house. To do so they required a permit from the California Coastal Commission ("CCC"). 483 U.S. at 827. After seeking to impose a condition on approval without conducting a

[2] Significantly, the Court of Appeal of Florida concluded that the dedication of the conservation area, to which Petitioner did agree, was enough to mitigate the impacts of development. *St. Johns River Water Management District v. Koontz*, 5 So. 3d 8, 12 (Fla. Ct. App. 2009)

proper hearing, the CCC was required by the Ventura County Superior Court, to conduct a public hearing on the application. The CCC made findings of fact that "the new house would increase blockage of the view of the ocean, thus contributing to the development of "a 'wall' of residential structures"" *Id*. at 828. The CCC approved the application with the condition that the property owner dedicate an easement allowing public access across their property. *Id*. at 829.

This Court proceeded to decide the case by assuming that the CCC could have denied the permit outright. *Id*. at 836. In developing the "essential nexus" test, the question for the Court was whether the condition served the same police power purpose as an outright denial. *Id*. Thus, the only legitimate purpose of a condition is to mitigate that aspect of the application that could have supported a denial. Accordingly, the issue of whether a condition is a legitimate effort at mitigation or an exaction giving rise to takings liability only arises in the limited circumstances where the property owner cannot make a record that would mandate an approval as of right.

In view of the foregoing, the policy concern raised by the Florida Supreme Court would not even present itself in most land use situations. Where the applicant makes a record supporting approval, development proceeds unabated. The supposed fear of liability from the imposition of conditions raised by the Florida Supreme Court presents no risk at all most of the time, and development carries on. This Court described exactions such as faced by Petitioner as "an out-and-out plan of

extortion." *Id*. at 837. Such a small risk can hardly justify allowing such extortion to continue.

B. The Power to Impose Exactions Represents a Coercive Tool Which Distorts the Balance of Power in Favor of the Government.

Another reason that the Florida Supreme Court is incorrect in fearing a slew of arbitrary denials if Petitioner's position is accepted by this Court is that the unbridled power to impose exactions is a coercive tool that inherently distorts the negotiation process in favor of the government.

As the facts of this case demonstrate so unfortunately, a permitting authority may hold up development for years by demanding exactions which seek to obtain unlawful concessions from a property owner. This is because the agency does not bear the cost of its unlawful demand. If a demand is made by the agency and, after years, the demand ultimately proves to be unlawful, the full cost of the agency's misconduct is thrust entirely on the property owner who was prevented from developing his property by refusing to accede to the unlawful exaction, as Petitioner was here. This creates an enormous incentive for agencies to abuse that power (since it is costless) and constitutes a substantial coercive hammer the agency may employ against the property owner.

Imposing temporary taking liability on the government merely serves to correct this imbalance. It forces the government to internalize the cost of an unlawful demand,

that is, the government bears the cost of an unlawful demand rather than the property owner. The result is that the government must include the costs associated with an unlawful demand in formulating the types of demands it makes. Without such exposure, an agency may make whatever outlandish demands it can conceive of hoping that the threat of protracted delay (and its attendant cost) will bring the property owner to its knees. The result is that the agency has succeeded in coercing a result that it could not lawfully obtain but for the imbalance of power.

Government agencies are rational actors. The decision to approve an application with conditions rather than deny an application represents a conclusion by the agency that the public is better off with the development than without it. If it satisfies the "essential nexus" and "rough proportionality" rules of *Nollan* and *Dolan*, an imposed condition eliminates or mitigates the negative aspects of a proposed development. Thus, an approval with lawful conditions represents a net benefit for the public and a win for bureaucrats and politicians. This is a strong incentive for agencies to approve with lawful conditions rather than deny outright.

As rational actors, agencies are perfectly capable of incorporating the risks of temporary taking liability into their formulation of conditions. The facts of *Nollan* and *Dolan* bear this out. In *Nollan* the condition was ruled an exaction because it bore no nexus to the impact of the development. That is, the condition did not serve to ameliorate the impact identified by the CCC. This Court concluded that the only way to find a fit between the

condition and the impact was to play words games. The Court noted:

> It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house.

483 U.S. at 838.

In *Dolan*, this Court found that there was no "rough proportionality" because the City made no effort to connect quantitatively the impact of the development with the need for the bicycle path. 512 U.S. at 395.

In both *Nollan* and *Dolan* the failure of the government was fairly egregious. Neither case imposes particularly onerous requirements on agencies in formulating lawful conditions. Accordingly, there is no reason to believe that accepting the Petitioner's position will send agencies running for the hills. Suggesting that government agencies will simply deny all applications before them if they are forced to incorporate potential takings liability into their formulation of conditions is like suggesting that butchers will stop selling meat because the law is such that they could be held liable for tainted hamburger. Butchers conform their conduct to avoid such liability, and so will government agencies.

The fear that arbitrary denials will result from reversing the judgment below is unfounded.

C. Empirical Studies Prove That Government Agencies are Readily Capable of Methodically and Rationally Incorporating Land Use Rules Into Their Behavior.

The foregoing conclusion, that agencies can and will rationally adapt their behavior to incorporate new land use rules, is not only supported by logic and a basic understanding of land use procedures but is also supported by empirical evidence.

In 2001, Ann E. Carlson, Professor of Law at UCLA, and Daniel Pollak, an Environmental Policy Analyst at the California Research Bureau of the California State Library, conducted an extensive study of the experience of California municipalities in the wake of *Nollan* and *Dolan* and their progeny. *See* Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. Davis L. Rev. 103 (2001). Their findings are highly instructive as to how agencies react to a changing legal landscape.

Although the study examines a variety of issues, most relevant to this brief are the authors' findings regarding the reaction of land use planners advising land use agencies to *Nollan* and *Dolan* and the manner in which they have readily adapted to the changed legal environment. Particularly telling is this summary:

> . . . we found that an overwhelming percentage of California planners now view the *Nollan* and *Dolan* cases not as an

> encroachment upon their planning discretion but instead as establishing "good planning practices."

Id. at 105. The authors explain:

> The [*Nollan* and *Dolan*] decisions seem to have nudged many localities into more systematic, comprehensive planning through the preparation of reports and studies justifying and documenting the rationale for exacting money or land from developers.

Id.

Thus, the authors' findings demonstrate that the imposition of constitutional constraints under *Nollan* and *Dolan* has actually assisted planners in improving their procedures. This is because these rules do not punish the imposition of conditions *per se* but simply "penalize ad hoc decisions to impose exactions . . ." *Id*. at 115. The result is improved and more finely tailored decision making.

One observation in the wake of *Nollan* and *Dolan* is that planners have demonstrated new creativity in imposing conditions, often favoring impact fees in many instances, which can be more readily tailored to specific circumstances. *Id*. at 137. This demonstrates that agencies can and do easily comply with the requirements of *Nollan* and *Dolan* and that they need not and will not fear takings liability because compliance with constitutional requirements can be readily and predictably accomplished.

This study demonstrates that the specter of arbitrary denials engendered by fear and panic on the part of government land use agencies is entirely unfounded. Agencies can and do adapt readily and rationally to new land use rules. In particular, the *Nollan* and *Dolan* rules have resulted in improved land use procedures and more careful and thoughtful land use decision making on the part of government. The policy fears of the Florida Supreme Court are groundless. Accordingly, there should be no concern that ruling in favor of Petitioner will result in any adverse impact to development efforts. The judgment below should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Florida should be reversed.

Respectfully submitted,

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