ARIZONA COURT OF APPEALS

DIVISION ONE

AMERICAN FURNITURE WAREHOUSE, CO., a Colorado corporation, Plaintiff/Appellant, v. TOWN OF GILBERT, an Arizona Municipal corporation; JOHN DOES 1-X; and ABC ENTITIES 1-X, Defendant/Appellee.	)	No. 1 CA-CV 16-0773 Maricopa County Superior Court Cause No. CV2013-009133

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF/APPELLANT

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded over 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys participated as lead counsel or amicus curiae in all three exactions cases before the United States Supreme Court. *Koontz v. St. Johns River Water Management District*, __ U.S. __, 133 S. Ct. 2586 (2013) (lead counsel); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (amicus curiae), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (lead counsel). PLF attorneys have also participated in several landmark United States Supreme Court cases in defense of the right of individuals to make reasonable use of their property, and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Murr v. Wisconsin*, __ U.S. __, 137 S. Ct. 1933 (2017); *Horne v. Department of Agriculture*, __ U.S. __, 135 S. Ct. 2419 (2015); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997). Because of its history and experience with regard to

issues affecting private property, PLF believes that its perspective will aid this Court in considering American Furniture Warehouse's appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises an important question concerning the limitations that the Takings Clause of the Fifth Amendment of the U.S. Constitution places on a government's authority to use the permit process to force private property owners to dedicate private property, including money, to a public use. Specifically, this case asks the Court to determine whether an exaction mandated by an act of generally applicable legislation is subject to heightened scrutiny under the "essential nexus" and "rough proportionality" analysis set out by the U.S. Supreme Court in *Nollan*, *Dolan*, and *Koontz*. The answer to that question is yes.

The nexus and proportionality tests constitute a special application of the unconstitutional conditions doctrine, which holds that the government cannot demand that individuals surrender their constitutional rights in exchange for a government benefit. *Koontz*, 133 S. Ct. at 2599. For over a century, the U.S. Supreme Court has invalidated legislatively mandated conditions under that doctrine, without regard to the branch of government authorizing the condition or the branch imposing it against an individual. And in specific regard to land use exactions, the U.S. Supreme Court held exactions mandated by acts of generally applicable legislation subject to heightened scrutiny in *Nollan*, *Dolan*, and *Koontz*.

Thus, there is no basis in the U.S. Supreme Court's case law to exempt legislative exactions from the nexus and proportionality requirements.

Dicta from the Arizona Supreme Court's decision in *Home Builders Ass'n of Central Arizona v. City of Scottsdale (Scottsdale III)*, 187 Ariz. 479, 485-86, 930 P.2d 993 (1997), does not warrant a contrary conclusion. The Arizona Supreme Court's suggestion that legislative exactions should be excluded from the doctrine of unconstitutional condition was based on the mistaken belief that *Nollan* and *Dolan* did not involve legislatively mandated exactions. They did. Furthermore, *Scottsdale III*'s conclusion that nexus and proportionality can be satisfied upon a minimal showing that the exaction bears a "reasonable relationship" to a legitimate public goal conflicts with *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542-43 (2005), and *Koontz*, 133 S. Ct. at 2599, in which the High Court explained that the question whether an exaction advances a public purpose is irrelevant to the doctrine of unconstitutional conditions. The nexus and proportionality tests require the government to show that permit condition demanding a dedication of land or money to the public "is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. If the government cannot meet this burden, then the condition is unconstitutional and must be stricken from the permit. *Id*.

ARGUMENT

I.

CONDITIONS MANDATED BY ACTS OF GENERALLY APPLICABLE LEGISLATION ARE SUBJECT TO THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

A. The U.S. Supreme Court Routinely Invalidates Legislative Conditions Under the Unconstitutional Conditions Doctrine

The doctrine of unconstitutional conditions is distinct from other constitutional causes of action, such as regulatory takings or due process theories. In its most basic formulation, the doctrine holds that government may not grant an individual a benefit or permit on the condition that he or she surrender a constitutional right.[1] *Koontz*, 133 S. Ct. at 2594 (The doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up.").

Since the doctrine's origin in the mid-Nineteenth Century, the U.S. Supreme Court has frequently relied on the doctrine to invalidate legislative acts that impose unconstitutional conditions on individual rights, including the rights to property, free speech, free exercise of religion, equal protection, and the right to be free from

[1] *See also* Richard A. Epstein, *Bargaining with the State* 5 (1993) (The doctrine holds that even if the government has absolute discretion to grant or deny any individual a privilege or benefit—such as a land-use permit, "it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

unreasonable searches.[2] The purpose of the doctrine is to enforce a constitutional limit on government authority, including the legislative branch:

> [T]he power of the state [. . .] is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926) (invalidating state law that required trucking company to dedicate personal property to public uses as a condition for permission to use highways). The doctrine "does

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[2] *See Lafayette Ins. Co v. French*, 59 U.S. (18 How.) 404, 407 (1855) (Invalidating provisions of state law conditioning permission for a foreign company to do business in Ohio upon the waiver of the right to litigate disputes in the U.S. Federal District Courts because "This consent [to do business as a foreign corporation] may be accompanied by such condition as Ohio may think fit to impose; . . . provided they are not repugnant to the constitution of laws of the United States."); *see also Marshall v. Barlow's Inc.*, 436 U.S. 307, 315 (1978) (invalidating provisions of the Occupational Safety and Health Act, holding that a business owner could not be compelled to choose between a warrantless search of his business by a government agent or shutting down the business); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (holding a state statute unconstitutional as an abridgement of freedom of the press because it forced a newspaper to incur additional costs by adding more material to an issue or remove material it desired to print); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (provisions of unemployment compensation statute held unconstitutional where government required person to "violate a cardinal principle of her religious faith" in order to receive benefits); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (a state constitutional provision authorizing the government to deny a tax exemption for applicants' refusal to take loyalty oath violated unconstitutional conditions doctrine). *See also* James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 407 (2009).

not distinguish, in theory or in practice, between conditions imposed by different branches of government." James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 400 (2009).

Importantly, the doctrine does not implicate questions of government discretion or prerogative. Instead, it polices against government actions that demand unconstitutional conditions. *See Doyle v. Continental Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) ("Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so."). Thus, the suggestion that legislative conditions be given more leeway "is inconsistent with the theoretical justifications for the doctrine because those justifications are concerned with questions of the exercise [of] government power and not the specific source of that power." Burling & Owen, 28 Stan. Envtl. L.J. at 438.

Given this doctrinal background, legal scholars find "little doctrinal basis beyond blind deference to legislative decisions to limit [the] application of [*Nollan* or *Dolan*] only to administrative or quasi-judicial acts of government regulators." David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and*

Federal Courts Are Doing About It, 28 Stetson L. Rev. 523, 567-68 (1999). Indeed, such distinctions are meaningless where—as shown in the below discussion of *Nollan*, *Dolan*, and *Koontz*—it is often difficult to distinguish the actions of one branch of the government from the other. Steven A. Haskins, *Closing the Dolan Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487, 514 (2006) (describing the difficulty in drawing a line between legislative and administrative decisionmaking in the land-use context). Indeed, from the property owner's perspective, he suffers the same injury whether a legislative or administrative body forces him to bargain away his rights in exchange for a land-use permit.

B. The Nexus and Proportionality Tests Are Applicable To Conditions Imposed By Acts of General Legislation

Typically, a government demand that a person waive a constitutional right in exchange for a discretionary benefit constitutes a per se violation of the unconstitutional conditions doctrine. *Koontz* explains, however, that given the unique nature of land use planning, a demand for property in exchange for a land use permit is not necessarily a per se violation of the doctrine; instead, such conditions are subject to heightened scrutiny. *Koontz*, 133 S. Ct. at 2599. It is that distinction that makes the nexus and proportionality tests a "special application" of the unconstitutional conditions doctrine. *Id*.

The nexus and proportionality tests are designed to protect both landowners and the public by recognizing the limited circumstances in which the government

may lawfully condition permit approval upon the dedication of a property interest: (1) the government may require a landowner to dedicate property to a public use where the dedication is necessary to mitigate for the negative impacts of the proposed development on the public; (2) the government may not use the permit process to coerce landowners into giving property to the public that the government would otherwise have to pay for. *Koontz*, 133 S. Ct. at 2594-95; *see also Dolan*, 512 U.S. at 385 ("[G]overnment may not require a person to give up the constitutional right . . . to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit [that] has little or no relationship to the property."); *Nollan*, 483 U.S. at 833 ("[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements — cannot remotely be described as a 'governmental benefit.'").

Certainly, there has been confusion among the state courts about whether legislative exactions should be subject to the same degree of scrutiny as adjudicative exactions.[4] *See Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga.*, 515 U.S.

[4] The Texas, Ohio, Maine, Illinois, New York, and Washington Supreme Courts and the First Circuit Court of Appeals do not distinguish between legislatively and administratively imposed exactions, and apply the nexus and proportionality tests to generally applicable permit conditions. *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004); *Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Me. 1998); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995); *Northern Illinois Home Builders*

1116, 1117 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari); *see also California Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of certiorari). But, as was the case in *Scottsdale III*, much of that confusion was based on a mistaken understanding of the facts in *Nollan* and *Dolan* and a misunderstanding of the unconstitutional conditions doctrine. *See, e.g.*, *Scottsdale III*, 187 Ariz. at 485-86 (concluding that *Nollan* and *Dolan* involved only adjudicative conditions). A brief discussion of the U.S. Supreme Court's exactions cases will clarify any confusion about the precise nature of the conditions at issue.

In *Nollan*, the California Coastal Commission, acting pursuant to the requirements of a state law, demanded that the Nollans dedicate an easement over a strip of their private beachfront property as a condition of obtaining a permit to

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Association, Inc. v. County of Du Page, 649 N.E.2d 384, 397 (Ill. 1995); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995); *Trimen Development Co. v. King Cnty.*, 877 P.2d 187, 194 (Wash. 1994).

On the other hand, the Supreme Courts of Alabama, Alaska, California, and Colorado, and the Tenth Circuit Court of Appeals, limit *Nollan* and *Dolan* to administratively imposed conditions. *See, e.g.*, *Alto Eldorado P'ship v. City of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011); *St. Clair Cnty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007 (Ala. 2010); *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702 (Alaska 2003); *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 102-04 (Cal. 2002); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001).

rebuild their home. The dedication was required by the California Coastal Act and California Public Residential Code, which directed the Commission to demand public access as a condition of approval on all coastal development permits. *Nollan*, 483 U.S. at 828-30; *see also id.* at 858 (Brennan, J., dissenting) (Pursuant to the California Coastal Act of 1972, a deed restriction granting the public an easement for lateral beach access "had been imposed [by the Commission] since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract.").

The Commission justified the condition on the grounds that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a "wall" of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit,' " and would "increase private use of the shorefront." *Id.* at 828-29 (quoting Commission). The Nollans challenged the condition, arguing that it violated the Takings Clause because it bore no connection to the impact of their proposed development.

The U.S. Supreme Court agreed, holding that the easement condition violated the Takings Clause because it lacked an "essential nexus" to the alleged public impacts that the Nollans' project caused. *Id.* at 837. Because the Nollans' home would have no impact on public beach access, the Commission could not justify a permit condition requiring them to dedicate an easement over their property. *Id.* at

838-39. Without a constitutionally sufficient connection between a permit condition and a project's alleged impact, the easement condition was "not a valid regulation of land use but an 'out-and-out plan of extortion.' " *Id.* at 837 (citations omitted.).

In *Dolan*, the U.S. Supreme Court defined how close a "fit" is required between a permit condition and the alleged impact of a proposed land use. There, the city's development code imposed conditions on Florence Dolan's permit to expand her plumbing and electrical supply store that required her to dedicate some of her land for flood-control improvements and a bicycle path. *See* 512 U.S. at 377-78 (The City's development code "requires that new development facilitate this plan by dedicating land for pedestrian pathways."); *id*. at 379-80 ("The [development code] establishes the following standard for site development review approval: 'Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.' ") (citation omitted). Dolan refused to comply with the conditions and sued the city, alleging that the development conditions violated the Takings Clause and should be enjoined.

The U.S. Supreme Court held that the City established a nexus between both conditions and Dolan's proposed expansion, but nevertheless held that the

conditions were unconstitutional. Even when a nexus exists, the Court explained, there still must be a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. There must be rough proportionality—*i.e.*, "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. *Dolan* held that the city had not demonstrated that the conditions were roughly proportional to the impact of Dolan's expansion and invalidated the permit conditions. *Id.*

In *Koontz*, the U.S. Supreme Court confirmed that *Nollan* and *Dolan* also apply to impact fees. In that case, a government permitting agency demanded that Coy Koontz agree to pay impact fees before it would issue the permits necessary to develop 3.7 acres of his 14.9-acre commercial-zoned property. 133 S. Ct. at 2592. The agency imposed the condition pursuant to generally applicable "mitigation ratios" that had been adopted by Florida's Department of Environmental Protection a decade before Koontz submitted his applications. *See Koontz*, 133 S. Ct. at 2592 (the regulations were enacted pursuant to Florida's Water Resources Act of 1972 and Wetland Protection Act of 1984). Koontz objected to the size of the impact fees and the agency denied his application. *Id.* Koontz challenged the agency's decision as a violation of the doctrine of unconstitutional conditions. *Id.*

On review, the U.S. Supreme Court concluded that impact fees are often the "functional equivalent" of an exaction of land. *Id.* at 2599. Thus, the Court held that impact fees are plainly subject to *Nollan* and *Dolan* because a government demand that a landowner "relinquish[] funds linked to a specific, identifiable property interest such as a . . . parcel of real property, [if imposed directly, would constitute] a '*per se* [taking]." *Koontz*, 133 S. Ct. at 2600 (quoting *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 235 (2003)).

The *Koontz* Court rejected the agency's argument that impact fees were necessary to advance Florida's wetland protection policies, explaining that an unconstitutional conditions claim "does not implicate normative considerations about the wisdom of government decisions." *Koontz*, 133 S. Ct. at 2600 (quotation omitted). Indeed, whatever the wisdom of the government policy, imposing a permit condition "would transfer an interest in property from the landowner to the government." *Id*. And for that reason, "any such demand would amount to a *per se* taking similar to the taking of an easement or a lien" and is therefore subject to heightened scrutiny under *Nollan* and *Dolan*. *Id*. The fact that the monetary exaction was mandated pursuant to an act of general legislation was of no consequence to the Court's decision. *See Koontz*, 133 S. Ct. at 2608 (questioning whether the majority opinion had rejected the legislative-versus-adjudicative distinction) (Kagan, J., dissenting).

II.

ONLY THE HEIGHTENED SCRUTINY REQUIRED BY *NOLLAN, DOLAN,* AND *KOONTZ* WILL PROTECT THE PROPERTY RIGHTS THREATENED BY PERMIT CONDITIONS

The constitutional rights threatened by exactions cannot be adequately protected by the "rational relationship" test proposed in *Scottsdale III*, 187 Ariz. at 482.[3] In fact, the "rational relationship" test entirely misses the substance of the unconstitutional conditions doctrine by focusing solely on whether a demand for private property (or money) will advance a public purpose. *Id*. ("[R]egulations of general application will be overturned by the courts only if a challenger shows the restrictions to be arbitrary and without a rational relation to a legitimate state interest."); *but see Koontz*, 133 S. Ct. at 2600 (The unconstitutional conditions doctrine "does not implicate normative considerations about the wisdom of government decisions," nor posit whether the exaction is "arbitrary or unfair.").

Since *Scottsdale III* was decided in 1997, the U.S. Supreme Court expressly rejected the "substantially advances a legitimate government interest" test's applicability to the doctrine of unconstitutional conditions, because it "reveals nothing about the magnitude or character of the burden a particular regulation

[3] According to the Arizona Supreme Court, the "reasonable relationship" test is derived from substantive due process case law and therefore asks only whether the regulation has "rational relation to a legitimate state interest." *Scottsdale III*, 187 Ariz. at 482 (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *Cardon Oil Co. v. City of Phoenix*, 122 Ariz. 102, 104, 593 P.2d 656 (1979)).

imposes upon private property rights." *Lingle*, 544 U.S. at 542; *see also Koontz*, 133 S. Ct. at 2600. "A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through payment of compensation." *Lingle*, 544 U.S. at 543. Thus, in the context of the unconstitutional conditions doctrine, a determination that a legislatively mandated exaction serves a public need, without more, is not sufficient to justify a permit condition. *Id.* at 542-43; *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change.").

The analysis required by *Nollan*, *Dolan*, and *Koontz* is especially important where the government seeks to exact benefits relating to popular policy goals, such as building new traffic infrastructure. When the government places public costs on a small number of people, the democratic process, which is majoritarian in nature, works as an endorsement, not a check. *See* James L. Huffman, Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 Envtl. L. 143, 152 (1995) ("The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure."). In that circumstance, "it [is] entirely possible that the government could 'gang up' on particular groups to force extractions that a majority

of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others." *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d at 641.

The Texas Supreme Court's warning, however, is precisely how the Town's Traffic Signal System Development Fee Ordinance is designed to operate. The fee is imposed pursuant to a legislatively adopted schedule that sets mandatory per-square-foot rates based on the proposed use of the property. Town Ordinance No. 2226 (Appellant's Appendix 3). The fee is not designed to mitigate for any actual impacts resulting from any individual developer's specific proposal, but rather to distribute the Town's projected infrastructure costs onto new development, based on its ten-year growth projections. Town Response Br. at 10-11. For each categorized use, the Town predicted the total amount square footage to be developed over the next ten years, then allocated a total dollar amount needed to build regional traffic infrastructure. *Id*. Thus, instead of limiting the impact fee to that portion of the increased traffic directly attributable to American Furniture Warehouse's development, the Town demanded a pro-rata share of the total assumed cost associated with ten years of retail development. *Id*. at 11 (The Town "calculates [impact fees] *on a uniform basis for all new development*.").

The Town's predicted costs for growth-related infrastructure is a textbook "public burden" which constitutionally must be shouldered by the public at large.

Armstrong v. United States, 364 U.S. 40, 49 (1960) ("[P]ublic burdens . . . should be borne by the public as a whole" and cannot be shifted onto individual property owners.). The nexus and proportionality analysis is absolutely necessary in this circumstance because it is the only way to determine whether a development condition is "'merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.'" *Dolan*, 512 U.S. at 390 (quoting *Simpson v. City of North Platte*, 292 N.W.2d 297, 301 (Neb. 1980)); *see also* Mark W. Cordes, *Legal Limits on Development Exactions: Responding to* Nollan *and* Dolan, 15 N. Ill. U. L. Rev. 513, 551 (1995) (The nexus and proportionality tests were intended to curtail the "common municipal practice of using the development exaction process as a means to capture already targeted tracts of land without paying just compensation[.]"). Only a faithful application of the nexus and proportionality tests to legislatively mandated permit conditions will protect against the very real risk that the legislature will take advantage of the government's permitting authority as a tool to exact increasingly large sums of money from developers in order to solve costly (and politically unpopular) social problems that are unrelated to a proposed development.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's decision and hold the Town's impact fee subject to heightened scrutiny under *Nollan*, *Dolan*, and *Koontz*.

RESPECTFULLY SUBMITTED this 25th day of September, 2017.

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CERTIFICATE OF COMPLIANCE

1. This certificate of compliance concerns:

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