COURT OF APPEALS OF WISCONSIN
DISTRICT II

Bridget Fassett,
Plaintiff-Respondent,

Appeal No.
2021-AP-269

v.

City of Brookfield,
Defendant-Appellant

On Appeal From the Circuit Court for Waukesha County, the Honorable Michael O. Bohren, Presiding, Case No. 2020CV000317

JOINT *AMICUS CURIAE* BRIEF OF THE WISCONSIN REALTORS® ASSOCIATION, WISCONSIN BUILDERS ASSOCIATION, AND NAIOP-WI

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OVERVIEW

New development provides many benefits to communities including an increased tax base, population growth, and new employment opportunities. However, new development also may create added costs for the community such as the need for new road improvements, additional park space, or school expansions. Determining who should pay for these new improvements is often a challenging decision.

In recent years, communities have increasingly shifted this financial responsibility to the developer and new residents. The justification for having new development pay these costs is that current residents already pay for existing infrastructure and services and a belief that new growth should pay for itself. Developers have generally been agreeable to paying these public infrastructure costs, if the costs relate directly to the new development and will enhance the overall value of the project.

To ensure that communities require developers to pay only their fair share, courts and legislatures have developed standards and procedures to regulate required land dedications and financial contributions. Some of these standards and procedures are in the form of constitutional protections, while others are established through state statutes. Together, these laws are

designed to provide a regulatory framework that allows communities to impose land dedication requirements on new development in a fair and just manner.

This case presents this Court with the opportunity to clarify when a required land dedication goes too far. Specifically, this case will help provide clarity as to (a) the requirements a community must satisfy to impose a lawful exaction, and (b) when a community's decisions regarding such dedication requirements are entitled deference from a court if alleged to be unconstitutional.

LAW AND ARGUMENT

I. THE CITY'S EXACTION IS AN UNCONSTITUIONAL TAKING.

The Fifth Amendment of the United States Constition, made applicable to the states by the Fourteenth Amendment, guarantees that "private property [shall not] be taken for public use, without just compensation."[1] U.S. Const., amend. V. The prohibition against uncompensated takings was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice,

[1] Similarly, Article I, Section 13 of the Wisconsin Constitution provides that "[t]he property of no person shall be taken for public use without just compensation therefore."

should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

To protect individual property owners from excessive regulations, Wisconsin courts have recognized two types of government actions that constitute a "categorical taking" without requiring a "case-specific inquiry into the public interest advanced in support of the restraint." *See R.W. Docks & Slips v. State*, 244 Wis. 2d 497, 507, 628 N.W.2d 781 (2001) (citing *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1015 (1992)). The first category is a "physical taking," involving "regulatory actions that bring about some form of physical 'invasion' of private property." *Id.* The second category is a "regulatory taking" which "includes regulatory actions that deny 'all economically beneficial or productive use of land.'" *Id.* Wisconsin courts have interpreted this "to include regulatory actions that 'deny the landowner all or substantially all practical uses of a property.'" *Id.* (citation omitted).

Exactions, like the one at issue in this case, are in a separate category of regulatory takings. An "exaction" is defined as "conditioning approval of development on the dedication of property to public use." *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702 (1999). However,

exactions are not limited to land dedications. They also include impact fees, water or sewer connection fees, or other forms of compensation as a condition to the granting of a permit, subdivision plat approval, or some other development approval. *See* Blaesser & Kentopp, *Impact Fees: The "Second Generation,"* 38 J.Urb. & Contemp. L. 55, 63 (1990).

A. Exactions Must Satisfy The Two-Part *Nollan/Dolan* Test.

To determine whether an exaction constitutes a regulatory taking, the U.S. Supreme Court has created a two-part test. *See Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994). Under the first part of the test, a reviewing court determines whether an "essential nexus" exists between a legitimate government interest and the exaction. *Nollan v. Cal. Coastal Comm.,* 483 U.S. 825, 836 (1987). If an essential nexus exists, a court must decide whether connection between the exaction and the projected impact is "roughly proportional" to the proposed development. *Dolan*, 512 U.S. at 386-88. This two-prong test is often referred to as the "*Nollan/Dolan* test," as it incorporates the two decisions that served as the basis for the test. *See Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. 595, 622 (2013).

1. The City has failed to show an "essential nexus" between the exaction and the impact caused by the land division.

Under the "essential nexus" part of the test, the government must show that the condition imposed was caused by the development. *Nollan*, 483 U.S. at 836-37. In other words, the government must demonstrate that the proposed development created the need for the condition. *See Koontz*, 570 U.S. at 599. The nature of the relationship between the exaction and need created by the proposed development is the central focus of this part of the analysis. The "essential nexus" test is aimed at preventing the government from using "the land use regulatory process to extract public benefits from private owners that are not substantially related to some problem or need generated by the particular development in question." 5 Rathkopf's The Law of Zoning and Planning § 90.45 (4th ed.).

In *Nollan*, the Nollans owned a small bungalow between two public beaches. 483 U.S. at 827. The Nollans wanted to replace the bungalow with a new, three-bedroom house and applied for the necessary permits. *Id.* at 828. The California Coastal Commission conditioned the permits on a requirement that the Nollans dedicate an easement for public use across the beach portion of their property. *Id.* The commission claimed the new house would interfere with the visual access to the beach from the street and create a "psychological barrier" to beach access. *Id.* at 828-29.

In its holding, the Supreme Court observed that an easement allowing the public, already present on the public beaches, to walk across the beach portion of the Nollan's property, would not reduce viewing obstacles from the street created by the new house. *Id*. at 838-39. As a result, the Court concluded that no nexus existed between the condition and the public burden allegedly generated by the Nollan's proposed new house. *Id.* Thus, according to the Court, since no nexus existed, the condition was "not a valid regulation of land, but an out-an-out plan of extortion." *Id.* at 837.

In this case, the City maintains that Fassett's proposed land division creates a need for connecting the existing two dead-end roads. App. Br. at 10. According to the City, connecting the roads would improve pedestrian and bike safety, traffic congestion, and emergency services. *Id.* In addition, the City asserts that the street connection requirement would benefit the lots created by Fassett through improved emergency service response time, snowplow operation, and resident access to their homes. App. Rep. Br. at 9. Finally, the City claims that the proposed land division will make these current conditions even worse because the roads will never be connected. *Id.*

However, none of the City's arguments satisfy the "rational nexus" test because they fail to show how the proposed land division has caused these problems. *See Nollan*, 483 U.S. at 836-37. The problems identified by the City are pre-existing conditions resulting from the fact that these two dead-end roads have existed for at least 20 years. (R. 30-9) Rather than showing how the proposed land division has created the need for the road connection, the City's arguments show how the proposed land division has created the opportunity for the road connection.

2. The City's exaction is not "roughly proportional" to the impacts caused by the proposed land division.

Under the "roughly proportional" part of the test, if an exaction satisfies the "essential nexus" requirement, the government must demonstrate the exaction is "roughly proportional" to the impact caused by the development. *Dolan*, 512 U.S. at 391. Rough proportionality means the exaction imposed must be "related both in nature and extent to the impact of the proposed development." *Id.* Thus, the nature and amount of the exaction must roughly relate to the burden placed on the government resulting from the development.

In *Dolan*, the Dolans owned a small plumbing and electrical supply store with a gravel parking lot. *Id.* at 379. The Dolans applied for permits

to expand the size of the store and to pave the parking lot. *Id.* The city conditioned the permits upon the dedication of a portion of the property for a storm-drain system and a pedestrian/bicycle path. *Dolan*, 512 U.S. at 380. The Dolans challenged the exaction, maintaining that the city had not identified any special quantifiable burdens created by their applications that justified the exactions. *Id.* at 382.

The U.S. Supreme Court concluded the dedication requirement was not roughly proportional to the burden placed on the city resulting from the development. *Id*. at 395. The city provided no evidence that the bike path would offset the traffic demands generated by the building addition. *Id*. While an exact calculation is not required, the Court declared "the government must make some sort of individualized determination that the exaction is roughly proportional both in nature and extent to the proposed impact of the proposed land use submitted for governmental approval." *Id*. at 391.

In this case, the City maintains its land dedication and street improvement requirements satisfy the "roughly proportional" test in *Dolan* because the dedication requirement (a) is directly related to the proposed

land division, and (b) would comprise only five percent of Fassett's property. *See*, App. Br. at 12; *see also*, App. Rep. Br. at 10-11.

As indicated above, the two dead-end streets at issue have existed for at least 20 years. (R. 30-9) The problems cited by the City that the street connection is supposed to address are all pre-existing conditions that have existed since the dead-end streets were created. As demonstrated by the testimony of Alderman Christopher Blackburn, who represents the area where the proposed land division is located, "[t]hat area has been separated. Indianwood has been there probably at least 50 years and Starbridge about 20 years . . . There is no compelling reason to connect that road." *Id*.

With respect to the City's assertion that the road dedication requirement would comprise only five percent of Fassett's property and thus is "roughly proportional" to the impact of the development on the City, the City ignores the disproportionate cost impacts that such requirements would have in relation to the value of the property and overall scope of the project. The proposed land division is a small development, with a 4.93 acre lot being split into three lots for three single-family homes. Resp. Br. at 4-5. While there is nothing in the record relating to the anticipated sales prices of the new homes or the cost to build the road, residential lots (0.5

acre to 0.8 acres in size) in the City of Brookfield currently range in price from $182,500 to $329,000. *See* Realtor.com website, https://www.realtor.com/realestateandhomes-search/Brookfield_WI/type-land. According to one source, a two-lane, undivided road in an urban area cost between $3 and $5 million per mile in 2016. *See* Midwest Industrial Supply, Inc. website, https://blog.midwestind.com/cost-of-building-road/. Thus, the City is imposing on an individual developer the cost of land dedication and building a public road, which would require significant expenditures that are disproportionate to the size and scope of the project.

Because the City failed to demonstrate the proposed land division created the need for road connection requirement, the City has not satisfied the "rough proportionality" test, which requires a direct relationship between the proposed development and the condition required by the municipality. *See Dolan*, 512 U.S. at 391.

B. Local Governments Have The Burden To Prove Exactions Are Constitutional.

Under *Dolan*, the Supreme Court placed the burden to prove the constitutionality of exactions on the government. *See* Mulcahy & Zimmet, *Impact Fees for A Developing Wisconsin*, 79 Marq. Law Rev. 759, 781

(1996). The Court explained that in exaction cases 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; *see also*, *id.* at 391, fn. 8 ("[T]he city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden rests on the city.") Accordingly, the government must prove the exaction is both "related in nature" (essential nexus) and "related in extent to the impact" (rough proportionality) of the proposed development.

In this case, the City maintains that because the exaction is based upon the City's subdivision and platting ordinance and the Wisconsin Statutes allow property owners to appeal for a certiorari review if a plat or certified survey map has been denied, the City's decision to impose the exaction is not subject to the requirements established by *Dolan*. *See* App. Br. at 15-18. According to the City, these decisions are subject to deference and minimal scrutiny by this Court and are entitled to presumption of correctness. *Id.*

The City's argument is based on an incorrect analysis of *Dolan* and a mischaracterization of the exaction it imposed in this case. In

distinguishing between general land use decisions that courts must presume to be valid and exactions that are not entitled to the same presumption, the Supreme Court explained that exactions, unlike general land use decisions, are "not simply a limitation on the use" of property, but rather a requirement that the owner transfer legal title to portions of the property to the local government. *Dolan*, 512 U.S. at 385. By requiring the dedication and the actual transfer of Fassett's land to the City, the City's exaction "is the quintessential physical invasion of private property" and "necessarily strikes at the cornerstone of the takings clause." *See Amoco Oil Co. v. Village of Schaumburg*, 227 Ill. App.3d 926, 661 N.E.2d 380, 389 (1995). Thus, the City's decision to impose the exaction is not entitled to deference from this Court.

II. THE CITY'S EXACTION FAILS TO MEET THE REQUIREMENTS IN WISCONSIN'S IMPACT FEE LAW.

In addition to failing to satisfy the constitutional requirements established by *Nollan* and *Dolan*, the City's exaction fails to comply with Wisconsin's Impact Fee Law.

In 1994, the Wisconsin legislature enacted Wisconsin's Impact Fee Law ("Impact Fee Law"), which authorized and regulated the use of exactions and impact fees. *See* 1993 Wis Act 305. In doing so, the

legislature codified the requirements established by the *Nollan/Dolan* test for determining when impact fees and exactions are constitutional.

The Impact Fee Law defines "impact fees" broadly to mean "cash contributions, contributions of land or interests in land or any other items of value that are imposed on a developer by a municipality under this section." Wis. Stat. § 66.0617(1)(c)(emphasis added). Thus, under this definition, any contribution required of a developer by a municipality that has a monetary value, including land dedications, is considered an "impact fee." *Id.*

When enacting the Impact Fee Law, the Wisconsin legislature recognized that municipalities had separate legal authority with different standards to require land or monetary contributions from developers as part of the development approval process. *See* Wis. Stat. § 66.0617(2)(b); *see e.g.*, Wis. Stat. § 236.13(2)(am)1.a (authorizing municipalities to "require that the subdivider make and install any public improvements reasonably necessary or that the subdivider provide security to ensure that the subdivider will make those improvements within a reasonable time."). Accordingly, the legislature provided municipalities with 13 months after the date of the Impact Fee Law's enactment to update their ordinances and

development approval processes to comply with the Impact Fee Law. *See* 1993 Wis. Act 305 ("Beginning on the first day of the 13th month after the effective date of this paragraph . . . , a political subdivision may impose and collect impact fees only under this section."). However, since May 1, 1995, any land or monetary contribution required by municipalities must meet the requirements set forth in the Impact Fee Law. *See* Wis. Stat. §66.0617(2)(c). Thus, even if a municipality is authorized under separate legal authority to impose a land or monetary contribution, the municipality must follow the procedural and substantive requirements established in the Impact Fee Law. *Id.*

Prior to adopting an impact fee ordinance, municipalities must prepare a needs assessment for the public facilities for which the municipality anticipates imposing impact fees. Wis. Stat. § 66.0617(4). The needs assessment must include, among other things, (a) an inventory of existing public facilities, including any existing deficiencies, for which an impact fee may be imposed, and (b) identifying the new public facilities or improvements that will be required because of the new development. *See* Wis. Stat. §§66.0617(1) and (2). The needs assessment is substantially

similar to the "individual determination" requirement established by *Dolan*. *See Dolan*, 512 U.S. at 391.

Any impact fee imposed by a municipality must (a) bear a rational relationship to the public facilities required to serve the development, (b) not exceed the proportionate share of the capital costs that are required to serve the land development, and (c) not include amounts necessary to address existing deficiencies in public facilities. *See* Wis. Stat. § 66.0617(6). The statutory standards required for an impact fee are substantially similar to the "essential nexus" and "rough proportionality" requirements established by *Nollan* and *Dolan*. *See Nollan*, 483 U.S. at 836-37 and *Dolan*, 512 U.S. at 391.

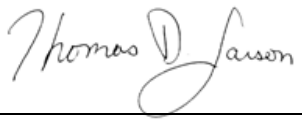
In this case, the City has not demonstrated compliance with the procedural and substantive requirements established by the Impact Fee Law.

CONCLUSION

For the reasons stated above, we respectively request this Court to affirm the circuit court's decision and declare the City's exaction requirement to be unconstitutional and invalid.

Dated this 20th day of August, 2021.

Respectfully submitted,



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2979 words.

Thomas D. Larson

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding any appendix, that complies with the requirements of Wis. Stat. § 809.19(12).

The content, text and format of the electronic copy of the brief are identical to the original paper copy of the brief filed with the Court on today's date.

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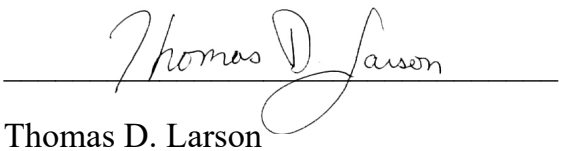

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CERTIFICATE OF SERVICE

I hereby certify that:

I have caused three true and correct copies of this Joint *Amicus Curiae* Brief to be served on counsel by placing the same in U.S. mail, first class postage, on this date:

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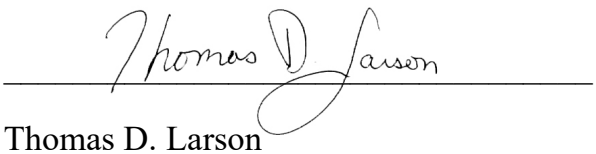

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