No. 99545-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON
(FROM THE COURT OF APPEALS STATE OF WA,
DIVISION II No. 535581-II)

DOUGLASS PROPERTIES II, LLC,

Appellant,

v.

CITY OF OLYMPIA,

Respondent,

RESPONDENT CITY OF OLYMPIA'S ANSWER TO BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION AND BUILDING INDUSTRY ASSOCIATION OF WASHINGTON IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

Amici Building Industry Association of Washington and Pacific Legal Foundation filed a brief in support of Appellant Douglass Properties II, LLC ("Douglass") request for review of the Court of Appeals decision issued on February 2, 2021 in this matter.. Because the opinion below is consistent with both state and federal precedents, including *Koontz v. v. Johns River Water Management District*, 570 U.S. 595, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013), and was correctly decided consistent with RCW 82.02.050 - .090, the court should deny the petition for review and the policy arguments raised by amici should be left to the Legislature.

II. ARGUMENT

A. AMICI MISREPRESENT CALIFORNIA LAW WHICH IS DIRECTLY CONTRARY TO THEIR POSITION.

Amici misrepresent the holding of the California Supreme Court in *California Bldg. Indus.Ass'n v. City of San Jose, ("CBIA")* 61 Cal. 4th 435, 351 P.3d 974, 189 Cal. Rptr. 3d 475 (2015). Amici falsely claim that the California Supreme Court held, after *Koontz* that legislative fees must satisfy nexus and proportionality tests. Amicus Brief at 7. In reality, the case held to the contrary and is consistent with *City of Olympia v. Drebick,* 156 Wn.2d 289, 126 P.3d 802 (2006) and cases cited by the City.

First, the Court in *CBIA* recognized that California cases rejected extension of *Nollan-Dolan's* heightened scrutiny to legislatively adopted fees in *San Remo Hotel v. City & County of San Francisco* 27 Cal.4th 643,

117 Cal.Rptr.2d 269, 41 P.3d 87 (2002). The court explained that the law is opposite from what amici claims, stating:

> the opinion in *San Remo Hotel* first declined "to extend heightened takings scrutiny to all development fees" and instead adhered to the distinction drawn in earlier decisions of this court "between ad hoc exactions and legislatively mandated, formulaic mitigation fees." (*San Remo Hotel, supra,* 27 Cal.4th at pp. 670–671, 117 Cal.Rptr.2d 269, 41 P.3d 87, citing *Ehrlich, [v. City of Culver City (1996)]* 12 Cal.4th 854, 50 Cal.Rptr.2d 242, 911 P.2d 429, *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006, 73 Cal.Rptr.2d 841, 953 P.2d 1188, and *Santa Monica Beach, [v. Superior Court (1999)]* 19 Cal.4th 952, 81 Cal.Rptr.2d 93, 968 P.2d 993.) The opinion explained: "While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustified by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls." (*San Remo Hotel, supra,* at p. 671, 117 Cal.Rptr.2d 269, 41 P.3d 87.)

California Bldg. Indus. Assn. v. City of San Jose, 61 Cal. 4th 435, 470–71, 351 P.3d 974, 997–98, 189 Cal. Rptr. 3d 475, 503–04 (2015) (emphasis added).

If it wasn't clear enough, the court specifically rejected amici's argument explaining in a footnote that California, like Washington has rejected application of heightened scrutiny under *Nollan* and *Dolan* to legislative enactments, like the impact fees at issue here. In footnote eleven,

the *CBIA* court first distinguished *Koontz* from legislative fees because it was imposed by the district on an ad hoc basis upon an individual permit applicant and was not a legislatively prescribed condition that applied to a broad class of permit applicants. The Court was explicit in rejecting application to legislative enactments, stating:

> The *Koontz* decision does not purport to decide whether the *Nollan/Dolan* test is applicable to legislatively prescribed monetary permit conditions that apply to a broad class of proposed developments. (See *Koontz, supra,* 570 U.S. at p. ——, 133 S.Ct. at p. 2608, 186 L.Ed.2d at p. 723 (dis. opn. of Kagan, J.).) Our court has held that legislatively prescribed monetary fees that are imposed as a condition of development are not subject to the *Nollan/Dolan* test. (*San Remo Hotel, supra,* 27 Cal.4th at pp. 663–671, 117 Cal.Rptr.2d 269, 41 P.3d 87; see *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 966–967, 81 Cal.Rptr.2d 93, 968 P.2d 993 (*Santa Monica Beach*).)

California Bldg. Indus. Assn. v. City of San Jose, 61 Cal. 4th 435, 461, n. 11, 351 P.3d 974, 991, 189 Cal. Rptr. 3d 475, 495 (2015).

B. *NOLLAN, DOLAN* AND *KOONTZ* ARE LIMITED IN APPLICATION TO ADJUDICATIVE, NOT LEGISLATIVE EXACTIONS.

Amici also mischaracterize the Supreme Court's articulation of the nexus and proportionality test, implying that it is broad based and applies to legislative enactments. *City of Olympia v. Drebick*, 156 Wn.2d 289, 302, 126 P.3d 802, 808 (2006), citing, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702–03, 119 S.Ct. 1624, 143 L.Ed.2d 882

(1999) (noting that the Court has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions-land-use decisions conditioning approval of development on the dedication of property to public use").

Amici do not discuss *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) which acknowledges that the applicability of the *Nollan*/*Dolan* framework is limited to *adjudicative* land-use exactions "requiring dedication of private property" where a *per se* physical taking has occurred. *Lingle*, 544 U.S. at 547, 125 S.Ct. 2074 The applicability of the *Nollan*/*Dolan* framework is limited, however, to *adjudicative* land-use exactions "requiring dedication of private property" where a *per se* physical taking has occurred. *Id.* (emphasizing that *Nollan*/*Dolan* has not been extended "beyond the special context" of adjudicative land-use exactions that "involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings").

Dolan and *Koontz* both recognize the inapplicability of this standard to legislatively adopted conditions. *Dolan* itself suggested the limitation between legislative and adjudicative exactions by underscoring that there "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel," instead of imposing an

"essentially legislative determination [ ] classifying entire areas of the city." 512 U.S., at 385, 114 S.Ct. 2309.

Koontz emphasized that in the adjudicative process, there is a danger of coercion that justifies this heightened scrutiny, a context lacking where there is a legislatively determined pre-established fee. *Koontz* provides:

> The standard set out in *Nollan* and *Dolan* reflects the danger of governmental coercion in this context while accommodating the government's legitimate need to offset the public costs of development through land use exactions. *Dolan, supra,* at 391, 114 S.Ct. 2309; *Nollan, supra,* at 837, 107 S.Ct. 3141. Pp. 2594 – 2595.

Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 596, 133 S. Ct. 2586, 2589, 186 L. Ed. 2d 697 (2013).

Nothing in *Koontz* expands the application of *Nollan/Dolan* analysis beyond the context of adjudicatively imposed conditions that mitigate specific impacts. It is only in that context where the concern over the "leveraging" of legitimate interests in mitigation would arise. *Koontz,* 570 U.S. at 606, 133 S. Ct. at 2595.

The out-of-state cases cited by amici also do not support review. Neither *Town of Flower Mound v. Stafford Estates Ltd.,* 135 S.W. 2d 620 (Tx. 2004) nor *Highlands-In-The Woods, LLC v. Polk County*, 217 So.3d 1175 (Fla.App. 2017) involved assessment of legislatively required impact fees. *Flower Mound* involved a requirement to place street improvements

which were not necessitated by the development's impact. Cf. *Benchmark v. City of Battle Ground*, 146 Wn.2d 685, 49 P.3d 860 (2002). *Highlands-in-the-Woods* likewise involved a condition to use a reclaimed water system where reclaimed water was not available, not legislatively mandated impact fees.

Although *Washington Townhomes, LLC v. Washington Cty. Water Conservancy Dist.*, 388 P.3d 753 (Utah 2016) involved legislatively adopted impact fees, the Utah Supreme Court declined to consider the challenge on jurisdictional grounds. Subsequently, Utah has affirmed legislatively adopted impact fees against state and US constitutional challenges. *Alpine Homes v. Village of West Jordan*, 424 P.3d 95 (Utah 2017). Moreover, Utah's statutory scheme is different than Washington's The Utah legislature codified the Nollan/Dolan nexus and proportionality tests in their statute, reflecting a policy decision to require rough proportionality of all development exactions as a matter of statute. *B.A.M. Dev., L.L.C. v. Salt Lake Cty.*, 128 P.3d 1161, 1167 (Utah 2006).

C. AMICI IMPROPERLY RELY ON UNPUBLISHED AUTHORITY IN VIOLATION OF GR 14.1

On April 20, 2021, Petitioner submitted a Statement of Additional Authorities citing to an unpublished California appeals court decision. *Alliance v. Taylor,* 2021 Cal. App. Unpub. LEXIS 2482 (April 19, 2021).

On April 21, 2021, Respondent City of Olympia objected and moved to strike the Statement of Additional Authority because it is not permitted to cite such unpublished cases under GR 14.1(b).

Upon receipt of the City's objection, the Petitioner withdrew their Statement of Additional Authority. Consequently, the Court struck the City's motion as moot. Now, in the form of an amicus brief, once again there is an improper citation to this same unpublished decision in *Alliance for Responsible Planning v. Taylor*, No. C085712, 2021 WL 1525538 (Cal. Ct. App. Unpub. Apr. 19, 2021). Amicus Curiae Brief at 7.

Under GR 14.1(b) unpublished opinions from jurisdictions other than Washington may only be cited as authority only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court.

California law does not permit citation to unpublished appeals court opinions. Cal. Rules of Court, Rules 8.1115(a). The only exceptions allowing citation to an unpublished opinion concern the law of the case or in criminal or disciplinary proceedings involving the same defendant or respondent. Cal. Rules of Court, Rules 8.1115(b). A copy of the California rule is attached as Appendix A. Because California law does not permit citation to an unpublished opinion, Petitioner is not permitted to cite this case under GR 14.1(b).

Amici contend that their citation is appropriate because they do not cite it as authority, but to show the state of the law. Amici's position is counter to reason as unpublished decisions cannot show the state of the law because they are not legal authority under California's rules, as amici admit.

Moreover, the context of the citation to this case by amici is plainly as authority for their false characterization of California law as found in their description of the *CBIA* case. Certainly, it is improper to use an unpublished decision from a jurisdiction whose rules forbid citing it as authority to misrepresent California law as set forth by published California Supreme Court decisions.

D. AMICI'S POLICY ARGUMENTS CONCERNING AFFORDABLE HOUSING ARE WRONG AND ARE BEST DIRECTED TO THE LEGISLATURE THAT ADOPTED GMA IMPACT FEES.

Amici argue that the Court should reverse the legislatively adopted policy of funding a portion of the costs of infrastructure necessitated by new growth through GMA impact fees on such new growth. The policy of "growth paying for growth" is soundly rooted in the Growth Management Act and has been established for over three decades. It was upheld by this Court in *Drebick*, 156 Wn.2d at 295-6.

Amici suggest that this strategy is used in order to avoid making the public pay for new facilities required to serve new development through tax

increases. Amicus Brief at 9. Amici are simply wrong because the GMA impact fees at issue here are actually taxes imposed on developers to fund the required new infrastructure. See Respondent's Brief at 8-13. However, without such charges, developers like amici's members would reap an unfair windfall and avoid paying their fair share of the true costs of public facilities, (streets, parks, fire facilities) that the GMA imposes on them.

Amici fail to recognize that GMA impact fees, when first adopted in 1982 by Snohomish County were held to be taxes, albeit unauthorized at the time. *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982). *Hillis* involved virtually the same type of charge -- legislatively predetermined charges on residential land division and housing proposals in the county to raise revenue to pay for the increased demands on solid waste disposal facilities, parks, roads, and sheriff's services. In response to *Hillis*, in 1990 the Legislature authorized adoption of impact fees as part of the Growth Management Act, revenue to pay for new traffic capacity, parks or fire services arising from anticipated new growth. Laws of 1990, 1st ex.sess., Ch. 17 § 43 – 48. Because they are taxes rather than land use controls, such fees are not subject to the vested rights doctrine. *New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 235, 989 P.2d 569, 575 (1999).

Amici argue that the Court should accept review because a policy issue concerning affordable housing is presented. This case involves fees imposed on a commercial storage business, not residential fees who are eligible for a variety of credits and relief in order to provide affordable housing. Amici ignore that RCW 82.02.060(2) already authorizes exemptions from impact fees for construction of low income housing. Olympia has adopted such an exemption in OMC 15.04.060 for developers of "low-income housing".

The shortage of affordable housing seems to arise more from developers who see little profit in low-income development, opting instead to build large single family homes that are priced out of the market for the lower strata of working families. Any relationship between price and impact fees is tenuous, requiring the type of analysis for which the Legislature is best suited. There seems to be little distinction between market forces that drive prices in jurisdictions that include impact fees and those that do not. See Deen, Impact Fees and Housing Affordability, Cityscape: A Journal of Policy Development and Research, Vol. 8, No. 1 (2005), U.S. Department of Housing and Urban Development, Office of Policy Development and Research (concluding more analysis required and linking price increase to increased desirability from additional facilities and services provided through impact fee funds).

Amici made these same policy arguments in *City of Olympia v. Drebick*, which nevertheless upheld the validity of these very same impact fees imposed under the very same ordinances. See *City of Olympia v. Drebick*, Brief of Amicus Building Ind. Ass'n of Washington, No. 75270-2, December 18, 2002). Having rejected these arguments for over two decades, there is no cause to revisit the same failed arguments here.

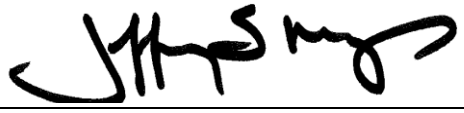
The issues of how to provide affordable housing are complex and addressed by a myriad of statutes and incentives, including those built into GMA impact fees under RCW 82.02.060(2). Any attempt to blame the lack of supply of such housing on GMA impact fees is shortsighted and misses the mark. Amici's suggestion that the Court should intervene in this case due to the need for affordable housing is misplaced and contrary to the well settled principle that under our Constitutional separation of powers, such policy questions are best directed to the Legislature. *Washington State Coal. for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 946, 949 P.2d 1291, 1318 (1997) (J. Durham, dissent); *In re the Salary of the Juvenile Director*, 87 Wn.2d 232, 240, 552 P.2d 163 (1976) (quoting G. Wood, *The Creation of the American Republic, 1776–1787,* at 449 (1969)); *see also State v. Blilie,* 132 Wn.2d 484, 939 P.2d 691 (1997); *Carrick v. Locke*, 125 Wn.2d 129, 882 P.2d 173 (1994).

III. CONCLUSION

The Court should deny the Petition for Review because the Court of Appeal decision is consistent with applicable case law. The Court should leave the complex issue of how to provide affordable housing to the Legislature, where it belongs. This case does not meet the criteria for granting review under RAP 13.4.

DATED this 24th day of May, 2021.

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.



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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2021, I served the foregoing with the Clerk of the Court for the Supreme Court of the State of Washington using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 24th day of May, 2021.

/s/ *Lisa Gates*
Lisa Gates, Assistant to Jeffrey S. Myers

LAW LYMAN DANIEL KAMERRER & BOGDANOVICH

May 24, 2021 - 10:32 AM

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