No. 21-766

IN THE

Supreme Court of the United States

DOUGLASS PROPERTIES II, LLC,

Petitioner,

v.

CITY OF OLYMPIA,

Respondent,

On Petition for Writ of Certiorari to the Washington Court of Appeals, Division Two

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFREY S. MYERS
Counsel of Record
LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
P.O. Box 11880
Olympia, WA 98508
Phone: (360) 754-3480
E-mail: jmyers@lldkb.com
Attorney for Respondent City of Olympia

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ORDINANCES

RULES AND REGULATIONS

I. INTRODUCTION

Petitioner seeks review of an intermediate appellate court decision upholding application of traffic impact fees pursuant to a legislatively adopted generally applicable schedule. The Petition is fails to show any basis for Supreme Court Review under S.Ct. Rule 10. The Petition should be denied.

II. STATEMENT OF THE CASE

Respondent adopts the Statement of Facts set forth in the Court of Appeals decision issued in this matter. (Appendix 4-8 to the Petition).

III. THE PETITION SHOULD BE DENIED.

Petitioner seeks review of a Washington lower appellate court's decision not to apply the test for takings under the 5th Amendment used to analyze land use exactions that was developed in *in Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) and *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). Petitioner argues that this result is compelled by *Koontz v. Johns River Water Management District*, 570 U.S. 595, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013).

Petitioner presents no basis to support review of this case under the considerations normally used by the Court to determine which cases are appropriate for exercising its discretionary supervisory authority over state courts. See S.Ct. Rule 10. Instead, the

petition describes a decision which is consistent with decisions of sister state courts and federal courts analyzing similar claims. Petitioner cites no cases that have adopted their position and fail to show any conflict between state courts or between federal circuit courts. See S.Ct. Rule 10.

Rule 10 describes three considerations indicating the character of the reasons normally used for granting review. Petitioner does not contend that Rule 10(a) applies as they do not identify any conflicts between any U.S. court of appeals decisions and other circuits or state courts. Likewise, there is no basis for review under S.Ct. Rule 10(b) as no conflict between a state court of last resort and another state or U.S. Court of Appeals is identified. Finally, Rule 10(c) is inapplicable as the decision of the Washington Court of Appeals follows well settled law decided by this Court and followed routinely by state and federal courts applying *Nollan, Dolan* and *Koontz.*

1. **The Petition does not show any conflict between the states which consistently recognize the distinction between adjudicative exactions and legislatively adopted fees.**

The state court decisions cited by the petition all support the Washington Court of Appeals decision not to apply the *Nollan/Dolan* analysis to a legislatively adopted, generally applicable schedule of impact fees. This same result was also reached in both *American Furniture Warehouse Co. v. Town of Gilbert*, 245 Ariz. 156, 425 P.3d 1099 (2018) and

Dabbs v. Anne Arundel County, 458 Md. 331, 182 A.3d 798 (Md. 2018). Petitioner neglects to mention that this court has already rejected a similar petition for certiorari of this issue in *Dabbs,* 139 S. Ct. 230, 202 L. Ed. 2d 127 (2018).

Indeed, the City of Olympia's same ordinance adopting a schedule of traffic impact fees, which is at issue here, was upheld by the Washington Supreme Court which declined to apply *Nollan/Dolan* to legislatively adopted impact fees. *City of Olympia v. Drebick,* 156 Wn.2d 289, 126 P.3d 802 (2006). This Court also denied the developer's petition for certiorari asking that the heightened scrutiny applicable to development exactions be applied to these fees. *Drebick v. City of Olympia,* 549 U.S. 988, 127 S. Ct. 436, 166 L. Ed. 2d 330 (2006). Petitioner now asks for the same result denied in *Drebick.*

The first case after *Koontz* to consider whether *Nollan/Dolan* scrutiny applies to impact fees was *Dabbs v. Anne Arundel County*, 458 Md. 331, 182 A.2d 798 (Md. April 10, 2018) where Maryland's highest court held that area wide impact fees similar to those assessed under the Washington Growth Management Act are not subject to *Nollan/Dolan* takings analysis. *Dabbs* rejected precisely the argument advanced by Douglass – that *Nollan* and *Dolan* analysis applies to the County's impact fee ordinance because of *Koontz*. *Dabbs*, 182 A.2d at 807-08. The Court there held:

> We re-affirm our holding in *Waters Landing [Ltd. Ptnrsp. v. Montgomery County,* 650 A.2d 712 (1994)], and, thus,

> conclude that *Koontz* is inapplicable to the Impact Fee Ordinance in this case. Impact fees imposed by legislation applicable on an area-wide basis are *not* subject to *Nollan* and *Dolan* scrutiny.

Dabbs, 182 A.2d at 812-13. (Emphasis added).

Numerous other courts have followed this well settled distinction and refused to apply *Nollan/Dolan* to legislatively adopted fees. *San Remo Hotel, LP v. City and County of San Francisco*, 41 P.3d 87, 103 (Cal.4th 2002) (citing *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 966 (Cal.4th 1999) (quoting *Dolan*, 512 U.S. at 385) (… The most deferential review of land use decisions appears to be for those that pertain to 'essentially legislative determinations' that do not require any physical conveyance of property'")); *Rogers Machinery v. Washington County,* 45 P.3d 966, 973 (Or. App. 2002) ("[W]hen the government regulates property without physically occupying it, the Takings Clause is much less protective of the interests of the property owner and much more deferential to the public interests served."); *Krupp v. Breckenridge Sanitation Dist.,* 19 P.3d 687, 696 (Colo. 2001); *Home Builders Ass'n of Central Arizona v. City of Scottsdale,* 930 P.2d 993, 1000 (Az. 1997); *McCarthy v. City of Leawood,* 894 P.2d 836 (Kan. 1995); *West Linn Corp. Park, L.L.C. v. City of West Linn*, 240 P.3d 29, 45 (2010); and *Loyola Marymount Univ. v. Los Angeles Unified Sch. Dist.,* 53 Cal. Rptr.2d 424, 434 (1996)).

The Petition does not discuss this long history of cases applying *Nollan/Dolan* only to adjudicative fees. Moreover, they point to nothing in the majority opinion in *Koontz* that is inconsistent with this well settled distinction.

2. The Decision does not conflict with rulings from Federal Courts which routinely apply the well-settled distinction between adjudicative exactions and legislatively adopted fees.

Petitioner does not show a conflict between this case and any federal court decision. Petitioner cites only one federal case, which is also consistent with the decision of the Washington Court of Appeals. *Better Hous. for Long Beach v. Newsom,* 452 F. Supp. 3d 921 (C.D. Cal. 2020). Likewise, in *Building Industry Association—Bay Area v. City of Oakland*, 289 F.Supp.3d 1056 (N.D. Cal. 2018), affirmed, 775 Fed.Appx. 348 (9th Cir. 2019) ("*BIA-Bay Area*"), the Court ruled that a takings claim based on *Koontz* against an ordinance requiring developers to pay for art as a condition of development was precluded against a legislative act, rather than an adjudicative land-use determination.

The opinion in *BIA-Bay Area* demonstrates that in the years since *Koontz,* courts have had no trouble applying the *Nollan/Dolan* test to exactions imposed in ad hoc adjudicative proceedings, but have followed the well settled rule that takings claims arising from legislative policy enactments are evaluated under the traditional test articulated in *Penn Central Transportation Co. v. City of New York,*

438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). In rejecting the same argument advanced by Petitioner here, the court summarized this Court's jurisprudence distinguishing between adjudicative exactions and legislatively adopted fees, stating:

> But the Supreme Court has only applied this exactions doctrine in cases involving a particular individual property, where government officials exercised their discretion to require something of the property owner in exchange for approval of a project. And the Court has consistently spoken of the doctrine in terms suggesting it was intended to apply only to discretionary decisions regarding individual properties. *See*, *e.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546–47, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).

BIA—Bay Area, 289 F.Supp.3d at 1057-1058.

Instead, petitioner relies on a forecast of future results made by the dissent in *Koontz* to argue that clarification is now needed eight years later. Petition at 14. The forecast in the *Koontz* dissent that legislatively adopted fees will be subject to *Nollan/Dolan* scrutiny has not proven to be correct, as it would be inconsistent with the precedents of this court applying *Nollan* and *Dolan,* including *Dolan* itself and the majority opinion in *Koontz.*

This Court has long recognized the limited applicability of *Nollan/Dolan* to adjudicative conditions. *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"). Likewise, *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 546, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) 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 (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 itself acknowledged the distinction 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.

The majority opinion in *Koontz* followed *Dolan,* also acknowledging the distinction between legislative actions and ad hoc adjudicative exactions, thus refuting petitioner's argument that the decision of the Washington court here is now somehow inconsistent with *Koontz.* *Koontz* emphasized that in the

adjudicative process, there is a danger of coercion that justifies the heightened *Nollan/Dolan* scrutiny, a context lacking where there is a legislatively determined pre-established schedule of generally applicable impact fees. *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, 570 U.S. at 596, 133 S. Ct. at 2589.

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.

Finally, no lower federal or state court has ever applied *Nollan* and *Dolan's* individualized, heightened scrutiny to legislatively adopted impact fees, which are traditionally afforded greater deference. The Petition cites no such cases, refuting their contention that clarification is now needed. The only cases cited support the limitation of the proportionality test of *Dolan* to adjudicative exactions. "It has long been axiomatic that legislative and quasi-legislative

enactments enjoy a significantly higher degree of judicial deference than individualized adjudications." *Homebuilders Ass'n of Metropolitan Portland v. Tualatin Hills Park and Recreation Dist.,* 62 P.3d 404, 410 (Or. App. 2003) (citing *Bi-Metallic Co. v. Colorado*, 239 U.S. 441, 445 (1915); *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993)).

3. The factual record here does not support granting review because petitioner did not preserve its rights by filing an independent fee calculation.

Petitioner argues that the City's fee is discretionary because under the state statute, its ordinance allows for adjustment of the fees, by consideration of an independent fee calculation. What petitioner fails to disclose is that they did not preserve their right to seek an adjusted fee because they never used the procedure to allow consideration of site specific reasons to lower their fee by submitting an independent fee calculation. Here the Washington Court of Appeals agreed that this is a legislatively determined fee, not a discretionary fee imposed as a condition of development.

Petitioner claims that the state statute requires individualized proportionality between the impacts of a specific proposal and the fee. Petition at 6. This is misleading. The Washington Supreme Court in *Drebick* rejected this interpretation, requiring only that the fee be proportionate to the costs of new development anticipated as a whole. Traffic impact fees under RCW 82.02.050 - .090 ("GMA Impact fees")

are developed with assessment of the area-wide improvements needed to serve new growth and development in the aggregate. These new improvements must only provide reasonable benefit, as a whole, to the new development. *Drebick*, 156 Wn.2d at 300-309, 126 P.3d 807-811.

Petitioner falsely claims that it is uncontested that they proved a disproportionality of the City's scheduled fee. Petition at 9. Petitioner's arguments were rejected by the Hearing Examiner and were contested by the City. Petitioner fails to disclose that they did not file an "independent fee calculation" to support reduction of their scheduled fee as required by state and local law, but inexplicably failed to do so. Having failed to file an independent fee calculation, they did not preserve the right to seek a fee other than the legislatively scheduled fee. Hence, the fee imposed by the City did not involve any discretion. Instead of submitting an independent fee calculation, petitioner below chose to ambush the City by raising the issue for the first time before the hearing examiner without submitting an independent fee calculation. The Examiner correctly rejected their disproportionality argument.

The City's ordinance implements RCW 82.02.060(5-6) and RCW 82.02.070(5) by requiring that a fee payer who believes the scheduled fee is incorrect submit an independent fee calculation disclosing the reasons for an adjustment and supporting evidence. If no such calculation is submitted, the City is required to assess the scheduled fee, which was the case here. Petitioner did not submit

an independent fee calculation and thus the City had no discretion except to apply the fees adopted by the Ordinance. OMC 15.04.050 (C).

Given the petitioner's failure to file an independent fee calculation, the fees imposed in this case are the legislatively adopted schedule of fees adopted in the City's ordinance. Such fees are not based on the facts of individual cases but are based on legislative determinations of what is required for new development to pay its fair share of costs for new infrastructure needed to serve new growth.

This Court has recognized the validity of spreading the costs caused by growth upon new development as sound land use policy. *Koontz* said as much in recognizing the legitimacy of land use ordinances that require new development to bear the costs that it imposes upon the community, stating:

> Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack. See *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

Koontz, 570 U.S. at 605, 133 S. Ct. at 2595.

Koontz therefore adheres to the legislative / adjudicative dichotomy established by the Court in *Dolan* and followed in *Lingle.* This well settled principle clearly establishes what lower courts

routinely follow – the *Nollan/Dolan* nexus and proportionality tests apply only where there is an exaction imposed in the ad hoc adjudicative context of land use permitting where such an exaction threatens undue coercion for a developer to cede his property or a fee in lieu thereof. The test does not apply to legislatively adopted measures or fees adopted to raise revenue to offset the general costs of new development on local communities.

IV. CONCLUSION

Given these considerations, petitioner has failed to show compelling reasons why its petition for a writ of certiorari should be granted. The petition itself ignores S.Ct. Rule 10 and does not even attempt to show that there is a conflict in lower courts that creates a compelling reason for the Court to exercise its supervisory powers in this matter. The petition for a writ of certiorari should therefore be denied.

DATED this 21st day of December, 2021.

JEFFREY S. MYERS
Counsel of Record
LAW, LYMAN, DANIEL, KAMERRER
& BOGDANOVICH, P.S.
P.O. Box 11880
Olympia, WA 98508
Phone: (360) 754-3480
E-mail: jmyers@lldkb.com

Attorney for Respondent City of
Olympia