No. 22-1074

In the Supreme Court of the United States

GEORGE SHEETZ, *Petitioner*,

v.

COUNTY OF EL DORADO, CALIFORNIA, *Respondent.*

On Writ of Certiorari to the Court of Appeal of California, Third Appellate District

BRIEF OF THE AMERICAN PLANNING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST OF *AMICUS*

The American Planning Association (APA) is a non-profit, public-interest research organization founded in 1978 to advance the art and science of land-use, economic, and social planning and development at the local, regional, state, and national levels. APA, based in Chicago, Illinois and Washington, D.C., and its professional institute, the American Institute of Certified Planners, represent more than 39,000 practicing planners, elected officials, and citizens in 47 regional chapters. APA members work in both the public and private sectors, on behalf of government agencies and private landowners and developers, to formulate and implement planning, zoning, and other development regulations. APA has long educated the nation's planning professionals on the planning and legal principles that underlie land-use planning and regulation through publications and training programs, and APA advocates for planners' interests by filing *amicus curiae* briefs on important land-use law questions in state and federal courts across the country.[1]

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[1] Pursuant to Supreme Court Rule 37.6, APA affirms that no counsel for a party authored this brief in whole or in part, and that no such counsel or party, other than APA or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Marcy Park in Highlands Ranch, Colorado: brought to you by legislatively adopted development exactions. Photo Credit: Google Street View.

Marcy Park in Highlands Ranch, Colorado is, by all accounts, a run-of-the-mill example of a neighborhood park in suburban America. Although it lacks the notoriety of internationally recognized urban parks such as the National Mall, New York City's Central Park, or Chicago's Millennium Park, Marcy Park is locally beloved. It contains a sports field that hosts children's soccer games, basketball courts for neighborhood pick-up games, a popular playground, picnic tables, and views of the Rocky Mountains in the distance. Every day, millions of Americans visit and recreate in neighborhood parks. These places provide green space to urban dwellers, serve as centers of

community social life, and improve public health by offering recreational opportunities.

In many cases, parks like Marcy Park, along with neighborhood streets, sidewalks, water and sewer lines, schools, and other facilities were constructed or paid for by a developer under the form of legislatively adopted development exactions[2] system that is at issue here. Since colonial times, localities have relied on private landowners and developers to provide public goods that offset the impact of their development activities. *See* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 S.M.U. L. REV. 177, 193 (2006). Today, from Maine to Hawaii, Americans drive on streets, walk on sidewalks, cycle on trails, play in parks, drink from public water facilities, attend schools, live in affordable housing units, and rely on police, fire, and emergency services that are built or funded by real-estate developers pursuant to local impact-mitigation regulations that account for communities' growth and change. *See, e.g.*, NELSON ET AL., *supra,* at 68–69. Unsurprisingly, then, this case is of importance to every community—and nearly every person—in the United States.

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[2] "Development exactions" collectively reference governmental conditions on private parties' land-use approvals, including property dedications, in-kind construction of public facilities, or monetary payments, the latter of which are sometimes called "impact fees" or "mitigation fees." *See* ARTHUR C. NELSON ET AL., PROPORTIONATE-SHARE IMPACT FEES AND DEVELOPMENT MITIGATION 7–8 (2022).

A neighborhood street and sidewalk in Michigan, constructed and dedicated by a developer pursuant to legislatively adopted subdivision standards. Photo Credit: Author.

This Court has acknowledged that "[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605 (2013). Whether they require a landowner to dedicate property, construct public infrastructure, or pay impact-mitigation fees to address a project's impact on local government services, legislatively adopted development exactions lie at the heart of land-use planning. Land-use planning is concerned with *where* and *how* growth should occur, *when* and *how* public infrastructure and services are needed to accommodate that growth, and the relationship between the public and private sectors in realizing these visions. *See* AM. PLAN. ASS'N, *What Is Planning?*, AM. PLAN. ASSOC. https://planning.org/

aboutplanning/ (last visited Oct. 31, 2023). Every planner, whether he or she works on behalf of the government or a developer, knows that good infrastructure and public services are the backbone of any growing community, whereas inadequate infrastructure and public services will stymie new housing, shops, offices, or other growth. Just as a publicly vetted, community-wide future-growth plan is meaningless without private-sector development that advances the plan's goals, a development project constructed without necessary infrastructure and services thwarts the plan, burdens the entire community with the costs of growth, and is often unsuccessful. *See Koontz*, 570 U.S. at 605. The development exaction is the fulcrum on which the plan succeeds or fails.

This case presents the question of *how* legislatively adopted exactions survive constitutional scrutiny. And as the principal drafters, negotiators, implementers, and enforcers of development-exactions regulations, America's 39,000 professional planners have a keen interest in the constitutional propriety of impact-mitigation requirements. Planners today operate under uncertain guidance in this area. The Court's trio of development-exactions cases, including *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz*, 570 U.S. 595, has not conclusively established whether legislatively adopted exactions must satisfy heightened scrutiny. Those decisions have also left planners guessing as to applicable evidentiary burdens, the import of critical terms such as "rough proportionality," and the outer bounds of the

unconstitutional-conditions doctrine. APA files this brief in support of neither party in the interest of (1) assisting the Court in better understanding legislatively adopted development exactions' importance to planners, and (2) seeking clear legal guidance to inform the establishment and maintenance of locally adopted impact-mitigation programs.

LEGAL ARGUMENT

A. Planners, Developers, and the General Public Have Long Relied on Legislatively Adopted Development Exactions to Provide Necessary Public Goods.

For more than 250 years, American communities have relied on developers to provide public goods to serve new development. As early as colonial times, landowners were required to drain wetlands, remove unwanted vegetation, provide public access, and construct housing for public benefit. *See* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1263–80 (1996). As the nation urbanized in the early Twentieth Century, land-subdivision regulations required developers to dedicate necessary rights-of-way and other lands to provide public improvements to serve their projects. *See, e.g.*, *Ridgefield Land Co. v. City of Detroit*, 217 N.W. 58, 59 (Mich. 1928). The Department of Commerce's model city-planning law, which continues to inform contemporary land-development regulation, contemplated conditioning development approvals on the provision of necessary public facilities. *See* U.S. DEP'T OF COM., A STANDARD CITY PLANNING ENABLING ACT § 13 (1928).

Before this Court confirmed zoning's constitutionality in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926), local governments' unclear authority over land use[3] prompted localities to fund public-infrastructure improvements. In the Great Depression, however, this approach to public-infrastructure development proved to have "catastrophic economic consequences" and led to "the imposition of expanded subdivision land exactions just a few years later." Rosenberg, *supra*, at 196. The breadth of the problem was recounted by one author as follows:

> First, developers often abandoned the under-sold, under-developed and under-improved subdivisions after an initial period of marketing success. This resulted in many real estate tax delinquencies with the ultimate ownership of the parcels reverting to local governments through tax foreclosure. Secondly, municipal bonds issued to secure financing for subdivision improvements often went into default during the thirties due to the devastating economic effect of the Great Depression.

Id. at 197. These harsh lessons "influenced the post-World War II local government development policies requiring land developers themselves to construct on-site infrastructure improvements as a condition of

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[3] The lower-court split regarding zoning's constitutionality prior to this Court's ruling in *Euclid* is described briefly in *Euclid,* 272 U.S. at 390–91, and in more detail in cases such as *Goldman v. Crowther*, 128 A. 50, 59 (Md. 1925).

subdivision approval." *Id.* at 198. With increased demand for new housing in the postwar period, local governments increasingly turned to developers to fund and construct infrastructure and other public facilities. *Id.* at 200.

Today, across the United States, regulators and the general public rely on developers to fund and construct a variety of infrastructure and critical public services in connection with real-estate projects. Loudon County, Virginia's subdivision regulations require any landowner constructing a new subdivision to dedicate and construct streets, provide utility easements, install signage, build drainage systems, and construct water and sewer facilities to serve its project. LOUDON COUNTY., VA., LAND SUBDIVISION AND DEVELOPMENT ORDINANCE § 1245.03. Draper, Utah's development regulations require landowners to construct or pay for street improvements, including drainage, curb, sidewalk, and fire-hydrant improvements, along the frontages of properties that are developed or redeveloped. DRAPER, UTAH, CODE OF ORDINANCES ch. 27, §§ 9-27-100–10. Montgomery County, Maryland levies development-impact charges for transportation-system and public-school improvements so that new development does not overwhelm existing roads, transit systems, and schools. MONTGOMERY COUNTY., MD., COUNTY. CODE part II, ch. 52, art. IV, §§ 52-39–59. Douglas County, Colorado's subdivision rules require developers to dedicate land within their projects for parks, thus ensuring that new developments provide recreational facilities for their residents and avoid overburdening existing parks. DOUGLAS COUNTY., COLO., SUBDIVISION RESOLUTION art. 10, § 1003.

Auburn, Washington imposes a fire-protection impact fee to guarantee quality emergency services to its growing population. AUBURN, WASH., MUNICIPAL CODE ch. 19.06, §§ 19.06.010–130. Polk County, Florida assesses a library impact fee to support expansions of the local library system necessitated by a growing population. POLK COUNTY., FLA., CODE OF ORDINANCES ch. 8.7, art. VII, § 8.7-71–75. The list goes on.

A neighborhood walking trail in Colorado that was constructed pursuant to development standards requiring pedestrian connectivity in new subdivisions. Photo Credit: PCS Group, Inc., https://www.pcsgroupco.com/projects/sterling-ranch.

To date, a majority of states have adopted statutes enabling local governments to charge development-impact fees.[4] NELSON ET AL., *supra*, at 43. By 2000, of U.S. cities with more than 25,000 residents, 59 percent maintained impact-fee requirements. Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE 139, 141 (2005). APA now recommends that communities utilize legislatively adopted exactions in planning practice. AM. PLAN. ASS'N, *APA Policy Guide on Impact Fees*, AM. PLAN. ASSOC. (Apr. 1997), https://www.planning.org/policy/guides/adopted/impactfees.htm (hereinafter, APA POLICY GUIDE). Furthermore, as described *infra* in Sections B and C, developers themselves bank on the opportunity to

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[4] The following states enable local governments to charge development-impact fees: Arizona (Ariz. Rev. Stat. Ann. §§ 9-463.05, 11-1102 *et seq.*), Arkansas (Ark. Code Ann. § 14-56-103), California (Cal. Gov't Code §§ 66000 *et seq.*, 66477), Colorado (Colo. Rev. Stat. § 29-20-104.5), Florida (Fla. Stat. § 163.31801), Georgia (Ga. Code Ann. § 36-71-1 *et seq.*), Hawaii (Haw. Rev. Stat. §§ 46-142 *et seq.*, 264-121 *et seq.*), Idaho (Idaho Code § 67-8201 *et seq.*), Illinois (605 Ill. Comp. Stat. § 5/5-901 *et seq.*), Indiana (Ind. Code § 36-7-4-1300 *et seq.*), Maine (Me. Stat. tit. 30-A, § 4354), Maryland (Md. Code Ann., Local Gov't § 20-701), Montana (Mont. Code Ann. § 7-6-1601 *et seq.*), Nevada (Nev. Rev. Stat. § 278B.225), New Hampshire (N.H. Rev. Stat. Ann. § 674:21), New Jersey (N.J. Stat. Ann. §§ 27:1C-1 *et seq.*, 40:55D-42), New Mexico (N.M. Stat. Ann. § 5-8-1 *et seq.*), Oklahoma (Okla. Stat. tit. 62 § 895), Oregon (Ore. Rev. Stat. § 223.297 *et seq.*), Pennsylvania (53 Pa. Cons. Stat. § 10502-A *et seq.*), Rhode Island (45 Gen. Laws R.I. § 45-22.4 *et seq.*), South Carolina (S.C. Code Ann. § 6-1-910 *et seq.*), Texas (Tex. Local Gov't Code Ann. § 395.001 *et seq.*), Utah (Utah Code § 11-36a-101 *et seq.*), Vermont (Vt. Stat. Ann., tit. 24, § 5200 *et seq.*), Virginia (Va. Code Ann. § 15.2-2317 *et seq.*), Washington (Wash. Rev. Code § 82.02.050 *et seq.*), West Virginia (W. Va. Code § 7-20-1 *et seq.*), and Wisconsin (Wisc. Stat. § 66.0617).

provide development exactions to ensure that projects can be built on a predictable timeframe. The legislatively adopted development exaction is a well-worn path, and all parties to the development process now rely upon its existence.

B. Legislatively Adopted Exactions Vindicate Private Property Rights by Making Development Possible.

Basic planning principles caution against intense development on parcels lacking infrastructure and services. *See Golden v. Plan. Bd. of Ramapo*, 30 N.Y.2d 359, 379 (1972). Accordingly, this Court has confirmed that local governments enjoy constitutional authority to restrict development that overwhelms available public services and threatens the general welfare. *See Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 5 (1974). Thus, across the vast portions of America that lack paved streets, public water systems, or sufficient classroom desks, well-reasoned zoning regulations allow little more than a nominal list of agricultural, residential, or extractive uses. For the owners of these millions of un- or under-served acres, development options can be very limited.

Nevertheless, for these same owners, legislatively adopted development exactions offer an otherwise-unavailable opportunity. By enabling landowners to construct infrastructure or pay money to expand public services in exchange for development rights, exactions expand the supply of developable property and offer localities the ability to zone more land for development. Gregory Burge & Trey Dronyk-Trosper, *Impacts of Proportionate-Share Development Fees*, *in* NELSON ET

AL., *supra*, at 207–08. For a landowner who constructs or pays for necessary road improvements, public-water-line extensions, sanitary-sewer-system expansions, increased school capacity, or augmented police, fire, or emergency-services capacity in exchange for development approval, the benefits are often many-fold with respect to his or her property's potential uses and value. Undeniably, just as communities rely on developers to provide facilities and services to offset their impacts, landowners rely on their ability to provide these amenities in order to unlock development rights.

Developers rely on their ability to install utilities, such as this sanitary sewer pump house, to provide necessary services for new development projects. Photo credit: City of Virginia Beach, Virginia.

Absent legislatively adopted exactions, local governments' only alternatives are to withhold land-use approvals or to tax existing community residents and businesses to construct infrastructure to serve new

development. *See* Burge & Dronyk-Trosper, *supra*, at 207–08. Taxing existing residents places the burdens of new development squarely on the community at large. *Cf. Koontz*, 570 U.S. at 605. Moreover, it empowers local governments to decide *when* capital improvements or services should be provided to serve new development, thus choosing winners and losers among property owners. In contrast, development-exactions regulations afford landowners the ability to construct public facilities or pay impact fees to develop property that might otherwise be undevelopable due to limited public infrastructure, and to "hasten the . . . provision of infrastructure necessary for development." Been, *supra*, at 145.

This benefit of development exactions is especially consequential for landowners whose property rights are restricted as a result of majoritarian political opposition to growth. Popular antipathy to new development often produces restrictive local zoning controls. *See* RICHARD F. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES 141 (1966). Except in the rare circumstance where they are deprived of all beneficial uses, *see Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 330 (2002), or experience interference with their reasonable investment-backed expectations, *see Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), under prevailing precedents of this Court, landowners have little recourse against these controls. *See Euclid*, 272 U.S. at 388 ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."). In contrast, legislatively adopted

development exactions can result in greater public acceptance of new housing, commercial uses, and other growth by ensuring that developers "internalize the negative externalities of their conduct." *Koontz*, 570 U.S. at 605. Legislatively adopted development exactions make development possible.

C. Legislatively Adopted Exactions Provide Much-Needed Certainty in the Real-Estate-Development Process.

Uncertainty is the enemy of planning and real-estate development. *See* Michael Manville et al., *Does Discretion Delay Development?*, 89 J. AM. PLAN. ASS'N 336, 345 (2023). "Faster and more certain approvals can reduce carrying costs, help developers secure financing, and allow developers to bid more for land or budget for lower returns, all of which can help projects pencil and increase the supply of new housing overall." *Id.*

Real-estate developers today contend with uncertainty at every turn. Market conditions change rapidly with little notice, financing terms vary as a result of unforeseen global events, construction costs fluctuate in response to supply-chain shocks, and construction timelines are slowed by surprise labor shortages. Compounding these uncertainties is the land-use and building-approval process itself. Even in localities where development approvals are issued on a predictable timeframe, the "cumbersome" administrative back-and-forth of the plan-review process interjects even greater uncertainty into projects. *See id.* For the many thousands of real-estate-development projects that are subject to

discretionary approval—which typically includes community notice, a public hearing before a planning commission or elected body, and the application of subjective approval criteria—the uncertainty extends not just to timing and cost, but to whether a project can be built at all. *Id.* at 337–38. For real-estate developers and their planners, all of these uncertainties present financial risk. For government planners, these uncertainties pose risk to the implementation of an entire community vision.

Amid this vast sea of uncertainty, the legislatively adopted exaction stands as a rare beacon of predictability. Whether a local government requires a developer to improve the road that serves its project or requires another developer, pursuant to a publicly available schedule, to pay a per-housing unit fee for school expansion, these requirements take guesswork out of the process. *See id.* at 339; Burge & Dronyk-Trosper, *supra*, at 213. For planners, these requirements provide assurance that the public facilities necessary to serve the real-estate-development project will be provided without overwhelming necessary infrastructure.

The predictability of the legislatively adopted development exaction is distinguishable from the *ad hoc*, adjudicative determinations that the Court considered in *Nollan*, *Dolan*, and *Koontz*. *See Dolan*, 512 U.S. at 385. Chief Justice Rehnquist noted this distinction between "essentially legislative determinations classifying entire areas of the city" and "an adjudicative decision to condition petitioner's application for a building permit on an individual

parcel."[5] *Id*. In the adjudicative context, outcomes for all parties are already uncertain, owing to a project- or property-specific bargaining process between government and developer. *See* Manville et al., *supra*, at 338. Opportunities present themselves for extortionate behavior and singling-out of specific individuals or properties on the part of the regulator. *See Koontz*, 570 U.S. at 604–05. In contrast, under a legislative development-exactions system, uncertainty and opportunities for malfeasance are reduced if not eliminated. *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001) (en banc) ("When a governmental entity assesses a generally applicable, legislatively based development fee, all similarly situated landowners are subject to the same fee schedule, and a specific landowner cannot be singled out for extraordinary concessions as a condition of development.").

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[5] Arguing that the exactions at issue in *Nollan*, *Dolan*, and *Koontz* all involved legislatively adopted exactions, Brief for Petitioner at 12–24, the Petitioner seemingly disregards the California courts' distinction between legislatively *authorized* and legislatively *mandated* exactions, *see* Pet. App. A-16–17. and implies that this Court misunderstands that distinction, *cf. Dolan*, 512 U.S. at 385 (comparing the difference between legislative and adjudicative decisions). Whatever the outcome of this case, there is a clear and important distinction between legislation *authorizing* a government body to impose an *ad hoc*, adjudicative exaction and legislation *mandating*, for example, the payment of a predetermined impact-mitigation fee or construction of particular infrastructure. The latter category is at issue in this case.

Unsurprisingly, only the rare landowner or developer likes exactions. *See* Burge & Dronyk-Trosper, *supra*, at 199. Yet in contrast to a discretionary land-use approval process with an uncertain timeline, cost, or outcome, a predictable, legislatively adopted exaction enables a developer to determine readily whether a given project is feasible, and allows the developer to plan accurately for the cost of the exaction. *See* APA POLICY GUIDE, *supra*. And for the planner, the legislatively adopted exaction guarantees that, with new development, the considered plan for growth will be implemented.

D. Existing Law Protects Property Owners from Excessive Legislatively Adopted Exactions.

Irrespective of whether legislatively adopted development exactions are subject to the *Nollan*/*Dolan* framework, landowners subject to excessive exactions will have available recourse. Governments do not have unlimited power to impose user fees. *See, e.g.*, *United States v. Sperry Corp.*, 493 U.S. 52, 63 (1989). Although state laws distinguish between legislatively adopted exactions and user fees, *see, e.g.*, *Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 876 S.E.2d 476, 489 (N.C. 2022), the character of these charges is similar to the extent that the "governmental body has an obvious interest in making those who specifically benefit from its services pay the cost," *Massachusetts v. United States*, 435 U.S. 444, 462 (1978).

Landowners subject to excessive legislatively adopted impact fees have remedies under state laws, too. State impact-fee enabling statutes routinely

contain remedies for landowners who are overcharged by local governments. *See, e.g.*, Ariz. Rev. Stat. Ann. § 9-463.05.H–J; Cal. Gov't Code §§ 66020–24; Colo. Rev. Stat. § 29-20-104.5(7); Ga. Code Ann. §§ 36-71-9–10; Mont. Code Ann. § 7-6-1603(6), (9) (effective Jan. 1, 2024); Utah Code Ann. §§ 11-36a-701–05. Under these statutes, landowners who are overcharged are entitled to state-court judicial review and commensurate refunds. No constitutional claim is necessary to address overcharging. Were a state statute or local ordinance devoid of a post-deprivation remedy, due-process principles require that the landowner have a pre-deprivation opportunity to challenge the application of the development exaction. *See Harper v. Va. Dep't of Taxation,* 509 U.S. 86, 101 (1993).

E. If Legislatively Adopted Exactions are Subjected to Heightened Scrutiny, the Court Should Clarify Three Questions of Great Practical Importance to Planners, Regulators, and Landowners.

In an era of limited federal and state infrastructure resources, localities often must fend for themselves in providing backbone public goods. *See* NELSON ET AL., *supra* at 6. Therefore, irrespective of how the Court decides this case, communities will continue to rely on and partner with private landowners and developers to provide capital improvements and pay for services necessary to support growth. Planners, landowners, local elected officials, and entire communities across the nation will continue to engage with one another in crafting exactions regulations to accommodate that

growth. Amid this dialogue, all parties to the real-estate-development process need clear guidance with respect to the constitutional requirements for legislatively adopted development exactions. This imperative will be even greater should the Court determine that these exactions are subject to the unconstitutional-conditions doctrine. Three questions are especially pertinent, as discussed below.

First, *what must a governmental defendant show to satisfy the evidentiary burden of heightened scrutiny?* Whereas the plaintiff bears the burden of proof in challenging a generally applicable zoning regulation, *Dolan*, 512 U.S. at 391 n.8, this Court's development-exactions cases place the burden on the governmental defendant to establish the required nexus and rough proportionality to satisfy heightened scrutiny. *Koontz*, 570 U.S. at 622 (Kagan, J., dissenting). But these cases say little about how a defendant can satisfy its burden. For example, the Court's passing reference in *Dolan* to an "individualized determination," 512 U.S. at 391—in a case where that fact was present—has led to much litigation about the nature of that requirement.[6] If the Court reverses in this case—without clarifying how a *legislative* decision may be made that also constitutes an *individualized* determination under *Dolan*—even greater disagreement and confusion is likely to follow.

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[6] For example, that question resulted in three separate opinions from the three-judge panel in *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998).

In adopting development-exactions regulations, planners customarily rely on comprehensive land-use plans, transportation plans, and other detailed studies quantifying new development's impact. These plans and studies calculate, for example, each new dwelling unit's (or commercial use's) anticipated pro rata share of the projected cost of system-wide transportation improvements—such as street widenings, non-motorized trails, and transit enhancements—that are necessitated as a result of new development. *See, e.g.*, SAN DIEGO CNTY., CALIF., *Transportation Impact Fee*, DEP'T OF PUB. WORKS (Dec. 31, 2012), https://www.sandiegocounty.gov/dpw/land/tif.html. Another example is a fire-protection impact-fee study that determines the cost of necessary facilities and services upgrades necessary to serve each new unit of development. *See, e.g.*, DUNCAN ASSOCS., *Fire/EMS Impact Fee Study for Lee County, Fla.*, LEE CNTY. (Jan. 2018), https://www.leegov.com/dcd/Documents/Studies_Reports/ImpactFees/FireEMSImpactFee2018.pdf. The findings of such studies inform planners' creation of fee schedules or other compulsory mitigation measures. Although generalized in nature, these studies relieve both individual applicants and the government of the obligation to conduct a costly study with each land-use application. In the event of litigation, governmental agencies rely upon these studies to justify their exactions requirements against statutory and constitutional challenges. *See, e.g.*, *Charleston Trident Home Builders, Inc. v. Town Council of Summerville*, 632 S.E.2d 864, 869–70 (S.C. 2006).

Should the Court hold that legislatively adopted exactions are subject to the *Nollan*/*Dolan* framework, it should clarify whether a generalized, locality-wide exactions study will suffice for a governmental defendant to establish the requisite "essential nexus" and "rough proportionality." If it will not, the Court should clearly articulate what might be required instead. Indeed, if each specific property or project subject to a legislatively adopted improvement obligation or impact-fee schedule truly necessitates an *individualized study*, the consequences will be onerous for *all* participants in the development process. Preparing individualized, project-specific exactions analyses will impose additional costs on applicants and result in greater review-time delays. The costs of such an approach will most likely accrue to property owners in the form of greatly increased application fees or requirements that they prepare their own projects' individualized studies. *See Koontz*, 570 U.S. at 615–17; *Sperry*, 493 U.S. at 62. Although this outcome would be exceedingly inefficient compared to the current practice of preparing generalized analyses, *see, e.g.*, *Massachusetts*, 435 U.S. at 465–66 (observing that it will likely result in less cost on all parties to rely upon a generalized, rather than precise, calculation of applicable exactions), planners must understand what is necessary to satisfy constitutional scrutiny.[7]

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[7] A middle-ground approach might be to allow local governments to prepare generalized studies of facilities and services needs that account for the obligations of landowners, but to require that local governments or state courts permit landowners to prepare their own studies as a means of rebutting the local government's findings.

Second, *what does "rough proportionality" actually require?* First used in *Dolan*, the term "rough proportionality" has been described by this Court only as requiring "[n]o precise mathematical calculation," 512 U.S. at 391, although the Court has barred the use of "very generalized statements" establishing the relationship between a condition and a project's impact, *id.* at 389. Yet for the planner who must determine the precise obligation of a developer in the face of one or more studies, this explanation of the contours of "rough proportionality" provides precious little direction.

As this Court correctly observed even before *Dolan*, it "has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services." *Sperry*, 493 U.S. at 60. "All that we have required is that the user fee be a 'fair approximation of the cost of benefits supplied.'" *Id.* (quoting *Massachusetts*, 435 U.S. at 463 n.19).

Acceptance of fair approximations and rough proportionality rests in part on a common-sense recognition that requiring precision can backfire. As this Court reasoned when rejecting Massachusetts' argument that a fee imposed by the federal government for use of the airways was not precise enough:

> If the National Government were required more precisely to calibrate the amount of the fee to the extent of the actual use of the airways, administrative costs would increase and so would the amount of revenue needed to operate the system. The resulting increment in a State's actual fair share might well be greater than any

> overcharge resulting from the present fee system.

Massachusetts, 435 U.S. at 466. That common-sense recognition should continue.

Certain lower-court attempts to define "rough proportionality" are confusing. *See, e.g.*, *Town of Flower Mound v. Stafford Ests., L.P.*, 135 S.W.3d 620, 644–45 (Tex. 2004); *Ehrlich v. City of Culver City*, 911 P.2d 429, 448–49 (Cal. 1996). For example, in *Town of Flower Mound*, the town maintained a legislatively adopted development regulation requiring developers to make improvements to arterial roads abutting their projects, irrespective of a project's anticipated impact on the road. 135 S.W.3d at 623. According to the town, this requirement was imposed in lieu of a generally applicable traffic-impact fee that the town could have otherwise levied. *Id.* at 626. The Texas Supreme Court concluded that the requirement was not roughly proportional to the impact of the plaintiff developer's project because the project was anticipated to contribute only 18 percent of the overall traffic on the abutting road, even though the project would otherwise create system-wide impacts on the town's road network for which it was not charged. *Id.* at 644. Yet despite its importance to planners working to address the impacts of growth, the court did not suggest what percentage of overall traffic a project might need to generate in order to allow the town to mandate road improvements, the type of road improvements that might be permissibly required if a particular threshold were met, or more importantly, what type of study or

report might be necessary to justify such a requirement.

This Court's answer to this second question will also inform the response to the first question noted above, and vice versa. If rough proportionality is truly *rough*—not exacting—in its precision, then even if an individualized determination is required for the government to satisfy its evidentiary burden, a jurisdiction-wide study premised on accurate underlying information *might* be sufficient to satisfy the obligation. But if "rough proportionality" means something more rigorous, developers and regulators will need better guidance as to its meaning.

Third, *if legislatively adopted development conditions are subject to heightened scrutiny, what types of land-use regulations fall outside the unconstitutional-conditions doctrine?* The line between a legislatively adopted exaction and a simple land-use regulation can be blurry. *Cf. Dolan*, 512 U.S. at 385; *Cal. Bldg. Indus. Ass'n v. City of San Jose* (*CBIA*), 351 P.3d 974, 989–90 (Cal. 2015). But if the Court is to require a legislatively adopted development exaction to meet the requirements of the unconstitutional-conditions doctrine, planners will need to understand better the boundary between an exaction and a regulation.

In some circumstances, that boundary may be straightforward. For instance, dedicating land to a governmental agency is distinguishable from a regulation allowing only residential land uses in a given zoning district. *See, e.g.*, *Dolan*, 512 U.S. at 385. In *Dolan*, the Court distinguished exactions from other

types of land-use regulations based on (1) their adjudicative, rather than legislative nature, and (2) the fact that "the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel," but rather required the dedication of property. *Id*.

Other situations are less clear. Subdivision regulations, adopted by tens of thousands of localities across the United States, govern the division of property and, therefore, the development of thousands of new residential and commercial projects each year. *See* David L. Prytherch, *Where a Subdivision is not a "Subdivision": State Enabling Statutes and the Local Regulation (or not) of Land Division in the United States*, 37 J. PLAN. EDUC. & RES. 286, 291 (2017). To ensure that newly subdivided lots are adequately served with public facilities, nearly every subdivision regulation contains generally applicable design standards that require developers to ensure public-street frontage for new lots, create connectivity between parcels (usually in the form of streets or sidewalks), construct utilities, and provide internal parks and open spaces. *See, e.g.*, MARYA MORRIS & STUART MECK, SMART CODES: MODEL LAND-DEVELOPMENT REGULATIONS, at 5–7 (Marya Morris ed., 2009). Although they might require some of the improvements to be dedicated to the government (to ensure that lot owners have access to public services), these subdivision regulations can be similar in effect to zoning regulations that limit private property rights via unbuildable setbacks, building-height limits, landscaping and open-space requirements, and

standardized access requirements for other new development.

Other opportunities for confusion abound. Zoning rules routinely require developers to expend funds in order to secure approvals, whether in the form of constructing off-street parking spaces, employing specific building materials, providing outdoor lighting, or incorporating technologies to mitigate the impacts of sound, odor, or dust. Many localities require developers to install facilities for use by emergency-services personnel, such as fire hydrants, and to provide access for emergency-services personnel through their properties. Others require developers to provide affordable housing units within new development projects to offset the impact of new development on affordable housing supplies. *See, e.g.*, *CBIA*, 351 P.3d at 980. Still other regulations require developers to provide publicly accessible sidewalks or open spaces within their projects. In each case highlighted above, even if the landowner is not required to convey property to the government, the landowner's choices are inherently limited as a condition on new development.

To the extent the Court's decision in this case calls into question the validity of impact-mitigation fees, the Court should also clarify the extent to which special assessments are also affected. Where developers do not provide infrastructure or public services, states and localities may rely upon special assessments—whether established by general-purpose local governments or special districts—to provide these public goods. *See, e.g.*, Fla. Stat. § 170.201. Whereas state or local laws

imposing special assessments typically contain provisions enabling landowners to challenge such levies, *see id.; Indian Creek Country Club, Inc. v. Indian Creek Vill.,* 211 So.3d 230, 234 (Fla. Dist. Ct. App. 2017), unless the Court clarifies the contours of development exactions, the Court's decision in this case could inadvertently make such levies into a constitutional problem.

Few courts have had an opportunity to clarify the boundaries of the unconstitutional-conditions doctrine. In *CBIA*, the California Supreme Court determined that an affordable-housing mitigation requirement was not an exaction simply because the *Nollan*/*Dolan* framework applies only in those scenarios where the government confiscates real or personal property in exchange for a permit. 351 P.3d at 991. Although the *CBIA* court's holding makes for a simple-enough rule of thumb, it does not take full stock of the array of land-use regulations that might impact a landowner's property rights. For example, a landowner who is required, in exchange for a building permit, to grant an easement allowing public emergency-services personnel to traverse a parking lot may retain far greater beneficial use of his or her property than a landowner's project that is required by zoning to maintain an unbuildable setback area between the building and an adjoining property line.

Whether the Court chooses to accept the *CBIA* formulation or another one, the distinction between regulation and exaction is a necessary point of clarity for planners, regulators, and landowners who are party to the development process. Indeed, the effect of this

Court's decision in this case may well turn on this distinction, and the Court would be wise to provide needed definition in this area.

CONCLUSION

This case provides an opportunity for the Court to provide needed clarification on a topic of great importance to nearly every community around the nation. For generations, development exactions have provided the foundations on which entire communities are built, from street grids to park systems, and public services from schools to police and fire protection. Ensuring that new development mitigates its impact is an important responsibility lying at the core of the planning profession. Yet planners require guidance to ensure the formulation of legally defensible development exactions. With this guidance, planners are prepared to facilitate new development and ensure the realization of the future goals and plans of tens of thousands of communities across our country.

Respectfully submitted,

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