CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION

The Agenda

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Litigation of the Narrow Exception to Sovereign Immunity for Known Hazards or Traps

By John A. Greco
Deputy City Attorney, City of Miami

The preservation of sovereign immunity is one of the most significant issues in government litigation defense. In the seminal case of Trianon Park Condominium Ass'n v. City of Hialeah, 468 So. 2d 912 (Fla. 1985), the Florida Supreme Court recognized that certain discretionary functions of government are inherent in the act of governing and are immune from suit. These functions are policy-making, planning or judgmental governmental functions. See Commercial Carrier Corp. v. Indian River Cnty., 371 So. 2d 1010, 1020 (Fla. 1979). Municipalities are immune from liability for these policy-making, planning or judgmental governmental functions because to hold otherwise would supplant the wisdom of the judicial branch for that of the government entities whose job it is to determine, fund, and supervise necessary improvements, thereby violating the separation of powers. See, e.g., Department of Transportation v. Neilson, 419 So. 2d 1071, 1077-78 (Fla. 1982).

See "Sovereign Immunity" page 13

Chair's Report

By David C. Miller

It is a pleasure and an honor to serve as Chair of your Section for 2019-2020.

Section Leadership

I am fortunate to be surrounded by an outstanding group of leaders on the Executive Committee and Executive Council. In the few months since our selection, I have turned numerous times to Chair-Elect Don Crowell and Secretary-Treasurer Amanda Coffey for counsel and decision-making. They have responded with thoughtful, well-reasoned support. You can be assured that the future executive leadership of the Section is in good hands.

I have also been impressed by the level of dedication of the members of the Executive Council and their willingness to work hard in these volunteer positions. Before becoming Chair, I was not fully aware of just how much time and effort is required and is put in by Council members as program chairs and as heads and members of the Section's committees. This is not to overlook the equal dedication of the non-Council members of the committees, which is where much of the Section's work is done. I have experienced firsthand the real passion – and I use the word advisedly

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– that all these attorneys put into the Section.

We all, and I, especially, owe them gratitude: Thank you all very much, indeed.

Priorities

I announced three priorities to the members of the Executive Council at the June 29 meeting.

My first priority was to task the Technology Committee with creating resources for our local government clients to make their websites and other digital platforms accessible to disabled people. It is both a legal and a moral obligation to do so. Part of our duty as attorneys is to ensure compliance with the law but also to defend our clients against legal attacks. There has been what one federal judge has termed an "epidemic" of cynical, ill-founded, and opportunistic litigation that does little to advance the cause of accessibility and, in fact, diverts resources that could do so. I have asked the committee, under the very able leadership of Margate City Attorney Janette Smith, to develop a clearinghouse of information on how our clients' sites can become more accessible and how our clients can defend against these meritless attacks.

The second priority is to update and improve the Section's bylaws. In recent years, circumstances have revealed gaps or shortcomings. We must address these and it is my intention to use this chance for an overdue streamlining and updating of our "charter." This is an arduous process, not only because of the careful drafting that must be done, but also because Bar section bylaws changes must go through a complex and close review by the Bar and, ultimately, be approved by the Board of Governors. This task will not be completed during my tenure, but I hope to have it well on its way by the time I hand over the gavel.

My third goal is to formalize the Section's own social media. I learned that responsibility for our Facebook page developed in something of an ad hoc way that imposed an undue amount of work and responsibility on one person – Chelsea Hardy – who has done a tremendous job with very little help. Therefore, I created the Social Media Committee, with Chelsea as chair. I have asked her and her members to determine and make sure we are complying with all Bar guidelines and to propose a structure whereby the Section's social media platforms get the support and oversight from the Executive Council that they need and deserve.

Participate!

I strongly encourage you to participate in the Section, whether by attending our programs and Council meetings or, particularly, by joining a committee or seeking membership on the Executive Council. The path is open and obvious: Show up and raise your hand! I guarantee that I will welcome anyone who wants to help.

This newsletter is prepared and published by the City, County and Local Government Law Section of The Florida Bar.

David Miller, Miami ..... Chair
Don Crowell, Clearwater ..... Chair-elect
Amanda Coffey, Clearwater ..... Secretary-Treasurer
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REGISTER NOW!

PELRF

45th Public Employment Labor Relations Forum

October 17-18, 2019

Rosen Plaza* – Orlando, FL

COURSE NO. 3476

This is the 45th year of the jointly sponsored Public Employment Labor Relations Forum. Topics include Federal 11th Circuit and Florida Public Sector Update; State and Federal Causes of Action for Retaliatory Conduct in Florida Public Employment; Special Considerations under FLSA for Public Employers; EEOC/FCHR Update; PERC: Year in Review; Is Florida's Workplace Still Drug-Free? Discussion of the Impact of Medical Marijuana on Drug-Free Workplace Policies; FRS & Pension Developments; Effective and Ethical Uses of Social Media in Litigation; First Amendment in Public Employment; Best Practices to Avoid Discrimination, Harassment, and Retaliation

HOTEL INFORMATION: The cut-off date for the block of rooms was September 26, 2019. If you need to stay overnight, ask the hotel if they will still honor the $149.00 rate for The Florida Bar PERLF and Executive Council Meeting Group.

There are two Rosen hotels on International Drive in close proximity. One is the Rosen Plaza, and the other is the Rosen Centre. This year, we are not meeting at the Rosen Shingle Creek on Universal Drive.

The Florida Bar Labor and Employment Law Section

City, County and Local Government Law Section of The Florida Bar

SAVE THE DATES

Sunshine Law, Public Records and Ethics for Public Officers and Employees

February 28, 2020
Rosen Plaza
9700 International Dr.
Orlando, FL

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City, County and Local Government Annual Meeting

CLE Seminars

April 29 - May 2, 2020
Omni Orlando Resort at ChampionsGate
1500 Masters Blvd.
ChampionsGate, FL 33896

City, County and Local Government Certification Review Course

April 29-30, 2020

Land Use

April 30, 2020

43rd Annual Local Government Law in Florida

May 1-2, 2020

Understanding and Avoiding Liability for "Prohibited Exactions" Under § 70.45 Florida Statutes

By Robert K. Lincoln, M.S.P, J.D, B.C.S.
Law Office of Robert K. Lincoln, P.A.
2055 Wood Street, Suite 206, Sarasota, FL 34236
Robert.Lincoln@flalandlaw.com

I. Background

In 2015, the Legislature adopted § 70.45, Fla. Stat. (the "Exaction Statute"). The genesis of the Exaction Statute was, in part, the Florida Supreme Court's decision in *St. John River Water Management District v. Koontz*, 77 So. 3d 1220 (2011), which was overturned by the *U.S. Supreme Court in Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013). The issue underlying the cases (and multiple trips between the trial court and the Fifth DCA before the case had gone to the Florida Supreme Court) was whether the District had violated the "unconstitutional conditions" doctrine, as related to a taking of property, by demanding (or proposing, depending on your point of view under the facts) that Koontz make a monetary payment for off-site wetland mitigation in order to approve a development plan that would impact seriously degraded wetlands on his property. Many aspects of the case are confusing and idiosyncratic: Koontz did not attack the permit condition, or the underlying wetland assessment, through an appeal of the permit denial (and arguably was never denied the permit), and instead asserted a claim under § 373.617(2), Fla. Stat., which allows owners a damages remedy where an agency action on an ERP or MSSW permit is "an unreasonable exercise of the police power constituting a taking without just compensation."

The U.S. Supreme Court decision somewhat resolved two issues: first, that a "takings" claim under an unconstitutional conditions theory (the theory that underlies *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 (1987) and *Dolan v. City of Tigard*, 114 S. Ct 2309 (1994), can apply to "cash" exactions, as well as demands for land or easements; and, second, the doctrine may apply in some circumstances where the exaction is never paid, that is, where the government denies the permit because the landowner refuses to concede to an exaction the landowner considers "extortionate." What the U.S. Supreme Court did not resolve was how to determine when a government's "demand" for an "extortionate exaction" creates liability, leaving open the possibility for years of litigation to resolve the question.

II. The Exaction Statute

The Exaction Statute attempts to address the issues left unanswered by *Koontz*. The Exaction Statute creates a cause of action for damages when a government entity (including a municipality) imposes a "prohibited exaction" on the proposed use of property. The language creating the cause of action and its elements states:

> In addition to other remedies available in law or equity, a property owner may bring an action in a court of competent jurisdiction under this section to recover damages caused by a prohibited exaction. Such action may not be brought until a prohibited exaction is actually imposed or required in writing as a final condition of approval for the requested use of real property. ***The right to bring an action under this section may not be waived.*** This section does not apply to impact fees adopted under s. 163.31801 or non-ad valorem assessments as defined in s. 197.3632.

§ 70.45(2), Fla. Stat. (emphasis added). The Exaction Statute defines a "prohibited exaction" as:

> any condition imposed by a governmental entity on a property owner's proposed use of real property that lacks an essential nexus to a legitimate public purpose and is not roughly proportionate to the impacts of the proposed use that the governmental entity seeks to avoid, minimize, or mitigate.

§ 70.45 (1)(c), Fla. Stat.

The "and" between the "essential nexus" and "roughly proportionate" provisions might lead one to think the landowner must prove both; that is, there would be no liability for any exaction, even a grossly disproportionate exaction, so long as there was an essential nexus between the exaction and a legitimate public purpose. However, the Exaction Statute places the burden on the government to prove "the exaction has an essential nexus to a legitimate public purpose and is roughly proportionate to the impacts of the proposed use that the governmental entity is seeking to avoid, minimize, or mitigate." § 70.45(4), Fla. Stat. Therefore, the government must prove both "prongs" of the test, and may be liable for a "disproportionate exaction," even where the "essential nexus" test is met.

The Exaction Statute requires the landowner give the government notice and an opportunity to cure its imposition of a prohibited exaction. § 70.45(3), Fla. Stat. The notice must be given "at least 90 days before filing an action under this section, but no later than 180 days from the imposition of the prohibited exaction." *Id.* Thus, there is a short window for a landowner to exercise the right.

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The court may award prevailing party attorney's fees, but must award the landowner attorney's fees if it determines the exaction "lacked an essential nexus to a legitimate public purpose" § 70.45(5), Fla. Stat. Damages under the Exaction Statute include "in addition to the right to injunctive relief, the reduction in fair market value of the real property or the amount of the fee or infrastructure cost that exceeds what would be permitted under this section." § 70.45(1)(a), Fla. Stat.

III. What is an Exaction?

An exaction, broadly, is any regulation, imposed during the development approval process, that requires a developer to pay money or provide land (or easements) to the government, or to construct, expand or improve off-site facilities, in order to mitigate the impacts of the development on public facilities. They include items such as: right-of-way reservation and dedication requirements, school site dedication requirements (sometimes imposed on larger subdivisions or DRIs), off-site mitigation requirements, conservation or preservation easement requirements, sidewalk dedication and construction (particularly off-site), turn lane or signal construction or improvement, impact fees, mobility fees, and water and sewer connection fees (mobility fees and connection fees are particular forms of impact fee).

A number of requirements seem "exaction like" but are not, because they are not aimed solely at capital improvements, but also at operations and services. These may include special assessments, or "user fees," for services like trash collection, stormwater management (e.g. where the local government has a stormwater utility), or fire service. Special assessments are a different case. While special assessments can be imposed against new development at the time of development (or have different levels), they are not regulatory. Instead, they are a special form of proprietary levy, with deep roots in Florida law, and their own "test" for validity:

> To comply with the requirements of the law, a special assessment funding a bond issuance must satisfy the following two-prong test: (1) the property burdened by the assessment must derive a special benefit from the service provided by the assessment; and (2) the assessment for the services must be properly apportioned among the properties receiving the benefit.

City of Winter Springs v. State, 776 So. 2d 255, 257 (Fla. 2001)

Impact fees are cash fees (generally levied at the time building permits or certificates of occupancy are issued) imposed to offset the costs of paying for capital facilities. The test for a valid impact fee, called the "dual rational nexus test," is more stringent than the test imposed by the Exaction Statute. The Florida Supreme Court has explained this test, and its history in Florida:

> This Court upheld the imposition of impact fees to pay for the expansion of water and sewer facilities in *Contractors & Builders Association v. City of Dunedin,* 329 So.2d 314 (Fla.1976). We stated:
>
> > Raising expansion capital by setting connection charges, which do not exceed a *pro rata* share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, *if use of the money collected is limited to meeting the costs of expansion.*
>
> *Id.* at 320. In essence, we approved the imposition of impact fees that meet the requirements of the dual rational nexus test adopted by other courts in evaluating impact fees. *See* Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma,* 9 Fla.St.U.L.Rev. 415 (1981). This test was explained in *Hollywood, Inc. v. Broward County,* 431 So.2d 606, 611–12 (Fla. 4th DCA), *review denied,* 440 So.2d 352 (Fla.1983), as follows:
>
> > In order to satisfy these requirements, the local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision. In order to satisfy this latter requirement, the ordinance must specifically earmark the funds collected for use in acquiring capital facilities to benefit the new residents
>
> *St. Johns County v. NE. Florida Builders Ass'n, Inc.*, 583 So. 2d 635, 637 (Fla. 1991).

A. Improper Exactions Under Florida Law Before *Nollan* and *Dolan*: Unauthorized Taxes versus Takings

Historically, the critical issue to determine the validity of an exaction was whether it imposed an unauthorized tax, not whether it created a taking. Under Florida law, even after home rule, cities and counties have no authority to levy taxes without specific legislative authority because Article VII, § 1(a) of the Florida Constitution preempts all taxation other than ad valorem taxation to the state.

Some early cases rejected "dedication requirements" as unauthorized or arbitrary. Then, in *Wald Corp v. Metropolitan Dade County*, 338 So. 2d 863 (Fla. 3d DCA), the court upheld a county ordinance requiring subdivisions to provide and dedicate drainage canals to the county. 338 So. 2d at. 864. After reviewing standards used in other jurisdictions and prior Florida cases, the court agreed that exactions with a "rational nexus" between the required dedication and the anticipated needs of the new community are a valid policy power regulation. 338 So. 2d at 868.

Several years later, the Fourth District was faced with an ordinance requiring the dedication of park and school sites, or the payment of fees in lieu. After reviewing prior cases and the decision in *Wald*, the Court held:

> we discern the general legal principle that reasonable dedication or impact fee requirements are permissible so long as they offset needs sufficiently attributable to the subdivision and so long as the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents.

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Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611 (Fla. 4th DCA 1983). The court stated the test cited by the Florida Supreme Court in *St Johns County* as the "dual rational nexus" test. However, the "authority" issue and the "takings" issue converged, at least with respect to dedications of land or easements, after *Nollan* and *Dolan*.

B. Exactions as Takings Under *Nollan* and *Dolan*

Nollan and *Dolan* involved attacks on easement exactions imposed on development permits, and asserted the easements violated the "unconstitutional conditions" doctrine. As the Court described in *Dolan*:

> [u]nder the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

Dolan, 114 S. Ct. at 2317.

In *Nollan*, the California Coastal Commission required the property owner to dedicate a "lateral easement" for public access along the beach in order to obtain permission to construct a house on a coastal lot. The stated justification was the house would impair views of the water. The Court held the easement was property protected by the Takings Clause. The Court held the "unconstitutional conditions" principal – that the government cannot force a person to give up or waive a right in order to obtain a benefit – meant the state could not force the property owner to grant the easement in order to obtain the permit, unless the requirement had an "essential nexus" to the stated government interest. The Court found there was no "essential nexus" between the state's interest in preserving views and the lateral beach easement, and the permit condition therefore was a taking without just compensation.

In *Dolan*, the City required the property owner to dedicate an extensive "greenway" easement that included a pedestrian/bicycle easement, as well as a drainage easement, in order to obtain a permit to develop the property. 114 S. Ct. at 2314. The Court held that, in addition to having an essential nexus between the regulatory objective and the exaction, an exaction had to be "roughly proportional" to the needs created by the development. 114 S. Ct at 2319. While there was a nexus between the City's interest in flood control and in managing congestion, the Court held "the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building." 114 S. Ct at 2321.

The tests set out in *Nollan* and *Dolan* had the effect of placing the burden on the government to establish an exaction was not an unconstitutional condition under the two tests. But, they left open key issues: whether the tests applied to demands for exactions other than the dedication of easements or conveyances of land; and whether the tests applied to exactions imposed by legislative standards, rather than purely through the administrative process.

Koontz answered the first question: the *Nollan* and *Dolan* tests apply to demands for cash, as well as for real property interests. *Koontz* holds:

> Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.
>
> Nor does it make a difference, as respondent suggests, that the government might have been able to deny petitioner's application outright without giving him the option of securing a permit by agreeing to spend money to improve public lands.

Koontz, 133 S. Ct. at 2596. The Court held the denial of a permit where the property owner refused to accede violated the unconstitutional conditions doctrine even though it meant no property changed hands. *Id.* The Court also held that demands for monetary compensation, "fee in lieu" of dedication requirements, or other variations on how the exaction was imposed did not change the analysis. 133 S. Ct. at 2599.

What *Koontz* did not address, and where there has been a split in the Circuits ever since *Nollan* and *Dolan*, is the question of whether the unconstitutional conditions doctrine, in the takings context, applies to legislatively imposed exactions. See *California Bldg. Indus. Ass'n v. City of San Jose, Calif.*, 136 S. Ct. 928 (2016) (Justice Thomas, concurring in denying review, but noting "That division shows no signs of abating," stating there is no basis for differentiating the takings effects based on the source of the taking, and suggesting the Court address the issue in an appropriate case). However, even a "legislatively imposed" exaction will be applied to particular property through action on a development permit; and the Exaction Statute makes no distinction between legislatively and administratively imposed exactions.

IV. Application in Florida Cases – When Is an Exaction an Illegal Tax or a Taking?

In *Town of Longboat Key v. Lands End, Ltd.*, 433 So. 2d 574, 576 (Fla. 2d DCA 1983), the Second District upheld a decision invalidating an ordinance requiring the provision of park land or the payment of a fee in lieu because the fees were not "earmarked" for park purposes, but could be used for other capital needs.

In *Lee County v. New Testament Baptist Church of Fort Myers, Fla., Inc.*, 507 So. 2d 626 (Fla. 2d DCA 1987), the Second District invalidated a right-of-way dedication ordinance, holding:

> all property owners whose property abuts certain streets to give to the county the land necessary to meet the minimum right-of-way

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requirements established by the county for the street on which the property is located, regardless of the size of the landowner's proposed development or the amount of traffic that development will generate. The ordinance does not comply with the rational nexus test because it does not require any reasonable connection between the requirement that land be given to the county and the amount of increased traffic, if any, generated by the proposed development.

507 So. 2d at 629.

In *Hernando County v. Hernando Budget Inns of Florida, Inc.*, 555 So.2d 1319 (Fla. 5th DCA 1990), the "authority" and the "takings" issues converged. A property owner challenged a requirement imposed on the project's building permit, requiring the owner to reserve land for, and then construct on demand, a frontage road to address future needs. 555 So. 2d at 1319. The Court found the dedication and construction requirement invalid based on a lack of nexus and present need, and a temporary taking of the reserved property. 555 So. 2d at 1320.

In *Sarasota County v. Taylor Woodrow Homes Ltd.*, 652 So. 2d 1247, 1249-50 (Fla. 2d DCA 1995), the Second District was faced with the developer's objection to a condition imposed on the development that required the developer to build and operate a sewer treatment plant for its development and then dedicate and convey the plant to the County on demand. The County sued when the developer refused to convey the plant and property when the County demanded, eighteen years after the condition was imposed, and the developer asserted a defense that the condition was invalid and a taking. *Id.* While holding the County could assert laches or waiver as a defense, the court held the developer "is entitled to the benefit of current constitutional case law, but it must establish that the factual circumstances in 1974 rendered its agreement invalid at that time." 652 So. 2d at 1250–51.

In *Paradyne Corp. v. Fla. Dep't of Transportation*, 528 So. 2d 921 (Fla. 1st DCA 1988), FDOT required a landowner to construct a 250' driveway to connect to a state road, at an existing intersection. Due to issues with the configuration of the intersection, FDOT also required the landowner to share the driveway with the adjacent property. The First District found FDOT could take various actions and did not have to grant the landowner an unsafe permit, but the easement requirement failed the nexus test. 528 So. 2d at 927.

In *New Testament Baptist Church, Inc. of Miami v. Fla. Dep't of Transportation*, 993, So. 2d 112 (Fla. 3d DCA 2008), the Third District held a church waived its right to contest the validity of a prior dedication requirement by failing

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to object at the time. While holding the Church's claim was barred by the statute of limitations, the Court noted "although the church 'accepted the benefit of the development rights to which the ordinance condition attached, an acceptance of such benefits does not waive the right to contest invalid conditions of development.'" 993 So. 2d at 115.

Recently, in *Highlands-In-The-Woods, L.L.C. v. Polk County*, 217 So. 3d 1175, 1177-78 (Fla. 2d DCA 2017), *review denied sub nom. Highland-In-The-Woods, LLC v. Polk County*, SC17-994, 2017 WL 4280620 (Fla. Sept. 27, 2017), the Second District rejected a developer's claim that the County's requirement to install and dedicate reclaimed water lines in a new subdivision violated *Nollan* and *Dolan* because the County lacked sufficient capacity to provide reclaimed water for the system at the time it was installed. The Polk County Code included the requirement - so it was legislatively adopted – but, the Court found the operation of the ordinance required administrative fact-finding and applied the *Nollan/Dolan* Tests. 217 So. 3d at 1178-79. The Court found an essential nexus to lowering potable water use, and a rough proportionality because the improvements were part of the subdivision. With respect to the availability issue, the Court held:

> The County required the installation and dedication of reuse improvements in the subdivision that will be used by the future residents for landscape irrigation. The conditions imposed by the County are directly related to the impact of the subdivision on the state's water resources and do not impermissibly reach beyond that impact. The fact that reclaimed water was not available for two years, requiring Highlands to use potable water to irrigate the landscaping in its common areas during that time, does not alter the conclusion that the reuse improvements have a rough proportionality to the impact of the development. The unavailability of reclaimed water for the common areas for a period of two years is insignificant in comparison to the availability of reclaimed water for the indefinite future of the entire sixty-lot subdivision.

Highlands-In-The-Woods, 217 So. 3d at 1180.

Two recent circuit court cases found exactions to be a taking under *Nollan/Dolan/Koontz*. In City of Venice v. Neal Communities, Case No 2017-CA-3532-NC (12th Cir, 2019), the City of Venice sued a developer over the developer's objections to an "extraordinary extraction" that had been imposed (and agreed to by prior owners) in a pre-annexation agreement. The "Money Extractions" were on a per-EDU (equivalent dwelling unit) basis, and paid to the City for infrastructure requirements, but not otherwise limited or earmarked for particular improvements that related to, or would benefit, the development. The amount of the Money Extraction was not established on any particularized analysis of needs created by the new developments, or investments necessary to address those needs. There also was disagreement about right-of-way dedication requirements that had been imposed.

The court rejected the City's claims the Money Extractions were mere contractual obligations, or that the developers waived or were estopped from defending against them. Citing *Nollan, Dolan* and *Koontz*, the court applied the unconstitutional conditions analysis and "easily concluded" they were invalid, as there was no evidence of any reasonable nexus between the Money Extractions and particular harms, or that the Money Extractions were proportionate to specific needs created by the developments, particularly in light of the fact that the developments would also pay road, water/sewer, park and other impact fees. The court also found the Money Extractions would be an invalid tax under *St. Johns County*, as they were not earmarked, and would not pass the dual rational nexus test. With respect to the dedication requirement, the court found while the dedication was related to the need to widen the road, the developments themselves would not increase traffic to the point of necessitating the widening and therefore, failed the rough proportionality test. As a result, the court invalidated the dedication requirement.

Mandarin Development, Inc. v. Manatee County, Case No. 2015-CA-3463-AX (12th Jud. Cir. 2015) (currently on appeal to the 2d DCA), involved a required conservation easement over wetland areas on the landowner's property. The complaint alleged - and the circuit court found – the conservation easement and 50' wide buffer required by the ordinance were unconstitutional conditions in violation of *Dolan,* because there was no evidence they were tied to any site-specific evaluation relating the impact of the development to the easement or buffer requirements.

V. Liability Under the Exaction Statute

None of the cases cited above involved claims under the Exaction Statute; and it appears there may be no reported decisions. However, it is likely that all of the invalidated exactions described above would (a) be actionable under the Exaction Statute, and (b) would, in all likelihood, have resulted in a determination of liability and damages under the Statute.

The possibility of new cases in the future is increased because the Exaction Statute (1) places the burden on the government, rather than the developer; (2) makes no distinction between exactions that derive directly from legislative standards rather than those determined through administrative review; and (3) traverses two common defenses to claims by property owners or developers. First, the Exaction Statute expressly nullifies any waiver defense. Second, the cause of action is ripe when a "prohibited exaction is actually imposed or required in writing as a final condition of approval for the requested use of property." This standard does not appear to require exhaustion of administrative remedies; that is, it does not appear a property owner or developer must try to invalidate the condition or obtain a variance or other relief before providing the required notice and then filing the action. Instead, the Exaction Statute gives the government

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an opportunity to provide relief after the property owners gives the notice. Finally, the availability of injunctive and damages relief (rather than just having the exaction invalidated) and attorney's fees, may increase the number of cases.

A. Some Common Exactions

Right-of-Way Dedication Requirements or Conditions. Many local governments require property owners to dedicate right-of-way necessary to meet adopted or standard street cross-sections. For example if the property fronts on a collector street with 80' of right-of-way, but the local standard for collector streets is 100', common practice would be to require dedication of 10' at the time of construction plan/plat approval (the property across the street would be obligated for the other 10'). As one can see from *Hernando Budget Inn*, if the local government has no plans to widen the road, the dedication requirement might not pass the *Nollan* "essential nexus" test, and the first part of the statutory test, because there is no legitimate relationship between the development and the County's desire to "land bank" for future needs. If the requirement to dedicate, or the amount of the dedication (1' rather than 10') is not tied to some evaluation or threshold related to the type of development and its trip generation or other impacts, the requirement will likely fail the *Dolan* "rough proportionality" test and, therefore the second part of the statutory test, as seen in *Hernando Budget Inns*, *New Testament Baptist Church of Fort Myers*, and *Neal Communities*.

Local governments often try to avoid liability for road dedication requirements by either adding layers of administrative appeals or variances, or by simply prohibiting development if the roads serving the road do not meet local standards. Both of these strategies are likely to fail under the Exaction Statute because exhaustion is not required and the cause of action would appear to apply where a local government denies a permit based on the developer's unwillingness to improve an insufficient road.

Conservation/Preservation Easements. Many local governments (not to mention the water management districts) require developers to place all the wetlands on site that are not being impacted or developed - as well as the buffer areas surrounding those wetlands - into conservation or preservation easements. The same requirements may apply to other environmentally sensitive lands or ecosystems within the development, particularly beaches, and habitats for endangered species. This practice overlays the regulatory requirement to protect and conserve the property with a transfer of core property rights in the land from the landowner to the local government.

As seen in the *Mandarin* case discussed above, these types of easements may be problematic with respect to both parts of the statutory standard – the essential nexus to a legitimate state interest, and the rough proportionality. With respect to the first test, because the wetland and buffer are protected by regulations it is unclear how there is a essential nexus between the impact of the development and the imposition of the requirement. With respect to the second test, it is unclear how the requirement can be proportionate, as the development is not impacting the regulatorily protected wetland or buffer. Buried in *Mandarin* is the potentially more significant question of whether "fixed" requirements for environmental buffers may be actionable (for example, requiring a 50' buffer for all wetlands or water bodies with no evaluating of the site-specific conditions).

Lateral Beach Access Easements. Many local governments (as well as the state) demand waterfront property owners (particularly oceanfront property owners) to grant lateral access easements (up and down the beach) in conjunction with permits for nourishment or hardening. Demands for lateral beach easements sometime show up when dune cross-overs or other structures are permitted. While these easements may pass the essential nexus test if the permitted activity somehow adversely affects existing lateral access rights, excessive widths or restrictions on the property owner's rights within the easement area might not be "roughly proportionate."

Off-Site Sidewalk Construction Requirements. Many local governments have comprehensive plan policies and land development regulations requiring the developer of a residential project or subdivision to build out gaps in sidewalks in existing public right-of-way if the property is within two miles of a school (which may be required, in turn, by

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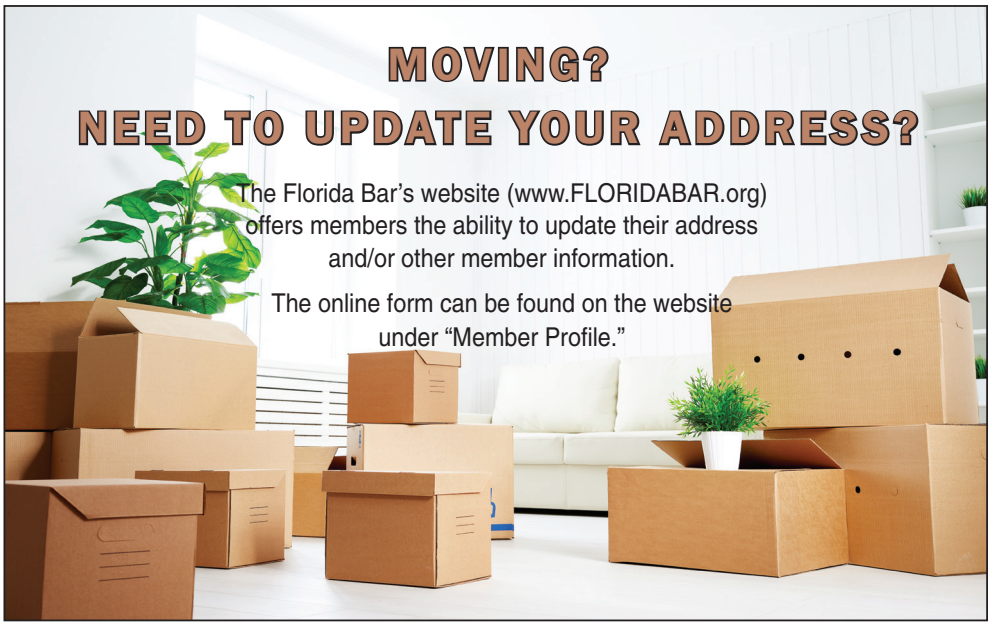

a state statute). While this requirement would meet the *Nollan* essential nexus test and the first part of the statutory test, a blanket construction requirement, not tied to the likely student generation of the project, may not be "roughly proportionate" to the needs generated by the project, and therefore violate *Dolan* and the second part of the statutory test.

Intersection/Signal/Turn Lane Improvements. In PUD and DRI reviews, intersection improvements like turn lanes and signalization, where warranted, are thought to be immune from rational nexus analysis based on a "public safety" exception or because they were based on an individual analysis of the project impacts. While the public safety exception may remain true where the project is the only user of the improvement, there are times where improvements to an intersection affected by multiple developments might not be "warranted" until the "last one to the party" applies to develop, and that land owner could be hit with a disproportionate requirement for signalization or turn lanes to address the cumulative impacts of the other developments. Conditions requiring signalization or turn lane improvements might be actionable under the Exaction Statute if the cost imposed on the development is not roughly proportional to the development's contribution to the total trips using the intersection.

Oversized Utility, Drainage and Internal Street Easements. Some local governments have standard subdivision or site plan standards requiring large utility and drainage easements around lots or projects, or requiring street rights-of-way that are significantly larger than the paved streets, sidewalks and utilities would require.

Conveyance of Dedicated Easements by Deed. Plat dedications do not transfer fee simple interest in the dedicated property, but only an easement. Some local governments require developers to convey fee simple title to platted streets or drainage easements, rather than simply granting the dedication.

Flat Percentage Dedication Requirements. There used to be a common practice of requiring residential developments over a certain size to dedicate between five and ten percent of the land for schools, parks or other public purposes, with the final requirements established during the platting process. While this practice has largely been replaced with impact fees, it still shows up from time to time.

Oversizing Requirements for Lift Stations or Similar Facilities. Some local governments make new development install oversized lift stations or sewer mains and then dedicate them to the government utility, perhaps with a possibility the developer will be partially repaid in the future by contributions from later developers. Absent a truly voluntary program, these requirements may be actionable.

Fee in Lieu Requirements. Where property owners can pay a fee in lieu of a required dedication, an excessive fee will violate the rough proportionality test.

Public Art. Local programs that require development to provide public art on their premises, or to pay fees to the government in lieu of providing public art, may run headlong into a combination of First Amendment issues and the Exaction Statute.

B. What Can Local Governments Do to Avoid Liability Under the Exaction Statute?

Review existing ordinances for dedication or easement requirements. Any ordinance that requires (or contemplates) a landowner to grant an easement (or title) to property during the development permitting process should be scrutinized and eliminated if it cannot be justified. With respect to areas like conservation or preservation easements, consider how to use the regulatory framework to achieve the desired public purpose without requiring the property owner to grant an easement.

Avoid requiring landowners to dedicate property for future improvements that are not programmed or anticipated. Do not require dedications or conveyances of property for land banking. Examine any right-of-way protection programs in particular.

Do not require property owners to provide more lands or rights than are actually needed. If the public uses only require 75' of land, do not require the property owner to dedicate 100'. If the public need is for pedestrian and bicycle access, limit any required dedication or easement to those purposes.

Develop impact assessment methodologies or quantitative justifications for required dedications. These requirements will vary greatly depending on the type of exaction, but should be thought through carefully with the relevant planning and engineering staff.

Require heightened internal review and sign-off for any development orders imposing conditions that could include exactions. Ensure that dedication or other exaction requirements are not included in development orders rote copying of prior orders or ordinance language without consideration of the need and extent of the exaction with respect to the particular development, and how the exaction would be justified if challenged.

Consider special assessments with credits as a means to acquire desired rights-of-way or other lands and improvements. Many of the right-of-way acquisition and road/sidewalk/drainage improvements that local governments attempt to support through exactions could be the subject of special assessments levied against new development at the time of development approval. If the methodology is well thought out, such assessments might be in addition to impact fees, or at least only partly creditable. Property owners can be given credit against those assessments for dedicating right-of-way or constructing improvements. In addition, these approaches could allow appropriate assessments against existing development that also benefits from the improvements.

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To avoid this immunity, plaintiffs frequently invoke a narrow exception to government immunity from liability for policy-making, planning, or judgmental governmental functions. The exception applies to known inconspicuous hazards or traps. The importance of understanding the contours of this exception and its narrow application are of utmost significance in government litigation defense.

The nature of the exception was set forth in a series of Florida Supreme Court cases. See Department of Transportation v. Neilson, 419 So. 2d 1071 (Fla. 1982); City of St. Petersburg v. Collom, 419 So. 2d 1082 (Fla. 1982); Harrison v. Escambia County School Board, 434 So. 2d 316 (Fla. 1983).

In Neilson, the plaintiffs sued governmental entities alleging negligence in the design and construction of an intersection; failure to install adequate traffic control devices; designing, constructing, and maintaining confusing traffic control devices; and failure to warn through the placement of additional traffic control devices. The Court held that the above decisions were planning-level functions subject to sovereign immunity, and in doing so, explained the subject exception to sovereign immunity:

> This is not to say, however, that a governmental entity may not be liable for an engineering design defect not inherent in the overall plan for a project it has directed be built, or for an inherent defect which creates a known dangerous condition. ... If, however, the alleged defect is one that results from the overall plan itself, it is not actionable unless a known dangerous condition is established. Illustrations of inherent defects include the construction of a two-lane highway where traffic use indicates four-laning is necessary or the construction of a curved road where a straight road would be more appropriate. Such decisions as the location and alignment of roads, the width and number of lanes, and the placing of traffic control devices are not actionable because the defects are inherent in the overall project itself. The fact that a road is built with a sharp curve is not in itself a design defect which creates governmental liability. If, however, the governmental entity knows when it creates a curve that vehicles cannot safely negotiate the curve at speeds of more than twenty-five miles per hour, such entity must take steps to warn the public of the danger.

Id. at 1077-78 (emphasis added).

In Collom, decided the same day as Neilson, the plaintiffs in two separate cases alleged wrongful deaths caused by falls into a storm sewer drain and drainage creek. The Supreme Court held that the complaints in both cases alleged a cause of action based on the subject exception:

> Both Collom and Mathews illustrate the application of the principle that once a governmental entity creates a *known* dangerous condition which may not be readily apparent to one who could be injured by the condition, and the governmental entity *has knowledge* of the presence of people likely to be injured, then the governmental entity must take steps to avert the danger or properly warn persons who may be injured by that danger. Savignac v. Department of Transportation, 406 So.2d 1143 (Fla.2d DCA 1981). The failure of government to act in this type of circumstance is, in our view, a failure at the operational level. We find that a governmental entity may not create a known hazard or trap and then claim immunity from suit for injuries resulting from that hazard on the grounds that it arose from a judgmental, planning-level decision. When such a condition is knowingly created by a governmental entity, then it reasonably follows that the governmental entity has the responsibility to protect the public from that condition, and the failure to so protect cannot logically be labelled a judgmental, planning-level decision. ...

Id. at 1086 (emphasis in original).

One year later, in Harrison, the Supreme Court again addressed this exception with regard to allegations of negligence location of a bus stop and failure to post warning signs:

> We also hold that Harrison's amended complaint fails to allege the creation of a dangerous condition or trap which would necessitate giving notice of the danger, as needed under City of St. Petersburg v. Collom, 419 So. 2d 1082 (Fla. 1982), and Department of Transportation v. Neilson, 419 So. 2d 1071 (Fla.1982), in order to circumvent the school board's immunity. ...
>
> Under Collom, therefore, a plaintiff would have to allege specifically the existence of an operational level duty to warn the public of a known dangerous condition which, created by it and being not readily apparent, constitutes a trap for the unwary. Neilson also requires the pleading of a known trap or known dangerous condition. Collom and Neilson require specific allegations of fact instead of generalities.

Id. at 320-21 (footnote omitted).

Later, in Department of Transportation v. Konney, 587 So. 2d 1292, 1298-1300 (Fla. 1991), Justice Kogan, concurring, explained his interpretation of Neilsen and Collom:

> However, while this loose usage of the English language may seem confusing, I believe the Court's true meaning is evident both from the overall thrust of the analysis (quoted above) and the facts upon which Collom was based. The Collom opinion, for example, concluded that liability could exist notwithstanding sovereign immunity where a local government constructs water drainage systems in such a way that unsuspecting persons are sucked into them, to their deaths. Collom, 419 So.2d at 1084–87. Such a situation obviously constitutes a very serious peril.
>
> I believe these factors indicate the Neilson and Collom Court was talking about a known hazard so serious and so inconspicuous to a foreseeable plaintiff that it virtually constitutes a trap. In such circumstances, a duty arises either to warn foreseeable plaintiffs or to take actions to diminish the peril. Neilson; Collom.

Following Justice Kogan's lead, this narrow exception has been applied strictly by the District Courts of Appeal which have held that this narrow exception applies only in situations where there is a known hazard so serious and so inconspicuous to a

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foreseeable plaintiff that it virtually constitutes a trap. See, e.g., Scott v. Florida Dept. of Transp., 752 So. 2d 30 (Fla. 1st DCA 2000).

Based on the foregoing, the government is entitled to sovereign immunity where the degree of danger is insufficient to overcome immunity. As an example, in Florida Dept. of Transp. v. Allen, 768 So. 2d 496 (Fla. 4th DCA 2000), the Court held that a confusing intersection was not a known dangerous condition rising to the level sufficient to vitiate sovereign immunity, stating:

> While the intersection in the present case may have been confusing, we note as did the Second District that "a certain level of hazard is intrinsic and unavoidable in roadway construction and in the management of traffic flow." See Stevens, 630 So.2d at 1163. Virtually every intersection may be inherently dangerous. *See* Department of Transp. v. Konney, 587 So.2d 1292, 1295 (Fla.1991); Stevens, 630 So.2d at 1163. The question then becomes what degree of danger must be presented in order for sovereign immunity to be waived. Over the years since Collom, cases have acknowledged that the Collom exception required that before sovereign immunity will be waived there must be a "known hazard so serious and so inconspicuous to a foreseeable plaintiff that it virtually constitutes a trap." See Cygler, 667 So.2d at 460–61; Scott, 752 So.2d at 34; Stevens, 630 So.2d at 1162–63. Such a situation, however, is not presented here. Although the intersection may have caused confusion, any danger was not so serious and so inconspicuous to a foreseeable plaintiff that it virtually constituted a trap. As in Cygler, we do not find that the DOT created a known dangerous condition rising to a level sufficient to vitiate its sovereign immunity. Accordingly, we reverse the trial court's denial of the DOT's motion for summary judgment and remand for the trial court to enter a final summary judgment in favor of the DOT.

Further, in Department of Transp. v. Stevens, 630 So. 2d 1160, 1162-63 (Fla. 2d DCA 1993), the Court held that a guardrail on bridge which permitted vaulting (where vehicle goes over or through it rather than being deflected) was neither a very serious danger nor a hidden risk to large numbers of the public. The Court stated:

> The hazard D.O.T. is accused of creating in the present case is not inconspicuous nor does it fall into the exceptional category of a "very serious peril." Here the driver, Mr. Sloat, hit a guardrail, not some object disguised as a guardrail, and not some object which ensnared him or deceived him into placing the vehicle and its passengers in danger. Perhaps the traffic restraint system did not function at the level of modern railings, but as a matter of law on impact its performance was not so deficient or its condition so derelict as to pose a very serious danger or hidden risk to large numbers of the traveling public, including people like decedents' driver who might fall asleep at the wheel, veer off the road and collide with it.

In addition to the above, the District Courts of Appeal have made it clear that the exception to immunity should not be applied where the danger is open and obvious. See Kaweblum v. Thornhill Estates Homeowners Ass'n, 801 So. 2d 1015 (Fla. 4th DCA 2001) (canal with very steep drop-off was not a dangerous condition virtually constituting a trap); Barrera v. State, Dep't of Transp., 470 So. 2d 750, 751-752 (Fla. 3d DCA 1985) (low clearance of the bridge was readily apparent to persons who could be injured by it); see also Francis v. Sch. Bd. of Palm Beach Cnty., 29 So. 3d 441, 444 (Fla. 4th DCA 2010) (a busy roadway is not so inconspicuous that it virtually constitutes a trap); Orlando v. Broward Cnty., 920 So. 2d 54 (Fla. 4th DCA 2005) (danger of jaywalking was on a busy street during rush hour is readily apparent to pedestrians); Gabino v. Orange Cnty., 861 So. 2d 521 (Fla. 5th DCA 2003) (a street where vehicular traffic is expected is open and obvious); Romano v. Palm Beach Cnty., 715 So. 2d 315 (Fla. 4th DCA 1998) (chain link fence with protruding edges was obvious and conspicuous hazard).

As demonstrated by these authorities, the application of this exception to sovereign immunity requires: a known hazard so serious and so inconspicuous to a foreseeable plaintiff that it virtually constitutes a trap; actual knowledge on the part of the government; and the pleading of specific facts instead of generalities. In order to protect this immunity for policy-making, planning, or judgmental governmental functions, it is of vital importance for practitioners to understand the limitations of this exception. Improper application of this exception to erode sovereign immunity can have a severely detrimental impact on the government's financial exposure and ability to govern.