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June 8, 2026

Knoxville-Knox County Planning
City-County Building
400 Main Street
Suite 403
Knoxville, TN 37902

Re: 315 Kerbela Ave.
Agenda Item #12
4-A-26-OB

Dear Planning Commission,

I am representing CR-Endeavors relating to their application for Level III, Alternative Compliance Review, of the Form Based Code District (City Zoning Ordinance Article 7.0.2.G). Specifically, I was retained to research and address whether or not the Planning Commission, or City Council, could compel public access across private property as part of this review and approval process. As set forth more fully below, it is illegal and unconstitutional to compel a developer to provide a public benefit as part of the approval or entitlement process without paying just compensation for the proposed public use. In the context of this use being required during an entitlement process, this would be considered an unconstitutional exaction as expressed in the Supreme Court cases of *Nollan v. California Coastal Com'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and its progeny.

I. Nollan/Dolan

In *Nollan*, where property owners sought permission to rebuild their house, the United States Supreme Court held that a state agency could not, without paying compensation, condition its grant of permission on the owners' transfer to the public of an easement across their beachfront property. In *Dolan*, the United States Supreme Court held that where a city conditioned approval of a storeowner's application to expand her store and pave her parking lot upon her compliance with dedication of land for a public greenway and a pedestrian/bicycle pathway, the city's dedication requirements constituted an uncompensated taking of property.

Interestingly, both of these landmark cases on unconstitutional exactions specifically involve a government's attempt to compel public access to private property as part of an entitlement review.

Nollan and *Dolan* establish a three-part test. First, a court asks whether government imposition of the exaction – that is, the concession sought by the government, or the condition upon which granting the permit depends – would constitute a taking. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013). Second is the "essential nexus" test; under this prong, the court asks whether the government has a legitimate purpose in demanding the exaction. *Nollan*, 483 U.S. at 837 Third is the "rough proportionality" test; under this prong of the analysis, a court asks whether the exaction demanded is roughly proportional to the government's legitimate interests. *Kamaole Pointe Development LP v. County of Maui*, 573 F. Supp. 2d 1354 (D. Haw. 2008). This test has come to be known variously as the "rough proportionality" test, "Nollan/Dolan heightened scrutiny analysis," or the "Nollan/Dolan test." *Dolan*, 512 U.S. at 391. The burden of proving the rough proportionality of the taking is placed upon the government seeking the taking. *Dolan*, v. City of Tigard, 512 U.S. at 391 n.8. The "essential nexus" test and the "rough proportionality" test seek to determine whether the government may shield itself from a takings claim through the use of its police powers. The essential nexus test compares the government's purpose in seeking the concession with its legitimate land-use interests. If the government's purposes are not connected, then the government's demand for the exaction is not a legitimate exercise of its police power. *Kamaole Pointe Development LP v. County of Maui,* 573 F. Supp. 2d 1354 (D. Haw. 2008).

Courts are often called on to employ the *Nollan/Dolan* test when a government, such as the City of Knoxville, has conditioned approval of a permit upon the property owner's construction of a sidewalk or other public accessway. More recently in *Knight v. Metro. Gov't of Nashville & Davidson Cty.*, 67 F.4th 816, 827 (6th Cir. 2023), the Sixth Circuit Court of Appeals considered whether the Metropolitan Government of Nashville's sidewalk ordinance constituted an unconstitutional exaction. In *Knight*, as a condition for the one landowner to build on Acklen Park Drive, Nashville required him to construct a sidewalk or pay $7,600.00, and as a condition for the other landowner to build on McCall Street, Nashville required him to construct a sidewalk or pay $8,883.21 for one some 2.5 miles away. *Id.* The Sixth Circuit Court of Appeals analyzed the constitutionality of Nashville's sidewalk ordinance under the *Nollan/Dolan* test because the sidewalk ordinance imposed a clear condition on the issuance of the permit.

A. The first *Nollan/Dolan* factor – would the condition, if imposed, be a "taking"?

With respect to the first of the three factors under the *Nollan/Dolan* test, the condition, if imposed, would be considered a governmental taking. In *Knight,* the Sixth Circuit focused on the requirement that the landowners dedicate the sidewalk to the public, or stated differently, that they grant the public an easement as a condition for a building permit. The Court held that this requirement is certainly a taking because the "direct interference with the property owner's right to exclude would fall under the Court's automatic-taking rule." *Id.*, at 27. Therefore, if an approval requires a dedication of an easement to the public, the ordinance is an automatic taking. Indeed, the *Knight* Court noted that many other courts applying the *Nollan/Dolan* analysis arrived at the same conclusion. *See, e.g., Skoro v. City of Portland*, 544 F. Supp. 2d 1128, 1133-

38 (D. Or. 2008); *Dudek v. Umatilla County*, 69 P.3d 751, 753-59 (Or. Ct. App. 2003); *Kottschade v. City of Rochester*, 537 N.W.2d 301, 307-08 (Minn. Ct. App. 1995); *see also William J. (Jack) Jones Ins. Tr. v. City of Fort Smith*, 731 F. Supp. 912, 913-14 (W.D. Ark. 1990).

Here the conversation relating to north/south access across the Property would be attempting to compel public access easement across private property at the expense of the developer. Under the guidance of *Nollan/Dolan* and *Knight*, this condition, if imposed condition as a condition for site approval under a Level III Compliance review is undoubtedly a taking and the first factor of the *Nollan/Dolan* test is met in this case.

B. The second *Nollan/Dolan* factor – "essential nexus" – does the government have a legitimate purpose in demanding the exaction?

The "essential nexus" test was first iterated by the Supreme Court in *Nollan*. There, the Nollans applied for a permit with the California Coastal Commission to replace the bungalow on their beachfront property with a larger home. 483 U.S. at 827-28. The Commission approved the permit on the condition that the Nollans grant the public an easement to travel across their beach, which sat between two nearby public beaches. *Id.* at 827-29. To justify this easement, the Commission reasoned that the larger home would harm the public by limiting its view of the ocean. *See id.* at 828. The Court held that this demand qualified as an unconstitutional condition. It noted that the Commission would have committed an automatic taking if it had compelled the Nollans to grant the easement. *Id.* at 831-32. The Court ultimately held that the condition of an easement to walk across the beach lacked any "nexus" to the stated governmental concern about the public's viewing the beach from afar. *Id.* at 837-39. In truth, the Commission sought to give the public a benefit unrelated to the home's costs. *Id.* at 841.

Here, the development will not create any additional foot traffic requiring a north/south connection other than what is already provided by the development itself. The issue is inverse—the development will be an impediment to the public traversing between Mimosa Street and Sevier Avenue through private property. But the public does not currently have this right. As in *Nollan*, the County is attempting to give the public a benefit (*i.e.* an easement for public foot traffic) that is completely unrelated to additional foot traffic to the development is creating. While the city may desire easier access through private property, it cannot compel it (at least not without exercising its rights to eminent domain). The second element is met as well.

C. The third *Nollan/Dolan* factor – is the exaction demanded roughly proportional to the government's legitimate interests?

Similarly, under the "rough proportionality" test, the government must make an individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. Dolan, 512 U.S. at 391.

Here, the expense of providing a public easement for foot-traffic through private

property cannot be roughly proportional to the government's legitimate interest in maintaining public health and safety. As described above, any additional foot traffic would be minimal, and it would simply require walking around the development on public right-of-way instead of through the development across private property. Additionally, creating this access is expense and impractical due to site constraints, including slopes exceeding 20 percent along the site perimeter and steeper grades within the interior.

Finally, the city would be asking that a private party take on the additional cost, and liability, of maintaining a public throughfare on private property when that access is not required for the residents of the development. While the applicant is attempting to address open space and pedestrian oriented development patterns as contemplated in Articles 7.1.3.F and 7.1.3.G through its proposed east/west access and the proposed public plaza along the western portion of the property, it simply cannot compel north/south public access. Under these circumstances, it would not be roughly proportional to any impact created by the development and is therefore illegal and unconstitutional.

If this public access is demanded, then the City can, and should, condemn the access, pay the property owners compensation for the taking, and take full responsibility for future maintenance and liability. They cannot, however, compel it as part of a Level III review process.

II. Conclusion

Level III Review is intended to allow developments and nonprohibited uses that would not otherwise be allowed under a strict interpretation of the Form District regulations but nevertheless comply with the intent of the applicable Form District and Plan. Nevertheless, it cannot be leveraged as a tool to compel public access across private property without condemnation and compensation. Any conditions requiring north/south access for the general public fail the *Nollan/Dolan* rubric and are illegal and unconstitutional.

I'm happy to further discuss this at Thursday's meeting.

Sincerely,

Benjamin C. Mullins
FRANTZ, McCONNELL & SEYMOUR, LLP

BCM:amc

cc: CR-Endeavors *(via Email)*
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