

***NOLLAN AND DOLAN AND KOONTZ—OH MY! THE
EXACTIONS TRILOGY REQUIRES DEVELOPERS TO
COVER THE FULL SOCIAL COSTS OF THEIR PROJECTS,
BUT NO MORE.***

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ABSTRACT

In this article I argue that, contrary to appalled assertions of some observers, the U.S. Supreme Court's decision in Koontz v. St. Johns River Water Management District is a straightforward application of Nollan v. California Coastal Commission and Dolan v. City of Tigard. Nollan and Dolan established that when the government requires a permit applicant to give up property in exchange for a permit, the demand must be closely related and roughly proportional to the development's social cost. Anything that exceeds those bounds violates the unconstitutional conditions doctrine by burdening the right to just compensation for a taking. Koontz, like Nollan and Dolan, recognizes that the government may legitimately require landowners to carry their own weight, mitigating their development plans so that they do not impose costs on their community. But the government cannot use the permitting process to coerce landowners into giving up more. That simple rule will not end land-use planning or permit negotiations.

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I. INTRODUCTION

Last year, the Supreme Court decided one of the most important property rights decisions in decades in *Koontz v. St. Johns River Water Management District*.¹ The decision has already sent shockwaves through the legal community, as government agencies, developers, and their attorneys determine how *Koontz* will change the permitting process. *Koontz* clarifies that the government violates the unconstitutional conditions doctrine when it uses the permitting process to make excessive demands for property from permit applicants.² To protect applicants from excessive demands, the Court has put the burden on the government to demonstrate that permit conditions—whether they demand land, money, or services—are closely related and roughly proportional to the impact that a development will have.³

Though contentious, the rule is a straightforward application of

1. 133 S. Ct. 2586 (2013).

2. *See id.* at 2594–95.

3. *See id.* at 2595, 2603.

existing precedent laid down in *Nollan v. California Coastal Commission*⁴ and *Dolan v. City of Tigard*.⁵ *Koontz* recognizes the same two basic ideas recognized in *Nollan* and *Dolan*: (1) the government should not be able to use land-use laws and permit applications to coerce landowners into giving the government what it would otherwise have to pay for; and (2) the government may legitimately require landowners to carry their own weight, mitigating their development plans so that landowners do not impose costs on their neighbors. Yet the dissent and some of the legal community responded with shock and confusion, arguing that the protection recognized in *Koontz* will scare government agencies away from permit negotiations, either rejecting applications outright or accepting permit applications without requiring developers to shoulder the costs they would impose on society.⁶

In this article, I will address those concerns and explain how *Koontz* clarifies a process that otherwise would create a trap for only legally ignorant permitting agencies, failing to protect permit applicants against the kind of excessive demands overturned in *Nollan* and *Dolan*. In Part II, I explain how permitting fees and mitigation requirements can be a legitimate way to keep developers from imposing the costs of their developments on others. Unfortunately, some government entities turned the permitting process into a way to take property without paying just compensation, which led to *Nollan* and *Dolan*. *Nollan* and *Dolan* established the limit that the government's demands must be roughly proportional and closely related to the impact that a development will have. Those seemingly clear directives were lost as courts limited the cases to their facts. In Part III, I describe how *Koontz* arose and ultimately clarified two important points from *Nollan* and *Dolan*. In doing so, the Court has finally cemented the simple rule from *Nollan* and *Dolan*: Requiring applicants to pay their own way is fine, but excessive demands are extortionate. The sky will not fall because of this

4. 483 U.S. 825 (1987).

5. 512 U.S. 374 (1994).

6. See, e.g., John D. Echeverria, *Koontz the Very Worst Takings Decision Ever?* Vermont Law School, Research Paper No. 28-13 (August 26, 2013), available at <http://ssrn.com/abs/tract=2316406>; see also Julie A. Tappendorf & Matthew T. DiCianni, *The Big Chill? - the Likely Impact of Koontz on the Local Government/developer Relationship*, 30 *TOURO L. REV.* 455, 476-77 (2014) ("With its indifference to practical realities, *Koontz* is reminiscent of a *Lochner* Court decision, the Court that created the doctrine of unconstitutional conditions, which some regard as one of the worst in American history.").

decision. Rather, *Koontz* will protect property rights while also protecting the community by ensuring that developers bear the full costs of their projects.

II. LAND-USE EXACTIONS INTERNALIZE THE FULL COSTS OF DEVELOPMENT

A. *The Legitimate Role of Land-Use Exactions Is To Internalize the Spillover Costs of Development*

When a property owner decides to develop a piece of land, that decision will inevitably affect his or her neighbors, for better or for worse. Some effects may be impossible to measure: The neighbors may suffer aesthetic pain when seeing an ugly building on what used to be an empty lot, or they may rejoice at beautiful landscaping. Other effects may be more significant, such as, overburdening the sewer system, or causing traffic hazards. Private decisions have spillover effects on the community. Economists call these spillovers “externalities” or “social costs and benefits.”⁷

Most people generally agree that a legitimate role of government is to require developers to internalize at least the most objectively quantifiable external costs imposed on a community by a new development.⁸ For example, if a plan for a giant apartment complex would create traffic hazards, the government can, and should, require the developer to pay for the necessary upgrades to ensure that traffic flows as smoothly and safely as before.⁹ By doing so, the

7. See, e.g., PUBLIC GOODS AND MARKET FAILURES: A CRITICAL EXAMINATION 2, 53 (Tyler Cowen ed., 2d ed. 1999).

8. E.g., FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 38–39 (1944) (“There are, finally, undoubted fields where no legal arrangements can create the main condition on which the usefulness of the system of competition and private property depends: namely, that the owner benefits from all the useful services rendered by his property *and suffers for all the damages caused to others by its use*. Where, for example, it is impracticable to make the enjoyment of certain services dependent on the payment of a price, competition will not produce the services; *and the price system becomes similarly ineffective when the damage caused to others by certain uses of property cannot be effectively charged to the owner of that property*. . . . In such instances we must find some substitute for the regulation by the price mechanism.”) (emphasis added); David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1248 (1997) (“[G]overnments should require new development to internalize the dollar-equivalent cost of its net negative externalities, even if those externalities are impossible or difficult to mitigate.”).

9. See, e.g., Robert H. Freilich & S. Mark White, *Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America’s Major Quality of Life Crisis*, 24 LOY. L.A. L. REV. 915, 917–18 (1991) (“In many rapidly growing areas, citizens

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government is merely ensuring that the developers “internalize” the negative externalities of their development.

Some kinds of impacts may be easy to measure. For example, for many decades cities often required developers to dedicate land for public roads, sidewalks, and sewers that would be needed to serve a new development.¹⁰ But the frequency and types of dedications expanded in the latter half of the twentieth century as sprawling growth patterns and municipal deficits caused government entities to increasingly shift costs to individual developers.¹¹

The problem is that some externalities (social costs) are difficult to measure.¹²

Social cost, like beauty, often is in the eye of the beholder; for example, some may regard the introduction of a modern apartment building into a historic district as a social cost in terms of historic heritage and aesthetics, whereas others may regard it as a welcome addition to an architecturally staid and dull neighborhood.¹³

Thus, government entities will have to guess about many kinds of externalities.¹⁴ Those guesses may be significantly shaped by the personal taste or political leanings of the government’s decision-maker.

Government agencies, especially those with budgets inadequate to meet their ambitions, may at times be tempted to inflate fees or level mitigation demands that would subsidize the government’s other projects, forcing permit applicants to individually carry the burden of paying for the community’s costs. Some exactions might be wholly unrelated to any harm imposed by the project, or wildly

perceive traffic congestion as the greatest public problem, outdistancing crime, the economy and housing shortages Traffic congestion now constitutes a predominant motivating factor behind recent growth control movements in rapidly growing states such as California, Florida and New Jersey.”)

10. See Michael T. Kersten, *Exactions, Severability, and Takings: When Courts Should Sever Unconstitutional Conditions from Development Permits?*, 27 B.C. ENVTL. AFF. L. REV. 279, 285–86 (2000).

11. See *id.* at 280–81.

12. See *Dolan v. City of Tigard*, 512 U.S. 374, 411 (Stevens, J., dissenting) (“In our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms.”) (quoted in Dana, *supra* note 8, at 1268 n.120).

13. Dana, *supra* note 8, at 1266.

14. See *id.*

disproportionate to the extent of the harm. Accordingly, it seems logical to construct safeguards against agencies using the permit process as an opportunity for extortion. Indeed, even before the Supreme Court defined a safeguard, numerous cases sprung up in state courts that recognized that some kind of standard limiting impact fees was necessary.¹⁵ Still, judges largely deferred to the government, and landowners increasingly found themselves at the mercy of agencies that abused the permitting process to fund government projects.¹⁶

Understandably, judges who review land-use exactions may have a difficult time determining whether the exaction is fair since measuring the social costs of a development can be largely subjective. Without clear legal guidelines, it may become an exercise in subjectivity to decide when an exaction goes too far.

B. Nollan Required Exactions to Be Directly Related to Mitigating the External Costs of Permitted Development

The United States Supreme Court first dealt with the limits of land-use exactions when it decided *Nollan v. California Coastal Commission*, twenty-five years ago.¹⁷ In that case, Mary and Pat Nollan needed to upgrade their beach bungalow to a two-story house

15. See, e.g., *Ayres v. City Council*, 207 P.2d 1, 8 (Cal. 1949) (exaction must be “reasonably related” to the impact of proposed development); see also *Howard Cnty. v. JJM, Inc.*, 482 A.2d 908, 921 (Md. 1984) (requiring “reasonable nexus between the exaction and the proposed subdivision”); *Town of Longboat Key v. Lands End, Ltd.*, 433 So. 2d 574, 576 (Fla. Dist. Ct. App. 1983) (citing *Hollywood, Inc. v. Broward Cnty*, 431 So.2d 606, 614 (Fla. Dist. Ct. App. 1983) (exactions must “offset, but not exceed, reasonable needs sufficiently attributable to the new subdivision residents” and funds exacted must actually go toward offset); *Aunt Hack Ridge Estates, Inc. v. Planning Comm’n of City of Danbury*, 273 A.2d 880, 885 (Conn. 1970) (exaction must be “specifically and uniquely attributable to [developer’s] own activity.”).

16. See Nicholas V. Morosoff, “‘Take My Beach, Please!’: *Nollan v. California Coastal Commission* and A Rational-Nexus Constitutional Analysis of Development Exactions,” 69 B.U. L. REV. 823, 873–74 (1989). See, e.g., *Jenad, Inc. v. Vill. of Scarsdale*, 218 N.E.2d 673, 676 (N.Y. 1966) (requiring that the development must create the specific need for the development, but as the dissent explains at 86, the court’s deferential standard allows the government to arbitrarily choose a fee “without regard to the location, size, shape, value or restrictions of the lot.”); see also *Ayres*, 207 P.2d at 11 (Carter, J., dissenting) (“The [Majority’s] construction . . . has the effect of telling the subdivider that he may dedicate land to the city for the privilege of recording and selling—a matter which is not a privilege, but a right, in other situations, or let the land go idle, or sell it and go to jail, pay a fine, or both. This, it appears to me, amounts to a form of duress[.]”).

17. See *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987).

in order to exercise an option to buy the house.¹⁸ They applied to the Coastal Commission for a permit.¹⁹ The Coastal Commission did not hold a hearing or consider any individual traits of the Nollans' redevelopment.²⁰ It applied the plain language of California's Public Resources Code²¹ and applicable regulations and approved the permit application with the statutorily required condition that the Nollans give a public easement over part of the beachside of their property.²² The permit would not issue until the condition was satisfied. The condition was standard under existing law. The Commission similarly "conditioned 43 out of 60 coastal development permits along the same tract of land."²³ The other 17 permit applications either did not involve shorefront property or had been approved prior to the regulations that imposed the condition.²⁴

At that time, the rule in California was that permit conditions needed to be related to the impact of the proposed development. However, the relationship could be indirect.²⁵ The Nollans challenged the permit condition, which eventually led to the Commission providing evidence to try to justify the exaction.²⁶ The larger house would increase private use of the beach and create a "psychological barrier" between people driving on the nearby highway and the beach, thereby decreasing the public's enjoyment of the seashore.²⁷ According to the Commission, the demand that the Nollans surrender an easement over the beachside portion of the

18. *Id.* at 828.

19. *Id.*

20. *Nollan v. California Coastal Comm'n*, 177 Cal. App. 3d 719, 724 (1986) ("The original Commission decision was made in an administrative permit context and no findings were made, no evidence was in the record other than the application, submissions and the executive director's statement of reasons and no hearing was held.").

21. *See* CAL. PUB. RES. CODE § 30212(a) (2013) ("Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected.").

22. *Nollan*, 483 U.S. at 828 ("[T]he Commission staff had recommended that the permit be granted subject to the condition that they allow the public an easement to pass across a portion of their property bounded by the mean high tide line on one side, and their seawall on the other side.").

23. *Id.* at 829.

24. *Id.*

25. *See Nollan*, 177 Cal. App. 3d at 723 ("[O]nly an indirect relationship between an exaction and a need to which the project contributes need exist.").

26. *Id.* at 724.

27. *Nollan*, 483 U.S. at 828.

property—from the mean high-tide line up to the Nollans’ seawall—would increase public access to the beach and make up for that loss. The California Court of Appeals agreed. The court determined the larger house would be another “brick in the wall” blocking public enjoyment of the beach, thus the exaction was reasonably related to the need indirectly created by the Nollans’ rebuilding project.²⁸ Though the larger house alone would not create the need for the easement:

[T]he justification for required dedication is not limited to the needs of or burdens created by the project. Here the Nollans’ project has not created the need for access to the tidelands fronting their property but it is a small project among many others which together limit public access to the tidelands and beaches of the state and, therefore, collectively create a need for public access.²⁹

Even still, the California court held that the relationship was adequate.

The Nollans’ case was not heard again until it reached the U.S. Supreme Court. Four Justices agreed with the California court. But a majority of Justices disagreed, holding that a permit condition must have an “essential nexus” to the impact of an applicant’s proposed project.³⁰ An indirect connection to the impact was not enough. The exaction needed to have a close, causal relationship to the actual impact of the project.³¹ Or as Justice Blackmun paraphrased in his dissent, the connection must follow “an ‘eye for an eye’ mentality.”³²

28. *Nollan*, 177 Cal. App. 3d at 723 (citing *Grupe v. California Coastal Comm’n.*, 166 Cal. App. 3d 148, 168 (1985)).

29. *Id.*

30. *Nollan*, 483 U.S. at 837.

31. “[I]f the Commission attached to the permit some condition that would have protected the public’s ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional.” *Id.* at 836. But requiring lateral access across the Nollans’ beachside property was not sufficiently tailored to serve the Commission’s concerns about the view and the public realizing access to the beach. *See id.* at 838–39.

32. *Id.* at 865 (Blackmun, J., dissenting). “Eye for an eye” refers to a traditional Jewish religious approach to handling criminal offenses, recorded in *Leviticus* 24:19–20: “Anyone who injures their neighbor is to be injured in the same manner: fracture for fracture, eye for eye, tooth for tooth. The one who has inflicted the injury must suffer the same injury.” (see also *Exodus* 21:23–25; *Deuteronomy* 19:21). Justice Blackmun probably meant “eye for an eye” as an insult, however, since as a Methodist, he likely subscribed to the teaching of Jesus recorded in *Matthew* 5:38: “You have heard that it was said, ‘Eye for eye, and tooth for tooth.’

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Justice Scalia, writing for the majority, said that the Commission's permit condition could not meet this higher standard since it would not directly ameliorate the alleged harm of a larger house: "[A] requirement that people already on the public beaches be able to walk across the Nollans' property" did not "lower any 'psychological barrier' to using the public beaches," "reduce[] any obstacles to viewing the beach created by the new house," or "remedy any additional congestion."³³ Since the connection between the demand and the alleged burden created by the house was so blatantly insufficient, the Commission's demand amounted to "an out-and-out plan of extortion."³⁴ The Commission was abusing the permitting process to get an easement across the Nollans' property without paying for it.³⁵

The Takings Clause of the Federal Constitution provides that the government can take private property for public use, however, it must pay just compensation.³⁶ In this way, the Takings Clause uniquely "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."³⁷ Thus, the Commission could require property owners to pay to mitigate the direct impact of any proposed development. However, even though the Commission had the power to deny the permit outright, it could not use that power to coerce property owners into giving up property that the Commission would otherwise have to pay for.³⁸

Some scholars immediately responded to the *Nollan* decision by narrowly construing it³⁹ or with doomsday predictions that local-level

But I tell you, do not resist an evil person. If anyone slaps you on the right cheek, turn to them the other cheek also."

33. *Nollan*, 483 U.S. at 838–39.

34. *Id.* at 837. The Court explained that the Commission's exaction went well beyond the outer limits of what it would consider even a looser standard: "We can accept, for purposes of discussion, the Commission's proposed test as to how close a 'fit' between the condition and the burden is required, because we find that this case does not meet even the most untailed standards." *Id.* at 838.

35. *Id.* at 837.

36. U.S. CONST. amend. V, which is incorporated to the states through the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1896).

37. *Nollan*, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

38. *Id.* at 835–36.

39. *See, e.g.*, Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1608 (1988) (limiting *Nollan* to only permit conditions involving physical invasions of property). *But see, e.g.*, Robert Brauneis, *Taking a Step Back: A Reconsideration of the Takings Test of Nollan v.*

governments would resort to granting permits without conditions, at the expense of the community and the environment.⁴⁰ Likewise, most courts missed the meaning of *Nollan* and continued to largely defer to the government's permit conditions.⁴¹

C. Dolan Required Exactions to Be Roughly Proportional to the External Costs of Development

The Court revisited land-use exactions in *Dolan v. City of Tigard*.⁴² Florence Dolan had sought a permit from the city to expand her business and parking lot. Pursuant to city code,⁴³ and armed with a twenty-seven page staff report⁴⁴ detailing the need for its proposed exactions, the City of Tigard decided that it would approve her permit application only if she dedicated part of the property for a bike trail and for improvement of the storm drainage system.⁴⁵ The City justified the attempted exaction according to its understanding of *Nollan*. It explained that the expanded parking lot would increase the amount of impervious surface, which would negatively affect flooding, thus requiring the dedicated greenway for storm

California Coastal Commission, 102 HARV. L. REV. 448 (1988) (recognizing that *Nollan* couldn't be a physical takings case because *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) explained that physical invasions are per se takings, with no need for heightened scrutiny to determine their legitimacy. Nonetheless, Brandeis argued that *Nollan* must have implicitly overruled *Loretto*, and the per se physical takings rule no longer applied).

40. See Steven J. Lemon & Sandy R. Colin, *The First Applications of the Nollan Nexus Test: Observations and Comments*, 13 HARV. ENVTL. L. REV. 585, 598–600 (1989).

41. See *id.* See also, e.g., *Commercial Builders of N. California v. City of Sacramento*, 941 F.2d 872, 873 (9th Cir. 1991); Richard Epstein, *The Harms and Benefits of Nollan and Dolan*, 15 N. ILL. U. L. REV. 479, 492 (1995) (“One of the reasons for *Dolan* was the hostile response in the lower courts to *Nollan*. Everywhere you looked the state satisfied the essential nexus test. The lower courts worked a pretty thorough nullification of *Nollan*, which was dutifully confined to its particular facts.”).

42. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

43. *Id.* at 377, 379–80 (“The CDC establishes the following standard for site development review approval: ‘Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.’”).

44. *Dolan v. City of Tigard*, 854 P.2d 437, 439 (Or. 1993) *rev'd*, 512 U.S. 374 (1994).

45. *Dolan*, 512 U.S. at 380. (“Thus, the Commission required that petitioner dedicate the portion of her property lying within the 100-year floodplain for improvement of a storm drainage system along Fanno Creek and that she dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway. The dedication required by that condition encompasses approximately 7,000 square feet, or roughly 10% of the property.”) (footnote omitted).

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management.⁴⁶ The bike trail, which would allow customers an alternative path to visiting the store, would help alleviate the extra traffic congestion that a larger store would attract.⁴⁷ Oregon courts upheld the conditions. Noting the extensive evidence that the City had advanced to prove the existence of a nexus, both the appellate court and the Oregon Supreme Court held that the City's exactions satisfied *Nollan* because they were reasonably and directly related to the impacts of Dolan's expansion of her business.⁴⁸

Indeed, the conditions were *related* to the impact the store would have. Every court that reviewed that question agreed that there was a relation, a nexus, including the U.S. Supreme Court.⁴⁹ However, the City had not shown that the *extent* of the exactions was justified.⁵⁰ Again, the Court explained that the government may require property owners to mitigate their negative impacts on the community. For example, "[d]edications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use."⁵¹ But without limitations, development exactions may become extortionate, violating the unconstitutional conditions doctrine by burdening the Takings Clause right to just compensation.⁵²

The Supreme Court explained that while "[n]o precise mathematical calculation is required," 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."⁵³ Not only must a government's permit condition bear an essential nexus to the improvement's impact (as required by *Nollan*), the condition must also be roughly proportional to the actual

46. *Id.* at 381–82.

47. *Id.*

48. *Dolan*, 854 P.2d at 443–44; *Dolan v. City of Tigard*, 832 P.2d 853, 856 (Or. Ct. App. 1992) ("In addition to the fact that the conditions are part of a general and comprehensive regulatory scheme, the findings demonstrate that the increased water runoff from the intensified development will create conditions to which the greenway/storm water drainage requirement is responsive. Similarly, the pedestrian and bicycle pathway condition is reasonably calculated to alleviate the increased traffic problems and accommodate the increased need and demand for non-vehicular access to the area that will result from the intensified operations."), *aff'd*, 854 P.2d 437 (Or. 1993), *rev'd*, 512 U.S. 374 (1994), *rev'd*, 877 P.2d 1201 (Or. 1994).

49. *Dolan*, 512 U.S. at 387–88; *see also Dolan*, 832 P.2d 853, 856 (Or. Ct. App. 1992).

50. *Dolan*, 512 U.S. at 388.

51. *Id.* at 395.

52. *Id.* at 383–84.

53. *Id.* at 391.

impact of the project.⁵⁴ In other words, Justice Blackmun’s “eye for an eye” characterization in *Nollan* was more accurate than his contemporaries probably realized.

Moreover, the Court said that the government must bear the burden of justifying the exaction,⁵⁵ and the City of Tigard had failed to meet that burden. Admittedly, the greenway would help prevent flooding—the risk of which would grow because of the expansion of impervious surface on the property. But the City had failed to show how that could justify a *public* greenway.⁵⁶ “If petitioner’s proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere. But that is not the case here.”⁵⁷ Likewise, while a pedestrian or bicycle path “could offset some of the traffic” created by a larger store, the city had failed to show that it was “likely.”⁵⁸ While a “precise mathematical calculation” was not necessary, the Court held that “the city must make some effort to quantify its findings in support of the dedication.”⁵⁹

D. Nollan and Dolan were Applications of the Unconstitutional Conditions Doctrine

The Court in *Dolan* explained that the Takings Clause applied by way of the unconstitutional conditions doctrine.

In *Nollan, supra*, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under 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.⁶⁰

54. *Id.*

55. *Id.*

56. *Id.* at 394.

57. *Id.* (citation omitted).

58. *Id.* at 395 (quoting *Dolan v. City of Tigard*, 854 P.2d 437, 447 (Or. 1993) (Peterson, J., dissenting)).

59. *Id.* at 395–96.

60. *Id.* at 385 (majority opinion).

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Nollan itself did not mention the unconstitutional conditions doctrine, though it cited precedent that did.⁶¹

The unconstitutional conditions doctrine prohibits the government from requiring an individual to give up a constitutionally protected right as the condition of exercising another constitutional right or receiving a government benefit. *Dolan* cited to *Perry v. Sindermann*, which explained:

[E]ven though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests⁶²

In *Perry*, a professor’s contract was not renewed at a state school allegedly based on his speaking against the school’s leadership.⁶³ There, the “valuable governmental benefit” was employment at the college.⁶⁴ Though he had no right to the job, the Court explained why it would be impermissible to fire him for his public criticism. The Court explained:

[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to ‘produce a result which (it) could not command directly.’⁶⁵

Perry did not use the term “unconstitutional conditions doctrine.” Similarly, *Nollan* did not use that language, but rested on the same principle forbidding the government from leveraging its power to accomplish indirectly something that it could not achieve directly.⁶⁶ “Had California simply required the Nollans to make an easement

61. See, e.g., *Littlefield v. City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986); *Parks v. Watson*, 716 F.2d 646, 651–53 (9th Cir. 1983).

62. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

63. *Id.* at 584–85.

64. *Id.* at 596–97.

65. *Id.*

66. However, Justice Brennan’s dissent recognized that the plaintiff’s argument may have relied on the unconstitutional conditions doctrine. See *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 859 (1987) (Brennan, J., dissenting).

across their beachfront” that “would have been a taking.”⁶⁷

There was an important distinction, however, between the unconstitutional conditions doctrine in the context of land-use permits versus the context of other rights. As the Court explained in *Nollan*, “the right to build on one’s own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a ‘governmental benefit.’”⁶⁸ In that sense, the stakes are higher than in a normal unconstitutional conditions case. In *Perry*, the benefit at issue was public employment—something created by and affirmatively bestowed by the government.⁶⁹ In *Nollan* and *Dolan*, the corresponding “benefit” was the lawful use of private property—property that belonged to the landowner, not the government. The permitting process merely allows the government to regulate, within limits, what the applicant would otherwise have an unqualified right to do.

The importance of the unconstitutional conditions doctrine to the decisions in *Nollan* and *Dolan* can best be understood by considering Justice Stevens’s objection to the majority’s use of the Takings Clause in *Dolan*, because Ms. Dolan’s property was not actually taken:

Dolan has no right to be compensated for a taking unless the city acquires the property interests that she has refused to surrender. Since no taking has yet occurred, there has not been any infringement of her constitutional right to compensation.⁷⁰

This of course misses the point of the unconstitutional conditions doctrine. In *Perry*, the plaintiff’s free speech right had not been taken away; he had freely communicated his disagreement with the school’s leadership.⁷¹ But he was penalized for exercising his right. Likewise, Dolan’s right to just compensation had not actually been taken since she refused the permit conditions. But she was penalized for rejecting the excessive condition. The unconstitutional conditions doctrine recognizes that government cannot use its coercive power over permits to take indirectly what it could not take directly without paying just compensation. The dissent might have embraced this

67. *Id.* at 831 (majority opinion).

68. *Id.* at 833 n.2.

69. *Perry*, 408 U.S. at 584–85.

70. *Dolan v. City of Tigard*, 512 U.S. 374, 408 (1994) (Stevens, J., dissenting).

71. *Perry*, 408 U.S. at 594–95.

point more readily if the right at issue had stemmed from the First Amendment, rather than from the Takings Clause.⁷² For example, if the government required that all permit applicants give up the right to attend peace rallies as a condition of receiving a permit, then whether or not an applicant accepted the condition, this would be a violation of that individual's First Amendment rights, by way of the unconstitutional conditions doctrine. Attempted extortion is detestable even if it fails to achieve its aim. As the *Dolan* majority explained, because the Takings Clause is no less important than the rest of the Bill of Rights, the rights it protects also come under the protection of the unconstitutional conditions doctrine.⁷³

E. Courts and Analysts Could Not Agree on the Proper Scope of Nollan and Dolan

Some of the legal community worried that *Nollan* and *Dolan* would hinder negotiations with developers, desirable city planning, and environmental stewardship.⁷⁴ Many courts avoided their nexus and proportionality requirements by creating exceptions to their applicability.⁷⁵ One stumbling block to granting *Nollan* and *Dolan*

72. For example, Justice Blackmun agreed with the majority in *Perry*, but thought that the Court should have gone further, granting the Plaintiff summary judgment. *Perry*, 408 U.S. at 605 (Blackmun, J., dissenting). Similarly, Justice Stevens joined the majority in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), where the court held that conditioning “promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees.” *Id.* at 75.

73. *Dolan*, 512 U.S. at 392 (“We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.”).

74. See Jill Ilan Berger Inbar, “A One Way Ticket to Palookaville”: *Supreme Court Takings Jurisprudence After Dolan and Its Implications for New York City’s Waterfront Zoning Resolution*, 17 CARDOZO L. REV. 331, 334 (1995) (“[T]he overexpansive reach of the *Dolan* standard threatens to invalidate potentially desirable ordinances”); see also Stephen Truesdale Carney, *Dolan v. Tigard: The Myth and Reality of Its Impact on Takings Jurisprudence and Land Use Regulation*, 7 ST. THOMAS L. REV. 329, 341 (1995) (“Environmentalists fear that land-use regulators face an unfair and unwise burden in their effort to stem harmful development. Many feel that the application of the *Nollan/Dolan* test will relate to a wide variety of Takings Clause challenges. Critics also believe that the level of scrutiny used to assess a condition on a development permit is too high. Finally, there is much concern about municipalities’ ability to cope with this new burden.”); Suzanna Glover-Ettrich, *A Newly-Minted Hurdle for City Planners: Dolan v. City of Tigard*, 28 CREIGHTON L. REV. 559, 587–88 (1995) (“In *Dolan v. City of Tigard*, the United States Supreme Court imposed another obstacle on cities attempting to formulate valid land-use regulations that address modern environmental and land development concerns.”).

75. See e.g., *McClung v. City of Sumner*, 548 F.3d 1219, 1227–28 (9th Cir. 2008)

broad applicability was that they did not easily harmonize with the pre-existing takings landscape articulated in *Penn Central*, *Lucas*, and *Loretto*.⁷⁶ The government could reject a permit application and be subject to the overwhelmingly deferential standard of *Penn Central*.⁷⁷ But if the government granted the permit with conditions then suddenly a stricter scrutiny applied under *Nollan* and *Dolan*—even though granting a permit with conditions might seem more gracious to a landowner than granting none at all.

A clear split developed in interpreting *Nollan* and *Dolan*, notably over whether their nexus and rough proportionality requirements applied to monetary exactions, or only to demands for the conveyance of land.⁷⁸ Other splits, focusing on the timing of the permit, or

(*Nollan* and *Dolan* do not apply to demands for money or to legislative exactions); *San Remo Hotel L.P. v. City & County of S.F.*, 41 P.3d 87, 104–05 (Cal. 2002) (generally applicable development fee is not a *Nollan/Dolan* exaction); *Home Builders Ass’n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997) (*Dolan* not applicable to legislative exactions); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995) (*Dolan* doesn’t apply to impact fees); *but see Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620, 636 (Tex. 2004) (*Nollan* and *Dolan* are not limited to dedications of land); *Home Builders Ass’n v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000) (impact fees from ordinance subject to *Nollan* and *Dolan*); *Smith v. Town of Mendon*, 822 N.E.2d 1214, 1219 (N.Y. 2004) (a permit’s requirement that the landowner agree to a conservation restriction on his property not subject to *Nollan* and *Dolan*); *City of Olympia v. Drebeck*, 126 P.3d 802, 807–08 (Wa. 2006) (rejecting the argument “that local governments must base GMA impact fees on individualized assessments of the direct impacts each new development will have on each improvement planned in a service area”).

76. Under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), a per se taking occurs when “government requires an owner to suffer a permanent physical invasion of her property—however minor,” which obliges government to pay just compensation for that taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (citing *Loretto*). Under *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003 (1992), government commits a per se taking, entitling a property owner to just compensation, when regulations take “all economically beneficial use” of property. *Id.* at 1019, 1026–32. “Outside these two relatively narrow categories (and the special context of [*Nollan* and *Dolan*] exactions . . .), regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).” *Lingle*, 544 U.S. at 538–39. *Penn Central* considers several factors to determine whether regulations are severe enough to entitle a property owner to just compensation, including: “The economic impact of the regulation on the claimant . . ., the extent to which the regulation has interfered with distinct investment-backed expectations,” and the “character of the governmental action.” *Penn Central*, 438 U.S. at 124.

77. See, e.g., Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 FED. CIR. B.J. 677 (2013), available at http://papers.ssrn.com/so13/papers.cfm?abstract_id=2139729; see also Basil H. Mattingly, *Forum Over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence*, 36 WILLAMETTE L. REV. 695 (2000).

78. Catherine L. Hall, *Valid Regulation of Land Use or Out-and-out Plan of Extortion? Commentary on St. Johns River Water Management Dist.*, 41 REAL EST. L.J. 270, 291 (2012) (“A survey of state and federal decisions reveals there is considerable disagreement about

whether the exaction is legislatively or adjudicatively imposed arose.⁷⁹ Two later Supreme Court cases that mentioned *Nollan* and *Dolan* when deciding other property issues fueled the debate.

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, the Supreme Court considered a case where a municipality teased a developer with the possibility of a permit.⁸⁰ There, Del Monte Dunes attempted to get permission to develop 37.6 acres for residential purposes.⁸¹ The City of Monterey rejected the application, suggesting ways to change the application so that it might be approved.⁸² Del Monte complied, only to be rejected again and to enter a cycle of further adjustments met with further rejections. “After five years, five formal decisions [by the city], and 19 different site plans, Del Monte Dunes decided the city would not permit development of the property under any circumstances.”⁸³ Del Monte Dunes challenged the city’s final rejection of their application as a violation of the Takings, Due Process, and Equal Protection Clauses. The lower court looked to *Nollan* and *Dolan*, which the Supreme Court rebuffed, explaining:

Although in a general sense concerns for proportionality animate the Takings Clause, we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of

when the application of *Nollan* and *Dolan* apply to the exactions takings analysis The Florida Supreme Court and other courts have issued conflicting opinions about whether impact fees and off-site mitigation should be subject to scrutiny under this doctrine.”); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGICAL L.Q.* 307, 369 (2007) (describing split in courts’ interpretation). Compare, e.g., *McClung*, 548 F.3d 1219 (*Nollan* and *Dolan* only apply to exactions of real property) and *Iowa Assur. Corp. v. City of Indianola*, Iowa, 650 F.3d 1094, 1099 (8th Cir. 2011) (*Nollan* and *Dolan* apply only to exactions demanding real property) with *Rogers Mach., Inc. v. Washington Cnty.*, 45 P.3d 966, 976 (Or. Ct. App. 2002) (acknowledging “no consensus . . . among lower courts” but that *Nollan* and *Dolan* apply to adjudicatively imposed monetary exactions) and *Ehrlich v. City of Culver City*, 911 P.2d 429, 439 (Cal. 1996) (*Nollan* and *Dolan* applied to monetary exaction).

79. James S. Burling & Graham Owen, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 *STAN. ENVTL. L.J.* 397, 429–37 (2009); see, e.g., *McClung*, 548 F.3d 1219 (Penn Central, not *Nollan* and *Dolan*, applies to legislative exaction); *Ehrlich*, 911 P.2d at 439 (*Nollan* and *Dolan* do not apply to legislatively adopted exactions); *B.A.M. Development, L.L.C. v. Salt Lake County*, 196 P.3d 601 (Utah 2008) (*Nollan* and *Dolan* apply to legislative exactions); *Trimen Dev. Co. v. King Cnty.*, 877 P.2d 187, 194 (Wash. 1994) (applying *Dolan* to legislatively imposed exaction).

80. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999).

81. *Id.* at 694.

82. *Id.* at 695–96.

83. *Id.* at 698 (citations omitted).

development on the dedication of property to public use. The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development.⁸⁴

Some observers argued that this was proof that *Nollan* and *Dolan* applied only when a government agency actually approved a permit application—not when the application was denied.⁸⁵ But *Del Monte Dunes* was not a case involving a government attempt to use extortion to get something of value in exchange for a permit. These arguments reappeared in *Koontz*.

In *Lingle v. Chevron U.S.A., Inc.*, the Court again revisited *Nollan* and *Dolan* when deciding whether a taking occurs when a land-use regulation “does not substantially advance a legitimate government interest.”⁸⁶ The *Lingle* Court rejected the “substantially advance” test, and in the process, it revisited its major Takings cases that referred to such a test. Discussing *Nollan* and *Dolan* as a special application of the unconstitutional conditions doctrine, *Lingle* summarized *Nollan* and *Dolan* as “both involv[ing] dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings.”⁸⁷ Again, critics of *Nollan* and *Dolan*, promptly declared those cases to be inapplicable to any exaction except one of real property.⁸⁸ This theory, too, became an

84. *Id.* at 702 (citations omitted).

85. See, e.g., Timothy M. Mulvaney, *Proposed Exactions*, 26 J. LAND USE & ENVTL. L. 277, 298–99 (2011) (“In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, the Court just one year prior to *Lambert* had unanimously stated that *Dolan*’s rough proportionality test ‘was not designed to address . . . questions arising where . . . the landowner’s challenge is based not on excessive exactions but on denial of development.’”) (footnotes omitted); see also *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1231 (Fla. 2011) (“As noted by the United States Supreme Court, *Nollan* and *Dolan* were not designed to address the situation where a landowner’s challenge is based not on excessive exactions but on a denial of development. See *Del Monte Dunes*, 526 U.S. at 703[.]”); Amici Curiae Brief of the National Governors Association, et al. in Support of Respondent at 10, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (No. 11-1447), 2012 WL 6755147, at *6.

86. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 548 (2005). This test arose in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), and was recited in both *Nollan* and *Dolan*.

87. *Lingle*, 544 U.S. at 547.

88. See, e.g., Carl J. Circo, *Should Owners and Developers of Low-Performance Buildings Pay Impact or Mitigation Fees to Finance Green Building Incentive Programs and Other Sustainable Development Initiatives?*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 55,

issue in *Koontz*.

A third source of disagreement, though not raised in *Koontz*, was whether legislatively imposed exactions implicate *Nollan* and *Dolan* scrutiny, or only those imposed on a case by case, discretionary basis.⁸⁹ The premise for this argument came from the Court's attempt to distinguish *Dolan* from Supreme Court precedent that had validated zoning laws.⁹⁰ The Court said that those cases were different because they "involved essentially legislative determinations classifying entire areas of the city" instead of "an adjudicative decision to condition petitioner's application for a building permit on an individual parcel."⁹¹ This confused most courts and scholars, convincing many that *Nollan* and *Dolan* could apply only to adjudicative decisions.⁹² Drawing that conclusion requires ignoring the facts of *Nollan*, which involved a legislatively mandated exaction codified under state law.⁹³ The proper distinction between the Court's exaction cases and its earlier zoning decisions should have been simply that *Nollan* and *Dolan*, unlike the zoning cases, involved demands that property owners give up something of value in

85, 87 (2009) (*Lingle* "all but forecloses the viability" of arguing that *Nollan* and *Dolan* apply to monetary exactions because "a governmental demand for a fee in exchange for development approval is not comparable to a governmental demand for a free easement in exchange for the same approval."); Daniel A. Jacobs, *Indigestion from Eating Crow: The Impact of Lingle v. Chevron U.S.A., Inc. on the Future of Regulatory Takings Doctrine*, 38 URB. LAW. 451, 482 (2006); Daniel Pollak, *Regulatory Takings: The Supreme Court Tries To Prune Agins Without Stepping on Nollan and Dolan*, 33 ECOLOGY L.Q. 925, 931 (2006); Lauren Reznick, *The Death of Nollan and Dolan? Challenging the Constitutionality of Monetary Exactions in the Wake of Lingle v. Chevron*, 87 B.U. L. REV. 725, 729 (2007) ("*Lingle*'s recasting of *Nollan* and *Dolan* as based on the doctrine of unconstitutional conditions has led some commentators to herald the death of any principled extension of the *Nollan* and *Dolan* heightened scrutiny standard to the context of monetary exactions.") (citing John D. Echeverria, *Lingle, Etc.: The U.S. Supreme Court's 2005 Takings Trilogy*, 35 ENVTL. L. REP. NEWS & ANALYSIS 10577, 10583 (2006)); Daniel L. Siegel, *Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L.J. 577, 589 (2009) (arguing that *Lingle*'s characterization of *Nollan* and *Dolan* as instances of the unconstitutional conditions doctrine limits their applicability to dedications of real property).

89. For a full discussion of the debate, see Burling & Owen, *supra* note 79.

90. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

91. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

92. In 2004, the Texas Supreme Court concluded that "as far as we can tell, all courts of last resort to address the issue have" limited *Nollan* and *Dolan* to adjudicative decisions. *Town of Flower Mound v. Stafford Est. Ltd. P'Ship.*, 135 S.W.3d 620, 640 (Tex. 2004). See also sources cited in *supra* note 79.

93. See *supra* text accompanying note 17.

exchange for favorable treatment by the government.

With so many jurisdictions adopting exceptions to *Nollan* and *Dolan*, many permit applicants found themselves at the mercy of permitting authorities. One amicus brief submitted in *Koontz* recounted example after example of governmental demands that property owners pay fees, give up land, and even forgo their voting rights in exchange for permits to build.⁹⁴ Still, some courts preserved the protections articulated in *Nollan* and *Dolan*.⁹⁵ For example, in *Town of Flower Mound v. Stafford Estates Ltd. Partnership*⁹⁶, the Supreme Court of Texas held that *Nollan* and *Dolan* applied to both legislative and monetary exactions. Conversely, the Florida Supreme Court in *Koontz*, exempted monetary exactions as well as conditions that preceded the issuance of a permit decision.⁹⁷

III. KOONTZ CLARIFIED THE APPLICABILITY OF NOLAN AND DOLAN IN TWO IMPORTANT RESPECTS

A. *Disputing Appropriate Mitigation Results In a 19-Year Legal Battle*

Coy Koontz purchased 14.9 acres of undeveloped land in 1972,

94. Brief of Amici Curiae Institute for Justice and the Cato Institute in Support of Petitioner at 10–32, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (No. 11-1447), 2012 WL 6018738, at *10–32 (explaining that in 2004, “Craig and Robin Griswold . . . requested a permit to build an addition to their single-family home. In exchange for the permit, Carlsbad officials demanded the Griswolds pay nearly \$115,000 for various street improvements, including paving, sidewalk, curb, and gutter improvements, and underground and overhead utilities - none of which were implicated by the Griswold’s construction plans. If the Griswolds wanted to proceed with the addition, they had to choose between paying for the neighborhood improvements themselves or signing away their constitutionally protected right to vote on future assessments.”); see also Brief Amicus Curiae of Hillcrest Property, LLP in Support of Petitioner at 19–25, *Koontz*, 133 S. Ct. 2586 (2013) (No. 11-1447), 2012 WL 6042216, at *19–25 (describing a county ordinance that would force Hillcrest to dedicate 28% of its commercially zoned property for future road development).

95. See, e.g., *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16–17 (1st Cir. 1995) (*Dolan* applies to monetary exactions); *Northern Illinois Home Builders Assoc., Inc. v. Cnty of Du Page*, 649 N.E.2d 384 (Ill. 1995) (applying *Dolan* to a legislatively created monetary exaction); see also *Toll Bros., Inc. v. Bd. of Chosen Freeholders of Burlington*, 944 A.2d 1, 4, n.2 (N.J. 2008) (applying *Nollan* and *Dolan* to monetary exactions); *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821, 825 (N.Y. 2003) (applying *Nollan* and *Dolan* to impact fee imposed via town ordinance).

96. 135 S.W.3d at 640–42.

97. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1230 (Fla. 2011) *rev’d*, 133 S. Ct. 2586 (U.S. 2013)..

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at the intersection of two highways outside of Orlando, Florida.⁹⁸ In 1987, the government condemned part of the property for an adjacent road, leaving Koontz with 14.2 acres.⁹⁹ In 1994, Koontz wanted to build on 3.7 acres of his vacant land, so he applied for a permit from the St. Johns River Water Management District.¹⁰⁰ Like countless landowners across the country, he embarked on the permitting process.¹⁰¹

According to the District, the property that Koontz wanted to develop contained valuable wetlands, even though the wetlands were “seriously degraded . . . by all of the activity around it.”¹⁰² The property was located immediately next to two highways and near significant residential and commercial developments, road construction, and government projects.¹⁰³ Florida Power Corporation had a 100-foot wide easement for large power lines running through the property that it kept cleared and mowed.¹⁰⁴ A 60-foot wide government drainage ditch also ran through the property.¹⁰⁵ The only standing water on the property formed in ruts of an access road used for the power lines.¹⁰⁶ But at the District’s request, Koontz offered to dedicate the remaining three-quarters of his land to a conservation easement, in exchange for permit approval.¹⁰⁷ The District wanted more, however, and said that unless Koontz agreed to pay for repairs to government lands miles away, it would not approve his permit.¹⁰⁸

98. *Koontz*, 133 S. Ct. at 2591–92.

99. *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 9 (Fla. Dist. Ct. App. 2009).

100. *Id.*

101. *Koontz*, 133 S. Ct. at 2592.

102. *St. Johns River Water Mgmt. Dist.*, 5 So. 3d at 9 (citing trial court opinion).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Koontz*, 133 S. Ct. at 2592.

107. *Id.* “Florida authorized preservation mitigation through conveyance of a conservation easement and with the limitation that preservation mitigation ‘will not be granted [at] a ratio lower than 10:1.’” Brief of Former Members of the National Council Committee on Mitigating Wetland Losses as Amici in Support of Respondent at 29, *Koontz*, 133 S. Ct. 2586, 2012 WL 6762583 at *29 (citing Memorandum from the Florida Department of Environmental Regulations (FDER) Secretary Dale Twachtmann to FDER Permitting Division Director Randy Armstrong, Policy for “Wetlands Preservation-as-Mitigation” (June 20, 1988); *St. Johns River Water Mgmt. Dist. Applicant’s Handbook* at § 12.3.2.2(c)).

108. *Koontz*, 133 S. Ct. at 2593. The District did offer to allow Koontz to revise his permit application to develop only 1 acre of his land. *Id.* at 2598. That offer, however, was still a rejection of Koontz’s permit application based on his refusal to improve public land. *Id.* at 2598. The Supreme Court explained that the district “in effect told petitioner that it would

Koontz, believing the demand unfair, objected.¹⁰⁹ In response, the District denied his permit application and Koontz sued.

The trial court ruled in favor of Koontz, finding that the offsite mitigation lacked the essential nexus to the impact of Koontz's proposed development required by *Nollan*.¹¹⁰ Moreover, even if a nexus existed, anything beyond the proposed conservation easement over Koontz's land would exceed *Dolan's* requirement that the condition be roughly proportional to any external costs of the project.¹¹¹ In a subsequent proceeding, the court awarded Koontz damages for the years he was denied his permit.¹¹² The District appealed, arguing that no exaction had occurred because nothing was taken from Koontz, since the permit application was never approved.¹¹³ Furthermore, the District contended that the demand for money (or services) could not violate *Nollan* and *Dolan*, since those cases supposedly involved only dedications of real property.¹¹⁴

The appellate court affirmed, stating simply that the Supreme Court had already answered these questions. The Court explained that the majority in *Dolan* "implicitly rejected" the argument that no taking can occur without an actual transfer of property, because the dissent had made that argument.¹¹⁵ The Supreme Court also "implicitly decided" the money issue when it vacated and remanded *Ehrlich v. City of Culver City*¹¹⁶ to be reexamined in light of *Dolan*.¹¹⁷

not allow him to build on 2.7 of those acres unless he agreed to spend money improving public lands." *Id.* at 2598.

109. *Id.*

110. *St. Johns River Water Mgmt. Dist.*, 5 So. 3d at 10 ("[T]he trial court determined that the off-site mitigation imposed by the District had no essential nexus to the development restrictions already in place on the Koontz property.").

111. *Id.* at 12 n.5 ("[T]he trial court decided as fact that the conservation easement offered by Mr. Koontz was enough and that any more would exceed the rough proportionality threshold, whether in the form of off-site mitigation or a greater easement dedication for conservation.").

112. Koontz's suit was brought pursuant to a state law that would provide Koontz with monetary relief if the government's action was an unreasonable exercise of the police power constituting a taking of property. *Koontz*, 133 S. Ct. at 2597–98 (citing FLA. STAT. § 373.617 (2013)).

113. *St. Johns River Water Mgmt. Dist.*, 5 So. 3d at 10–11.

114. *Id.* at 12.

115. *Id.* at 11.

116. 512 U.S. 1231 (1994).

117. *St. Johns River Water Mgmt. Dist.*, 5 So. 3d at 12. In *Ehrlich*, the city had conditioned a permit on the payment of money. *Ehrlich v. City of Culver City*, 911 P.2d 429, 434. The state court had upheld the condition, but after the Supreme Court vacated and

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The Florida Supreme Court reversed, holding that the protections articulated in *Nollan* and *Dolan* do not apply to exactions that demand money rather than land.¹¹⁸ Those cases were also held to be inapplicable because Koontz's permit was denied.¹¹⁹ The court posited legal arguments, but its opinion seemed rooted more in policy than in precedent.¹²⁰ The court argued that defending land-use restrictions and exactions, if subject to *Nollan* and *Dolan*, would become prohibitively expensive for government agencies, since they would be subject to judicial scrutiny.¹²¹ “[R]ather than risk the crushing costs of litigation,” government agencies would instead “deny permits outright without discussion or negotiation.”¹²²

Koontz appealed, and nineteen years after he started the permit process, the U.S. Supreme Court settled two questions: (1) whether *Nollan* and *Dolan* protect permit applicants when the government demands money or labor in exchange for a permit, and (2) whether *Nollan* and *Dolan* apply when the government's demands precede permit approval and result in a permit denial.¹²³ In a contentious decision, the Court ruled in favor of the petitioner on both issues: *Nollan* and *Dolan* apply to monetary exactions and also to situations where the government denies a permit because the applicant refuses to comply with conditions.¹²⁴

B. Koontz Establishes that Nollan and Dolan Apply even when a Permit is Denied

The unconstitutional conditions doctrine was pivotal to the *Koontz* Court's analysis of whether *Nollan* and *Dolan* apply to permit denials. At oral argument in *Koontz*, the Court was clearly concerned

remanded, the California Supreme Court held the condition in violation of *Dolan*. *Id.* at 450–51.

118. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1230 (Fla. 2011) *rev'd*, 133 S. Ct. 2586 (U.S. 2013).

119. *Id.*

120. *Id.* “It is both necessary and logical to limit land-use exactions doctrine to these narrow circumstances. Governmental entities must have the authority and flexibility to independently evaluate permit applications and negotiate a permit award that will benefit a landowner without causing undue harm to the community or the environment.”)

121. *Id.* at 1231.

122. *Id.*

123. The Court did not decide what remedy was appropriate, nor did it decide whether the off-site-mitigation condition satisfied *Nollan* and *Dolan*, since those questions were not before the Court.

124. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013).

over the timing of the permit conditions.¹²⁵ After all, the District had not actually issued Koontz a conditional permit, since he had refused to agree to the District's demands for off-site mitigation. If no permit was issued, and no property ever changed hands, then how could a taking occur?

This question was nothing new. Justice Stevens's dissent in *Dolan* asked the same question. Indeed, the argument that no taking occurs unless property changes hands could have been made in *Nollan*, since the plaintiff never actually agreed to the Coastal Commission's permit condition. Justice Scalia also raised that question thirteen years ago in his dissent from the Court's denial of a petition for writ of certiorari in *Lambert v. City & County of San Francisco*.¹²⁶ In his dissent, Justice Scalia wrote that the Court should settle the legal question of whether *Nollan* and *Dolan* could apply when a permit had been denied. He said:

From one standpoint, of course, such a distinction [between a permit denial and a permit acceptance] makes no sense. The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the permit process "an out-and-out plan of extortion," . . . There is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than as a condition subsequent should make a difference. It is undeniable, on the other hand, that the subject of any supposed taking in the present case is far from clear.¹²⁷

The Court in *Koontz* answered this question by simply pointing out that *Nollan* and *Dolan* are a special application of the unconstitutional conditions doctrine.¹²⁸ The Court explained that the unconstitutional conditions doctrine "vindicates the Constitution's

125. Transcript of Oral Argument at 18–26, *Koontz*, 133 S. Ct. 2586 (2013) (No. 11-1447) available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-1447.pdf (Justice Scalia asking about whether Koontz could have a claim even though the permit was denied and no property changed hands, said, "Here, the permit's been denied. I can't see where there's a taking here. Nothing's been taken." Justice Alito posed a series of questions to the district's lawyer, "trying to understand what would be [] left of *Nollan* and *Dolan*" under the district's theories: "Situation number 2: Permit is denied, but it will be granted if you give us one-third of your land. What about that?" Chief Justice Roberts: "Are you saying that if you are confronted with an unconstitutional condition, you have to accept it, and then you can challenge it?").

126. *Lambert v. City & Cnty. of San Francisco*, 529 U.S. 1045 (2000).

127. *Id.* at 1049 (citation omitted).

128. *Koontz*, 133 S. Ct. at 2594.

enumerated rights by preventing the government from coercing people into giving them up.”¹²⁹ Extortion itself—whether it is consummated with an exchange of property or not—is the harm under *Nollan* and *Dolan*. The Court explained that “regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.”¹³⁰ In the land-use context, excessive permit conditions “impermissibly burden” the Takings Clause.¹³¹ A consummated condition would violate the Takings Clause.¹³²

All nine justices agreed on this point.¹³³ Whether the government demands that a permit applicant consent to a development exaction prior to the permit decision makes no difference to the unconstitutional conditions doctrine.¹³⁴ “A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval.”¹³⁵ Or, as Justice Alito said during oral argument, such an interpretation amounts to “making *Nollan* and *Dolan* a trap only for really stupid districts . . . they say the right words and then they are out from under it”¹³⁶ In other words, the government could demand whatever it wants in exchange for a permit, provided that it is clever enough to not explicitly write the demand on a permit acceptance or denial. That kind of ruling would also amount to instructing property owners to accept unconstitutional permit conditions in order to challenge them.

The Court cited unconstitutional conditions cases that did not

129. *Id.*

130. *Id.* at 2595.

131. *Id.* at 2596–97 (emphasis added).

132. *Id.* (emphasis added).

133. See *id.* at 2596; see also *id.* at 2603 (Kagan, J., dissenting) (agreeing with the majority, Justice Kagan said, “[T]he Court gets the first question it addresses right. The *Nollan–Dolan* standard applies not only when the government approves a development permit conditioned on the owner’s conveyance of a property interest (*i.e.*, imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (*i.e.*, imposes a condition precedent).”).

134. *Id.* at 2596 (majority opinion).

135. *Id.* at 2595.

136. Transcript of Oral Argument at 55, *Koontz*, 133 S. Ct. 2586, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-1447.pdf.

involve property rights. It summarized *Perry* for its protection against restricting a professor's speech as a condition of renewing his teaching contract, and *Memorial Hospital v. Maricopa County*¹³⁷ for its protection against a county conditioning healthcare benefits on tenure of residence. The Court then reiterated that *Nollan* and *Dolan* apply the unconstitutional conditions doctrine to the permitting process in a way that accommodates two realities: First, landowners need protection against the manipulative power that government can wield in the permitting process:

[L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take So long as the building permit is more valuable than any just compensation the owner could hope to receive for the [exacted property], the owner is likely to accede to the government's demand, no matter how unreasonable.¹³⁸

Second, the government can require developers to pay for the costs that they would otherwise impose on society:

[M]any proposed land uses threaten to impose costs on the public that dedications of property can offset. Where a building proposal would substantially increase traffic congestion, for example, officials might condition permit approval on the owner's agreement to deed over the land needed to widen a public road Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack.¹³⁹

Nollan and *Dolan*, the Court explained, protect property owners from the sort of inappropriate demands that "frustrate the Fifth Amendment right to just compensation" without allowing developers to get a free ride.¹⁴⁰

As with *Nollan* and *Dolan*, the constitutional harm in *Koontz* did

137. 415 U.S. 250 (1974).

138. *Koontz*, 133 S. Ct. at 2594–95.

139. *Id.* at 2595.

140. *Id.*

not involve property changing hands.¹⁴¹ The harm occurred when the government used its coercive permitting power to make an extortionate demand for Koontz's resources in exchange for a permit. "Even if respondent would have been entirely within its rights in denying the permit for some other reason" that authority does not grant the government "power to condition permit approval on petitioner's forfeiture of his constitutional rights."¹⁴² Nor did it matter whether a permit was issued or denied.¹⁴³

The question of whether any property was ever physically taken was relevant only to determining the remedy.¹⁴⁴ The Court explained that when government takes property with an inappropriate permit condition, the Fifth Amendment requires the government to pay just compensation for the property it wrongly exacted.¹⁴⁵ But in *Koontz*, because no property was physically taken, and because damages were awarded under state law, the Court declined to decide "what remedies might be available for a *Nollan/Dolan* [claim]."¹⁴⁶ The question was left to the Florida Supreme Court.¹⁴⁷

141. The parties did not agree to the permit conditions, thus no property ever changed hands. The permit did not issue in *Nollan* or *Dolan* because the parties refused to agree to the conditions. In *Nollan*, the permit decision stated, "[p]rior to the issuance of the Coastal Development Permit, the applicants shall record, in a form and manner approved by the Executive Director, a deed restriction acknowledging the right of the public to pass and repass across the subject properties in an area bounded by the mean high tide line at one end, to the toe of the revetment at the other." Brief of Appellants at 5, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (No. 86-133). In *Dolan*, the permit decision stated, "[p]rior to the issuance of building permits [t]he applicant shall dedicate to the City as greenway all portions of the site that fall within the 100-year floodplain [of Fanno Creek] (i.e. all portions of property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary." Petitioner's Brief on the Merits at 31, *Koontz*, 133 S. Ct. 2586 (quoting *Dolan*, 20 Or. LUBA at 411, 413 (1991), Or. Land Use Bd. App. LEXIS 316, at *4 (emphasis added) (brackets in original)).

142. *Koontz*, 133 S. Ct. at 2596.

143. *Id.* at 2595.

144. *Id.* at 2597.

145. *Id.*

146. *Id.* *Koontz*'s remedy had been awarded by way of a state law that provided for compensation when "final agency action [with respect to a permit] . . . is an unreasonable exercise of the state's police power constituting a taking without just compensation." FLA. STAT. § 373.617(2) (2013).

147. *Koontz*, 133 S. Ct. at 2597. The dissent, on the other hand, wanted to apply the facts to the state law and hold that *Koontz* had no remedy under the state statute, reasoning that since nothing was taken, the state statute could not apply. *Id.* at 2612 (Kagan, J., dissenting).

C. Koontz Establishes that Nollan and Dolan Apply to Monetary Exactions

The second important issue resolved by *Koontz* is that monetary exactions are subject to the heightened scrutiny of *Nollan* and *Dolan*. As discussed above, the idea that money is exempt from *Nollan* and *Dolan* scrutiny originated from parties reading between the lines in *Lingle* and *Del Monte Dunes*. The District, however, relied upon another idea. It argued that a government-imposed “obligation to spend money is not a taking.”¹⁴⁸ The Court had previously recognized that money is property protected by the Takings Clause in *Brown v. Legal Foundation of Washington*¹⁴⁹ and *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*.¹⁵⁰ But the District argued that its own attempt to get *Koontz* to repair government property was different because it never took anything; it only asked *Koontz* to spend money.¹⁵¹ The obligation to spend money could not be likened to a claim on real property (with all of the attendant protections of the Takings Clause), because money is fungible.¹⁵² Finally, if the court did treat the obligation to spend money as private property protected by the Takings Clause, then a “broad range of monetary obligations—application fees, usage fees, and so forth”—would be subject to takings clause protections and *Nollan* and *Dolan*’s heightened scrutiny.¹⁵³ This, the district warned, would threaten every mitigation requirement that may require a property owner to pay money to complete.¹⁵⁴

To make its case that the obligation to spend money is not property, the district relied on *Eastern Enterprises v. Apfel*, a case where the Court overturned a law that retroactively required a company to fund health benefits for retired former employees.¹⁵⁵ The Justices in *Eastern Enterprises* disagreed about whether the Takings Clause or Due Process was implicated. Justice Kennedy, along with

148. Brief for Respondent at 45, *Koontz*, 133 S. Ct. 2586, 2012 WL 6694053, at *45.

149. 538 U.S. 216 (2003) (subjecting obligation to deposit clients’ funds in IOLTA account to Takings Clause analysis, but finding no taking occurred).

150. 449 U.S. 155 (1980) (government taking accrued interest from an interpleader fund was a taking).

151. Brief for Respondent at 46–47, *Koontz*, 133 S. Ct. 2586, 2012 WL 6694053, at *46–47.

152. *Id.* at 47–48.

153. *Id.* at 48–49.

154. *Id.* at 49.

155. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

four dissenting Justices concluded that the Takings Clause did not apply where the government's demand affected some "[un]identified property interest."¹⁵⁶ This led some, including the *Koontz* dissent, to conclude that government demands for money do not implicate the Takings Clause.¹⁵⁷

The *Koontz* majority, which included Justice Kennedy, explained that *Eastern Enterprises* did not alter the outcome of *Koontz* since the District had acted upon an identifiable property interest: Koontz's land.¹⁵⁸ The attempted monetary exaction burdened Koontz's land, much like a government lien would.¹⁵⁹ Thus, *Koontz* was a logical extension of cases that held the "government must pay just compensation when it takes a lien."¹⁶⁰

If the government had tried simply to require a landowner to repair government land or to give it money outside of the permit application process, "any such demand would amount to a per se taking similar to the taking of an easement or a lien."¹⁶¹ Thus, *Nollan* and *Dolan* should apply to an exaction of money, the Court reasoned.

To exempt monetary exactions from the protection of the Takings Clause would create a giant loophole that would effectively void *Nollan* and *Dolan*.¹⁶² If such exactions were not protected, the permitting agency could have simply demanded large sums of money from the Nollans or Ms. Dolan, and then used that money to condemn and take the respective land interests that it had illicitly tried to exact

156. *Id.* at 540.

157. *Koontz*, 133 S. Ct. at 2605–06.

158. *Id.* at 2600. "Identifiable property interest" would also include "bank accounts." *See id.* ("[P]etitioner's claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a 'per se [takings] approach' is the proper mode of analysis under the Court's precedent.")

159. *Id.*

160. *See id.* at 2599–2600 (citing *United States v. Security Industrial Bank*, 459 U.S. 70, 77–78 (1982); *Armstrong v. United States*, 364 U.S. 40, 44–49 (1960); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601–02 (1935); *Palm Beach Cty. v. Cove Club Investors Ltd.*, 734 So.2d 379, 383–84 (Fla.1999)).

161. *Id.* at 2600.

162. *Id.* at 2599 ("We note as an initial matter that if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*."). Justice Scalia quipped during oral argument, a holding that cash is not protected by *Nollan* and *Dolan* would amount to saying that "[t]he government can . . . come into my house [and] take all of the cash that's there" without implicating the Takings Clause. Transcript of Oral Argument at 34–35, *Koontz*, 133 S. Ct. 2586, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-1447.pdf.

through the permitting process. Under that scheme, “a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement’s value.”¹⁶³

D. The Dissent’s Concerns seem Exaggerated

The *Koontz* dissent worried that applying *Nollan* and *Dolan* to monetary exactions would threaten the government’s ability to levy taxes and fees: If “a simple demand to pay money—the sort of thing often viewed as a tax—can count as an impermissible ‘exaction,’ how is anyone to tell the two apart?”¹⁶⁴ Furthermore, if a demand for money is protected by *Nollan* and *Dolan*, it would also threaten broader regulatory laws that impose costs on individuals.

[T]he majority extends the Takings Clause, with its notoriously “difficult” and “perplexing” standards, into the very heart of local land-use regulation and service delivery Cities and towns across the nation impose many kinds of permitting fees every day. Some enable a government to mitigate a new development’s impact on the community, like increased traffic or pollution—or destruction of wetlands. Still others are meant to limit the number of landowners who engage in a certain activity, as fees for liquor licenses do. All now must meet *Nollan* and *Dolan*’s nexus and proportionality tests. The Federal Constitution thus will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high. And the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly.¹⁶⁵

But the dissent missed the point. *Koontz* provides that the government may require permit applicants to internalize their negative externalities, so long as that is what the government is actually doing. Regulating sewer rates and liquor prices has no connection to any cost-internalization rationale; therefore regulations of this sort will be completely unaffected by *Koontz*. Furthermore, the majority pointed out that the Federal Constitution already offers protections in those contexts, so subjecting them to the protections of the Constitution

163. *Koontz*, 133 S. Ct. at 2599.

164. *Id.* at 2607 (Kagan, J., dissenting).

165. *Id.* (citations omitted).

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would be nothing new.¹⁶⁶

Equally untenable are the dissent's concerns that government will not be able to require a new development to mitigate its impact on traffic or the environment. *Koontz*, *Nollan*, and *Dolan* all explicitly provide that permitting agencies may require developers to mitigate their negative impacts. These agencies simply must show that demands for mitigation are closely related and roughly proportional to the development's actual impact. Requiring the government to show how its conditions will mitigate those social costs helps protect property owners from being coerced into providing the community with benefits unrelated to, or grossly disproportionate to, any spillovers created by the use of their property.

Likewise, the taxing power is not implicated. *Koontz* adds nothing new to the difficulty of discerning between a tax and a taking and the Court's precedent "show[s] that teasing out the difference between taxes and takings is more difficult in theory than in practice."¹⁶⁷

The jurisdictions that had already applied *Nollan* and *Dolan* to monetary exactions have not encountered the sort of problems predicted by the dissent in *Koontz*.¹⁶⁸ "And studies on the impact of *Nollan* and *Dolan* have repeatedly shown that subjecting exactions to heightened scrutiny does not forestall land-use regulation, permitting, or the practice of conditioning permit approvals."¹⁶⁹ Even some government attorneys have concluded that *Koontz* is not earth-

166. *Id.* at 2602 (citing *id.* at 2608–09 (Kagan, J., dissenting)).

167. *Id.* at 2601. See generally Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189 (2002) (discussing theoretical distinctions between taxes, fees, and takings, and an argument that the government crosses the line into a taking when it unfairly singles out property owners to bear burdens that should be paid by the community as whole).

168. *Koontz*, 133 S. Ct. at 2602 (citing Northern Ill. Home Builders Assn. v. County of Du Page, 649 N.E.2d 384, 388–89 (Ill. 1995)); Home Builders Assn. v. Beavercreek, 729 N.E.2d 349, 356 (Ohio 2000); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d, at 640–41 (Tex. 2004)).

169. Brian Hodges, *The Koontz Case: Implications in Washington State*, Washington State Association of Municipal Attorneys 2013 Fall Conference, October 11, 2013, at 13a-7 (citing Steven P. Frank, *Yes in My Backyard: Developers, Government and Communities Working Together Through Development Agreements and Community Benefit Agreements*, 42 IND. L. REV. 227, 227 (2009)). See also David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 CASE W. RES. L. REV. 663, 663 (2001); Ann E. Carlson & Daniel Pollack, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 105 (2001)).

shattering, but simply requires governments not to “overreach,” but to tailor mitigation to the actual impact of the project.¹⁷⁰

The *Koontz* dissent concluded by saying that extending constitutional protections to *Koontz* was not necessary since no one proved that monetary exactions had become a problem.¹⁷¹ A similar argument was made by the District’s amici: The brief by the National Governor’s Association, et al., asserted that there is no need for such Constitutional safeguards because “conscientious local officials work hard on a daily basis to fairly balance the numerous competing demands they confront in the regulatory process.”¹⁷² But this argument ignores the many examples of abuse cited by *Koontz*’s amici, Cato Institute, and Institute for Justice.¹⁷³ Anyway, if extortion is not a problem, as some claim, then that means that government is usually good at tailoring demands—all the more reason to have confidence that government will continue to require developers to mitigate the actual impact their development would have. As Justice Alito pointed out in *Koontz*, the “argument that land use permit applicants need no further protection when the government demands money is really an argument for overruling *Nollan* and *Dolan*.”¹⁷⁴ *Koontz* simply is *Nollan* and *Dolan* reasserted and clarified so that government cannot avoid scrutiny by exploiting technicalities.

The doomsday warnings elicited by *Koontz* are nothing new. They commonly attend cases that uphold property rights. For example, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, a case holding that the Takings Clause

170. *E.g.*, Roger Wynne, *Koontz: What it said, what it didn’t say, and the implications for us in Washington State*, Washington State Association of Municipal Attorneys 2013 Annual Fall Conference, October 11, 2013, at 13b-8. Washington already had limits on some monetary exactions, but that has not stopped the use of exactions—it has only limited their reach. *Id.*

171. *Koontz*, 133 S. Ct. at 2608 (Kagan, J. dissenting) (“[The majority’s approach] is a prophylaxis in search of a problem. No one has presented evidence that in the many States declining to apply heightened scrutiny to permitting fees, local officials routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development’s costs.”).

172. Amici Curiae Brief of the National Governors Association, et al. in Support of Respondent at 27, *Koontz*, 133 S. Ct. 2586, 2012 WL 6755147 at *27.

173. Brief of Amici Curiae Institute for Justice and the Cato Institute in Support of Petitioner at 10–32, *Koontz*, 133 S. Ct. 2586, 2012 WL 6018738, at *10–32. Another amicus brief was submitted by a developer who was subjected to onerous exactions in Hillsborough County, Florida. See Brief Amicus Curiae of Hillcrest Property, LLP in Support of Petitioner at 19–25, *Koontz*, 133 S.Ct. 2586, 2012 WL 6042216, at *19–25.

174. *Koontz*, 133 S. Ct. at 2602.

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protected against temporary regulatory takings,¹⁷⁵ the dissent warned that “the policy implications” of the decision were “far reaching,” would “generate a great deal of litigation,” and would likely cause “[c]autious local officials and land-use planners” to fail to enact “important regulation” out of fear of litigation.¹⁷⁶ Yet land-use regulation has continued, seemingly unabated. The warnings are strikingly similar to those proffered by the dissent in *Koontz*. The Court unanimously rejected similar doomsday predictions in *Arkansas Game & Fish Comm’n v. United States*. “Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government’s ability to act in the public interest.”¹⁷⁷ But the Court dismissed those fears explaining,

While we recognize the importance of the public interests the Government advances in this case, we do not see them as categorically different from the interests at stake in myriad other Takings Clause cases. The sky did not fall [before], and today’s modest decision augurs no deluge of takings liability.¹⁷⁸

The same could be said of *Nollan* and *Dolan*. In *Nollan*, Justice Steven’s dissent warned that the “unreasonably demanding standard” the Court applied to the Nollans’ permit condition “could hamper” conservation efforts.¹⁷⁹ After *Dolan* some environmentalists feared that *Nollan* and *Dolan* would ruin conservation efforts, disrupting a wide range of environmental law.¹⁸⁰ These fears have uniformly turned out to be exaggerated in the past, and they will likely prove to be so after *Koontz* as well.¹⁸¹

175. *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 318–19 (1987).

176. *Id.* at 322, 340–41 (Stevens, J., dissenting).

177. *Arkansas Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 521 (2012) (citing *United States v. Causby*, 328 U.S. 256, 275 (1946) (Black, J., dissenting); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 455 (1982) (Blackmun, J., dissenting)).

178. *Id.*

179. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 849 (1987) (Stevens, J., dissenting).

180. *See* sources cited *supra*, note 74.

181. *See, e.g.,* Ilya Somin, *Two Steps Forward for the “Poor Relation” of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, 2013 CATO SUPREME COURT REVIEW 215, 230 (2013) (noting that criticisms of *Koontz* as hampering the permitting process could apply equally well to judicial restrictions of any kind on the government’s power to restrict the exercise of constitutional rights).

IV. CONCLUSION

Koontz is completely consistent with *Nollan* and *Dolan* and the unconstitutional conditions doctrine. No permit was actually issued in any of the cases, since every property owner objected to the government's attempted exaction. Every case recognizes that the government has a right to require landowners to internalize the social costs they would otherwise impose on their neighbors or community. At the same time, they all recognize that government should have to justify its demands for cost internalization, since the temptation to coercively take resources by the permitting process could allow the government to impose community costs onto permit applicants. Government should not be able to avoid justifying its exactions simply by requiring compliance with its demands prior to approving a permit application. Similarly, government should not be able to avoid justifying its exactions by simply assigning a dollar sign to the demand or requiring services instead of demanding the conveyance of land. As the Court explained in *Nolan*, "We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination."¹⁸² *Koontz* simply reiterates that directive.

182. *Nollan*, 483 U.S. at 839.