

Florida Law Review

Volume 67 | Issue 1

Article 4

January 2016

Bargaining for Development Post-*Koontz*: How the Supreme Court Invaded Local Government

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BARGAINING FOR DEVELOPMENT POST-*KOONTZ*: HOW THE SUPREME COURT INVADED LOCAL GOVERNMENT

*Sean F. Nolon**

Abstract

The U.S. Supreme Court's decision in *Koontz v. St. Johns River Water Management District* injected significant confusion into negotiations over land development approvals. The principal source of this confusion is the majority's unwillingness to clarify when and how a proposed condition offered in a negotiation becomes a demand that triggers heightened scrutiny under the Takings Clause of the Fifth Amendment. The Court decided that government demands made prior to a later denial must be evaluated in the same manner as conditions imposed as part of an approval. Specifically, conditions designed to mitigate harmful development impact that are demanded from an applicant prior to a denial must now satisfy the heightened-scrutiny requirements of *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* instead of the relatively deferential *Penn Central Transportation Co. v. New York City* takings test. This heightened scrutiny will likely cause land use boards to be more rigid, and therefore less creative, in the development approval processes.

While not fatal to land use negotiations, this expansion of the *Nollan-Dolan* scrutiny will have consequences. Because *Koontz* now requires government offers in negotiations to meet this more exacting standard, the practical effect of *Koontz* is that land use boards get more favorable judicial review by denying noncompliant proposals without suggesting mitigating conditions. This will lead prudent boards to favor denials over negotiation as a way to preserve their advantage if a property owner challenges their decision in court as an unconstitutional taking without just compensation.

This Article explains why *Koontz* makes land use negotiations less efficient and describes several ways land use boards can protect themselves while still taking advantage of opportunities in negotiation. Part I looks at the law of exactions in light of *Koontz*. Part II discusses the important role of negotiation in the land use approval process. Part III explores the consequences of *Koontz* on future land use negotiations and explains how courts can help maintain the efficiency of land use negotiations in the face of the challenges created by *Koontz*. Part IV suggests that land use boards have the following options when approving land use developments: avoid negotiation; facilitate negotiation without participating; negotiate without making proposals; negotiate; or attempt to insulate negotiations.

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INTRODUCTION

The United States Supreme Court's recent decision in *Koontz v. St. Johns River Water Management District*¹ will drastically change the way thousands of land use boards interact with landowners seeking to develop their land. Post-*Koontz*, any suggestions made by the government during the development review process may become subject to a heightened level of judicial scrutiny. While the rationale for this greater oversight is to protect property owners from extortionate demands of government, the practical effect of this oversight will be to impede developers' ability to improve their projects in the development review process. This Article addresses the complications the *Koontz* ruling presents for landowners and land use boards when they are negotiating over noncompliant applications.

In 1994, Coy Koontz Sr. submitted an application to Florida's St. Johns River Water Management District (the District) to develop 3.7 acres of wetlands in exchange for placing a conservation easement on his remaining eleven acres of land.² The technical staff of the District informed Koontz that his proposal did not comply with existing regulations.³ A compliant application would have protected ten acres of non-wetlands for each acre of wetlands destroyed.⁴ Before the District staff recommended to their governing board that the application be denied, they gave Koontz several options.⁵ Among those options, they suggested that Koontz resubmit a compliant application that only destroyed one acre of wetlands while preserving the remaining acreage of the parcel.⁶ They also suggested that Koontz could develop the 3.7 acres if he agreed to spend money to improve wetlands at another location in the same watershed.⁷ Koontz refused the District's suggestions and sued, alleging that the District's denial after he refused to accede to their suggestions amounted to a taking without just compensation.⁸

For over three decades, the Supreme Court has held land use boards to a heightened standard of review when they require noncompliant development proposals to dedicate a portion of their property as a

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

2. *Id.* at 2592.

3. *Id.* at 2593.

4. Brief for Respondent, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (No. 11-1447), 2012 WL 6694053, at *12; *see Koontz*, 133 S. Ct. at 2593 (noting that the District wanted Koontz to proceed with the 3.7-acre development project and to "enhance[] approximately 50 acres of District-owned wetlands").

5. Final Order, *In re Coy A. Koontz Wetland Res. Mgmt. Permit Application No. 12-095-0109A*, Case No. F.O.R. 94-1498, at 1626–29 (St. Johns River Water Mgmt. Dist. filed June 9, 1994) [hereinafter Final Order, No. F.O.R. 94-1498].

6. *Id.* at 1628–29.

7. *Id.* at 1627–28.

8. *See Koontz*, 133 S. Ct. at 2592–93.

condition of their approval.⁹ If these dedications—commonly called “exactions”—took place outside of the approval process through condemnation proceedings, they would violate the property owner’s Fifth Amendment right to be protected from government takings “without just compensation.”¹⁰ The Court justifies this heightened review on the premise that property owners need to be protected from the government’s ability to circumvent the Takings Clause by demanding property “exactions” through the development approval process.¹¹

Exactions are demands for dedications of land and payment of fees in exchange for permission to develop land more intensively than otherwise permitted.¹² The purpose of an exaction is to mitigate the potential harm caused by a development that does not comply with existing laws.¹³ Because these demands can approximate non-compensatory takings that violate the Fifth Amendment, the Court requires governments to show that a “nexus” and “rough proportionality” exist between the exaction and the threatened harm. The two cases imposing these requirements are *Nollan v. California Coastal Commission*¹⁴ and *Dolan v. City of Tigard*.¹⁵ The “nexus” requirement of *Nollan* obligates the government to show that the burden imposed on the landowner is connected to the authority of the board.¹⁶ For example, a government that issues a demand to protect wetlands in exchange for permission to destroy wetlands must be authorized to protect wetlands in the first place. The “rough proportionality” requirement of *Dolan* also places the burden on the approving board to show that the exaction is likely to reduce the threatened harm.¹⁷ Governments that fail to satisfy the burden that their exactions meet either requirement may have to compensate the landowner for the property taken.

This heightened standard is in contrast to the deferential scrutiny used by the Court when deciding non-exaction takings challenges. The default approach to non-exaction takings challenges places the burden of proof on the developer to demonstrate the relevant factors under the analytical framework established in *Penn Central Transportation Co. v. New York*

9. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005).

10. See U.S. CONST. amend. V.

11. *Lingle*, 544 U.S. at 546–47.

12. Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 478–79 (1991) (describing an exaction as a condition attempting to cure a non-compliant applications); see *infra* notes 65–69 for discussion of how the term “exaction” is also used broadly to describe conditions placed on compliant applications.

13. See Been, *supra* note 12, at 482.

14. 483 U.S. 825, 837 (1987) (coining the “nexus” requirement).

15. 512 U.S. 374, 391 (1994) (coining the “rough proportionality” requirement).

16. See *Nollan*, 483 U.S. at 837.

17. See *Dolan*, 512 U.S. at 391.

City.¹⁸ In these cases, the Court will examine “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations,” as well as “the character of the governmental action.”¹⁹ This burden is very hard for developers to overcome. As a result, courts will afford a more favorable standard of review to land use boards that deny noncompliant applications than those that grant approval subject to a condition.²⁰

An open question after the *Nollan* and *Dolan* decisions was whether *proposed* exactions were subject to the same heightened scrutiny as imposed exactions. This was one of the questions the Court addressed in *Koontz*.²¹ Clearly, conditions *imposed* through an adjudicative development approval process must comply with *Nollan* and *Dolan*, but what if a board proposes a condition, the developer refuses, and the board then denies the project? Would this *proposed* exaction be subject to heightened review under *Nollan* and *Dolan*?

According to both the majority and the dissent in *Koontz*, land use boards cannot circumvent the Takings Clause by denying the application of a developer who refused to accede to an exaction demand.²² The Justices disagreed, however, on what type of pre-approval negotiation behavior amounted to a “demand” triggering *Nollan* and *Dolan* scrutiny. The majority offered no guidance to distinguish a demand from a suggestion, offer, or proposal,²³ while the dissent explained why no demand was made in *Koontz*.²⁴ The result leaves land use boards with little direction about what form of negotiation behavior will be considered a “demand” triggering heightened scrutiny. This uncertainty is significant because exactions are so prevalent,²⁵ and negotiations play such an important role

18. See 438 U.S. 104, 124 (1978).

19. *Id.*

20. While many scholars feared that the heightened review of *Nollan* and *Dolan* would discourage the use of exactions, the impact of the rulings remains unclear. Compare Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court’s Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 142 (2001) (reporting that a “very large percentage of municipal planners view the Supreme Court takings precedents favorably”), with Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 366–68 (2002) (citing interviews with planners from Tigard, Oregon, who discuss how “the planning process has become more formal but less creative” since the *Nollan* and *Dolan* decisions).

21. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013).

22. *Id.* at 2591; *id.* at 2603 (Kagan, J., dissenting).

23. See *id.* at 2598 (majority opinion).

24. *Id.* at 2604, 2611 (Kagan, J., dissenting).

25. Mark Fenster, *Failed Exactions*, 36 VT. L. REV. 623, 623 & n.8 (2012) [hereinafter Fenster, *Failing Exactions*] (quoting JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 9.9, at 345 (2d ed. 2007) (“An ever increasing number of local governments—even those without full scale growth management programs—have adopted policies and programs designed to make new development and not

in identifying appropriate exactions.²⁶

This Article argues that *Koontz* will change the way land use boards interact with landowners who submit development proposals that do not comply with governing laws and regulations. Pre-*Koontz*, land use boards would commonly offer suggestions on how to improve noncompliant development applications.²⁷ If the developer did not want to incorporate the suggestions, she could refuse and her application would then likely be denied.²⁸ If she challenged the denial as a taking, she would have to show how the board's denial went too far under *Penn Central*.²⁹ However, post-*Koontz*, the confusion surrounding how a suggestion becomes a demand will likely cause boards to be more hesitant to offer pre-application suggestions.³⁰

Part I of this Article looks at the law of exactions in light of *Koontz*. Part II discusses the important role negotiation plays in the land use approval process. Part III explores the consequences of *Koontz* on future land use negotiations and explains how future courts can help restore the efficiency of land use negotiations. Finally, Part IV evaluates the following options available to land use boards post-*Koontz*: avoid negotiation; facilitate negotiation without participating; negotiate without making proposals; negotiate; and attempt to insulate negotiations. This Article's Conclusion addresses some of the implications of this ruling and contemplates ways that courts applying *Koontz* can clarify what behavior amounts to a demand.

I. LAND USE EXACTIONS—*NOLLAN*, *DOLAN*, AND *KOONTZ*

The Takings Clause of the Fifth Amendment of the Constitution, applied to the states through the Fourteenth Amendment,³¹ prevents the government from taking property for “public use, without just compensation.”³² This prohibition applies to direct appropriation as well as

existing residents bear the cost of new capital improvements . . . necessitated by the new development.” (alteration in original)).

26. See, e.g., Ryan, *supra* note 20, at 377.

27. See, e.g., *id.* at 338, 358–59.

28. See, e.g., *id.* at 358–59.

29. See Timothy M. Mulvaney, *Proposed Exactions*, 26 J. LAND USE & ENVTL. L. 277, 290–92 (2011) (characterizing the unconstitutional takings theory in *Koontz* as unusual, but pointing out that *Koontz* was unlikely to prevail under the *Penn Central* test, which is ordinarily applied in regulatory takings cases); see also *infra* notes 44–54 and accompanying text (discussing the application of the *Penn Central* test).

30. See *infra* Part III; see also Jeremy P. Jacobs, *Takings Decision Confounds Experts, Spurs Accusations of Judicial Activism*, GREENWIRE (June 26, 2013), <http://www.eenews.net/stories/1059983522> (quoting Coy Koontz, Jr., who stated that the decision “will give [developers] a bigger stick to take into court in the future to fight these types of cases”).

31. *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

32. U.S. CONST. amend. V.

regulations that accomplish the same effect.³³ In 2005, Justice Sandra Day O'Connor penned a unanimous decision in *Lingle v. Chevron USA, Inc.* to clarify how the Takings Clause applies to regulatory behavior.³⁴ Justice O'Connor wrote that "[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property."³⁵ She continued, stating the Court had recognized earlier that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment."³⁶

Direct appropriation is typically achieved by the government taking title³⁷ to land—such as seizing a coal mine to prevent a national strike of coal miners³⁸—or behavior that results in a complete or partial physical occupation of land—such as building a dam that causes water to flood upstream properties.³⁹ As for regulatory takings, Justice O'Connor in *Lingle* describes four categories of regulatory takings. She began by writing that "two categories of regulatory action [will generally] be deemed *per se* takings."⁴⁰ The first of these two categories occurs "where government requires an owner to suffer a permanent physical invasion of her property—however minor."⁴¹ The second *per se* regulatory taking category "applies to regulations that completely deprive an owner of 'all economically beneficial us[e]' of her property."⁴² A third category "involve[s] Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit."⁴³

33. *Lingle v. Chevron, U.S.A. Inc.*, 544 U.S. 528, 537–38 (2005).

34. *Id.*

35. *Id.* at 537.

36. *Id.* (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

37. Or some form of title such as a conservation easement. *See infra* note 43 and accompanying text.

38. *See, e.g.*, *United States v. Pewee Coal Co.*, 341 U.S. 114, 115–17 (1951) (finding that an unconstitutional taking occurred when the government seized a coal mine to prevent a national coal miner strike without providing just compensation).

39. *See, e.g.*, *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 182 (1871).

40. *Lingle*, 544 U.S. at 538.

41. *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

42. *Id.* (alteration in original) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

43. *Id.* at 546 (citing *Dolan v. City of Tigard*, 512 U.S. 374, 379–80 (1994) and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828 (1987)); *see also* Been, *supra* note 12, at 478–79 ("Exactions require that developers provide, or pay for, some public facility or other amenity as a condition for receiving permission for a land use that the local government could otherwise prohibit."). Note that Professor Vicki Been's definition of exaction specifies that the developer's proposal is noncompliant.

Regulatory takings challenges that fall outside of these three categories are constrained by the guidelines established in a preceding case⁴⁴—*Penn Central Transportation Co. v. New York City*.⁴⁵ Under *Penn Central*, the fourth category, courts look to “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.”⁴⁶ The courts also look to whether “the character of the government action” more closely resembles a physical occupation or diminution of a property interest than a “public program adjusting the benefits and burdens of economic life to promote the common good.”⁴⁷ While the *Penn Central* factors have “given rise to vexing subsidiary questions—[they] have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules.”⁴⁸ While not setting out a bright-line rule,⁴⁹ the Court held that the *Penn Central* factors have “particular significance” for evaluating regulatory takings claims.⁵⁰ Using the framework of *Lingle*, determining the category of a regulatory taking is relatively simple. Regulations that impose a physical occupation fall in the first category. Regulations that remove all economically viable use fall into the second category. Government demands that development be conditioned on the dedication of property fall into a third category of exactions. And everything else falls into the final fourth *Penn Central* category of takings.

A. Heightened Scrutiny for Exactions

Under all but the exaction cases, the burden is on the property owner to prove the facts of her case.⁵¹ Once she shows that the regulation results in forced occupation,⁵² or no economically viable use remains,⁵³ compensation is required under the Takings Clause. Similarly, under *Penn*

44. See *Lingle*, 544 U.S. at 538.

45. 438 U.S. 104 (1978).

46. *Id.* at 124.

47. *Id.*

48. *Lingle*, 544 U.S. at 539; see *supra* note 42 and accompanying text for the requirements of *Lucas*.

49. See Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 ALA. C.R. & C.L. L. REV. 25, 27 (2013) (“In the 30 plus years since *Penn Central*, the Court has struggled to create a sense of coherence in its interpretation of the Takings Clause in general and the *Penn Central* test in particular.”); James E. Holloway & Donald C. Guy, *Weighing the Need to Establish Regulatory Takings Doctrine to Justify Takings Standards of Review and Principles*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 315, 351 (2010) (referencing the “confusion surrounding the three-prong analytical inquiry of *Penn Central*”).

50. *Penn Cent.*, 438 U.S. at 124.

51. See *Lingle*, 544 U.S. at 543 (“[T]he Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.”).

52. *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

53. *E.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992).

Central, the landowner must prove that the government regulation does not meet the standards.⁵⁴ These review standards set a high bar for landowners to overcome when asking a court to decide whether a regulation violated the Takings Clause of the Fifth Amendment. However, when a land use board demands an unconstitutional condition in the course of an adjudicative development decision the Court applies a different test.⁵⁵

Exaction cases arise in the context of a development application. When a property owner submits an application to develop her land, the governing land use board must follow an adjudicative process to determine her right to develop. If the development application does not comply with the governing land use laws and regulations, the board can suggest conditions that would bring the application into compliance. If a condition appropriates the applicant's property rights, the Court will apply a stricter test to determine whether the conditions amount to a compensable taking.⁵⁶ The Court's logic is that the Fifth Amendment's prohibition against uncompensated takings cannot be circumvented by a condition that expropriates land or money as part of a development application unless the nexus and rough proportionality tests from *Nollan* and *Dolan* are met.⁵⁷

The Court said that exaction cases:

involve a special application of the “doctrine of ‘unconstitutional conditions,’” which provides that “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 has little or no relationship to the property.”⁵⁸

Nollan and *Dolan* address the special context presented by exactions and hold that the unconstitutional-conditions doctrine prevents a land use board from doing indirectly what it cannot do directly.⁵⁹ When evaluating

54. See, e.g., *Penn Cent.*, 438 U.S. at 128–29.

55. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 n.8 (1994) (clarifying that the burden of proof is placed on the government).

56. See *id.* at 391.

57. See *id.* at 385–86, 398.

58. *Lingle v. Chevron, U.S.A. Inc.*, 544 U.S. 528, 547 (2005) (quoting *Dolan*, 512 U.S. at 385).

59. See *Dolan*, 512 U.S. at 385 (“Under the . . . 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 has little or no relationship to the property.”); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (“In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’”); see also *Lingle*, 544 U.S. at 546 (“[H]ad the government simply appropriated the easement in question, this would have been a *per*

exactions, the Court requires the government to show that any proposed⁶⁰ or imposed exaction (e.g., a condition) bears an “essential nexus”⁶¹ to the threatened harm and that the condition is “roughly proportionate” to the extent of the harm.⁶² *Nollan* and *Dolan* place the burden on government. When a landowner challenges a proposed or imposed condition, the government must prove that the nexus and rough proportionality requirements are satisfied.⁶³

In practice, the impact of this heightened exaction burden means that the government has a more favorable standard of review when denying noncompliant development applications than it does when offering or requiring conditions that bring the project into compliance.⁶⁴ By placing a higher burden on land use boards that try to improve noncompliant applications, the Court is inadvertently discouraging negotiation of development projects. In order to lay a better foundation for understanding the impact of the Court’s rulings on government behavior in the following Parts, the remainder of this Part examines the nature of exactions and the Court’s treatment of them in *Nollan*, *Dolan*, and *Koontz*.

The types of conditions discussed in this Article are commonly referred to as exactions.⁶⁵ While this term is an imperfect label, its use is firmly established. “Exaction” implies that extortionate intent motivates the government’s desire to negotiate.⁶⁶ The term has negative associations, but

se physical taking.”). *But see* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1456–64 (1989) (explaining how the nexus requirement is used to address the Court’s inconsistent rulings on the unconstitutional-conditions doctrine and noting that cases such as *Stephenson v. Binford*, 287 U.S. 251 (1932), hold that government can rightly condition any benefit it could deny, while *Frost v. Railroad Commission of California*, 271 U.S. 583 (1926), holds that government cannot do indirectly what it cannot do directly).

60. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013).

61. *See Nollan*, 483 U.S. at 837.

62. *Dolan*, 512 U.S. at 391 (holding that “the city must make some sort of individualized determination” of the relationship between the condition and the threatened impacts).

63. *Id.*; *Nollan*, 483 U.S. at 837.

64. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999) (concluding that *Nollan–Dolan* does not apply when the property owner challenges the denial of development).

65. *See* Been, *supra* note 12, at 478–83 (providing additional analysis of various forms of exactions); Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 181 (2006) (discussing the practice of requiring exactions as a land development condition imposed by local governments); Stewart E. Sterk, *Nollan, Henry George, and Exactions*, 88 COLUM. L. REV. 1731, 1732 (1988) (defining an exaction as a single tax on land value). *See generally* ALAN A. ALTSHULER & JOSE A. GOMEZ-IBANEZ, *REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS* (1993) (evaluating the widespread use of exactions and the political, legal, equitable, and practical implications resulting from their use).

66. *See* Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 14 & n. 61 (2000) (citing BLACK’S LAW DICTIONARY 557 (6th ed. 1990) (defining “exaction” as “[t]he wrongful act of an officer or other person in compelling payment of a fee or

it is also not adequately specific. Municipalities use exaction as a catchall, referring to a wide range of government behaviors.⁶⁷ At least one author has described exactions as “requirements that local governments impose as conditions to their grants of permission for a building or subdivision.”⁶⁸ Specifically, the types of conditions that landowners see as exactions include “mandatory dedications of land, fees required in lieu of dedication, and impact fees.”⁶⁹

1. Physical Exactions

Exactions may be physical in nature. Physical exactions can take the form of resource conservation easements, public access easements, or actual title transfers, among others. These forms of exactions are discussed in turn in the following Subsections.

a. Resource Conservation

Land use boards can mitigate the impact that a development has on a community resource by requiring the dedication of a conservation easement on a portion of the property. The conservation easement will restrict the future use of the property to protect designated resources. For example, communities have used conservation easements extensively to preserve prime agricultural soils, scenic views, wildlife habitats, wetlands, and other valuable community resources.⁷⁰ In *Koontz*, the landowner offered to place a conservation easement on 11 of the 14.9 acres of his parcel to protect the remaining wetlands and wildlife.⁷¹

b. Public Access

Communities also use exactions to grant public access. Some boards may require an easement permitting the public some right to enter the applicant’s property. This right to access can be limited or unlimited. The

reward for his services, under color of his official authority, where no payment is due” and directing readers to also see the definition of “extortion”) (explaining and arguing that “extortion” is a synonym for “exaction”).

67. See Been, *supra* note 12, at 478–83 (describing the history of exactions as an effort by municipalities to have developers fund the infrastructure improvements required for their developments).

68. *Id.* at 473 n.2. Of course, in light of *Koontz*, this definition should now read: “requirements that local governments propose and impose”

69. Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 613 (2004) [hereinafter Fenster, *Formalism and Regulatory Formulas*].

70. John R. Nolon, *Managing Climate Change Through Biological Sequestration: Open Space Law Redux*, 31 STAN. ENVTL. L.J. 195, 242–43 (2012) [hereinafter Nolon, *Managing Climate Change*]; see also Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L.J. 121, 136 (2011).

71. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591–93 (2013).

California Coastal Commission imposed a limited right of access in *Nollan* when it required a lateral access easement allowing the public to traverse along the shoreline.⁷² This easement specifically prohibited public loitering, sunbathing, or similar activity.⁷³ Under different circumstances, the government may request an easement granting the public more extensive rights of access.⁷⁴

c. Fee Simple Transfer

A board may also request that a landowner transfer complete ownership of a portion of the property to the municipality or some other entity. These requests may be for parks or other public purposes like roads, sidewalks, or other infrastructure requirements. In these instances, the landowner does not retain any ownership rights as if the board had only imposed a conservation easement on the property.

2. Monetary Exactions

Exactions may also be monetary in nature. Monetary exactions can take the form of payments in lieu of physical dedication, impact fees, and off-site mitigation measures, among others. These forms of exactions are discussed in turn in the following Subsections.

a. Payments in Lieu of a Physical Dedication

Many boards require landowners to make payments in lieu of dedicating a property interest⁷⁵ for a variety of reasons. Communities can use in-lieu payments to help protect resources that might not be located on the development site. For example, a town can create an acquisition fund to help the community protect a critical mass of land instead of disparate parcels. Developers can either dedicate land that has those designated resources or they can make a payment in lieu of a dedication into a municipal fund. Municipalities can use these acquisition funds to protect a wildlife corridor, an area of prime agricultural soils, or a scenic viewshed. Payments in lieu of dedications can also be voluntary, giving the

72. Brief for Appellee, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (No. 86-133), 1987 WL 864769, at *4–5.

73. *Id.* at *8 n.3 (“No additional use is allowed, including loitering, sunbathing and the like.”).

74. *E.g.*, *Kaiser Dev. Co. v. City & Cnty. of Honolulu*, 649 F. Supp. 926, 930 (D. Haw. 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990), and *aff'd*, 913 F.2d 573 (9th Cir. 1990) (discussing an instance where the city requested dedication of the oceanfront as a public park).

75. Rosenberg, *supra* note 65, at 202–03 (“The ‘in-lieu of’ fee idea begins the practice of charging new development, in financial terms, for its contribution for *off-site* community facilities when the need for the new facility is related to the population occupying the new residential subdivision. . . . Today, these fees are commonly used to fund the acquisition and construction of off-site schools and park facilities and in some jurisdictions, street improvements, flood control, public resource access, and other public facilities.” (footnotes omitted)).

landowner the option to dedicate land or money.⁷⁶

b. Impact Fees⁷⁷

Impact fees are generally defined as charges on new development designed to pay for off-site infrastructure expenses that a community will incur as a result of the development.⁷⁸ Impact fees “could be imposed to provide for water treatment and supply, sewage collection and treatment, solid and/or hazardous waste treatment and storage, roads, bridges, mass transit, flood control, pollution control, schools, libraries, parks, open space and recreational facilities, sidewalks, affordable housing, and artwork.”⁷⁹ It is not yet clear what types of impact fees trigger *Nollan* and *Dolan* scrutiny under *Koontz*.⁸⁰ *Lingle* specified that heightened scrutiny only applies to adjudicative decisions and not legislative decisions.⁸¹ But *Koontz* imposes heightened scrutiny on monetary demands.⁸² This presents a problem for impact fees that governments adopt through legislative processes but administer through adjudicative processes.

How will future courts treat these types of impact fees? Will courts grant the imposition of impact fees deference as legislative decisions or subject them to heightened scrutiny because some element of the fee was administered through an adjudicative decision? One can argue that only ad hoc monetary exactions like those the Supreme Court addressed in *Koontz* should be subject to heightened review. Still, some scholars have raised concerns that mandatory affordable housing requirements and school impact fees will not satisfy the rough proportionality requirement because municipalities do not administer most programs through an “individualized determination.”⁸³

76. However, some courts have held that payments in lieu of dedications must be based on findings “that a proper case exist[ed] for requiring that’ parkland be set aside or that a fee be imposed in lieu thereof.” *E.g.*, *Legacy at Fairways, LLC v. McAdoo*, 906 N.Y.S.2d 668, 670 (App. Div. 2010) (alteration in original).

77. Vicki Been, U.S. Dep’t of Housing and Urban Dev., *Impact Fees and Housing Affordability*, 8 CITYSCAPE 139, 141 (2005), <http://www.huduser.org/periodicals/cityscape/vol8num1/ch4.pdf> (noting the existing confusion between the use of the terms “exactions” and “impact fees,” and conceptualizing impact fees as a form of exaction for the purposes of her Article).

78. JAMES C. NICHOLAS ET AL., *A PRACTITIONER’S GUIDE TO DEVELOPMENT IMPACT FEES* 1 (1991).

79. Rosenberg, *supra* note 65, at 205 n.100 (citing JAMES A. KUSHNER, *SUBDIVISION LAW AND GROWTH MANAGEMENT* § 6:31, at 1 (2d ed. 2005)).

80. *See id.* at 262 (arguing that while some states have imposed higher standards on all impact fees, the Court’s rulings have not produced a clear rule).

81. *Lingle v. Chevron, U.S.A. Inc.*, 544 U.S. 528, 547 (2005).

82. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (holding that monetary exactions are subject to *Nollan* and *Dolan*).

83. *E.g.*, Patricia Salkin, *U.S. Supreme Court Hands Down Koontz Case*, LAW LAND (July 1, 2013), <http://lawoftheland.wordpress.com/2013/07/01/u-s-supreme-court-hands-down-koontz-case>

c. Mitigation Measures

Beyond dedications of property and imposition of fees, boards may require applicants to engage in a broad array of activities that mitigate impacts of the development. When boards are concerned about the harmful effects of run-off from construction sites, they can require the developer to build siltation fences or other features that limit erosion.⁸⁴ When boards are concerned about the effect of expensive residences on the affordability of housing in the community, they can require developers to build additional units of affordable housing.⁸⁵ When boards are concerned about the impact of roads on endangered turtles, they can require developers to install slanted curbs that allow the animals to more easily cross roads that will fragment critical habitat.⁸⁶ These mitigation measures require the developer to spend money associated with their ownership of property, suggesting that heightened scrutiny would apply under *Koontz*.

Land use boards may require both on-site and off-site mitigation. If a development will impact traffic patterns, a board may require the developer to fund off-site traffic improvements. In *Koontz*, some of the District's suggested mitigation measures included off-site improvements.⁸⁷ Off-site mitigation measures obviously present a greater challenge when complying with the rough proportionality requirement. Boards must make an

("Are legislated exactions, such as wetland banking, solid waste impact fees, or mandatory affordable housing requirements, that apply through some formula, subject to *Koontz*, or is the case limited to individual permit conditions aimed at a specific project's impact such as those involved in *Nollan* and *Dolan*? If legislated and formulaic exaction systems are subject to *Koontz*, will the 'individualized determination' requirement of *Dolan*, not mentioned by either the majority or dissent, be implicated? If so, how greatly will this affect area- or community-wide impact fees and other exactions?"). Compare David L. Callies et al., *Land Development Conditions After Koontz v. St. Johns River Water Management District: Sic Semper Nexus and Proportionality*, A.B.A. *15–16 (Aug. 9, 2013), http://www.americanbar.org/content/dam/aba/events/state_local_government/2013/08/Planning_materials.pdf (arguing that many "in lieu of payments" and affordable housing set aside requirements will fail *Nollan–Dolan* scrutiny), with Kevin D. Siegel, *Inclusionary Housing Ordinance Developments*, PUB. L. UPDATE (July 2013), <http://www.bwslaw.com/tasks/sites/bwslaw/assets/Image/July%202013%20Public%20Law%20Update1.pdf> (arguing why *Nollan–Dolan* should not be applied to recent California affordable housing cases decided by the Sixth Circuit).

84. See, e.g., *Silt Fence Installation*, CLINTON CNTY., MICH., <http://www.clinton-county.org/Departments/PlanningZoning/SoilErosionSedimentationControl/SiltFenceInstallation.aspx> (last visited Nov. 27, 2014) (describing when siltation fences are required and when they should be used for protection against unnecessary siltation).

85. See David L. Callies, *Mandatory Set-Asides as Land Development Conditions*, 42–43 URB. LAW. 307, 328 (2011).

86. See NICHOLAS A. MILLER & MICHAEL W. KLEMENS, EASTERN WESTCHESTER BIOTIC CORRIDOR 21 (MCA Technical Paper No. 4, 2002), available at http://www.lewisborogov.com/sites/default/files/fileattachments/conservation_advisory_council/page/4727/bioticcorridor.pdf.

87. See Brief for Respondent, *supra* note 4, at *14–15; see, e.g., *supra* note 7 and accompanying text.

“individualized determination” to show that any off-site mitigation proposals will address the threatened harm and do so in a way that will satisfy a judge.⁸⁸

B. *Imposed Exactions Under Nollan and Dolan*

James and Marilyn Nollan leased a beachfront lot in Ventura County, California with a 504-square-foot house.⁸⁹ They entered into a contract to buy the property conditioned on getting approval to demolish the house and replace it with a much larger one.⁹⁰ Obtaining this approval required a permit from the California Coastal Commission—a state board authorized to protect the public’s access to the ocean.⁹¹ The Commission found that the new structure would diminish the public’s visual access to the ocean and impair the public’s willingness to access the beach.⁹² The Commission eventually approved the application on the condition that the Nollans dedicate a public easement along the shoreline to allow greater access to the beach.⁹³ This approval was consistent with fourteen other teardowns in the same area.⁹⁴ The Nollans then sued alleging that the imposed easement was a violation of their Fifth Amendment rights.⁹⁵

Justice Antonin Scalia, writing for a 5–4 majority, held that the imposed easement violated the Takings Clause because the condition did not bear an “essential nexus” to the impacts caused by the development and the Commission’s authority.⁹⁶ Justice Scalia acknowledged the Commission’s rationale that the expansion of the house would reduce the public’s *visual* access to the beach and, consistent with the Commission’s report, that such an impediment would discourage the public from accessing the beach.⁹⁷ Justice Scalia found, however, that the Commission’s remedy—a lateral beachfront easement—was not connected to the interest of preserving visual access.⁹⁸ He indicated that an easement for a public viewing spot would have been a constitutional condition because, in his opinion, it was connected to the harm—reduced visual access which would lead to reduced physical access—that the Commission

88. *See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

89. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 827 (1987).

90. *Id.* at 828.

91. Brief for Appellee, *supra* note 72, at *2–3.

92. *Id.* at *7–8.

93. *Id.* at *8.

94. *See id.*

95. *Nollan*, 483 U.S. at 829.

96. *Id.* at 837–39.

97. *Id.* at 838.

98. *Id.* (“It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans’ property reduces any obstacles to viewing the beach created by the new house.”).

was trying to prevent.⁹⁹ The decision in *Nollan* requires the government to show that any condition imposed on a development approval (to avoid harm from the development) is connected to a governmental purpose.¹⁰⁰ Without this “nexus,” such a condition becomes the “obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.”¹⁰¹

Seven years later, the Court added a second—and more demanding¹⁰²—criterion for evaluating exactions in *Dolan*.¹⁰³ Florence and John Dolan asked the City of Tigard to approve their application to demolish their hardware store, replace it with another nearly twice the size, and install a paved parking lot for thirty-nine cars.¹⁰⁴ The Dolan’s application did not comply with the city’s land use regulations and plans.¹⁰⁵ The proposed additions were consistent with the city’s existing zoning but not with the city’s development regulations.¹⁰⁶ These regulations contained provisions to protect against harms from storm drainage,¹⁰⁷ reduce traffic congestion¹⁰⁸ and protect open space.¹⁰⁹ Specifically, the city’s Community Development Code required developments on property adjacent to the Fanno Creek and within its floodplain to dedicate land for a bicycle or pedestrian pathway and flood control protection.¹¹⁰ The city zoning ordinance also required developments of this type to dedicate at least 15% of the property to open space.¹¹¹ The City Planning Commission approved the application on the condition that the Dolans dedicate a fifteen-foot strip of land for flood control and the pathway.¹¹² The land dedicated for the bike path and flood control measures would require approximately 10% of the lot and the Dolans could count it toward the 15% open-space requirement.¹¹³

Florence Dolan sued “on the ground that the city’s dedication requirements were not related to the proposed development, and, therefore,

99. *Id.* at 836.

100. *See id.* at 837 (“[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use . . .”).

101. *Id.*

102. Compare *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (requiring an “individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development”), with *Nollan*, 483 U.S. at 837 (requiring the government to show a connection between the imposed condition and the original purpose of the restriction).

103. *Dolan*, 512 U.S. at 391.

104. Brief for Respondent, *Dolan*, 512 U.S. 374 (No. 93-518), 1994 WL 123754, at *1–2.

105. *Id.* at *4; *see also Dolan*, 512 U.S. at 380.

106. *See* Brief for Respondent, *supra* note 104, at *2, *4.

107. *Id.* at *8–10.

108. *Id.* at *10–12.

109. *Dolan*, 512 U.S. at 380.

110. *Id.* at 379–80.

111. *Id.* at 380.

112. *Id.* at 379–80.

113. *Id.* at 380.

those requirements constituted an uncompensated taking of her property under the Fifth Amendment.”¹¹⁴ Eventually, the case made it to the Supreme Court where Chief Justice William Rehnquist, writing for another 5–4 majority, decided the case “to resolve a question left open by [the] decision in *Nollan* . . . of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.”¹¹⁵ Because the *Nollan* Court found no connection between the imposed condition and a legitimate state interest, it did not address how *related* the condition must be to the state’s interest. Therefore, the Court used the facts presented in *Dolan* to formulate the requirement for “rough proportionality” between the condition and the threatened harm.¹¹⁶

Similar to the nexus requirement in *Nollan*, the government has the burden of proving rough proportionality.¹¹⁷ When determining the proportionate relationship, the Court stated that “[n]o precise mathematical calculation is required, but the [land use board] 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.”¹¹⁸ Applying this test to the facts of the case, Chief Justice Rehnquist ruled that the city failed to show the requisite rough proportionality because the traffic impacts were too speculative.¹¹⁹

Eleven years after *Dolan*, the Court’s unanimous decision in *Lingle* reaffirmed the *Nollan–Dolan* analytical framework. Justice O’Connor reiterated:

[Exaction cases] involve a special application of the “doctrine of ‘unconstitutional conditions,’” which provides that “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 has little or no relationship to the property.”¹²⁰

Through *Nollan*, *Dolan*, and *Lingle*, the Court made it clear that demands for property *imposed* through adjudicative approvals trigger

114. *Id.* at 382.

115. *Id.* at 375, 377.

116. *Id.* at 391.

117. *See id.*

118. *Id.*

119. *Id.* at 395 (“[T]he findings of fact that the bicycle pathway system ‘could offset some of the traffic demand’ is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset some of the traffic demand.” (citation omitted)).

120. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005) (quoting *Dolan*, 512 U.S. at 385).

heightened scrutiny; however, the Court had not addressed whether conditions *proposed* in the approval process prior to a denial also triggered the same review.¹²¹ Stated differently, are the government's actions subject to the "nexus" and "rough proportionality" requirements if it denies an application because the developer refuses to convey a property interest?¹²² In 2013, the Court answered this question in the affirmative.

C. Proposed Exactions Under Koontz

In 1972, Florida passed the Wetlands Restoration Act (WRA) to regulate "construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state."¹²³ That same year Coy Koontz Sr. purchased a 14.9-acre parcel of land east of Orlando for roughly \$95,000.¹²⁴ Much of this parcel consisted of wetlands that would fall under the jurisdiction of the WRA.¹²⁵ The parcel is located on the south side of Florida State Road 50 less than 1000 feet from its intersection with Florida State Road 408.¹²⁶ A power line easement bisects this rectangular parcel of land into northern and southern portions.¹²⁷ Later, Florida passed another wetlands law making it illegal to "dredge or fill in, on, or over surface waters" without a permit.¹²⁸ In 1987, Florida paid Koontz \$402,000 in compensation when they took 0.7 acres of the parcel through eminent domain to improve State Road 50.¹²⁹

In 1994, Koontz decided he wanted to develop the parcel and sought approval to build a shopping mall on 3.7 acres.¹³⁰ He submitted an application to the District to fill 3.7 acres of wetlands on the northern

121. See Mulvaney, *supra* note 29, at 293–99. The following cases have addressed the circumstance of proposed conditions prior to *Koontz*: *Goss v. City of Little Rock*, 151 F.3d 861 (8th Cir. 1998), *William J. Jones Insurance Trust v. City of Fort Smith*, 731 F. Supp. 912 (W.D. Ark. 1990), *Lambert v. City and County of San Francisco*, 67 Cal. Rptr. 2d 562 (Ct. App. 1997), and *St. Johns River Water Management District v. Koontz*, 5 So. 3d 8 (Fla. Dist. Ct. App. 2009). See Mulvaney, *supra* note 29, at 293–99.

122. See Mulvaney, *supra* note 29, at 292–93.

123. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591–92 (2013 (quoting Water Resources Act, ch. 72–299, 1972 Fla. Laws 1115, 1116 (codified as amended at FLA. STAT. § 373.403(5) (2014))) (internal quotation marks omitted).

124. *Id.* at 2591–92. John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, 13 (Vt. Law Sch., Working Paper No. 28-13, 2014), available at <http://ssrn.com/abstract=2316406>. (citing Proposed Final Judgment for Defendant at 45, *Koontz*, 133 S. Ct. 2586 (CI-94-5673)).

125. See *Koontz*, 133 S. Ct. at 2592.

126. *Id.* at 2591–92.

127. *Id.* at 2592.

128. Warren S. Henderson Wetlands Protection Act of 1984, ch. 84–79, 1984 Fla. Laws 202, 205 (repealed 1993).

129. Echeverria, *supra* note 124, at 13 (citing *Orlando/Orange Cnty. Expressway Auth. v. Koontz*, No. CI87-9182 (Fla. Cir. Ct. Mar. 24, 1989) (on file with author) (stipulating the final judgment)).

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

portion of his property.¹³¹ The development proposal included provisions to fill wetlands, level the parcel, and install a pond to collect storm water runoff from the developed land.¹³² In an attempt to comply with Florida's wetlands laws, Koontz volunteered to place a conservation easement over the remaining approximately eleven acres of the property.¹³³ This proposal did not, however, comply with the governing regulations for wetland development. District policy required developers to restrict at least ten acres of upland for every one acre of wetland destroyed.¹³⁴ But, instead of denying the permit for not complying with relevant guidelines, District staff presented Koontz with several alternatives to mitigate the adverse impacts of his proposal.¹³⁵ One suggestion involved reducing the proposed development to one acre.¹³⁶ Another suggestion would allow Koontz to fill the 3.7 acres provided he improved wetlands at another location within the watershed.¹³⁷ District staff presented several parcels where Koontz could provide off-site improvement such as fixing culverts.¹³⁸ The estimated cost of these improvements was \$10,000 but this was never confirmed.¹³⁹ Consistent with past practices, District staff informed Koontz that "it 'would also favorably consider' alternatives to its suggested offsite mitigation projects if [applicant] proposed something 'equivalent.'"¹⁴⁰ Koontz rejected all of these suggestions and refused to alter his application.¹⁴¹ District staff then offered additional time to keep negotiating so as to avoid denying the application.¹⁴² Koontz, through his lawyer, refused.¹⁴³ On June 9, 1994, six months after receiving the application, the District denied the application because it did not comply with the existing regulations.¹⁴⁴

Koontz filed suit in Florida Circuit Court on the grounds that the District's denial constituted a taking of his property.¹⁴⁵ After several years

131. *See id.*

132. *Id.*

133. *See id.* at 2592–93.

134. *See* Brief for Respondent, *supra* note 4, at *12.

135. *Id.* at *13.

136. *Koontz*, 133 S. Ct. at 2593.

137. Brief for Respondent, *supra* note 4, at *14.

138. *Id.*; Final Order, No. F.O.R. 94-1498, *supra* note 5, at 1623, 1627.

139. *Compare* Brief for Respondent, *supra* note 4, at *15 (stating the amount to be approximately \$10,000), *with* ST. JOHNS RIVER WATER MGMT. DIST., TRANSCRIPT OF REGULATORY MEETING 1662–63 (May 10, 1994) (indicating that costs were unknown).

140. *Koontz*, 133 S. Ct. at 2593 (quoting Appendix at 75).

141. Brief for Respondent, *supra* note 4, at *15.

142. *Id.*

143. *Id.*; *Koontz*, 133 S. Ct. at 2611 (Kagan, J., dissenting).

144. Brief for Respondent, *supra* note 4, at *16; Final Order, *In re* Coy A. Koontz Mgmt. & Storage of Surface Water Permit Application No. 4-095-0474A, Case No. F.O.R. 94-1499, at 1621 (St. Johns River Water Mgmt. Dist. filed June 9, 1994); Final Order, No. F.O.R. 94-1498, *supra* note 5, at 1631.

145. *Koontz*, 133 S. Ct. at 2593.

litigating the issue of ripeness, the U.S. Supreme Court granted certiorari.¹⁴⁶ Justice Samuel Alito Jr., writing for a five-Justice majority, held “that the government’s demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.”¹⁴⁷ Both the dissent and majority in *Koontz* agreed that a proposed demand prior to a denial could not be used to circumvent the Takings Clause.¹⁴⁸ Justice Elena Kagan, writing for the dissent stated: “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).”¹⁴⁹

However, the majority and dissent disagreed on whether the District’s actions in this case amounted to a demand triggering *Nollan* and *Dolan*. The majority chose not to disturb the determination of the Florida District Court of Appeal—relied upon by the Florida Supreme Court—that the government made a demand.¹⁵⁰ But the decision left open the possibility that the issue could be revisited on remand.¹⁵¹ That the Court did not scrutinize the nature of the demand more thoroughly is troubling and Part III will discuss this issue in more depth.

The dissent argued that the question was properly before the court¹⁵² and used the record to explain why the District never made a demand of *Koontz*.¹⁵³ Justice Kagan expressed concern regarding the majority’s unwillingness to clarify what constitutes a “demand” and feared that it

146. *See id.* at 2594.

147. *Id.* at 2603.

148. *Compare id.* at 2591, *with id.* at 2603 (Kagan, J., dissenting). While the Justices agreed that both imposed and proposed demands trigger heightened scrutiny, the result muddies the water of takings law. The majority stated that proposed demands are not takings, rather they are “unconstitutional conditions.” *Id.* at 2597 (majority opinion). However, this conflicts with *Lingle*’s finding that exactions, like those involved in *Nollan* and *Dolan*, “involved Fifth Amendment takings challenges to adjudicative land-use exactions.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005). Neither the majority nor the dissent offered advice on how to clear up this confusion.

149. *Koontz*, 133 S. Ct. at 2603 (Kagan, J., dissenting).

150. *Id.* at 2598 (majority opinion) (citing *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1224 (Fla. 2011)).

151. *Id.* (“The Florida Supreme Court did not reach the question whether respondent issued a demand of sufficient concreteness to trigger the special protections of *Nollan* and *Dolan*. . . . Whether that characterization is correct is beyond the scope of the questions the Court agreed to take up for review. If preserved, the issue remains open on remand for the Florida Supreme Court to address.”).

152. *See id.* at 2604 (Kagan, J., dissenting).

153. *Id.* at 2610–11.

would lead to confusion.¹⁵⁴ Specifically, she stated:

Nollan and *Dolan* can operate only when the government makes a demand of the permit applicant; the decisions' prerequisite, in other words, is a condition. Here, the District never made such a demand: It informed Koontz that his applications did not meet legal requirements; it offered suggestions for bringing those applications into compliance; and it solicited further proposals from Koontz to achieve the same end. That is not the stuff of which an unconstitutional condition is made.¹⁵⁵

This Article agrees with Justice Kagan's concern and expresses the hope that future courts move quickly to clarify when a pre-decision proposal becomes a demand triggering *Nollan–Dolan* scrutiny. Until that time, land use boards must live with the current state of the law and exercise appropriate caution. The remainder of this Article explores the ruling's impact on development application negotiations and provides a framework for land use boards negotiating in a post-*Koontz* world.

D. Exactions Post-Koontz

The holding of *Koontz* expands the definition of an exaction. Now physical, monetary, imposed, and proposed conditions must meet the nexus and rough proportionality requirements.¹⁵⁶ Exactly what this means for land use boards is unclear.¹⁵⁷ These boards are likely to be confused about what types of suggestions and what types of monetary conditions are subject to *Nollan* and *Dolan*.¹⁵⁸ For example, what form of impact fee qualifies for *Nollan–Dolan* scrutiny?¹⁵⁹ What types of pre-decision suggestions will be seen as “proposed” demands under *Koontz*?¹⁶⁰

154. *See id.* at 2612.

155. *Id.*

156. *See id.* at 2603 (majority opinion).

157. Echeverria, *supra* note 124, at 40–41; *see* Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep 2* (Univ. of Chi. Law Sch. Coase–Sandor Inst. for Law & Econ., Working Paper No. 665, 2d series 2013), available at <http://ssrn.com/abstract=2345028>.

158. *See* Echeverria, *supra* note 124, at 40–41, 46; *cf.* Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L.J. 525, 528–29 (2009) (discussing the ambiguity that has arisen from the “fuzzy factors” used in past Supreme Court decisions dealing with regulatory takings claims); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 99–100 (2002) (discussing the vagueness of past Supreme Court takings jurisprudence).

159. Echeverria, *supra* note 124, at 49 (describing the confusion over how the various forms of monetary payments in land use processes can be distinguished from taxes).

160. *See, e.g., Koontz*, 133 S. Ct. at 2596 (using “condition subsequent” for an imposed exaction and “condition precedent” for proposed exactions, and stating that the Supreme Court’s “unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent”).

II. NEGOTIATING DEVELOPMENT APPROVALS

That negotiations play a central role in land use decision-making is well established.¹⁶¹ Many zoning techniques encourage a discussion of possibilities among municipalities and applicants.¹⁶² For a majority of Americans, the land use decision-making process offers the most direct access to government decision-making that they have.¹⁶³ Professor Mark Fenster noted that “negotiated land use decisions are an essential aspect of contemporary local American governance, an excellent opportunity for individual stakeholders to seek political and social involvement in an accessible set of institutions, and an integral aspect of the creation of a functional local public economy.”¹⁶⁴ There are over 35,000 government entities that have some form of land use control.¹⁶⁵ Because the barriers to participation are very low, many citizens can be directly involved in these local decision-making processes.

Municipalities can use a range of deliberative processes—including negotiation—to involve citizens in the legislative decision-making context while making legislative decisions, when adopting a comprehensive plan, zoning regulations, as well as during adjudicative decisions like development approvals.¹⁶⁶ Citizens can participate in development

161. Craig Anthony (Tony) Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENVTL. L. 441, 457, 460–473 (2007); Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions: Installment One*, 24 STAN. ENVTL. L.J. 3, 4 & n.3 (2005) [hereinafter Camacho, *Mustering the Missing Voices: Installment One*] (citing Ryan, *supra* note 20, at 347–48 (“[M]ost agree that today, the raw material of most land use planning is the process of negotiation.”)); Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions: Installment Two*, 24 STAN. ENVTL. L.J. 269, 318–20 (2005) [hereinafter Camacho, *Mustering the Missing Voices: Installment Two*]; Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1168–70 (1985) [hereinafter Rose, *New Models*] (describing the prevalence of negotiation in land use decisions and the pros and cons of mediation as a process option); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 882–93 (1983) [hereinafter Rose, *Planning and Dealing*] (commenting on the prevalence of negotiated land use decisions but also pointing out the problems that “piecemeal” decisions present for the integrity of the land use system); see *Merson v. McNally*, 688 N.E.2d 479, 486 (N.Y. 1997) (noting that an open and inclusive negotiation process plays a legitimate role in land use decision making).

162. See, e.g., JUERGENSMEYER & ROBERTS, *supra* note 25, at 262–63 (providing examples of zoning techniques that encourage discussion amongst municipalities and applicants).

163. See, e.g., Camacho, *Mustering the Missing Voices: Installment One*, *supra* note 161, at 15–16.

164. Fenster, *Formalism and Regulatory Formulas*, *supra* note 69, at 671.

165. CARMA HOGUE, U.S. CENSUS BUREAU, 2012 GOVERNMENT ORGANIZATION SUMMARY REPORT: GOVERNMENTS DIVISION BRIEFS 1 (2013), http://www2.census.gov/govs/cog/g12_org.pdf.

166. See, e.g., Camacho, *Mustering the Missing Voices: Installment One*, *supra* note 161, at 15–16 (describing the role of collaborative governance in zoning decisions); Archon Fung, *Varieties of Participation in Complex Governance*, 66 PUB. ADMIN. REV. 66 (2006) (describing how

applications through public hearings in ways that acknowledge their right to be heard.¹⁶⁷ They can play a central role by setting the agenda for and leading ad hoc community meetings that amplify their role in the development decision.¹⁶⁸ Additionally, since many significant development decisions involve multiple parties and raise many concerns not addressed by local laws, negotiation is often a more appropriate process than the more rigid required process.¹⁶⁹

A. *The Legal Framework for Development Negotiations*

While negotiating has become an integral part of land use decision-making, these interactions always take place in the context of a defined legal framework¹⁷⁰ established by the states to regulate land use under their general police power.¹⁷¹ Most state legislatures have delegated this authority to local governments through some form of enabling legislation.¹⁷² Therefore, to exercise this authority, municipalities generally develop comprehensive plans, zoning ordinances, and land use regulations.¹⁷³ To administer these local regulations, municipalities then create agencies such as planning boards, appeal boards, and planning

different forms of citizen participation can be used for different types of decisions). *But see* David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement*, 57 U. KAN. L. REV. 1, 1–2 (2008) (discussing concerns about citizen empowerment (citing JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 23–24, 29 (1985))); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 177 (1997) (“[P]olitical theorists have often suggested that mass participation is not always a positive good for democracy.”).

167. *Cf.* David L. Markell, *Understanding Citizen Perspectives on Government Decision Making Processes as a Way to Improve the Administrative State*, 36 ENVTL. L. 651, 655 (2006) (“Processes that citizens value are likely to be processes that citizens use and that enhance citizen confidence in government, while processes with features that citizens find unsatisfactory are likely to be processes that do not engender meaningful citizen input . . .”).

168. *See* Jaime Alison Lee, “Can You Hear Me Now?”: *Making Participatory Governance Work for the Poor*, 7 HARV. L. & POL’Y REV. 405, 409 (2013) (“Inclusive, decentralized processes reflect the idea that all stakeholders affected by a problem should be engaged in the process of solving it.”). *See generally* Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503 (2008) (weaving together common themes in negotiation literature and new governance literature).

169. *See* Sean F. Nolon, *The Lawyer as Process Advocate: Encouraging Collaborative Approaches to Controversial Development Decisions*, 27 PACE ENVTL. L. REV. 103, 108–12 (2010) [hereinafter Nolon, *The Lawyer as Process Advocate*].

170. *See* Stewart E. Sterk, *Structural Obstacles to Settlement of Land Use Disputes*, 91 B.U. L. REV. 227, 229–30 (2011) (describing the unique circumstances that must be considered when negotiating settlements of land use disputes).

171. JUERGENSMEYER & ROBERTS, *supra* note 25, § 3.5.

172. *Id.* § 3.6.

173. *See generally* JOHN R. NOLON, *WELL GROUNDED: USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH* 44–71 (2001) [hereinafter NOLON, *WELL GROUNDED*] (discussing devices employed by municipalities in exercising land use authority).

departments.¹⁷⁴ These entities may also hire planning consultants, engineers, enforcement officers, and lawyers to carry out their land use obligations.

If a landowner would like to develop a significant project on her property, she will probably need a host of approvals from the local, regional, and possibly state governments.¹⁷⁵ In theory, if the development application is consistent with governing laws, the land use board will approve the project. If, however, the application does not comply, the board can deny the application.¹⁷⁶ When faced with a noncompliant application, a board may also suggest conditions to bring the project into compliance before issuing a denial.¹⁷⁷ These suggestions serve as the foundation for many land use negotiations.

Because land use boards are constrained in their ability to approve or deny development applications based on the suite of enabling laws and judicial rulings controlling their conduct, their negotiation suggestions must be consistent with their authority.¹⁷⁸ For example, a board can only deny a project because it destroys a wetland if the state has granted the board the authority to protect wetlands in the first place.¹⁷⁹ Imposing conditions that go beyond the scope of a board's authority may invalidate the board's decision.¹⁸⁰ This nexus requirement, as just described, from *Nollan* is an effort to identify regulatory requirements that amount to an uncompensated taking.¹⁸¹ Boards must negotiate within the confines of the authorities delegated to them.

Despite the delegated nature of their authority, many land use boards still have considerable discretion.¹⁸² In many states, municipalities have granted local boards significant flexibility when approving development

174. *Id.* at 95.

175. See Nolon, *The Lawyer as Process Advocate*, *supra* note 169, at 108–12 (describing the unique nature of significant land use decisions); cf. MIKE MILES ET AL., *REAL ESTATE DEVELOPMENT: PRINCIPLES AND PROCESS* 307–14 (2d ed. 1997) (discussing overregulation as a major contributor to high land and housing development costs).

176. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013) (“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.”).

177. See Fennell, *supra* note 66, at 3.

178. JUERGENSMEYER & ROBERTS, *supra* note 25, § 3.7.

179. See John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 377–78 (2002) [hereinafter Nolon, *In Praise of Parochialism*].

180. See generally Frona M. Powell, *Challenging Authority for Municipal Subdivision Exactions: The Ultra Vires Attack*, 39 DEPAUL L. REV. 635, 637, 640–41, 645 (1990).

181. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (“The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition.”).

182. See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (“[T]he government often has broad discretion to deny a permit.”).

applications.¹⁸³ For example, a landowner seeking to develop residential housing on a large parcel will need approval to subdivide one parcel of land into many individual parcels.¹⁸⁴ How many parcels and their configuration will depend on site conditions as well as the relevant state laws, comprehensive plan, local zoning ordinances, subdivision regulations, other land use regulations, and any rules adopted by the approval board.¹⁸⁵ The land use boards charged with making these decisions will apply these laws to the physical features of the parcel and take into account adjacent land uses.¹⁸⁶ In these approval situations, the board will have considerable flexibility in determining how many lots the parcel can support and how the lots will be arranged.¹⁸⁷

To illustrate, assume that a landowner has one hundred acres in a district zoned for two-acre residential development. Strict arithmetic suggests that she could subdivide the parcel into fifty individual lots; however, after considering the governing laws and physical constraints, the calculation becomes more complicated. The lot count may be reduced after removing land for roads, infrastructure—such as electricity and water—and physical limitations—such as steep slopes, rock outcroppings, wetlands, and other protected habitats.¹⁸⁸ The board may increase the lot count if it has an incentive ordinance and the landowner agrees to provide the stated benefit.¹⁸⁹ Through this combination of laws and site conditions, boards have considerable flexibility in deciding what shape a subdivision will take.¹⁹⁰ Similar discretion exists in a host of other contexts such as site plan approval, wetland permits, special use permits, and environmental review.¹⁹¹ This discretion is what creates ample opportunity for developers to negotiate with land use boards and vice versa.

As indicated above, local land use laws are not only restrictive. A host of tools are available that allow developers to increase their development potential. Many states grant boards the flexibility to encourage development¹⁹² that is consistent with the community's comprehensive

183. Nolon, *In Praise of Parochialism*, *supra* note 179, at 378–86.

184. See JUERGENSEMEYER & ROBERTS, *supra* note 25, § 7.6.

185. See *generally id.* §§ 7.1–7.22 (providing an in-depth discussion of subdivision and planned unit development control law).

186. See *id.* § 7.6.

187. See *id.*

188. See *id.* §§ 7.9–7.16 (discussing conservation subdivisions, exactions on subdivision approval, and mapping for future streets and other public improvements).

189. *Id.* § 4.18.

190. See *id.* §§ 7.1, 7.6.

191. See Fennell, *supra* note 66, at 17, 25.

192. See, e.g., Jason McCann, *Pushing Growth Share: Can Inclusionary Zoning Fix What Is Broken with New Jersey's Mount Laurel Doctrine?*, 59 RUTGERS L. REV. 191, 204 n.92 (2006) (“Where zoning districts identify and prohibit certain uses, inclusionary zoning only encourages a particular type of construction: lower income housing.”); see also Jennie C. Nolon & John R. Nolon, *Land Use for Economic Development in Tough Financial Times*, 40 REAL EST. L.J. 233,

plan of development.¹⁹³ A local wetlands law may reduce the lot count, while an incentive zone may permit the clustering of smaller lots to increase the density of a development.¹⁹⁴ Floating zones permit owners of qualified land to build more intensive developments than the underlying zoning would otherwise allow.¹⁹⁵

B. *Supplementing the Required Decision-Making Process*

When making these development decisions, boards must follow procedures enumerated in local, state, and federal law. These procedures often require an adjudicative format¹⁹⁶ designed to protect both individual and communal property rights.¹⁹⁷ These adjudicative processes have specific timelines, requirements for exchange of information, and public hearing requirements. As a result, the required decision-making process is trial-like,¹⁹⁸ placing the board as the locus for information exchange and decision-making. A typical application goes through four stages: (1) the developer submits an application to the board; (2) the developer notifies adjacent property owners of the proposal and of the opportunity to

237–39 (2011) (“Many states use enabling legislation or administrative rules to authorize, encourage, or specifically require that economic development plans be included in a local comprehensive plan and coordinated with land use planning strategies.”).

193. Charles M. Haar, “*In Accordance with a Comprehensive Plan*,” 68 HARV. L. REV. 1154, 1154–55 (1955); Stuart Meck, *The Legislative Requirement That Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute*, 3 WASH. U. J.L. & POL’Y 295, 295 (2000).

194. See Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3, 3 (1991) (“Through the land use regulatory technique formally known as ‘incentive zoning,’ cities grant private real estate developers the legal right to disregard zoning restrictions in return for their voluntary agreement to provide urban design features such as plazas, atriums, and parks, and social facilities and services such as affordable housing, day care centers, and job training.”).

195. Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 601 (2011) (citing 3 EDWARD H. ZIEGLER ET AL., RATHKOPF’S THE LAW OF ZONING AND PLANNING § 45:1 (4th ed. 2010) (“Unlike traditional zoning by mapped districts, a floating zone establishes a use classification in the zoning ordinance when adopted by a legislative body but the classification is not delineated on the zoning map until after a rezoning process initiated by a property owner.”)).

196. See generally Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 638 (1976) (“Adjudication is conventionally perceived as a norm-bound process centered on the establishment of facts and the determination and application of principles, rules, and precedents.”); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 368 (1978) (“The proper province of adjudication is to make an authoritative determination of questions raised by claims of right and accusations of guilt.”).

197. See NOLON, WELL GROUNDED, *supra* note 173, at 95–96.

198. See R. Lisle Baker, *Exploring How Municipal Boards Can Settle Appeals of Their Land Use Decisions Within the Framework of the Massachusetts Open Meeting Law*, 44 SUFFOLK U. L. REV. 455, 455–56 (2011); see also Naved Sheikh, *Community Benefits Agreements: Can Private Contracts Replace Public Responsibility?*, 18 CORNELL J.L. & PUB. POL’Y 223, 226 (2008); Sterk, *supra* note 170, at 228–29.

comment on the proposal; (3) the board holds public hearings; (4) the board reviews the application in light of the comments and makes a decision.¹⁹⁹ Most applications move through the process without delay; however, decisions that will have a significant impact beyond adjacent parcels often take more time to move through the required process.²⁰⁰

While adjudicative processes minimize the likelihood of violating legally recognized rights, they are not well suited for more significant decisions that resist a narrow focus.²⁰¹ As demonstrated by the subdivision example above, significant development decisions involve many issues, implicate many parties, and raise many concerns that cannot be addressed in a rights-based adjudication. Relying on adjudicative processes to administer this type of a decision creates problems.²⁰² Without clear standards for decision-making, the adjudicator will have difficulty justifying one outcome over another in a way that satisfies the multiple parties involved. Scholars have long recognized that consensual processes such as negotiation offer advantages in development application.²⁰³ Negotiation offers developers, boards, and residents opportunities to find mutually satisfying alternatives beyond the narrow scope of the required decision-making process.²⁰⁴

When determining the reasonableness of development conditions—both limitations and bonuses—parties need to share information. Landowners

199. See SEAN F. NOLON ET AL., *LAND IN CONFLICT: MANAGING AND RESOLVING LAND USE DISPUTES* 7 (2013); Baker, *supra* note 198, at 457–59.

200. See, e.g., Michael B. Gerrard, *The Victims of NIMBY*, 21 *FORDHAM URB. L.J.* 495, 520–21 (1994) (discussing effects caused by local opposition to undesired facilities); Markell & Tyler, *supra* note 166, at 3–8 (discussing the issue of “procedural acceptability” in the context of “hotly contested” questions such as public decisions with environmental implications); Nolon, *The Lawyer as Process Advocate*, *supra* note 169, at 112–15 (“In routine land development matters, this adversarial dynamic does not interfere with good decision-making; in significant land development matters, it presents a considerable obstacle.”).

201. See Fuller, *supra* note 196, at 394 (“The more fundamental point is that the forms of adjudication cannot encompass and take into account the complex repercussions that may result from [a polycentric task.]”); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754, 793 (1984) [hereinafter Menkel-Meadow, *Toward Another View of Legal Negotiation*] (arguing that an adversarial mindset will result in a narrow set of solutions). *But see* Rose, *Planning and Dealing*, *supra* note 161, at 887–93 (describing how mediation can be used as an alternative process to supplement the required process for piecemeal changes).

202. See Fuller, *supra* note 196, at 394–95.

203. E.g., Camacho, *Mustering the Missing Voices: Installment Two*, *supra* note 161, at 270–71; Fenster, *Formalism and Regulatory Formulas*, *supra* note 69, at 671; John R. Nolon, *Champions of Change: Reinventing Democracy Through Land Law Reform*, 30 *HARV. ENVTL. L. REV.* 1, 32 (2006); Rose, *Planning and Dealing*, *supra* note 161, at 887–93; Ryan, *supra* note 20, at 338; Sterk, *supra* note 170, at 229–30.

204. See, e.g., LAWRENCE SUSSKIND & JEFFERY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 140–44 (1987) (describing how negotiation supplements the required decision-making process but does not substitute for it).

need to share information about the conditions of the site. Boards need to share information about their limitations and what authority they have to protect and improve community resources. Community members need to share information about their concerns. Unfortunately, the adjudicative nature of the required decision-making process inhibits the flow of information among the parties. First, parties need to direct communication to the board as the ultimate decision maker.²⁰⁵ Second, the process encourages misinformation and withholding of information as a way to make the other side look worse in front of the decision maker.²⁰⁶ Third, adversarial processes discourage creative problem solving by placing the interaction in an oppositional frame.²⁰⁷ Negotiation, on the other hand, allows parties to share the necessary information more freely to accurately determine what conditions are most appropriate. Negotiation offers a more efficient process when property owners are interested in engaging the community to determine the right type of project given the characteristics of the site and the needs of the community.

The liberal exchange of information in negotiation allows parties to create value beyond the narrow outcomes possible through the required process.²⁰⁸ Land use laws define the rights landowners have to develop and authorize land use boards to implement and interpret those laws.²⁰⁹ Unlike other negotiation contexts where the legal shadow tightly constrains the parties,²¹⁰ land use law casts a wide shadow within which parties can reach agreements.²¹¹ As illustrated by the subdivision application process, the law may give the parties a suite of options to consider. Instead of dividing a hundred-acre parcel into forty-five two-acre lots as allowed in that zone, an agricultural overlay ordinance may allow fifty-five lots if they are clustered onto twenty-five percent of the parcel away from prime agricultural soils. Similarly, affordable housing incentive zones may offer developers bonus units if they include some affordable units in their development. This result is often a more satisfying and appropriate use for both the landowner and the community because the landowner gets

205. See NOLON, WELL GROUNDED, *supra* note 173, at 96–99.

206. See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 21–22 (1996) [hereinafter Menkel-Meadow, *The Trouble with the Adversary System*].

207. Gary Mendelsohn, *Lawyers as Negotiators*, 1 HARV. NEGOT. L. REV. 139, 146 (1996).

208. See Menkel-Meadow, *Toward Another View of Legal Negotiation*, *supra* note 201, at 791 (“The limited remedial imagination of courts . . . narrows not only what items might be distributed but also how those items might be apportioned.”).

209. See, e.g., Fennell, *supra* note 66, at 18–20.

210. E.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951–53 (1979).

211. See Rose, *Planning and Dealing*, *supra* note 161, at 887–89; see also, e.g., Rosenberg, *supra* note 65, at 198–201 (discussing the wide legal framework surrounding subdivision regulation and development).

additional units for protecting an important community resource. Judicial decisions restricting this ability to bargain reduce that opportunity to create value.

C. *Creating Value in Negotiation—The Potential for Gain*

There are several reasons why development decisions present opportunities to create value. First, many zoning mechanisms rely on negotiation to add value beyond the basic uses allowed by the zoning ordinance. Incentive zones, floating zones, planned unit developments, and developer agreements are a few examples of zoning instruments that rely on negotiation to create value for property owners and the community.²¹² For example, incentive zones inform developers of resources the community needs and provide a list of development bonuses if those resources are provided.²¹³ Whereas floating zones rely on negotiation to help parties identify the appropriate mix of community benefit to development bonus.²¹⁴

Second, development decisions are ripe for value creation because they present multiple issues.²¹⁵ Disputes involving multiple issues allow parties to create value by taking advantage of differences in relative priorities among the parties.²¹⁶ Development decisions often present many issues for negotiation including: the type of development allowed; the density of development; the impact on community infrastructure like sewage, drainage, traffic, and the number of parking spots required; the protection of environmental features; and provisions for affordable housing and

212. See Camacho, *Mustering the Missing Voices: Installment One*, *supra* note 161, at 17–20, 22 (describing floating zones, planned unit developments, and other land use mechanisms dependent on negotiation); see also Nestor M. Davidson, *Values and Value Creation in Public-Private Transactions*, 94 IOWA L. REV. 937, 953–54 (2009) (describing how these “regulatory bargains are ubiquitous” in land use transactions).

213. Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States*, 19 B.C. ENVTL. AFF. L. REV. 565, 568–74 (1992) (defining and discussing incentive zoning).

214. Camacho, *Mustering the Missing Voices: Installment One*, *supra* note 161, at 18.

215. Owen Oplin, *Toward Jeffersonian Governance of the Public Lands*, 27 LOY. L.A. L. REV. 959, 962 (1994) (pointing out that “[m]ost important policy decisions on federal public land use and management do in fact involve multiple issues” that present opportunities for creative problem solving found in negotiation).

216. That multiple issues create opportunities to create value—expand the pie—is one of the central ideas behind modern negotiation theory. See, e.g., ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AN AGREEMENT WITHOUT GIVING IN* 58–62, 67, 72, 78 (3d ed. 2011); DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 29–45 (1986); DEEPAK MALHOTA & MAX BAZERMAN, *NEGOTIATION GENIUS* 77–78 (2007); ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 11–25 (2000); HOWARD RAIFFA ET AL., *NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF NEGOTIATION* 91, 206–07 (2002); Russell Korobkin, *Against Integrative Bargaining*, 58 CASE W. RES. L. REV. 1323, 1325–29 (2008); Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369, 370 (1996).

parkland. Negotiation allows parties to create value by trading across issues, also known as “log rolling,”²¹⁷ and adding new issues.²¹⁸ Most developers recognize that negotiation presents opportunities that do not exist in the adjudicative approval process.²¹⁹ A developer may be willing to add infrastructure needed by the community in exchange for increased density and a streamlined approval process.²²⁰

Third, the presence of multiple parties in most significant development decisions also creates room for value creation. Multiple parties bring more resources to the table, which increases the options for reaching agreements.²²¹ Negotiations can take place with community members directly or through government boards.²²² Whether the parties will eventually reach an agreement depends on a host of factors such as the land use regime, market economics, the local culture, the personalities involved, their history of interactions, and the process used to conduct the negotiations.

D. Claiming Value in Negotiation—The Potential for Abuse

The prevalence of bargaining in land use negotiations has also created problems. There is a long and unfortunate history of land use boards abusing their power in negotiations by overreaching and exploiting landowners.²²³ While one can attribute some of this behavior to hard

217. MALHORTA & BAZERMAN, *supra* note 216, at 59–61 (describing the process of “log rolling”); *see also, e.g.,* RAIFFA ET AL., *supra* note 216, at 459–60, 481–82 (providing specific illustrations of “log rolling” in political decision-making).

218. MALHORTA & BAZERMAN, *supra* note 216, at 62–65.

219. *See* Dwight H. Merriam, *The Koontz Corner*, ZONING & PLAN. L. REP., Dec. 2013, at 2, 5.

220. *See* Davidson, *supra* note 212, at 953 (“[A] private developer may enter into a community-benefits agreement in exchange for being able to build a project.”); Nolon, *The Lawyer as Process Advocate*, *supra* note 169, at 128.

221. *See* Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1, 12 (2003) (“There are five types of differences that are all potential sources of value creation: different resources; different relative valuations; different forecasts; different risk preferences; and different time preferences.”); *see also* LAX & SEBENIUS, *supra* note 216, at 45 (“[A] negotiator can also create and claim value by . . . bringing in a new party.”).

222. *See* 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); 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); Selmi, *supra* note 195, at 593.

223. *See* Rose, *Planning and Dealing*, *supra* note 161, at 848–49. *See generally* RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* (1966) (describing the practice of municipalities enacting low density zoning regimes to be in a stronger position to negotiate with developers); ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* (1974) (describing the role of land use boards and agencies in the redevelopment of New York, the lack of public involvement, and the harms caused to existing neighborhoods and residents).

bargaining, a portion has also been motivated by illegitimate intent.²²⁴ Boards have used their bargaining authority to systematically exclude minorities, low-income residents, and locally unwanted land uses; to push harmful impacts on neighboring communities; and to extract illegitimate concessions from developers.²²⁵

In response, state and federal governments have placed limits on municipal authority to regulate land use.²²⁶ Congress passed the Religious Land Use and Institutionalized Persons Act in response to municipal exclusion of religious facilities and prisons.²²⁷ After several judicial decisions in the *Mount Laurel* cases,²²⁸ the New Jersey legislature adopted the Fair Housing Act of 1985 to curtail local governments' ability to exclude affordable housing.²²⁹ Indeed, the government's history of abusing its discretion may be one of the reasons why the term "exactions" has become part of the land use vernacular.²³⁰

When used legitimately, land use boards can impose conditions to bring a deficient application into compliance. Because every development application presents benefits and harms, boards are responsible for balancing the two. A new commercial development may benefit the community by bringing more tax revenue and at the same time increase

224. See Been, *supra* note 12, at 482–83 (identifying five purposes that have been found for imposing exactions, two of which are illegitimate).

225. See *id.* (discussing the municipal use of exactions to mitigate traffic congestion, noise, and environmental degradation; prevent development such as low-income and moderate-income housing; and take financial advantage of developers); see also Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1384 (1994) (arguing that "people of color and the poor are exposed to greater environmental risks than are whites and wealthier individuals" through zoning control of locally undesirable land uses).

226. Paul A. Diller & Samantha Graff, *Regulating Food Retail for Obesity Prevention: How Far Can Cities Go?*, 39 J.L. MED. & ETHICS 89, 89–90 (2011) (describing how the delegation of police power authority from states to local governments places limits on municipal authority); see also John R. Nolon, *The Erosion of Home Rule Through the Emergence of State-Interests in Land Use Control*, 10 PACE ENVTL. L. REV. 497, 517–24 (1993) (explaining states' efforts to restrict the historical delegation of land use authority to municipalities).

227. See Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5 (2006)).

228. *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mt. Laurel*, 336 A.2d 713 (N.J. 1975); *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mt. Laurel*, 456 A.2d 390 (N.J. 1983).

229. See John M. Payne, *Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665, 666 (1996).

230. Fennell, *supra* note 66, at 14–15 (describing the history of how "exaction" has been used). Of course, there are many other plausible reasons why the use of "exactions" persists. The fact that courts commonly choose to use the term may be one. Another reason may be an intentional effort of libertarian scholars to capitalize on linguistic associations that degrade the underlying notion that zoning is a legitimate governmental purpose. See generally GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT: KNOW YOUR VALUES AND FRAME THE DEBATE (2004) (describing conservatives' coordinated efforts to use specific phrases and terms to frame policy issues).

vehicular traffic requiring a new stoplight and turning lanes. Land use boards structuring approval processes to maximize benefits and minimize harms in such a manner will produce the most efficient outcomes.²³¹ However, trial-like processes—like those of the required adjudicative approval process—are not well suited to identify appropriate exactions. Identifying appropriate exactions requires a free flow of information. Since adjudicative processes are notoriously poor at promoting information sharing among multiple parties,²³² negotiation is the more efficient process option for determining appropriate exactions.²³³

III. BARGAINING IN THE SHADOW OF *KOONTZ*

Negotiations take place in the context of alternatives. Whether a bargain can be reached depends on the parties agreeing to a deal that improves their no-agreement alternatives. The most common alternative in dispute settlement negotiations²³⁴ is to adjudicate the legal issues with the help of a court or administrative body.²³⁵ Divorcing couples negotiate the terms of their agreement in the shadow of the legal regime that courts will impose on them if an agreement is not reached.²³⁶ Similarly, developers and land use boards negotiate the terms of development proposals in the shadows cast by the many laws and regulations governing land use.²³⁷ This “bargaining in the shadow of the law” takes place in many negotiations and

231. See WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 358 (1995); see also Stewart E. Sterk & Kimberly J. Brunelle, *Zoning Finality: Reconceptualizing Res Judicata Doctrine in Land Use Cases*, 63 FLA. L. REV. 1139, 1142–43 (2011) (describing benefits that may be obtained for communities through the land use approval process).

232. See *supra* Section II.B.

233. See Menkel-Meadow, *The Trouble with the Adversary System*, *supra* note 206, at 6, 34; see also Fuller, *supra* note 196, at 404 (“The court gets into difficulty, not when it lays down rules about contracting, but when it attempts to write contracts.”). But cf. Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 896–900 (2004) (arguing that by sending conflicts to litigation, parties are delegating their authority to negotiate a solution to the judges).

234. Frank E. A. Sander & Jeffrey Z. Rubin, *The Janus Quality of Negotiation: Dealmaking and Dispute Settlement*, 4 NEGOT. J. 109, 109–10, 112 (1988) (discussing the distinction between different forms of settlement).

235. But see Menkel-Meadow, *Toward Another View of Legal Negotiation*, *supra* note 201, at 796–97 (arguing that while most disputes involve some legal issues, there are often more issues in the negotiation that cannot be resolved by relying on legal norms).

236. See Mnookin & Kornhauser, *supra* note 210, at 968–69 (describing how divorce negotiations take place in the context of legal endowments and against the backdrop of judicial uncertainty).

237. See Sterk, *supra* note 170, at 229 (describing the considerations of municipal boards when settling land use disputes); cf. David Markell et al., *What Has Love Got to Do with It?: Sentimental Attachments and Legal Decision-Making*, 57 VILL. L. REV. 209, 241 (2012) (exploring how parties’ perceptions affect their attraction to different processes and noting that “while judicial litigation fares well when monetary values predominate, it does not fare well in protecting sentimental values”).

the shadow cast by the law has a direct influence on the way that parties order their behavior.²³⁸

A. *The Shadow Cast*

A key question after *Koontz* is how the shadow of the heightened review for proposed conditions will change the behavior of land use boards. Will it cause municipalities to favor the absolutism of denials over the flexibility of deliberative negotiation? Justice Kagan makes a strong argument that governments “might desist altogether from communicating with applicants.”²³⁹ She offers this plausible hypothetical:

Consider the matter from the standpoint of the District’s lawyer. The District, she learns, has found that Koontz’s permit applications do not satisfy legal requirements. It can deny the permits on that basis; or it can suggest ways for Koontz to bring his applications into compliance. If every suggestion could become the subject of a lawsuit under *Nollan* and *Dolan*, the lawyer can give but one recommendation: Deny the permits, without giving Koontz any advice—even if he asks for guidance.²⁴⁰

A shift to absolutism was not an unforeseen possibility. Reinforcing the warnings in amicus briefs filed with the Florida Supreme Court,²⁴¹ Professor Fenster forecasted similar concerns: “Local governments, in turn, would become exceedingly wary about offering, or even discussing, conditions on development, thereby harming not only communities that would approve development without conditions, but also property owners who would face summary denials without the opportunity to bargain.”²⁴² Similarly, Professor Timothy Mulvaney opines:

[I]f all permit application denials that followed some level of failed negotiations were subject to the Supreme Court’s exaction takings framework based on even one exaction

238. See Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 697 (2005) (pointing out that many attorneys now litigate in the shadow of ADR).

239. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2610 (2013) (Kagan, J., dissenting) (“If a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so . . .”).

240. *Id.* at 2611.

241. *E.g.*, Brief of Audubon as Amici Curiae in Support of Appellant St. Johns River Water Mgmt. Dist. at 7, *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220 (Fla. 2012), *rev’d*, 133 S. Ct. 2586 (2013).

242. Fenster, *Formalism and Regulatory Formulas*, *supra* note 69, at 641–42; see also Fenster, *Failing Exactions*, *supra* note 25, at 643–44 (arguing that *Nollan–Dolan* scrutiny of proposed government demands to which landowner does not accede would unduly impede negotiations).

mentioned by the government during those negotiations, governmental officials would be forced into uncommunicative rejections or unconditioned approvals of development applications when a more amenable compromise may have been available.²⁴³

In a recent article, Professor Ilya Somin agrees that *Koontz* diminishes the government's ability to negotiate with developers²⁴⁴ and will lead land use boards to change their negotiation behavior.²⁴⁵ Others disagree, arguing instead that the decision will have little impact on the way land use boards negotiate with developers.²⁴⁶ Professor Steven Eagle notes:

[L]ocal governments find conversations and bargaining with developers very useful and would be loath to give up the practice. If the price of continuing is to press demands that they actually are tailored to the applicant's parcel and proportionate to the burden of development, the ensuing utility would seem to far outweigh the costs of possible legal challenges.²⁴⁷

If the past is prologue, we can perhaps draw a lesson from a similar debate that occurred in the aftermath of *Nollan* and *Dolan*. Some scholars predicted that the enhanced requirements would have a chilling effect on the willingness of governments to impose conditions.²⁴⁸ Planners in the

243. Mulvaney, *supra* note 29, at 307.

244. Ilya Somin, *Two Steps Forward for the "Poor Relation" of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, 2012–2013 CATO SUP. CT. REV. 215, 216. (“*Koontz* thereby limits the government's ability to use permit processes and other land-use restrictions as leverage to force property owners to perform various services.”).

245. *See id.* at 230. (“In practice, however, governments can deal with the danger of lawsuits by restricting the demands they impose on landowners to those that are unlikely to violate the Takings Clause . . .”).

246. *E.g.*, Merriam, *supra* note 219, at 5; *see also* Callies et al., *supra* note 83, at 17–18 (discussing the equally likely alternative of development agreements, which would allow local governments to require exactions prohibited by *Koontz*).

247. Steven J. Eagle, *Koontz in the Mansion and the Gatehouse*, 61 URB. LAW. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354617.

248. Jonathan M. Davidson et al., “*Where's Dolan?*”: *Exactions Law in 1998*, 30 URB. LAW. 683, 697 (1998); *see also* RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 183–84 (1993) (arguing that *Dolan's* nexus “narrows the size of the bargaining range and hence reduces the state's ability to extract concessions from individual owners”); Fennell, *supra* note 66, at 28–33 (describing how the nexus and rough proportionality requirements retard bargaining for efficient outcomes); Robyn L. Sadler, *Dolan v. City of Tigard: Takings Doctrine Remains Vague Under the Rough Proportionality Standard*, 31 WILLAMETTE L. REV. 147, 176–77 (1995) (arguing that the difficulty in appraising exaction fees for certain types of developments could discourage the projects entirely); Stewart Sterk, *The Inevitable Failure of Nuisance-Based Theories of the Takings Clause: A Reply to Professor Claeys*, 99 NW. U. L. REV. 231, 246 (2004) (“*Nollan* and *Dolan* have altered the takings landscape by reducing the leverage enjoyed by municipal officials in the planning process. Municipalities often seek concessions from developers as a condition to the

City of Tigard indicated that the decision steered them away from any actions that would be questionable.²⁴⁹ Other scholars argued that the fear was overstated.²⁵⁰ A study by Professors Ann Carlson and Daniel Pollak indicated that, at least in California, *Nollan* and *Dolan* did not end the practice of conditioning developments: “Contrary to initially negative reactions to the Court decisions, we found that an overwhelming percentage of California planners now view the *Nollan* and *Dolan* cases not as an encroachment upon their planning discretion but instead as establishing ‘good planning practices.’”²⁵¹

Koontz, however, is different. The shadow it casts over development negotiation is more complete than *Nollan–Dolan* and, therefore, more likely to leave a chill. The imposed nature of *Nollan–Dolan* conditions—demands issued as part of an approval—presents a bright line for determining when a condition must have a nexus and be roughly proportionate. *Koontz* obscures that bright line with a thick fog by not clarifying what behavior will be subject to judicial review. *Koontz* requires that all demands made before a decision show a nexus and rough proportionality between the condition and public harm the condition seeks to minimize. While the opinion implies that demands should be definite, concrete, and specific, it does not offer any guidelines to make that determination.²⁵² This lack of clarity leaves boards wondering when their suggestions will be considered demands by a reviewing court.

Subjecting early-stage negotiation suggestions to the level of rigor necessary to show nexus and rough proportionality is problematic. Prudent boards are likely to retreat from direct involvement with developers and impose a more formal, ritualized development approval process because they cannot always be certain of whether their suggestions will be treated as demands that must satisfy the strict standard of *Nollan* and *Dolan*.²⁵³ This lack of certainty over how suggestions, offers, or proposals in negotiations convert into demands triggering heightened scrutiny will have an effect on land use boards’ willingness to bargain.

Prior to *Koontz*, boards could rely on the bright-line rule that only imposed exactions would be subject to heightened scrutiny under *Nollan*

issuance of development permits. . . . *Nollan* and *Dolan* have strengthened the hand of developers seeking to avoid these concessions.”)

249. Ryan, *supra* note 20, at 366–68 (explaining that “the planning process has become more formal but less creative”). Based on *Koontz*, negotiating the details of a development application would now be a risky behavior for some planners.

250. *See, e.g.*, Carlson & Pollak, *supra* note 20, at 142 (reporting that a “large percentage of municipal planners view the Supreme Court takings precedents favorably”).

251. *Id.* at 105.

252. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2598 (2013).

253. *See infra* Section IV.A.

and *Dolan*.²⁵⁴ The Court removed that bright line in *Koontz* by holding that courts should treat proposed exactions the same as imposed exactions. While Justice Alito and Justice Kagan agreed that municipalities cannot use proposed demands to circumvent Fifth Amendment just compensation protections, they disagreed on whether the District made a “demand.”²⁵⁵ The majority relied on the Florida District Court of Appeal’s determination that the District had issued a demand and declined to address the question.²⁵⁶

The Florida Supreme Court did not reach the question whether respondent issued a demand of sufficient concreteness to trigger the special protections of *Nollan* and *Dolan*. It relied instead on the Florida District Court of Appeals’ characterization of respondent’s behavior as a demand for *Nollan/Dolan* purposes. Whether that characterization is correct is beyond the scope of the questions the Court agreed to take up for review. If preserved, the issue remains open on remand for the Florida Supreme Court to address. The Court therefore has no occasion to consider how concrete and specific a demand must be to give rise to liability under *Nollan* and *Dolan*.²⁵⁷

Unfortunately, this characterization of the District’s behavior as a demand was little more than that. Judge Robert J. Pleus, in his opinion concurring with the Florida District Court of Appeal, made the conclusory determination that the District’s behavior amounted to a “demand” with little analysis of the issue.²⁵⁸ But the question before the Florida District Court of Appeal in 2003 was ripeness—specifically, whether the District could appeal an order by the Circuit Court ruling that the District’s action amounted “to an unreasonable exercise of its police power.”²⁵⁹ The Court of Appeal ruled that the District could not appeal the Circuit Court’s order.²⁶⁰ Judge Pleus concurred “specially” with an opinion that went

254. See Mulvaney, *supra* note 29, at 290–95 (citing *Goss v. City of Little Rock*, 151 F.3d 861 (8th Cir. 1998), *William J. Jones Ins. Trust v. City of Fort Smith*, 731 F. Supp. 912 (W.D. Ark. 1990), *Lambert v. City & Cnty. of S.F.*, 67 Cal. Rptr. 2d 562 (Ct. App. 1997), and *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8 (Fla. Dist. Ct. App. 2009)) (arguing that only a few courts considered the question of proposed exactions prior to the Supreme Court’s ruling in *Koontz*).

255. See *supra* notes 147–55 and accompanying text.

256. *Koontz*, 133 S. Ct. at 2598 (implying that a demand should be “concrete” and “specific” but deciding not to use the extensive record to explain whether the District’s behavior met that requirement to guide future land use boards).

257. *Id.* (citation omitted).

258. See *St. Johns River Water Mgmt. Dist. v. Koontz*, 861 So. 2d 1267, 1268–69 (Fla. Dist. Ct. App. 2003) (Pleus, J., concurring), *rev’d*, 133 S. Ct. 2586 (2013).

259. See *id.* at 1268 (majority opinion).

260. *Id.*

beyond the ripeness question presented to the Court of Appeal.²⁶¹ A review of Judge Pleus’s concurring opinion reveals the purpose of his opinion was “to describe the extortionate actions of St. Johns Water Management District . . . in this case as shown in the trial below.”²⁶² Other than labeling the District’s behavior as a “demand,” Judge Pleus offers no rationale as to what turned the District’s suggestions into demands.

At the Supreme Court, in her dissent, Justice Kagan disagreed that the issue was not properly before the Court and explored the question of whether the District had made a demand.²⁶³ Instead of relying on Judge Pleus’s dictum that labeled the behavior as a demand, Justice Kagan used the record—provided in the parties’ briefs—to explain why the District’s proposals never amounted to “a demand or set a condition.”²⁶⁴ “[T]he District suggested to Koontz several non-exclusive ways to make his applications conform to state law. The District’s only hard-and-fast requirement was that Koontz do something—anything—to satisfy the relevant permitting criteria.”²⁶⁵ In addition, the District’s suggestions were not definite, concrete, or specific,²⁶⁶ the costs of the District’s mitigation alternatives were not specified, and the transcript of the District’s hearing did not reveal a convincing case that a demand was made. According to the transcript, the District had not established the cost of the off-site mitigation or the cost of the one-acre alternative.²⁶⁷

Because the majority offered no discernible test for what constitutes a demand, land use boards now have little direction about what negotiation behavior may subject them to the heightened standard of judicial review.²⁶⁸ This lack of a definition makes it difficult for attorneys to advise municipal clients about what negotiation behavior courts will see as a demand that triggers heightened scrutiny. Therefore, it is very likely that attorneys will advise their municipal clients to be cautious and avoid making pre-approval proposals before developers provide adequate information about the impacts of their projects. Anecdotal evidence suggests that attorneys are already providing such advice.²⁶⁹

261. *Id.* at 1268–72 (Pleus, J., concurring).

262. *Id.* at 1268.

263. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2609–11 (2013) (Kagan, J., dissenting).

264. *Id.* at 2610–11.

265. *Id.* at 2611.

266. *Id.* at 2610–11.

267. *ST. JOHNS RIVER WATER MGMT. DIST.*, *supra* note 139, at 1662–67.

268. *See Koontz*, 133 S. Ct. at 2594–95 (majority opinion) (concluding that land use boards must show that at least one condition, proposal, suggestion, offer or demand made in a negotiation passes the “essential nexus” and “rough proportionality” tests).

269. *E.g.*, Interview with Julie Tappendorf, Partner, Ancel Glink Diamond Bush DiCanni & Krafthefer (Feb. 11, 2014) (on file with author) (discussing her policy of advising municipal clients that they should assume all suggestions made prior to a decision must satisfy the *Nollan–Dolan* criteria).

Future courts have an opportunity to clarify what will be seen as a specific, concrete, and definite demand. Since *Koontz* extends the *Nollan–Dolan* framework, that clarification should trench closely to the context within which the demands arose in those cases. *Nollan* and *Dolan* presented the Court with demands that were included in approved development projects—imposed conditions. The California Coastal Commission and the City of Tigard stated these demands with sufficient specificity to incorporate them into the technical engineering specifications of the development.²⁷⁰ Without doing so, the developer could not comply. A framework consistent with the context of *Nollan* and *Dolan* would require that a demand is “concrete” when the effect on the applicant is measurable. A demand is “definite” when the board has made a commitment that if the landowner incorporates the condition into the application, the board will approve the application. A demand is “specific” when the board describes the condition with sufficient detail to provide clarity from an engineering perspective.

B. *Comparing Apples (Imposed Demands) to Oranges (Proposed Demands)*

Without a clear framework indicating what constitutes a demand, boards are left in a difficult position. If all suggestions must, prudently, show a nexus and rough proportionality, boards will be at a disadvantage in their negotiations. If they make suggestions without the requisite findings, courts will judge any subsequent denial under heightened scrutiny. In this sense, proposed demands are the apples to the oranges of imposed demands. Demands imposed through an approved permit are a very different beast than demands proposed prior to a denial. A post-decision demand is easy to identify. For example, when requiring conveyance of a public access easement in exchange for permission to build, the demand specifies an amount of land and identifies a specific purpose. Landowners must meet the specified conditions of approval to complete the development. Courts, landowners, and land use boards can measure the impact of a post-decision demand on the landowner and the community. They can also measure the impact of the condition on the property value; and, relevant to the *Nollan–Dolan* determination, the decision-making record of the required approval process provides a rationale for post-decision demands.

On the other hand, many proposed demands lack the adequate specificity described above. Land use boards often propose conditions, during the review process prior to a denial, without the benefit of a full record because the record is not yet complete. Boards cannot satisfy *Nollan*

270. See Brief for Respondent, *supra* note 104, *10–12; Brief for Appellee, *supra* note 72, at *7–8.

and *Dolan* without adequate information about what the impacts of a development will be. That information is usually not available early in the approval process because most developers do not provide it until later stages.

In imposed-condition cases—like *Nollan* and *Dolan*—the condition is a by-product of a thorough and rigorous review process.²⁷¹ In most states, that review process includes extensive opportunity to exchange information as part of the formal review procedure. This process often takes weeks or months and involves gathering and processing information from engineers, biologists, hydrologists, and a host of other experts. The land use board, with help from their attorneys, must evaluate this information along with information submitted by the public before approving or denying the development.²⁷² As a consequence of this significant deliberation, a condition incorporated into—imposed on—an approval is a product of a robust analysis with advice from many land use professionals. Post-*Koontz*, land use boards must wait until the record is sufficiently complete before they can make a proposal that they are sure satisfies *Nollan* and *Dolan*.

For example, when the *Nollan* Court found that the condition imposing public access to the beach exhibited no “nexus” to the governmental purpose, the Court relied on an extensive record created by the California Coastal Commission.²⁷³ The Court used that record to hold that the Commission’s purpose in imposing the easement was to enhance the public’s visual access to the ocean.²⁷⁴ Justice Scalia used that record to find that a beachfront easement was not connected to enhancing visual access from the road.²⁷⁵ In *Dolan*, the Court found that a condition requiring a public easement was not roughly proportionate to the goal of traffic

271. See, e.g., *Uniform Land Use Review Procedure*, DEP’T OF CITY PLANNING, N.Y.C., APPLICANT PORTAL, http://www.nyc.gov/html/dcp/html/ap/step5_ulurp.shtml (last visited Nov. 27, 2014).

272. See, e.g., *id.*

273. See *supra* text accompanying notes 91–97.

274. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 838–39 (1987) (finding that the California Coastal Commission was attempting to enhance visual access and not physical access). However, in reading the Commission’s brief, Justice Scalia seems to have missed an important point: the Commission stated that they were not just protecting visual access but physical access. The enlarged house would diminish visual access to the beach, the diminished visual access would lead to diminished physical access, and, therefore, the beachfront easement was an effort to remedy that condition by promoting physical access. Brief for Appellee, *supra* note 72, at *8 (arguing that the *Nollan*’s proposed house was “a visual impediment to public access” because “if the public cannot see the coast, the public is not inclined to use it”). Justice Scalia saw the Commission’s purpose as promoting visual access but not physical access; therefore, the condition was not connected. This type of judicial confusion (or intentional distortion?) will become more common in the wake of *Koontz* now that judges are obligated to subject proposed conditions to heightened scrutiny.

275. *Nollan*, 483 U.S. at 838–40. *But see id.* at 850–51 (Brennan, J., dissenting) (arguing that the trial record did show a nexus between the condition and the Commission’s authority).

reduction because it was based on the rationale that it “could” reduce traffic not “would” or even “was likely to.”²⁷⁶ The Court used the extensive record created in the development approval process to evaluate the condition and make the necessary determination of rough proportionality.²⁷⁷ In addition, many development projects present a range of interrelated issues. Adjusting one attribute of the project may require similar adjustments to other components. How can a board ensure that every suggestion satisfies *Dolan*’s “individualized determination” requirement to show that any off-site mitigation proposals will address the threatened harm before the application process defines that threatened harm?

Negotiation proposals may not have the benefit of a complete record when the parties generate them. Yet, post-*Koontz*, courts will evaluate those proposals in light of the now-complete record. If a board makes a suggestion early in the process and then denies the permit, that suggestion must satisfy *Nollan* and *Dolan* to avoid being an unconstitutional condition. This is particularly true of the rough proportionality prong that requires “some sort of individualized determination that the required dedication is related both in nature and extent to the proposed development’s impact.”²⁷⁸ The *Dolan* Court held that a condition that “could” mitigate harmful impacts is not sufficient to pass the “roughly proportionate” test.²⁷⁹ Instead, only conditions that “will” or “are likely” to mitigate impacts are constitutional.²⁸⁰ The conditions that amounted to unconstitutional conditions in *Nollan* and *Dolan* were stated with specificity in the final decision after the full deliberation of the required process.²⁸¹

Post-*Koontz*, land use boards offering proposals in development processes should be wary of the standard to which they will be held if the developer appeals any subsequent denial. Proposals to improve noncompliant applications must be reasonably related to the governmental purpose, and boards must make an individualized determination to show

276. *Dolan v. City of Tigard*, 512 U.S. 374, 395–96 (1994) (“No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.”).

277. *Id.* at 389–91.

278. *Id.* at 391.

279. *See id.* at 395–96.

280. *Id.* at 395.

281. Brief for Respondent, *supra* note 104, at *3 (stating that the condition in *Dolan* “required Petitioner to dedicate easements to allow the City to address flood hazards and traffic congestion, problems caused by the proposed development”); Brief for Appellee, *supra* note 72, at *8 (“At the conclusion of the hearing, the Commission approved the *Nollan* permit subject to recordation of a deed restriction acknowledging the right of the public to pass and repass across the narrow beach between the ocean and the toe of the *Nollans*’ seawall.”).

the requisite rough proportionality. Since the boards have the burden of proving these two elements,²⁸² they will need to create a record supporting their proposals before any proposals are made to developers. This cuts off the options for negotiation at an early stage in the process and thus reduces the likelihood that an agreement will be reached.

IV. POST-KOONTZ OPTIONS FOR LAND USE BOARDS

Fortunately, boards have several options in addition to choosing a strict diet of denials. When boards face a discretionary approval they can also chose to: hire a mediator who can facilitate negotiation among the stakeholders; negotiate without making offers; negotiate (despite the risks); or attempt to insulate their negotiation process through pre-approval processes and waiver.

A. *Avoid Negotiation—Deny If Noncompliant and Approve If Compliant*

Land use boards need not negotiate. Since most land use boards are set up as adjudicative bodies, they are not naturally equipped to negotiate.²⁸³ State and local laws define the required process that municipalities must follow and do not require boards to interact with applicants beyond those requirements. Boards receive the application, determine when the application is complete, ensure all time frames are met, give notice of the meetings, and provide an opportunity for public comment.²⁸⁴ Once the boards have satisfied the requirements of the process, they can either approve or deny the proposal based on the information submitted. If the board does not propose or impose conditions, *Nollan* and *Dolan* will not trigger heightened scrutiny. If the developer challenges the decision as a taking, the developer must show that the decision violated *Penn Central*. Justice Kagan noted this “avoid negotiation” option in her dissent in *Koontz*: “If every suggestion could become the subject of a lawsuit under *Nollan* and *Dolan*, the lawyer can give but one recommendation: Deny the permits, without giving [the developer] any advice—even if he asks for guidance.”²⁸⁵

This option presents difficulties, however. For development decisions, where boards have the discretion to accept suggested improvements and make their own suggestions, not negotiating will seem artificial.²⁸⁶

282. See *supra* text accompanying note 63.

283. Baker, *supra* note 198, at 455–56.

284. NOLON, WELL GROUNDED, *supra* note 173, at 95–100.

285. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2611 (2013) (Kagan, J., dissenting).

286. Cf. Eagle, *supra* note 247, at 31–32 (arguing that because negotiation is an informal process, fears about increasing municipal rigidity and absolutism are overstated); Merriam, *supra* note 219, at 5 (pointing out that developers will want to negotiate).

Municipalities adopt many ordinances that anticipate and encourage negotiation. In New York, some planning boards have the authority to require subdivision applicants to cluster the lots away from critical community resources.²⁸⁷ Courts may view requesting that the applicant cluster units as a demand that triggers heightened scrutiny. Not negotiating will take discipline.

B. Facilitate Negotiation Among Stakeholders

Boards that decide not to negotiate can simultaneously encourage the developer to negotiate directly with community stakeholders.²⁸⁸ This negotiation could take place before or after the developer submits an application.²⁸⁹ If the developer and the stakeholders reach an agreement, the developer can integrate that agreement into the application and make it part of the board's decision. If the developer chooses to integrate any of the conditions discussed in the negotiation, she does so voluntarily. Any conditions included will be part of the developer's application and then be voted on by the board. This leaves open the option for negotiation but does not require the board to participate. By not participating, the board does not propose any conditions and the heightened scrutiny of *Nollan* and *Dolan* will not apply if the developer appeals a subsequent denial.

Many boards have the discretion to promulgate rules outlining their decision-making procedures and can use that discretion to encourage pre-application negotiations. In fact, there are many examples of these local ordinances.²⁹⁰ These rules typically provide an opportunity for developers to discuss their plans with neighbors prior to submitting a formal application. For example, the City of San Francisco requires pre-application meetings between the developer and a prescribed group of neighbors for new construction, alterations, and formal retail uses.²⁹¹ Other municipalities simply encourage negotiation with affected parties but do

287. See NOLON, WELL GROUNDED, *supra* note 173, at 219–22.

288. *E.g.*, Merson v. McNally, 688 N.E.2d 479, 486 (N.Y. 1997) (upholding the actions of a land use board that facilitated a stakeholder negotiation as part of a special permit application).

289. See, *e.g.*, Nolon, *The Lawyer as Process Advocate*, *supra* note 169, at 117–21 (documenting a case study where the developer submitted an as-of-right application while simultaneously negotiating with community stakeholders).

290. The Gaining Ground database of land use ordinances cites eleven examples of pre-application and consensus building ordinances. *Pre-Application & Consensus Building*, GAINING GROUND INFO. DATABASE, <http://www.landuse.law.pace.edu/SPT--BrowseResources.php?ParentId=762> (last visited Nov. 27, 2014).

291. *Section 311 Pre-Application Process*, S.F. PLANNING DEP'T, <http://www.sf-planning.org/index.aspx?page=1575> (last visited Nov. 27, 2014) (“Pre-Application shall be required for certain alterations proposed in all RH and RM Districts. The intent of the process is to: (1) initiate neighbor communication to identify issues and concerns early on; (2) provide the project sponsor the opportunity to address neighbor concerns prior to submitting their building permit application; and (3) reduce the number of Discretionary Reviews (DRs) that would result in a public hearing before the Planning Commission.”).

not require it.²⁹² Many municipalities also provide general information intended to make the approval process more satisfying to citizens and applicants.²⁹³ Highlighting the specific advantages of pre-application negotiation can increase the likelihood that developers and stakeholders do not miss the opportunity to identify mutually acceptable conditions early in the process.

There may be barriers to this option. Some developers resist pre-application processes fearing that boards will use the added procedure to delay an already lengthy and drawn-out process.²⁹⁴ In addition, citizens often fear that pre-application negotiations will limit a board's authority later in the process.²⁹⁵ To allay these fears, local rules should state that any agreement is only advisory and boards must review an agreement through the required decision-making process.

Mediators may provide support when these types of obstacles arise. When facing highly contentious decisions, a board can suggest that parties hire a mediator to manage the negotiations.²⁹⁶ Some ordinances make this

292. See, e.g., *Land Use Facilitation Program*, CITY OF ALBUQUERQUE, <http://www.cabq.gov/legal/adr/luf> (last visited Nov. 27, 2014); *Pre-Application & Consensus Building for Borough of Red Bank, NJ*, GAINING GROUND INFO. DATABASE, <http://landuse.law.pace.edu/landuse/documents/laws/reg2/BoroughofRedBankNJ-Pre-App&Consensus.doc> (last visited Nov. 27, 2014).

293. See, e.g., Dep't of Regulatory & Econ. Res. Zoning Process Improvement Project, *Pre-Application Process*, MIAMI-DADE COUNTY (June 2014), <http://www.miamidade.gov/zoning/library/guidelines/pre-application-process-summary.pdf>; *One Stop Shop*, CITY OF NEW ORLEANS, <http://www.nola.gov/onestop/> (last visited Nov. 27, 2014); see also "*One Stop Shop*" for Building Permits, NASHVILLE.GOV, <http://www.nashville.gov/Codes-Administration/Construction-and-Permits/One-Stop-Shop.aspx> (last visited Nov. 27, 2014).

294. Cf. Brad Spangler, *Decision-Making Delay*, BEYOND INTRACTABILITY (July 2003), <http://www.beyondintractability.org/essay/delay> ("Normally, disputants use delay to deliberately stall the decision making process.")

295. Compare William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1375 (1997) ("[T]here is a subtle (and sometimes not so subtle) dynamic in the negotiation process that diminishes the sanctity of the law as both the source of agency authority and its limit."), with Philip J. Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 DUKE L.J. 1389, 1418–20 (1997) (describing how agency representatives have resisted implementing the results from collaborative processes), and Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000) (providing evidence from studies that negotiated rulemaking offers efficiencies not possible in the required rule making process).

296. See Jeffrey H. Goldfien, *Thou Shalt Love Thy Neighbor: RLUIPA and the Mediation of Religious Land Use Disputes*, 2006 J. DISP. RESOL. 435, 462 ("[T]he highly contested nature of religious land use disputes may eventually encourage local officials to try mediation."); Matthew McKinney et al., Commentary, *Responding to Streams of Land Use Disputes*, 60 PLAN. & ENVTL. L., Apr. 2008, at 3 (discussing two studies demonstrating that negotiation and mediation can resolve disputes over land use); John R. Nolon & Jessica A. Bacher, *Changing Times—Changing Practice: New Roles for Lawyers in Resolving Complex Land Use and Environmental Disputes*, 27 PACE ENVTL. L. REV. 7, 36 & n.101 (2010) (identifying seven states that have statutes that acknowledge the importance of land use mediation); Rose, *Planning and Dealing*, *supra* note 161, at 887–93; *cf.*

option explicit. For example, in the Town of Amenia, New York, a local rule states the following:

At any point in a project review process the Planning Board may, if it deems appropriate and the parties consent, appoint a mediator to work informally with the applicant, neighboring property owners, and other interested parties to address concerns raised about the proposed Special Permit use. Any party may request mediation.²⁹⁷

Mediators can help by identifying the right parties to involve, building trust, improving communication, gathering relevant facts, identifying and evaluating alternatives, and drafting agreements.²⁹⁸

One disadvantage of this option is that boards and their staff cannot participate in the negotiation. If they do, any of their suggestions may be subject to *Nollan–Dolan* scrutiny in a subsequent legal challenge. Many land use boards have valuable expertise that would be useful to the parties. Not having them at the table will decrease the efficiency of the negotiation. Municipalities may have to complete studies that duplicate the pre-application process and the negotiators will not benefit from the board's expertise regarding what has worked in the past. For example, the District in *Koontz* has a staff of experts who offer valuable information about the application, adjacent parcels, and regional resources.²⁹⁹

Additionally, boards often conduct studies pursuant to their planning function. These studies can identify threats to the community clarifying what types of mitigation measures are appropriate. Boards also have technical staff with expertise to help the parties find suitable ways to reduce the impact of their development. If these staff are not part of any negotiation, their expertise is not available to the parties during their deliberations. If the parties reach an agreement with incomplete information, a board may require that they reopen their negotiation to address these issues and improve the agreement. While *Koontz* may

Rose, *New Models*, *supra* note 161, at 1168–70 (describing a model of land use decisions as forms of mediation). See generally Jonathan M. Davidson & Susan L. Trevarthen, *Land Use Mediation: Another Smart Growth Alternative*, 33 URB. LAW. 705 (2001) (highlighting recent research and examples of mediated land use settlements).

297. *Special Permits and Site Plan Review for Town of Amenia, NY*, GAINING GROUND INFO. DATABASE, <http://landuse.law.pace.edu/landuse/documents/laws/reg2/AmeniaNY-PreApp&ADR.doc> (last visited Nov. 27, 2014).

298. See, e.g., JOSEPH B. STULBERG & LELA P. LOVE, MIDDLE VOICE; MEDIATING CONFLICT SUCCESSFULLY 23–28 (2009); SUSSKIND & CRUIKSHANK, *supra* note 204, at 140–50; Howard Bellman & Susan Podziba, *Public Policy Mediation*, DISP. RESOL. MAG., Winter 2012, at 14; Ane D. Deister, *Environmental Mediation Strategies for Success: Summaries of Two Consensus-Based Cases—Florida's Growth Management Act Legislation and the Los Angeles River Watershed Task Force*, 32 URB. LAW. 73, 93 (2000).

299. See *Organizational Structure*, ST. JOHNS RIVER WATER MGMT. DISTRICT, http://floridaswater.com/organization/organization_chart.html (last visited Nov. 27, 2014).

encourage more stakeholder negotiations, not involving the board reduces their efficiency. Developers and the community would be better served if the board could offer its expertise to the negotiations.

The confidentiality provisions of mediation may provide an avenue for boards to offer suggestions during negotiations. By protecting a board's suggestions through the mediation process, it may be possible to avoid missing out on the board's expertise. Unfortunately, this alternative is cumbersome because the actual route to protect a board's suggestions would require a mediator to enter caucus—a separate session—with the board to elicit suggestions and then communicate those suggestions to the other side as if they came from the mediator.³⁰⁰ The obvious inefficiencies of this approach would likely reduce its effectiveness. This option is also imperfect because not all mediations can rely on confidentiality protections.³⁰¹ A future court, concerned with protecting landowners from extortionate demands, could decide to override any promised confidentiality of mediation.³⁰²

C. Negotiate Without Offering Conditions

A similarly inefficient alternative for avoiding heightened scrutiny would be to allow the board to negotiate but not to make any proposals. For example, the board can tell the developer that a proposal does not adequately protect wetlands but then not propose any mitigation alternatives. In this way, the board never makes a demand and never triggers the scrutiny of *Nollan* and *Dolan*. If the developer does not change the application the board can deny the permit and any Fifth-Amendment takings claim by the developer will be subject to *Penn Central* and not *Nollan–Dolan*.

If the developer wanted to avoid a denial, she could suggest mitigation measures hoping that such an alternative would satisfy the board. The complication with this option is how this negotiation would integrate with the required decision-making process. If the developer identifies an

300. See Richard M. Calkins, *Caucus Mediation—Putting Conciliation Back into the Process: The Peacemaking Approach to Resolution, Peace, and Healing*, 54 *DRAKE L. REV.* 259, 270, 283 (2006) (describing the purpose and practice of caucus in mediation).

301. Susan Oberman, *Confidentiality in Mediation: An Application of the Right to Privacy*, 27 *OHIO ST. J. ON DISP. RESOL.* 539, 541 (2012) (“There is no uniformity in confidentiality protections between state and federal laws, among the states, or even among localities within states.”); Note, *Protecting Confidentiality in Mediation*, 98 *HARV. L. REV.* 441, 441 (1984) (“Under current law, however, it is far from clear that a mediator can back up a promise that everything said in mediation will remain confidential . . .”).

302. See Maureen A. Weston, *Confidentiality’s Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 *HARV. NEGOT. L. REV.* 29, 33 (2003) (“Few . . . statutes, however, acknowledge the authority of a court to override the confidentiality privilege to enforce participation orders, address claims of participant misconduct, or to prevent abuse of process or professional ethics violations.”).

acceptable option, the board cannot commit to an approval prematurely. The board is required to follow the required process before rendering a binding decision. Doing so would make the board's decision vulnerable to a procedural challenge. While this alternative protects the board from heightened scrutiny, this inefficient form of negotiation increases transaction costs for all involved. The developer will have to spend more time in the approval process. The community will have to wait longer for any benefits from the development and may even have to fund litigation. The board will waste valuable time playing "hot or cold" with the developer instead of addressing other important decisions.

D. *Negotiate*

A board may decide that negotiating with developers over potential exactions is worth the added judicial scrutiny. It can still use the approval process to offer suggestions about how to mitigate the impact of a proposed development. The majority opinion in *Koontz* does not prevent these conversations. It does, however, require boards to have a greater level of certainty—a nexus and rough proportionality—when offering suggestions. As a result, municipalities must conduct a rigorous analysis before proposing conditions because research indicates that governments fail heightened scrutiny half of the time on appeal.³⁰³ If the negotiations collapse and the developer decides to sue, a court will require the board to show that its proposals meet the *Nollan–Dolan* standard.

Therefore, boards should only enter into land use negotiations when they have reliable and up-to-date information that can justify the nexus and rough proportionality requirements,³⁰⁴ and the development promises sufficient community benefit to warrant the risk of litigation and a possible adverse ruling. This will be difficult in practice since the project details are often malleable in the early stages of a development application.

E. *Insulate Negotiations—Ensure Proposals Do Not Become Demands*

Governments may attempt to insulate their negotiations from triggering heightened scrutiny by specifying when a proposal becomes a demand.

303. See Echeverria, *supra* note 124, at 7 & n.38 (citing research of appellate decisions applying the "rough proportionality" test revealing that the "government flunks the test about half the time").

304. If boards do not have this information they can ask developers to provide funds to conduct studies. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(1) (2014) ("The project sponsor or the lead agency, at the project sponsor's option, will prepare the draft [Environmental Impact Statement (EIS)]. If the project sponsor does not exercise the option to prepare the draft EIS, the lead agency will prepare it, cause it to be prepared or terminate its review of the action. A fee may be charged by the lead agency for preparation or review of an EIS pursuant to section 617.13 of this Part. When the project sponsor prepares the draft EIS, the document must be submitted to the lead agency.").

While the Court used imprecise language to define the triggering behavior, an argument can be made that *Koontz* only applies to specific, concrete, and definite demands.³⁰⁵ Therefore, indefinite proposals that are not concrete and specific are not considered demands. Accordingly, a board that specifies when a proposal amounts to a demand may be able to avoid being subject to heightened scrutiny. But given the Supreme Court's demonstrated hostility to similar maneuvers in *Nollan*, *Dolan*, and *Koontz* the Justices will likely view any efforts to insulate negotiations with suspicion.

Boards may be able to use pre-application processes and development agreements to insulate their negotiations.³⁰⁶ Many boards have used pre-application processes to address important issues before the rigidity of the required process interferes with parties' ability to communicate.³⁰⁷ By conducting negotiations before an application is finally accepted, the board may be able to avoid heightened scrutiny. A community may create a pre-negotiation process to explore the impacts of the development and possible mitigation measures. Boards can issue a rule explaining that any of the ideas in this pre-application problem-solving workshop are not demands until they become part of an application.

One problem with this approach is timing. Early-stage negotiations may lack sufficient information to produce mutually agreeable and efficient outcomes. In order to understand the true impacts of a project, the board needs details about what the developer will build, how she will build it, and where. The board must then use that information to identify mitigating measures. Further, information about harms may not be available in the early stages of the approval process because of inadequate information about what is being proposed. Identifying this information takes time and money and landowners are only willing to invest those resources if there is a reasonable likelihood of success in the approval process. Therefore, replacing negotiation opportunities at the end of the process with pre-application negotiation is problematic because it can leave on the table value that might normally be discovered later in the process.

Another problem with these attempts to insulate is the Court's concern over circumventing the Takings Clause. The majority opinions in *Nollan*, *Dolan*, and now *Koontz*, make it clear that boards cannot do indirectly

305. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2598 (2013).

306. Compare Callies et al., *supra* note 83, at 17–18 (suggesting that development agreements—agreements between government and landowners that lock land use regulations in place for a discrete time frame—can also be used to insulate development negotiations), with Callies & Tappendorf, *supra* note 222, at 681–83 (arguing that in order for developer agreements to offer widespread relief from the pressures of *Koontz*, they must be authorized by a well-drafted statute, and noting that only thirteen states permit their use).

307. See, e.g., Peter A. Buchsbaum, Bibliography, *Permit Coordination Study by the Lincoln Institute of Land Policy*, 36 URB. LAW. 191, 218 (2004) (summarizing a study that points out the benefits of pre-application processes).

what they cannot do directly.³⁰⁸ If boards cannot avoid the Fifth Amendment using a proposed condition prior to a decision, will courts allow them to do so using a proposed condition before the developer submits an application? Again, this lack of clarity comes from the Court's unwillingness to define what amounts to a demand. Identifying the moment that transforms a "proposal" to a "demand" will be very difficult for boards.

How does a board know when its proposal crosses the threshold of specificity and concreteness? Is it when the board specifically incorporates the condition into an application as a written alternative? Is it when the board makes a condition with concreteness to measure the impact? While proposals offered in a pre-application process may not be adequately concrete and specific, any affirmative statement that they are is conjecture subject to a contrary ruling by a reviewing court.

Another option for insulating negotiation is to ask the developer to waive her right to a compensated taking.³⁰⁹ Professor Daniel Farber suggests that this type of a waiver may be permissible under certain circumstances: "Despite the Declaration of Independence's proclamation of inalienable rights, constitutional rights are indeed alienable in the sense that they can be waived in return for various benefits. . . . [T]he right to a jury trial can be surrendered in return for a lighter sentence as part of a plea bargain."³¹⁰

Could the right to be justly compensated be surrendered in return for an approval to build a noncompliant development? Professor Farber concludes that ultimately the Court's rulings dealing with development conditions are not likely to permit the possibility of a waiver unless revised by future Courts.³¹¹ Since these are essentially the facts of *Nollan*, *Dolan*, and *Koontz*, he is probably correct. Based on the opinions in those cases, it

308. See *Koontz*, 133 S. Ct. at 2598–99 ("[I]f the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking."); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) ("[H]ad the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred."); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking."); Sullivan, *supra* note 59, at 1505 (describing how *Nollan* fits with the other unconstitutional conditions doctrine cases and reiterating the Court's conclusion that "[b]eing offered a building permit on the condition that one surrender an easement to the public clearly pressures the right against uncompensated taking if 'direct' requisition of the easement would constitute a taking").

309. See generally Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913 (2006) (raising the question of when and how the right to a constitutional protection can be waived).

310. *Id.* at 914 (footnotes omitted).

311. See *id.* at 951.

is hard to imagine how a waiver would be seen as anything but “extortionate” behavior. However, until that question is answered, some land use boards may decide that requesting a waiver is a worthwhile alternative to forgoing negotiation.

CONCLUSION

Koontz will certainly not kill land use negotiations. Developers and land use boards receive too many benefits from the creative bargaining that negotiations allow. However, *Koontz* changes the balance of power among the parties, so some retreat from negotiation is inevitable. The Court’s decision in *Koontz* severely limits the ability of land use boards to work with developers who present noncompliant proposals. According to Coy Koontz Jr., the decision “will give [developers] a bigger stick to take into court in the future to fight these types of cases.”³¹² It is hard to imagine a future in which land use boards do not retreat from negotiations over noncompliant applications.

Hopefully, future courts will provide more guidance on what types of behaviors amount to demands triggering *Nollan–Dolan* scrutiny. The only definition given by the Supreme Court is that demands for property are *definite, concrete, and specific*.³¹³ There is no guidance beyond the plain meaning of these words. Future courts may be able to provide further guidance as to the meanings of these words.

One of the many questions after *Koontz* is whether the Court’s efforts to protect a few developers from potentially extortionate behavior will harm a much greater number of developers. This Article argues that it will. Post-*Koontz* boards must now spend more time and money ensuring that proposed development conditions meet the same rigorous standard as imposed conditions under *Nollan* and *Dolan*. Sensible boards will construct protection around their development negotiations to ensure that suggestions are only made when they can satisfy the heightened standard of scrutiny. These increased protections may reduce the likelihood that boards use development processes for illegitimate and extortionate purposes; however, the increased transaction costs will undoubtedly place more burdens—and costs—on developers, planners, and municipalities.

312. Jacobs, *supra* note 30.

313. *See Koontz*, 133 S. Ct. at 2598.

