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Constitutional Law—Fifth Amendment and Takings—Courts and the Judicial Process Will Impede Orderly City Development by Limiting Local Governments’ Use of Exactions in Development Planning. *Koontz V. St. Johns River Water Management District*, 133s. Ct. 2586 (2013).

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CONSTITUTIONAL LAW—FIFTH AMENDMENT AND TAKINGS—COURTS AND THE JUDICIAL PROCESS WILL IMPEDE ORDERLY CITY DEVELOPMENT BY LIMITING LOCAL GOVERNMENTS’ USE OF EXACTIONS IN DEVELOPMENT PLANNING. *KOONTZ V. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT*, 133 S. CT. 2586 (2013).

I. INTRODUCTION

Few consider how cities come to own their public parks or waterfront nature preserves. Most take these types of government amenities for granted and are surprised when they discover the source for a public space is a private owner who gave the land to the city in exchange for the city’s allowing an expansion of the private owner’s enterprises. For example, a developer who files a permit requesting permission to develop some of his protected wetlands could be required by the city to dedicate a large portion of the remaining undeveloped land to the city as a conservation easement in order to offset the potential harms resulting from the new development.¹

Government deals with private owners are called exactions.² Put simply, exactions are conditions that local governments may require of property owners in return for the grant of permits that allow the intensified use of real property.³ Common examples are “mandatory dedications of land, fees required in lieu of dedication, and impact fees given by property owners in exchange for permits, zoning changes, and other regulatory clearances.”⁴ While landowners might view exactions as a hindrance to development, they are essential tools for municipalities seeking to protect the public interest by guiding development in a certain direction when granting land use permits.⁵

Exactions law developed out of two constitutional concepts: the Fifth Amendment Takings Clause and the principle of unconstitutional conditions.⁶ The Takings Clause states, “nor shall private property be taken for

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

2. See Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 611 (2004) [hereinafter Fenster, *Takings Formalism*].

3. See *id.*

4. *Id.* at 613.

5. See, e.g., Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 511, 512–13 (2012) [hereinafter Mulvaney, *Exactions for the Future*].

6. See generally, Julie A. Tappendorf & Matthew T. DiCianni, *The Big Chill? — The Likely Impact of Koontz on the Local Government/Developer Relationship*, 30 TOURO L. REV. 455 (2014) [hereinafter Tappendorf & DiCianni, *Takings Law Today*] (providing an overview of the development of the doctrine of unconstitutional conditions); Robert Meltz,

public use, without just compensation.”⁷ The Supreme Court of the United States interpreted this to mean that the government, using its police power, may appropriate private property for the health, safety, and welfare of the public, so long as it provides just compensation for the property taken.⁸ Until the early twentieth century, the Court recognized only two types of takings: (1) a formal appropriation of property and (2) a permanent physical invasion of property.⁹ In 1922, the Court handed down a decision in *Pennsylvania Coal Co. v. Mahon*¹⁰ that gave birth to the notion of “regulatory takings.”¹¹ The Court held that when a government regulation of land use goes “too far,” a taking might result despite the absence of formal appropriation or physical invasion.¹² In the late twentieth century, beginning with *Penn Central Transportation Co. v. City of New York*,¹³ the Court began setting forth guidelines for determining how far is “too far,” and which regulations affect a taking and thus require just compensation.¹⁴

Exactions are a subset of takings jurisprudence in that most of the cases arise because a local government has placed limits on how a person may use his property via a condition that must be fulfilled before the permit for the use is granted.¹⁵ However, unlike the deferential *Penn Central* balancing test most regulatory takings claims receive,¹⁶ exactions are reviewed under a rule-formalist heightened scrutiny.¹⁷

Takings Law Today: A Primer for the Perplexed, 34 *ECOLOGY L.Q.* 307, 328 (2007) (providing an overview of the development of takings jurisprudence).

7. U.S. CONST. amend. V.

8. See, e.g., *United States v. Carmack*, 329 U.S. 230, 241–42 (1946).

9. See Meltz, *supra* note 6, at 328.

10. 260 U.S. 393 (1922).

11. See Meltz, *supra* note 6, at 328.

12. *Pennsylvania Coal*, 260 U.S. at 415.

13. 438 U.S. 104 (1978).

14. The factors in *Penn Central* include: (1) the character of the government action restricting the claimant’s property rights; (2) the economic impact of the regulation; and (3) the extent to which the regulation has interfered with distinct, investment-backed expectations. *Id.* at 124. For a more thorough discussion of takings jurisprudence, see Meltz, *supra* note 6.

15. See Fenster, *Takings Formalism*, *supra* note 2, at 614. For a brief explanation of regulations in *Koontz*, see BRIAN W. BLAESSER & ALAN C. WEINSTEIN, *FEDERAL LAND USE LAW & LITIGATION* § 3:31 (2014 ed.).

16. See, e.g., Fenster, *Takings Formalism*, *supra* note 2, at 612.

17. See *Dolan v. City of Tigard*, 512 U.S. 374, 391–92 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834–36 (1987); *infra* Part II.B. The “essential nexus” and “rough proportionality” tests of *Nollan* and *Dolan* require courts to consider a “prescribed, focused logic” when examining exactions. Fenster, *Takings Formalism*, *supra* note 2, at 611, 629. “Thus, the test differ[s] strikingly from the . . . open-ended inquiry of *Penn Central*.” See *id.* at 629.

The idea of “unconstitutional conditions” was introduced in 1910 in two Supreme Court cases.¹⁸ The doctrine “forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.”¹⁹ Thus, the government may not condition the receipt of a discretionary benefit on the recipient’s relinquishment of a constitutionally protected right.²⁰ While the doctrine of unconstitutional conditions evolved over the course of the twentieth century, the Court did not use it to regulate exactions until the latter part of the century.²¹ As exactions require landowners to forfeit the constitutionally protected right to use their property in whatever way they see fit in exchange for permits, unconstitutional conditions was the “logical underpinning” for the Court to use in developing exactions jurisprudence.²²

Theoretically, the purpose behind exactions is to put the burden of mitigating harm that may result from intensified land use on the person proposing the intensified use.²³ Until recently, however, municipal governments had little regulation concerning how they could use these exactions.²⁴ If a developer wanted to build a new shopping center, the city could require him to dedicate part of the land as a street right-of-way.²⁵ Or a business owner might request that the city rezone an area so that the business sits in a commercial zone rather than residential; the city will grant the permit, as long as he also dedicates a parcel of his property to the city for use in future highway expansion.²⁶

During its efforts to delineate the standards for takings jurisprudence it had established in the late 1900s, the Supreme Court began to limit the way

18. *W. Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 51 (1910) (White, J., concurring); *Pullman Co. v. Kansas ex rel. Coleman*, 216 U.S. 56, 69–70 (1910) (White, J., concurring).

19. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013).

20. Tappendorf & DiCianni, *Takings Law Today*, *supra* note 6, at 456. Tappendorf and DiCianni provided an example of a television station’s receipt of government funding: “the government cannot force a television station receiving public funds to refrain from endorsing a candidate for public office because then the constitutionally protected right (freedom of speech) would be impermissibly burdened by the government’s refusal to provide public funds to the television station.” *Id.* at 456–57.

21. *See Dolan*, 512 U.S. at 407; *Nollan*, 483 U.S. at 859; Tappendorf & DiCianni, *Takings Law Today*, *supra* note 6, at 458.

22. Tappendorf & DiCianni, *Takings Law Today*, *supra* note 6, at 458.

23. *See, e.g., Mulvaney, Exactions for the Future*, *supra* note 5, at 516; Fenster, *Takings Formalism*, *supra* note 2, at 613.

24. *See* J. David Breemer, *The Evolution of the “Essential Nexus”: How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 374–76 (2002).

25. *See City of Jonesboro v. Vuncannon*, 310 Ark. 366, 368–69, 837 S.W.2d 286, 287 (1992).

26. *See Goss v. City of Little Rock*, 90 F.3d 306, 307 (8th Cir. 1996).

local government could require exactions.²⁷ In *Nollan v. California Coastal Commission*²⁸ and *Dolan v. City of Tigard*,²⁹ the Court set out a two-pronged test to determine if an exaction violated the doctrine of unconstitutional conditions to rise to the level of a taking under the Fifth Amendment purposes.³⁰ First, per *Nollan*, exactions must bear an “essential nexus” to the harm prevented,³¹ and second, per *Dolan*, the condition imposed must be roughly proportional to the adverse impact of the project on the community.³²

After these landmark cases, municipalities still had some leeway when granting land use permits.³³ There were two primary methods to get around the test.³⁴ First, local governments could require the owner to pay a monetary exaction, or pay toward the costs of mitigating any perceived harms, rather than granting an actual portion of his or her land.³⁵ Second, local governments would simply deny the permit should the landowner refuse the condition attached; thus the exaction escapes the scrutiny of the *Nollan/Dolan* test.³⁶ This note focuses on the latter.

In its June 2013 decision of *Koontz v. St. Johns River Water Management District*,³⁷ the Supreme Court held that both monetary exactions and failed exactions are subject to the *Nollan/Dolan* rough proportionality test.³⁸ This decision in *Koontz* creates more questions than it resolves. While ostensibly expanding the individual rights of property owners, the decision may have an adverse impact on community growth as it limits and confuses local government control over the granting of land use permits. This article proposes that, in order to prevent adverse effects on community development, regulation of government exactions is better left to state legislatures and administrative review boards.

Part II of this note provides a brief history of how exactions have affected city development up to current times, and then describes *Nollan*, *Dolan*, and *Koontz*. Part III discusses some of the ramifications of the *Koontz* decision on city growth and development, looks into the confusion *Koontz*

27. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

28. 483 U.S. 825 (1987).

29. 512 U.S. 374 (1994).

30. See *id.* at 391; *Nollan*, 483 U.S. at 837.

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

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

33. See Breemer, *supra* note 24, at 375.

34. See *id.*; Mark Fenster, *Failed Exactions*, 36 VT. L. REV. 623, 624 (2012).

35. See Fenster, *Failed Exactions*, *supra* note 34, at 624.

36. See, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). See also Fenster, *Failed Exactions*, *supra* note 34, at 624.

37. 133 S. Ct. 2586 (2013).

38. *Id.* at 2595, 2599.

will cause in future litigation, and then provides a better method of examining exactions, that is, through state legislatures and administrative review boards.

II. BACKGROUND

A. The History of Exactions

Exactions arose in the early nineteenth century as a municipal effort to force rogue developers into taking responsibility for the societal harms their developments caused.³⁹ To develop land in the decades leading up to the 1930s, a developer needed only “a whim, a pen, and a map.”⁴⁰ This led to an overabundance of developed lots without amenities such as utility services or roads, which naturally no one wanted, and thus led to an abundance of vacant lots and tax delinquency on the part of the developers.⁴¹ This caused sporadic and disorderly growth, as no developers wished to continue work on this “dead land” property that was essentially uninhabitable and would simply move further out of town to develop again.⁴²

The Standard Planning Enabling Act of 1928 sought to remedy the problem by recommending that municipalities condition permit approval upon the developer providing essential necessities.⁴³ The city could require the developer to build “streets, water mains, sewer lines, and other utility structures” in order to cope with the increased population and its impact in the subdivision and surrounding area.⁴⁴ Thus, the institutionalized government exaction was born.⁴⁵ These original exactions mostly required “direct infrastructural enhancement”—meaning they focused on mitigating impacts that the developer could remedy on the developed land itself such as providing drainage systems, sidewalks, or road improvements in the developed area.⁴⁶ During and following the Great Depression, developers and the real estate community challenged these conditional requirements as they became

39. See ALVIN L. ARNOLD & MARSHALL E. TRACHT, 1 CONSTRUCTION AND DEVELOPMENT FINANCING § 2:82 (3d ed. 2013).

40. Mulvaney, *Exactions for the Future*, *supra* note 5, at 516.

41. R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 5–6 (1987).

42. *Id.*

43. Mulvaney, *Exactions for the Future*, *supra* note 5, at 517.

44. See *id.*; Jennifer Evans-Cowley, *Development Exactions: Process and Planning Issues*, at 3 (Lincoln Inst. of Land Policy, Working Paper WP06JEC1, 2006).

45. Mulvaney, *Exactions for the Future*, *supra* note 5, at 517.

46. *Id.*

a burden during the economic downturn, but they never gained sympathy in court.⁴⁷

By the 1940s, conditioning permit approval upon on-site, harm-mitigating requirements had become the norm in most cities.⁴⁸ Following World War II, local governments began imposing off-site requirements to mitigate the harm that came with the “mass suburbanization” of the 1950s.⁴⁹ These external exactions might require the developer to contribute, either directly by providing labor and materials or financially through a monetary exaction, to “wastewater facilities, schools, public parks, precinct houses, fire stations, or even day care services,” services to which their development had no connection.⁵⁰

Naturally, developers fought these off-site, external exactions, arguing that they were “inequit[able], inefficien[t], and general[ly] ineffective[] in what they saw as a piecemeal, ad hoc land use permitting process.”⁵¹ The general public, however, found exactions to be preferable to the other option of increasing local taxes to pay for these public projects.⁵² By the latter part of the twentieth century, exactions had become a standard tool wielded by local governments when issuing approvals for land use, especially in areas with fast-growing populations.⁵³ This time developers gained some traction when they brought suit challenging the conditions, usually in the form of state laws or state supreme court decisions imposing small limitations on municipalities.⁵⁴ A common trend among states was to impose a “reasonable relationship” test that weighed the burdens and benefits to the developer.⁵⁵

47. See, e.g., *Ridgefield Land Co. v. Detroit*, 217 N.W. 58 (Mich. 1928) (holding developer required to provide subdivision street dedications); *Mefford v. City of Tulare*, 228 P.2d 847 (Cal. Dist. Ct. App. 1951) (ruling developer required to provide sewers); *Brous v. Smith*, 106 N.E.2d 503 (N.Y. 1952) (holding developer required to provide roadway improvements); *Petterson v. City of Naperville*, 137 N.E.2d 371 (Ill. 1956) (ruling developer required to provide gutters and curbs).

48. See Mulvaney, *Exactions for the Future*, *supra* note 5, at 518.

49. *Id.*; see *Berman v. Parker*, 348 U.S. 26, 32–33 (1954) (holding that the state’s police power for takings may be used to make communities beautiful and desirable, and not solely for public health, safety, and morality purposes).

50. Mulvaney, *Exactions for the Future*, *supra* note 5, at 518; see also Evans-Cowley, *supra* note 44, at 3.

51. Mulvaney, *Exactions for the Future*, *supra* note 5, at 518.

52. See Evans-Cowley, *supra* note 44, at 3.

53. See Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Context of Exactions*, 58 HASTINGS L.J. 729, 734 (2007) [hereinafter Fenster, *Regulating Land Use*].

54. See Mulvaney, *Exactions for the Future*, *supra* note 5, at 518–19.

55. See, e.g., *Collis v. City of Bloomington*, 246 N.W.2d 19 (Minn. 1976) (holding there must be “a reasonable relationship between the approval of the subdivision and the municipality’s need for land”); *Simpson v. City of N. Platte*, 292 N.W.2d 297 (Neb. 1980) (stating that the test is “whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property

Exactions have become an essential tool for municipalities when making long-range development plans and have extended beyond simple land dedication or utility easements.⁵⁶ Monetary exactions, or cash payments, have become another way of mitigating potential harm caused by heightened land use.⁵⁷ These methods became an alternative to dedications of land or other physical exactions when those traditional exactions were “inconvenient, too small, or otherwise did not account for the perceived needs of the development.”⁵⁸ The “mitigation fees” or “impact fees” can be imposed by a local government as a condition to approving a development permit or some other land use action, such as rezoning.⁵⁹ Monetary exactions have become useful tools for municipalities to supplement both state and federal subsidies to local governments and in preventing tax increases as an alternative.⁶⁰ Until recently, municipalities had discretion to impose either land dedication or monetary exactions as needed.⁶¹

B. The Supreme Court Takes Action in *Nollan* and *Dolan*

Starting in 1987, the Supreme Court of the United States began placing limits on exactions used by municipalities.⁶² In two landmark cases, *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, the Court developed a two-part test to determine if the exaction imposed by the city

simply because at that particular moment the landowner is asking the city for some license or permit”); *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984) (holding that to be valid, the exaction must “be ‘substantially related’ to the health, safety, or general welfare of the people . . . [and] be reasonable”); *Call v. City of W. Jordan*, 606 P.2d 217 (Utah 1979) (ruling that “the dedication should have some reasonable relationship to the needs created by the subdivision”); *Jordan v. Vill. of Menomonee Falls*, 137 N.W.2d 442 (Wis. 1965) (holding that “[t]he test of reasonableness is always applicable to any attempt to exercise the police power”).

56. See, e.g., Fenster, *Regulating Land Use*, *supra* note 53, at 734; Mulvaney, *Exactions for the Future*, *supra* note 5, at 518–19.

57. See Lauren Reznick, *The Death of Nollan and Dolan? Challenging the Constitutionality of Monetary Exactions in the Wake of Lingle v. Chevron*, 87 B.U. L. REV. 725, 737 (2007).

58. *Id.*

59. *Id.*; see also Ehrlich v. City of Culver City, 911 P.2d 429, 433 (Cal. 1996) (discussing the City’s requirement that a developer pay a “mitigation fee” as a condition for approval of a rezoning permit).

60. See Reznick, *supra* note 57, at 738. For further discussion on the impacts of exactions on public tax policy, see Evans-Cowley, *supra* note 44.

61. See, e.g., Fenster, *Regulating Land Use*, *supra* note 53, at 734; Breemer, *supra* note 24, at 375.

62. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

had gone past a mere exaction to become a taking in violation of the Fifth Amendment.⁶³

I. Nollan v. California Coastal Commission and an "Essential Nexus"

In *Nollan v. California Coastal Commission*, the Nollans sought to convert an oceanfront cottage into a three-bedroom home, which would have blocked the public's view of the ocean.⁶⁴ The California Coastal Commission approved the permit on condition that the Nollans provide a public walking easement along the ocean in front of the property, which would have resulted in a permanent dedication of part of their property.⁶⁵ The Nollans lost in state court and eventually brought their appeal to the Supreme Court.⁶⁶

The Court determined that the easement dedication did not, and could never, alleviate the immediate developmental impact of expanding the home.⁶⁷ It held that in order for an exaction to pass constitutional muster, the government agency must prove that it bears an "essential nexus" to the impacts caused by the development requested.⁶⁸ Without that essential nexus, the Court likened the situation to a "California law forb[idding] shouting fire in a crowded theater, but grant[ing] dispensations to those willing to contribute \$100 to the state treasury."⁶⁹ In short, the Court stated, "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.'"⁷⁰

In his dissent, Justice Brennan pointed out several problems with the Court's analysis, noting first that the easement attached to the permit did in fact respond to the specific burden placed on the public in granting the Nollans's permit.⁷¹ He also noted that the Commission's action did not im-

63. See *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374.

64. *Nollan*, 483 U.S. at 827-30.

65. *Id.*

66. *Id.*

67. *Id.* at 838.

68. *Id.* at 836-37.

69. *Id.* at 837.

70. *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)).

71. *Id.* at 842 (Brennan, J., dissenting) ("[The Commission] has determined that the Nollans' burden on access would be offset by a deed restriction that formalizes the public's right to pass along the shore. In its informed judgment, such a tradeoff would preserve the net amount of public access to the coastline. The Court's insistence on a precise fit between the forms of burden and condition on each individual parcel along the California coast would penalize the Commission for its flexibility, hampering the ability to fulfill its public trust mandate.").

plicate any constitutional concerns under the takings clause, specifically the economic impact of the regulation and the extent to which it interferes with investment-backed expectations.⁷²

2. Dolan v. City of Tigard and Rough Proportionality

In *Dolan v. City of Tigard*, Ms. Dolan requested a permit to expand her plumbing and electrical supply store and pave over a gravel parking lot along a creek.⁷³ The Tigard City Planning Commission approved the permit upon the condition that she dedicate a strip of her land to the city for flood-plain management and a bicycle path.⁷⁴ Once again, Ms. Dolan lost all state court appeals.⁷⁵

Dolan was the first case in which the Court explicitly used unconstitutional conditions to rule on land use exactions, although it stated that the holding in *Nollan* was an application of the doctrine.⁷⁶ The Court stated 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 sought has little or no relationship to the property.⁷⁷ Rejecting the “reasonably related” standard most state courts had used,⁷⁸ the Court held:

[A] term such as “rough proportionality” best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.⁷⁹

These cases left two unresolved questions for city planning commissions: (1) whether a monetary exaction is subject to the *Nollan/Dolan* test and (2) whether a failed exaction, where a permit is denied before a condition is attached, is subject to *Nollan* and *Dolan*.⁸⁰

72. *Id.* at 853–57 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). Notably, Justice Brennan would have the Court apply the less rigorous *Penn Central* test already in place for regulating takings rather than create a new standard for exactions.

73. *Dolan v. City of Tigard*, 512 U.S. 374, 377–83 (1994).

74. *Id.* at 379–80.

75. *Id.* at 382–83.

76. *Id.* at 385.

77. *Id.*

78. *See supra* note 55.

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

80. Fenster, *Failed Exactions*, *supra* note 34, at 624.

C. *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013)

In spring 2013, the Court answered these two questions in *Koontz v. St. Johns River Water Management District*.⁸¹ Mr. Koontz sought a permit from St. Johns River Water Management District (“the District”) to develop part of his property, which, consistent with Florida law, requires permit applicants wishing to build on wetlands to offset the resulting environmental damage.⁸² Mr. Koontz offered to mitigate the environmental effects of his development proposal by deeding to the District a conservation easement on nearly three-quarters of his property, the entire portion that he did not plan to develop.⁸³

The District rejected Mr. Koontz’s proposal, however, and gave him the option of choosing between: (1) reducing the size of his development and, *inter alia*, deeding to the District a conservation easement on the resulting larger remainder of his property, or (2) hiring contractors to improve District-owned wetlands several miles away.⁸⁴ Believing the District’s demands to be excessive in light of the environmental effects his proposal would have caused, Mr. Koontz filed suit under a state law that provides money damages for agency action that is an “unreasonable exercise of the state’s police power constituting a taking without just compensation.”⁸⁵ Both the trial and appellate courts found that the District’s actions violated *Nollan* and *Dolan* and therefore constituted a taking, but the Supreme Court of Florida reversed and held that Mr. Koontz did not have a claim because the *Nollan/Dolan* test did not apply to applications for permits or to monetary exactions.⁸⁶

On appeal to the Supreme Court, the Court determined that Mr. Koontz’s property had in fact been taken per the Fifth Amendment.⁸⁷ The Court again used the unconstitutional conditions doctrine to state that the government could not coerce people into giving up certain rights.⁸⁸ *Nollan* and *Dolan* “‘involve a special application’ of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land use permits.”⁸⁹ Notably, the Court held

81. See 133 S. Ct. 2586 (2013).

82. *Id.* at 2591–94.

83. *Id.*

84. *Id.* at 2593.

85. *Id.*

86. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1231 (Fla. 2011), *rev’d*, 133 S. Ct. 2586 (2013).

87. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. at 2596.

88. *Id.* at 2595.

89. *Id.* at 2594 (quoting *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 547 (2005); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)).

that “the principles that undergird the decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so.”⁹⁰ The Court purported to recognize that the unconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from the people who exercise those rights, regardless of whether the government ultimately succeeds in pressuring someone into forfeiting those rights.⁹¹

The District argued that it was allowed to deny Mr. Koontz’s application outright with no option to pay for the improvements mentioned without violating the Constitution, but the Court declared it made no difference.⁹² The Court recognized that this may cause a problem when deciding what remedy to provide: the Fifth Amendment states that the remedy for an unconstitutional taking is just compensation, but when a permit is denied before a condition is attached, nothing has been taken.⁹³ The Court, however, failed to resolve this problem, remanding the case back to Florida and leaving the question of what remedy to provide to the lower court.⁹⁴ Ultimately, the Court held that: (1) a local government’s demand for property from a land use permit applicant must satisfy the *Nollan/Dolan* requirements, even when it denies the permit, and (2) a local government’s demand for money from a land use applicant must satisfy the *Nollan/Dolan* requirements.⁹⁵

In her dissent, Justice Kagan expressed concerns about the Court’s role in this decision, stating:

The majority turns a broad array of local land use regulations into federal constitutional questions. It deprives the state and local governments of the flexibility they need to enhance their communities—to ensure environmentally sound and economically productive development. It places courts smack in the middle of the most everyday local government activity.⁹⁶

As Justice Kagan stated, the Court effectively curtailed all local governing power to regulate land use in a manner practicable to each municipality’s specific needs by forcing its holding into the conditional permit process, which is a distinctly local issue.⁹⁷ This decision will lead to ramifica-

90. *Id.*

91. *Id.*

92. *Id.* at 2596.

93. Koontz, 133 S. Ct. at 2597.

94. *Id.*

95. *Id.* at 2599, 2603.

96. *Id.* at 2612 (Kagan, J., dissenting). Although Justice Kagan’s dissent primarily focused on the majority’s holding that monetary exactions are subject to *Nollan* and *Dolan*, her analysis applies likewise to permit denials.

97. *Id.* at 2607.

tions in city development not intended by the Court and provides an unworkable standard for lower courts hearing disputes.

III. ARGUMENT

A. Unintended Ramifications in City Development

Requiring city planning agencies to examine proposed conditions in the light of *Nollan*'s "rough proportionality" and *Dolan*'s "essential nexus" will cause a detrimental effect on land use negotiations, which will lead to undesirable results in city development.⁹⁸ Municipalities will forgo negotiations altogether, resulting in outright denials, over-regulation, or no development;⁹⁹ or municipalities will approve permits with significantly less stringent conditions attached, leading to under-regulation and mass chaos in development.¹⁰⁰

1. *The Effect on Conditional Permit Negotiations*

The Court's decision in *Koontz* appears initially to create a manageable way of preventing "extortionate" demands from local land use agencies.¹⁰¹ It allows landowners to bring suit challenging those demands rather than face a permit denial after extended negotiations.¹⁰² At first glance, it seems logical to allow a developer whose permit is denied because he stood in the face of an extortionate request and refused to cave to an inappropriate exaction to avail himself of *Nollan* and *Dolan*, just as one who submits to the demand

98. Fenster, *Takings Formalism*, *supra* note 2, at 654–68.

99. *Id.* at 661–65. Because of the litigation risks involved in negotiating with landowners over a mitigating condition, local governments may simply deny proposals outright rather than impose necessary exactions that *Koontz* has made "vulnerable to constitutional challenges. . . . Even when a developer or property owner would willingly choose an expensive condition over an outright denial, the burdens and risks imposed by the nexus and proportionality tests can keep local governments from offering such conditions." *Id.* at 662.

100. *Id.* at 654–61. Communities are often caught in between two potential litigants: that of property owners wishing to expand, and political interest groups who oppose either specific plans or development in general. *Id.* In light of *Koontz*, property owners can now come to court armed with their constitutional rights, a "powerful weapon" that third party litigants cannot raise, regardless of whether the local government has finalized the condition or if it has merely suggested a starting point from which further negotiations will follow. *See id.*

101. *See* Timothy M. Mulvaney, *Proposed Exactions*, 26 J. LAND USE & ENVTL. L. 277, 300 (2011), [hereinafter Mulvaney, *Proposed Exactions*].

102. *See id.* Prior to *Koontz*, the only remedy for a developer whose permit had been denied was to argue an unconstitutional taking under the more deferential *Penn Central* test. Fenster, *Takings Formalism*, *supra* note 2, at 617. The only way to have access to the heightened scrutiny of *Nollan* and *Dolan* was to agree to the exaction, allow it to attach to the permit, and then challenge it in court. *See* Mulvaney, *Proposed Exactions*, *supra* note 101, at 301.

and allows the condition to attach to the permit can.¹⁰³ In practice, however, the decision in *Koontz* is likely to have a cooling effect on compromise negotiations between landowners and land use agencies, which will ultimately hurt both developers and the general public as well as invite baseless litigation in federal court over a local issue.¹⁰⁴

It is common practice for land use agencies and developers to negotiate a compromise during the application approval process.¹⁰⁵ Subjecting an exaction to the heightened scrutiny of the *Nollan/Dolan* test at the moment it is proposed, however, could foreclose the possibility of such a negotiating session ever taking place.¹⁰⁶ *Koontz* dictates that governmental land use agencies face a constitutional challenge in federal court if they simply enter negotiations with an offer that the landowner views as extortionate, a challenge that many communities are ill-equipped to face.¹⁰⁷ This potential liability will cause these agencies to deny permit applications outright rather than enter risky negotiations for which they could be held to the *Nollan/Dolan* standard.¹⁰⁸ Thus, city-planning commissions will be reluctant to even consider negotiations with developers to reach a satisfactory exchange.¹⁰⁹

Alternatively, now that the negotiations themselves rather than the final deal must be roughly proportional and bear an essential nexus to the anticipated harm, local governments may simply refuse to enter negotiations and force the developer to offer “sweeteners” such as “workforce housing, oversized water and sewer pipes, [or] community recreational facilities,” in order to obtain expansion permits.¹¹⁰

103. See Mulvaney, *Proposed Exactions*, *supra* note 101, at 301.

104. See *id.* Justice Kagan, in her *Koontz* dissent, stated that by applying *Nolan* and *Dolan* to permit conditions, “the majority extends the Takings Clause, with its notoriously ‘difficult’ and ‘perplexing’ standards, into the very heart of local land use regulation and service delivery.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2607 (2013) (Kagan, J., dissenting) (quoting *E. Enters. v. Apfel*, 524 U.S. 498, 541 (1998)). Again, Justice Kagan’s reference to the Court’s holding regarding monetary exactions is equally applicable to permit denials. See *id.*

105. Mulvaney, *Proposed Exactions*, *supra* note 101, at 308.

106. *Id.*; see, e.g., Fenster, *Failed Exactions*, *supra* note 34, at 644.

107. Mulvaney, *Proposed Exactions*, *supra* note 101, at 301–02; see also Amicus Brief at 12–13, *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013) (No. 11-1447), 2012 WL 6755147, at *12–13 (“Applying *Nollan* and *Dolan* beyond the context of actual exactions would lead to more intrusive and frequent legal challenges to land use decisions, undermining local governments’ capacity to carry out their planning and regulatory responsibilities.”).

108. Mulvaney, *Proposed Exactions*, *supra* note 101, at 301–02.

109. See Fenster, *Failed Exactions*, *supra* note 34, at 644; David L. Callies, *Koontz Redux: Where We Are and What’s Left*, 65 PLAN. & ENVTL. LAW 7 (2013).

110. Callies, *supra* note 109, at 7.

By forcing unapproved permits into the *Nollan/Dolan* test, many city planning organizations, formerly willing to discuss possible conditions that could alleviate both parties' concerns, will simply deny permits without even entering negotiations in order to face the lesser standard of the *Penn Central* test rather than the heightened scrutiny *Koontz* requires should a lawsuit arise.¹¹¹ This will naturally lead to stagnated development, especially in smaller areas that are seeking economic as well as physical growth, but may not have the resources to fight large-scale battles in court. There are many reasons for a municipality to deny a land use permit,¹¹² and exactions are necessary tools that give local land use agencies the flexibility they need to protect public health and safety and promote development schemes for the general welfare.¹¹³

On the other hand, rather than denying applications outright, local land use agencies may begin to simply forgo placing conditions on land use applications altogether, which could result in massive harm to the general public.¹¹⁴ The exaction system was created to regulate development that serves the interests of both the developer and the public, but this system could now ultimately have the opposite effect by allowing unregulated development.¹¹⁵ This creates the worst possible result: local land use agencies will be unable to negotiate adequate, workable mitigation compromises with developers; developers will be denied conditional permit approvals from wary agencies; and the entire regulatory process will become more rigid and mechanical, resulting in more denials and fewer negotiated compromises to serve local and developer interests.¹¹⁶ Nobody wins.

111. See Fenster, *Failed Exactions*, *supra* note 34, at 644.

112. City regulations regarding land use are not "components of a permanent, fixed scheme," but rather "a negotiable set of parameters" used to create "relationships with property owners seeking to change the use of their property." Fenster, *Takings Formalism*, *supra* note 2, at 623. The negotiation process is essential to this development scheme, as is the necessity that some permits be denied. See *id.*; Mulvaney, *Proposed Exactions*, *supra* note 101, at 303–04.

113. See Timothy M. Mulvaney, *The Remnants of Exaction Takings*, 33 ENVIRONS ENVTL. L. & POL'Y J. 189, 214–15 (2010) [hereinafter Mulvaney, *Remnants*].

114. See, e.g., Mulvaney, *Proposed Exactions*, *supra* note 101, at 308–09. Likewise, under-regulation leads to windfalls on the part of the landowner at the expense of the public. *Id.* at 308 n.160. But see Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 5 (2000).

115. See Mulvaney, *Proposed Exactions*, *supra* note 101, at 308–09; Mulvaney, *Remnants*, *supra* note 113, at 214–15.

116. See Fenster, *Failed Exactions*, *supra* note 34, at 644; ARNOLD & TRACHT, *supra* note 39, at § 2:82.

2. *The Effect on City Development*

Not only will requiring land use permits to meet the *Nollan/Dolan* standard before they are approved result in fewer negotiated compromises between land use regulators and landowners, reaching long-term goals will be much more difficult for cities.¹¹⁷ Land use planning allows cities to guide development by limiting the type and degree of allowable intensified use of property and zoning.¹¹⁸ It usually reflects a municipality's "long-term design, economic conditions, geography, and environmental resources."¹¹⁹ Thus, exactions are generally in line with the land use policies of the community and are part of planning processes that broadly assess local needs and objectives.¹²⁰

By using exactions to reach these community goals, local governments are able to shift the costs of a proposed project's negative impacts from the general public (in the form of taxes) to the developer who is ultimately responsible for causing the harm.¹²¹ In this way, local government can regulate and limit land use development for the general welfare without imposing additional costs.¹²² Thus, exactions have become key regulatory tools in a narrow, local environment where elected and appointed officials can wield their power to further the interests of the community in land development.¹²³

By requiring that an exaction fit the *Nollan/Dolan* test at its inception, however, the Court in *Koontz* has created "a near per se rule against using exactions for the future" as an effort to prevent or control certain types of city development.¹²⁴ When a city is imposing exactions that fit a broad, future plan, it is almost impossible for it to demonstrate that the exaction bears an essential nexus or is roughly proportional to the development proposed.¹²⁵

117. Mulvaney, *Exactions for the Future*, *supra* note 5, at 529; *see also* Amicus Brief at 4–5, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (No. 11-1447), 2012 WL 6759407, at *4–5 ("Each day in countless communities across the country, land use planning and zoning officials negotiate with developers over permit conditions that promote responsible development—including, as in this case, conditions that mitigate related environmental harms. These negotiations typically end with agreed-upon conditions, tailored to each unique proposal, that allow development to go forward, while also providing mitigating benefits to account for the very real costs development can impose upon the community at large.").

118. *See* Mulvaney, *Exactions for the Future*, *supra* note 5, at 529.

119. *Id.*

120. *See, e.g., id.* at 536, 540–41; Fenster, *Takings Formalism*, *supra* note 2, at 623.

121. *See* Fenster, *Regulating Land Use*, *supra* note 53, at 735.

122. *Id.*

123. *Id.*

124. Mulvaney, *Exactions for the Future*, *supra* note 5, at 542.

125. *See, e.g., id.*; Fenster, *Takings Formalism*, *supra* note 2, at 615 ("Rather, the Court's efforts to describe and prescribe exactions so misunderstand the complicated dynamics of land use regulation that they result in variable and unfortunate consequences—including,

There is necessarily some uncertainty when developing a long-term city plan, and local governments need flexibility when placing conditions on permits in order to achieve these goals.¹²⁶

By placing unapproved conditional permits under the scrutiny of *Nollan* and *Dolan*, the only exactions that will pass constitutional muster are those with harms that are easily defined and quantified at the instant of permit approval.¹²⁷ Thus, nebulous yet necessary city planning benefits such as “traffic-reducing rights-of-way and safety-inducing shore protection measures” may never happen, and the impacts of intensified land use will go unmitigated.¹²⁸ Before *Koontz*, courts routinely deferred to local governmental planning efforts in regulatory takings disputes because they recognized that imposing exactions with a broad, comprehensive plan in mind is less likely to be extortionate than when the exaction is imposed in a targeted way toward a particular developer.¹²⁹ After *Koontz*, lower courts no longer have that discretion, and city development will suffer for it.

B. An Impossible Standard

When a land use agency denies a permit before a condition has attached, no property has been taken. The landowner might argue that his right to use the property in the manner in which he wishes has been taken, but this is not a takings claim; government infringement on personal rights sounds in due process and would be best resolved with a due process standard.¹³⁰ The Court’s insistence on a takings analysis leads to a confusing standard that lower courts will have difficulty applying in local contexts

ironically, diminished property rights for landowners. Local context, in other words, often frustrates and complicates constitutional rules.”).

126. Mulvaney, *Exactions for the Future*, *supra* note 5, at 542; *see also* Amicus Brief at 14, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (No. 11-1447) 2012 WL 6755147, at *14 (“Petitioner’s proposal also would have perverse, harmful consequences for property owners seeking to develop their property for profit. Conditions attached to development authorizations often provide an effective and relatively inexpensive way of addressing the negative externalities associated with development. Thus, exactions and other conditions attached to development approvals often produce ‘win-win solutions’ that allow developers to achieve all or most of their development objectives while addressing the legitimate concerns of public officials and their constituents about the adverse effects of development.”).

127. *See* Mulvaney, *Exactions for the Future*, *supra* note 5, at 542.

128. *Id.*

129. *See id.* at 530; Fenster, *Takings Formalism*, *supra* note 2, at 611–12.

130. For a discussion of how the Due Process Clause is meant to encompass broader rights than the simple taking of property, *see* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 984 (2000). *See also* Amicus Brief at 28, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (No. 11-1447), 2012 WL 6771846, at *28.

because cities develop plans to meet their specific needs, often without considering the large-scale constitutional implications that may arise should a property owner challenge that plan.¹³¹

I. Are Exactions Examined Under Takings or Due Process?

Exactions are designed to prevent an immediately-obvious potential harm.¹³² When this is the case, *Nollan* and *Dolan* fall easily into place because the exaction attached to the permit, intended to mitigate the potential harm of the development, will only be allowed if it is linked both qualitatively (bearing an essential nexus) and quantitatively (roughly proportional) to this potential harm.¹³³ Thus, under the Fifth Amendment Takings Clause, the condition attached to the permit was an actual physical taking of identifiable property.¹³⁴ In both *Nollan* and *Dolan*, the plaintiffs lost the right to exclude members of the public from their property.¹³⁵ Without question, these conditions would require compensation if they had not been imposed within the context of exactions.¹³⁶ When a condition fails before it is approved, however, no identifiable property has been lost.¹³⁷ According to the Court, there is no difference between a condition attached before or after approval; in each situation, a local government has conditioned approval of a land use permit on an unconstitutional condition.¹³⁸ But whether a condition has attached prior to approval, meaning definite property has attached to the application, is critical to determining the condition's constitutionality.¹³⁹

131. See Fenster, *Takings Formalism*, *supra* note 2, at 615–16.

132. Mulvaney, *Exactions for the Future*, *supra* note 5, at 521.

133. *Id.*

134. *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

135. *Dolan*, 512 U.S. 374; *Nollan*, 483 U.S. 825; see also ARNOLD & TRACHT, *supra* note 39 at § 2:82.

136. The right to intensified land use is the “just compensation” for an exactions taking. See Fenster, *Failed Exactions*, *supra* note 34, at 639.

137. *Id.* at 639–40; see also *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) (ruling that in order to challenge a regulation as a taking, the plaintiff may only assert: 1) a physical taking; 2) a total regulatory taking; 3) a *Penn Central* taking; or 4) an exaction that violates *Nollan* and *Dolan*).

138. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013); *Lambert v. City & Cnty. of San Francisco*, 529 U.S. 1045, 1048 (2000); Fenster, *Failed Exactions*, *supra* note 34, at 639–40.

139. Fenster, *Failed Exactions*, *supra* note 34, at 639–40. An amicus brief submitted in *Koontz* provides a helpful comparison: “[T]here is all the difference in the world between when government contemplates taking some action and when it actually takes that action. A citizen may ponder trespassing on his or her neighbor’s land but such an unneighborly thought is different as a matter of law from an actual trespass.” Amicus Brief at 14, *Koontz v.*

A court can only know what property will be taken after the land use regulator has identified the specific exaction required for permit approval.¹⁴⁰ The Fifth Amendment states “private property [shall not] be taken for public use, without just compensation.”¹⁴¹ When an exaction fails before it is approved no “private property” has been taken for “public use.”¹⁴² Unlike in *Nollan* and *Dolan*, in *Koontz*, the District did not specifically identify the property to be taken in exchange for Mr. Koontz’s permit approval; instead, the permit had been denied.¹⁴³ Even if the District’s actions were extortionate or unreasonable, Mr. Koontz’s property had not been taken for Fifth Amendment purposes.¹⁴⁴ Constitutionally, Mr. Koontz’s claim sounded in due process, not takings.¹⁴⁵ The Supreme Court of Florida recognized this distinction in refusing to expand *Nollan* and *Dolan* when it heard Mr. Koontz’s case.¹⁴⁶

Justice Kagan recognized the flaws in the Court’s overruling of the Florida decision, not only in the confusing application of the Takings Clause to property that had not been taken, but also in applying the same standard to both real property dedication and monetary exactions.¹⁴⁷ As highlighted in *Koontz*, exactions law falls into its own category of regulatory takings, which, by virtue of the way it operates, creates confusion.¹⁴⁸

2. Exactions Are Considered Under a Special Standard

The *Nollan/Dolan* test only applies to a narrow category of land use law: exactions cases.¹⁴⁹ This unique framework exclusive to exactions has resulted in legal confusion since the landmark cases were decided.¹⁵⁰ First of all, the standard places a greater burden on land use agencies to defend the condition attached to a permit than it does in justifying the regulations that

St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013) (No. 11-1447) 2012 WL 6755147, at *8.

140. See Fenster, *Failed Exactions*, *supra* note 34, at 639–40.

141. U.S. CONST. amend. V.

142. See Fenster, *Failed Exactions*, *supra* note 34, at 639–40.

143. *Koontz*, 133 S. Ct. at 2595; *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987); see also Fenster, *Failed Exactions*, *supra* note 34, at 639–40.

144. See Fenster, *Failed Exactions*, *supra* note 34, at 639–40.

145. See *id.*

146. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220 (Fla. 2011), *reh’g denied* (Jan. 4, 2012), *cert. granted*, 133 S. Ct. 420 (2012), and *rev’d*, 133 S. Ct. 2586 (2013).

147. *Koontz*, 133 S. Ct. at 2607 (Kagan, J., dissenting).

148. See *infra* Part III.B.3.

149. See, e.g., *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); BLAESSER & WIENSTEIN, *supra* note 15, at § 3:31; Mulvaney, *Proposed Exactions*, *supra* note 101, at 277–78.

150. See Mulvaney, *Proposed Exactions*, *supra* note 101, at 277–78.

allow the agencies to require a permit for expansion in the first place.¹⁵¹ Secondly, there is so much confusion about when and where the standard applies that agencies and developers alike are unable to rely on its application in any given scenario.¹⁵² *Koontz*, then, was the Court's effort to delineate and define the standard,¹⁵³ but clearly further efforts are needed.

Before *Koontz*, when a local land use regulator chose to deny a permit rather than condition approval on an exaction, courts hearing the case would apply the traditional regulatory takings standard from *Penn Central*.¹⁵⁴ When the government attached a condition, however, courts would apply the intermediate scrutiny of *Nollan* and *Dolan*.¹⁵⁵ This heightened scrutiny allows courts to ensure that the condition bears a reasonable relationship to the government's purpose in attaching the condition.¹⁵⁶ Exactions law, then, though ostensibly falling into the category of takings law, currently bears more of a resemblance to a due process claim.¹⁵⁷

In *Lingle v. Chevron, U.S.A.*,¹⁵⁸ the Court made an attempt to reconcile takings law with exactions law.¹⁵⁹ The Court's exactions decisions, according to the Court in *Lingle*, are no more than a check on government efforts to impose the functional equivalent of a taking of property via a regulatory act without compensation.¹⁶⁰

3. *The Courts' Role in Exactions Disputes*

As Justice Kagan stated, the *Koontz* decision inserts the judiciary into the "very heart" of local governance.¹⁶¹ Exactions law was fairly adequately regulated prior to the Court's involvement in *Nollan* and *Dolan*, whether through state court decisions or state statutes.¹⁶² The state court decisions regulated exactions by holding either that the local government did not have the authority to place certain conditions on development or by holding the

151. *See id.*

152. *See id.*

153. BLAESSER & WEINSTEIN, *supra* note 15, at § 3:31.

154. *See Fenster, Failed Exactions, supra* note 34, at 641.

155. *Id.*

156. *See Fenster, Regulating Land Use, supra* note 53, at 731.

157. BLAESSER & WEINSTEIN, *supra* note 15, at § 3:31; *see also* *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2608–09 (2013) (Kagan, J., dissenting) ("Finally, a court can use the *Penn Central* framework, the Due Process Clause, and (in many places) state law to protect against monetary demands, whether or not imposed to evade *Nollan* and *Dolan*, that simply 'go[] too far.'") (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922)).

158. 544 U.S. 528 (2005).

159. *Id.*; *Fenster, Regulating Land Use, supra* note 53, at 731.

160. *Lingle*, 544 U.S. 528; *Fenster, Regulating Land Use, supra* note 53, at 731.

161. *Koontz*, 133 S. Ct. at 2612 (Kagan, J., dissenting).

162. *See Fenster, Regulating Land Use, supra* note 53, at 735–36; *see also* Mulvaney, *Exactions for the Future, supra* note 5, at 12.

condition unconstitutional per the state constitution.¹⁶³ State legislation might allow exactions but would place limitations on them.¹⁶⁴

As stated earlier, by placing failed exactions into takings jurisprudence, state courts are left with an unworkable standard.¹⁶⁵ Because no condition has been attached to the permit, courts will be forced to engage in “judicial speculation on hypothetical exactions and their hypothetical impacts” in order to review these cases that may or may not present an actual controversy.¹⁶⁶ Additionally, once the land use agency denies a permit, the developer is left with the same rights that he had before he applied, that is, the right to the un-intensified use of his property.¹⁶⁷ He therefore has not forfeited anything; nothing was taken.¹⁶⁸ Thus, because nothing has been identified as taken, a court is unable to determine if the permit denial violates the takings tests provided in *Nollan* and *Dolan*.¹⁶⁹ The court can only provide the designated remedy of just compensation if the permit denial violates the *Nollan/Dolan* test.¹⁷⁰ Assuming this remedy is appropriate, the public should then be entitled to gain the property the court awarded just compensation for, as just compensation is only provided for property taken for public use.¹⁷¹ If a court awards just compensation for a failed exaction, there is nothing for the public to receive.¹⁷²

The courts’ role, then, is especially called into question when awarding remedies.¹⁷³ It is impossible to determine just compensation when nothing has been taken.¹⁷⁴ The remedies outlined in *Nollan* and *Dolan* only make sense when actual, identifiable property or a property interest is taken fol-

163. See, e.g., *City of Montgomery v. Crossroads Land Co., Inc.*, 355 So. 2d 363, 364–65 (Ala. 1978) (invalidating as beyond statutory authority fees imposed in lieu of park land dedication); *Haugen v. Gleason*, 359 P.2d 108, 111 (Or. 1961) (invalidating fee imposed on residential developers in lieu of park land dedication because failure of ordinance to limit use of funds to benefit made the fee a tax, which the county had no statutory authority to impose); Fenster, *Regulating Land Use*, *supra* note 53, at 735–36.

164. See Fenster, *Regulating Land Use*, *supra* note 53, at 735–36.

165. See Mulvaney, *Proposed Exactions*, *supra* note 101, at 301–02.

166. *Id.* at 301.

167. *Id.* at 302.

168. *Id.*

169. *Id.* at 302–03.

170. *Id.*

171. Mulvaney, *Proposed Exactions*, *supra* note 101, at 301–03. The Florida District Court Judge used slightly more colorful terms: “[I]n what parallel legal universe or deep chamber of Wonderland’s rabbit hole could there be a right to just compensation for the taking of property under the Fifth Amendment when no property of any kind was ever taken by the government and none ever given up by the owner?” *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 20 (Fla. Dist. Ct. App. 2009).

172. Mulvaney, *Proposed Exactions*, *supra* note 101, at 302.

173. See, e.g., *ARNOLD & TRACHT*, *supra* note 39, at § 2:82.

174. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2597 (2013).

lowing a negotiation with a land use regulatory agency.¹⁷⁵ Extortionate demands might warrant a constitutional remedy, but this remedy must flow from another source of law.¹⁷⁶

C. A Better Method: Local Governments Are in a Better Position to Regulate

These issues raise concerns about the role of courts in resolving disputes between landowners and local government. Resolving land use disagreements in court leaves parties tied up in the lengthy litigation process while community growth and development stagnates.¹⁷⁷ Likewise, court decisions result in inconsistent and arbitrary standards concerning land use regulation, as seen in *Koontz*.¹⁷⁸ Solutions to these problems are better left to the branches of government capable of applying local rather than national standards, either in the form of a state legislature or an executive agency.

Unlike lawsuits, which can tie parties up in litigation for many years and provide untenable results that leave everybody unhappy, state legislatures and municipal agencies know local needs and plans and have the power to set specific standards that give better guidance as to what constitutes an acceptable exaction.¹⁷⁹ Indeed, two states have attempted codification of the *Nollan/Dolan* standard.¹⁸⁰ While these statutes provide clear guidance for courts, developers, and local land use regulators, they run the risk of forcing all permit applications into the same fit, still leaving little discretion to the land use regulator.¹⁸¹

A strict standard enforced across the board, however, is more desirable than the varying and often incomprehensible standards determined in the courtroom.¹⁸² Even if some permits are ultimately denied despite the owner's flexibility regarding a condition that violates the statute, at least owners and city agencies are on notice as to what will constitute an outrageous condition and are not tying up the courts with easy-to-resolve yet ongoing cas-

175. See, e.g., ARNOLD & TRACHT, *supra* note 39, at § 2:82; Fenster, *Failed Exactions*, *supra* note 34, at 625, 640.

176. See, e.g., ARNOLD & TRACHT, *supra* note 39, at § 2:82.

177. See, e.g., Fenster, *Takings Formalism*, *supra* note 2, at 643–44; see also Amicus Brief, *supra* note 126, at *13 (“Petitioner’s proposed expansion of the *Nollan/Dolan* doctrine is also unworkable because it would foster frequent, unsolvable controversies. Was the permit denied because of the government’s inability to negotiate acceptable exactions, or for some other reason?”).

178. *Koontz*, 133 S. Ct. at 2608–09 (Kagan, J., dissenting).

179. See, e.g., Fenster, *Takings Formalism*, *supra* note 2, at 643–44.

180. See, e.g., ARIZ. REV. STAT. ANN. § 9-500.12 (2000); UTAH CODE ANN. § 10-9a-508 (West 2013).

181. Mulvaney, *Remnants*, *supra* note 113, at 221.

182. See, e.g., Fenster, *Takings Formalism*, *supra* note 2, at 645–48.

es.¹⁸³ And, in the event the case does ultimately go to court, the judge will have a voter-approved standard to apply.¹⁸⁴

Discretion and flexibility in the permit process, however, are essential for city planning commissions to meet their long-term goals.¹⁸⁵ By forcing these regulators to consider all permits in the strict light of *Nollan* and *Dolan*, and now *Koontz*, even supposing the cases had been codified to provide clear guidelines, the regulators are left with scant options in denying or approving permit applications in sync with an overarching and long-term plan.¹⁸⁶

Some states have enacted statutes that provide a bit more leeway by listing factors land use regulators may consider in approaching these conditional applications.¹⁸⁷ A combination of both should be considered: a clear definition of what will amount to an extortionate demand coupled with factors land use regulators are allowed to consider during negotiations. This combination will put local governments and developers on notice as to what is permitted and will give review boards a workable standard when the inevitable dispute arises. Additionally, should the review boards' decisions be appealed to a judicial court, the courts will also have more guidance concerning the land use agency's intent in denying the application.

On that note, it would be beneficial in dealing with these disputes to take them out of the court's jurisdiction until administrative review has been exhausted. Administrative review boards, like local governments, are more familiar with the goals of both developers and land use regulators and are in a better position than courts to negotiate a compromise likely to be amenable to both parties.¹⁸⁸ These local officials can use discretion and flexibility, not only to manage workable compromises, but also to alleviate local voter anxiety concerning new developments and the potential effects on property

183. See, e.g., *id.* at 647. ("Another reason to use formulas to determine impact fees and exactions is that formulas, once developed, can be used repeatedly for land use applications, thereby simplifying regulatory practices. Indeed, legislative formulas applied mechanically can settle disputes wholesale, as opposed to the more time-consuming and variable approach of designing individualized exactions. To attract development, pro-growth communities have made their formulas transparent to create a predictable and palatable project approval regime. Moreover, municipalities that establish formulas based upon comprehensive, long-range plans are less likely to face takings liability. Courts are likely to find such formulas persuasive insofar as they appear to be part of an ordered, considered regulatory scheme rather than an effort to obtain concessions from individual landowners.")

184. See *id.* at 645–48.

185. See Fenster, *Failed Exactions*, *supra* note 34, at 643–44.

186. See Fenster, *Takings Formalism*, *supra* note 2, at 645–48.

187. See, e.g., N.H. REV. STAT. ANN. § 674:21 (2012). These factors include a time frame for issuing the exaction, a method of appeal, and a provision for waiver of process, among others. *Id.*

188. See Fenster, *Takings Formalism*, *supra* note 2, at 645–48.

values.¹⁸⁹ By keeping judicial remedy as a final resort, many of these land use disputes can be resolved efficiently and painlessly by those best situated to affect an outcome favorable to both parties, not to mention the taxpayers.

IV. CONCLUSION

The Supreme Court's decision in *Koontz* will have a drastic impact on municipality development. Courts are left with forcing an unworkable, rule-formalist standard onto a variety of uniquely local issues. This will result in the stagnation of beneficial city development as developers, land use regulators, and courts alike struggle with the ramifications of this decision. Permit negotiations between land use regulators and developers will cease as regulators become wary of the heightened scrutiny now being applied to negotiations. Additionally, courts will be forced into local land use battles where they are unfamiliar with the needs of the developer and the goals of the local governments.

Nevertheless, cities should not be given a free pass to exact property rights from landowners however they see fit. But when a condition on a land use permit is truly extortionate, when a landowner's rights have truly been impinged upon, courts should avoid the unnecessary confusion involved in analyzing the claim under takings jurisprudence. There is already a constitutional remedy in place for redress of wronged rights: the claim sounds in due process, not takings.

A better solution is necessary. By keeping review of permit conditions within the discretion of the state legislature or a local review board, with litigation as a last resort, the goals of both developers and city planners can be heard, and a compromise satisfactory to both parties can be reached without pigeonholing the permit into *Nollan* and *Dolan*.

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189. See Fenster, *Failed Exactions*, *supra* note 34, at 643–44.

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