"A Cloud on Every Decision": Nollan/Dolan and Legislative Exactions

Friday, September 14, 2018 General Session; 8:00 – 10:00 a.m.

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Notes:

"A CLOUD ON EVERY DECISION": *NOLLAN/DOLAN* AND LEGISLATIVE EXACTIONS

presented at

LEAGUE OF CALIFORNIA CITIES
2018 Annual Conference & Expo
City Attorneys' Track

Friday, September 14, 2018, 8:00 a.m. – 10:00 a.m.
Long Beach Convention Center, Long Beach, California

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SUMMARY:

In *Koontz*, a closely-divided Court held that the two-part *Nollan/Dolan* test applies to a government's demand for a monetary exaction imposed on a land-use permit applicant on an *ad hoc*, adjudicative basis. However, the *Koontz* decision did not address the issue of whether *Nollan/Dolan* applies to generally-applied legislative fees. Justice Kagan recognized that uncertainty in her dissent in *Koontz*: "[T]he majority's refusal 'to say more' about the scope of its new rule [of applying *Nollan/Dolan* to monetary exactions] now casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money." More recently, Justice Thomas similarly warned: "Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively." (*California Building Industry Assn. v. City of San Jose*, 136 S. Ct. 928 (2016) (J.Thomas, concur. in den. cert.).) In several recent cases in California, property owners have argued that, following *Koontz*, all exactions must comply with *Nollan/Dolan.* This presentation, based on actual arguments successfully made in the California Superior Court, outlines why *Nollan/Dolan* should not apply to generally-applied legislative exactions.

PACE
ENVIRONMENTAL
LAW REVIEW

Let's Be Reasonable: Why Neither *Nollan/Dolan* nor *Penn Central* Should Govern Generally-Applied Legislative Exactions After *Koontz*

Glen Hansen

Reprinted from PACE ENVIRONMENTAL LAW REVIEW
Volume 34/Number 2/Spring 2017

II. KOONTZ EXTENDED THE HEIGHTENED SCRUTINY OF NOLLAN/DOLAN TO AD HOC, ADJUDICATIVE MONETARY EXACTIONS, BUT DID NOT ADDRESS WHETHER NOLLAN/DOLAN ALSO APPLIES TO LEGISLATIVE EXACTIONS

A. The Heightened Scrutiny in *Nollan/Dolan* Is Designed to Protect Land-Use Applicants from a Specific Type of Regulatory Taking

The Takings Clause in the Fifth Amendment provides "nor shall private property be taken for public use, without just compensation."[16] It does not prohibit the taking of private property, "but instead places a condition on the exercise of that power."[17] The Takings Clause is designed "to secure compensation in the event of otherwise proper interference amounting to a taking."[18]

The "paradigmatic" taking that requires just compensation is a "direct government appropriation or physical invasion of private property."[19] When the government physically takes possession of an interest in property for some public purpose, "it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof."[20] That category of "physical takings" cases "requires courts to apply a clear rule."[21]

However, beginning with the 1922 case of *Pennsylvania Coal Co. v. Mahon*,[22] the U.S. Supreme Court recognized that "[g]overnment 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

16. U.S. CONST. amend. V. The Takings Clause is made applicable to the States through the Fourteenth Amendment. Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897).

17. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987).

18. *Id.* at 315.

19. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005).

20. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002) (internal citation omitted).

21. *Id.* at 323 (quoting Yee v. Escondido, 503 U.S. 519, 523 (1992)).

22. 260 U.S. 393 (1922).

be compensable under the Fifth Amendment."[23] A "regulatory takings" case "'necessarily entails complex factual assessments of the purposes and economic effects of government actions.'"[24] So far, the Court has recognized four (4) different theories under which a government regulation may be challenged under the Takings Clause. Two of those theories are deemed *per se* takings, and two of those theories are not. The two categories of regulatory action that are deemed *per se* takings are "where government requires an owner to suffer a permanent physical invasion of her property,"[25] and where regulations "completely deprive an owner of '*all* economically beneficial us[e]' of her property."[26] For regulatory actions that do not involve *per se* takings, the Supreme Court has historically applied either the factored analysis in *Penn Central* or the heightened standard of review in *Nollan/Dolan*.

Under *Penn Central*, the Court applied a three-factor regulatory takings analysis that examines the economic impact of the regulation, the extent to which it interferes with investment-

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23. *Lingle*, 544 U.S. at 537–38 ("In Justice Holmes' storied but cryptic formulation, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" (citing *Pa. Coal Co.* 260 U.S. at 415)).

24. *Tahoe-Sierra*, 535 U.S. at 323 (quoting *Yee*, 503 U.S. at 523). In *Tahoe-Sierra*, the Court explained the rationale as to why judicial review is different in physical takings cases and regulatory takings cases:

> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa. . . . Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.

Id. at 323–24.

25. *Lingle*, 544 U.S. at 538 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

26. *Id.* (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)) (emphasis in original).

backed expectations, and the character of the governmental action.[27]

Under the two-part inquiry of *Nollan/Dolan,* "a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use."[28] In *Koontz*, the majority of the Justices held that this two-part test applies when the government demands a monetary exaction in order to obtain an adjudicative land use permit.[29]

B. The Majority in *Koontz* Applied *Nollan/Dolan* to *Ad Hoc*, Adjudicative Monetary Exactions

The petitioner in *Koontz* (and his father before him) sought to develop a portion of his 14.9-acre property, the southern portion of which included wetlands.[30] His development plans called for the development of the 3.7-acre northern section of his property.[31] Under Florida state law, a landowner wishing to undertake construction on that particular type of property had to obtain a management and storage of surface water permit (which could

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27. *See* Penn Cent. Transp. Co. (*Penn Central*) v. City of New York, 438 U.S. 104, 124 (1978); *see also* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 349 (1986); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224–25 (1986); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). In *Lingle*, the Court explained the *Penn Central* analysis as follows:

> The Court in *Penn Central* acknowledged that it had hitherto been "unable to develop any 'set formula'" for evaluating regulatory takings claims, but identified "several factors that have particular significance." Primary among those factors are "[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." In addition, the "character of the governmental action"-for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good" may be relevant in discerning whether a taking has occurred.

544 U.S. at 538–39 (internal citations omitted).

28. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2591 (2013).

29. *Id.* at 2603.

30. *Id.* at 2591-92.

31. *Id.* at 2592.

impose "such reasonable conditions" on the permit as are "necessary to assure" that construction will "not be harmful to the water resources of the district") and a wetlands resource management permit.[32] Petitioner sought such a permit from the St. Johns River Water Management District ("District").[33] To mitigate the environmental effects of his proposal, petitioner offered to foreclose any possible future development of the approximately 11-acre southern section of his land by deeding to the District a conservation easement on that portion of his property.[34] The District considered the proposed easement to be inadequate, and informed petitioner that the District would approve construction only if he agreed to one of two concessions: (a) Petitioner reduce the size of his development to 1 acre and deed a conservation easement to the District on the remaining 13.9 acres; *or* (b) proceed with the development on the terms proposed by petitioner *and* hire contractors to make improvements to District-owned land several miles away.[35] The District also said that it "would also favorably consider" alternatives to its suggested offsite mitigation projects if petitioner proposed something "equivalent."[36]

Petitioner filed suit in a Florida state court under a state law that provides money damages for agency action that are "an unreasonable exercise of the state's police power constituting a taking without just compensation."[37] The Florida trial court found that the District's demands failed to comply with *Nollan/Dolan*.[38] The Florida District Court of Appeal affirmed.[39] The Florida Supreme Court reversed on two grounds: (1) unlike the conditional approvals in *Nollan* or *Dolan*, the District here *denied* Petitioner's permit application; and (2) a monetary exaction cannot give rise to a takings claim under

32. *Koontz*, 133 S. Ct. at 2592.
33. *Id.*
34. *Id.* at 2592-93.
35. *Id.* at 2593.
36. *Id.*
37. *Id.* (quoting FLA. STAT. § 373.617(2) (2016)).
38. *Id.*
39. *Id.*

Nollan/Dolan.[40] The U.S. Supreme Court reversed and held that the Florida Supreme Court erred on both grounds.[41]

First, the Court unanimously agreed the *Nollan/Dolan* standard may apply to the government's denial of a permit. Writing for the majority, Justice Alito stated 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 . . . ."[42] The dissent agreed: "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)."[43]

Second, by a 5-4 margin, the Court held that "so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*."[44] The majority concluded that a government's "demand for property" from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan*, "even when its demand is for money."[45] Thus, the majority in *Koontz* applied the heightened scrutiny of *Nollan* and *Dolan* to monetary exactions in an *ad hoc*, individualized context. The analysis below examines the constitutional rationales adopted by the majority in reaching that conclusion.

C. The Majority in *Koontz* Focused on Extortionate Governmental Demands and Monetary Targeting of Specific Properties

Writing for the majority, Justice Alito explained that the constitutional basis for the heightened scrutiny in *Nollan/Dolan* is the "unconstitutional conditions" doctrine. The Court explained that, because "the government may not deny a benefit to a person

40. *Koontz*, 133 S. Ct. at 2593-94.
41. *Id.* at 2603.
42. *Id.*
43. *Id.* (Kagan, J., dissenting).
44. *Id.* at 2599.
45. *Id.* at 2603.

because he exercises a constitutional right,"[46] the unconstitutional conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."[47] The premise of any unconstitutional conditions claim "is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing."[48] Justice Alito noted that *Nollan* and *Dolan* involve "'a special application' of [the unconstitutional conditions] doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits."[49]

The majority opinion discussed the "two realities of the permitting process" that warrant the "special application" of the unconstitutional conditions doctrine under *Nollan/Dolan*.[50] The first reality is "that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take."[51] Justice Alito explains the "extortionate" nature of that relationship between permit applicants and local governments:

> By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate

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46. *Koontz*, 133 S. Ct. at 2594 (citing Regan v. Taxation With Representation of Wash., 461 U.S. 540, 545 (1983).

47. *Id.*

48. *Id.* at 2598.

49. *Id.* at 2594 (citing Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005)).

50. *Id.*

51. *Id.*

> the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.[52]

Justice Alito continues:

> Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.[53]

Thus, the potential for extortionate demands by the government warrants application of the heightened scrutiny of *Nollan/Dolan* in the land use context.[54]

The second reality of the permitting process, according to the majority, is that "many proposed land uses threaten to impose costs on the public that dedications of property can offset."[55] Justice Alito recognized that requiring landowners to 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."[56]

The heightened scrutiny in *Nollan/Dolan* accommodates those two realities "by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the

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52. *Koontz*, 133 S. Ct. at 2594-95 (internal citations omitted).

53. *Id.* at 2596 (emphasis added).

54. Because of that threat of extortionate demands in the adjudicative exactions context, the majority in *Koontz* explained that heightened scrutiny was needed, despite the potential applicability of other constitutional doctrines: the court has "repeatedly rejected the dissent's contention that other constitutional doctrines leave no room for the nexus and rough proportionality requirements of *Nollan* and *Dolan*. Mindful of the special vulnerability of land use permit applicants to extortionate demands for money, we do so again today." *Id.* at 2602–03.

55. *Id.* at 2595.

56. *Id.*

applicant's proposal."[57] Thus, the Court's precedents combine those two realities by allowing the government "to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in *'out-and-out . . . extortion'* that would thwart the Fifth Amendment right to just compensation.[58] Those rationales must be addressed in any analysis of judicial scrutiny of legislative exactions.

Furthermore, the majority in *Koontz* essentially made four arguments in support of applying *Nollan/Dolan* to the *ad hoc* monetary exactions in that case. First, Justice Alito argued that it would be "very easy" for land-use permitting officials to evade the limitations of *Nollan/Dolan* if monetary exactions were not brought under that heightened scrutiny.[59] For example, "[b]ecause the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value."[60] Those "in lieu of" fees are "functionally equivalent to other types of land use exactions."[61]

Second, the *Koontz* majority distinguished the monetary exaction imposed on the particular real property in that case from general taxes that were addressed in *Eastern Enterprises v. Apfel*.[62] In *Eastern Enterprises*, the United States retroactively imposed on a former mining company an obligation to pay for the medical benefits of retired miners and their families.[63] A four-Justice plurality in *Eastern Enterprises* concluded that the statute's imposition of retroactive financial liability was so arbitrary that it violated the Takings Clause.[64] However, Justice Kennedy joined four other Justices in dissent in *Eastern Enterprises* in arguing that the Takings Clause does not apply to

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57. *Koontz*, 133 S. Ct. at 2595 (citing Dolan v. City of Tigard, 512 U.S. 374, 391 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987)).

58. *Id.* (emphasis added) (citing *Dolan*, 512 U.S. at 391; *Nollan*, 483 U.S. at 837).

59. *Id.* at 2599.

60. *Id.*

61. *Id.*

62. *Id.* (citing E. Enters. v. Apfel, 524 U.S. 498 (1998)).

63. *E. Enters*, 524 U.S. at 513-14, 517.

64. *Id.* at 538.

government-imposed financial obligations that "d[o] not operate upon or alter an identified property interest."[65] The majority in *Koontz* distinguishes Justice Kennedy's opinion in *Eastern Enterprises* by focusing on the property-specific nature of the exaction at issue in *Koontz*. Justice Alito wrote that, unlike *Eastern Enterprises*, the demand for money in *Koontz* "'operate[d] upon . . . an identified property interest' by directing the owner of a particular piece of property to make a monetary payment," and "burdened petitioner's ownership of a specific parcel of land."[66] The *Koontz* case therefore bore a resemblance to cases holding that the government must pay just compensation "when it takes a lien–a right to receive money that is secured by a particular piece of property."[67] Justice Alito explained:

> The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property. Because of that direct link, this case implicates the central concern of Nollan and Dolan: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.[68]

Justice Alito added:

> [The petitioner] does not ask us to hold that the government can commit a *regulatory* taking by directing someone to spend money. As a result, we need not apply *Penn Central*'s "essentially ad hoc, factual inquir[y]," at all, much less extend that "already difficult and uncertain rule" to the "vast category of cases" in which someone believes that a regulation is too costly. *Eastern Enterprises*, 524 U. S. at 542, (opinion of Kennedy, J.). Instead, petitioner's claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a *specific, identifiable property interest* such as a bank account or par-

65. *E. Enters*, 524 U.S. at 540 (Kennedy, J., opinion concurring in judgment and dissenting in part).

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

67. *Id.*

68. *Id.* at 2600 (emphasis added).

> cel of real property, a "*per se* [takings] approach" is the proper mode of analysis under the Court's precedent.[69]

Thus, the majority in *Koontz* emphasized the individualized, property-specific nature of the exaction that falls within *Nollan/Dolan*.

Third, Justice Alito rejected the argument that, if monetary exactions are made subject to scrutiny under *Nollan* and *Dolan*, then there will be no principled way of distinguishing impermissible land-use exactions from property taxes. He wrote that "[i]t is beyond dispute that '[t]axes and user fees . . . are not "takings,"'" and therefore the Court's holding in *Koontz* "does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners."[70] Also, he explained, the Court has had "little trouble distinguishing" between the power of taxation and the power of eminent domain.[71]

D. The Dissent in *Koontz* Decried Judicial Intrusion into Local Land Use Decisions

Writing for the dissent, Justice Kagan refused to apply *Nollan/Dolan* to monetary exactions in the land use context. She explained that "[c]laims that government regulations violate the Takings Clause by unduly restricting the use of property are generally 'governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U. S. 104, (1978).'"[72] While the *Penn Central* test "balances the government's manifest need to pass laws and regulations 'adversely affect[ing] . . . economic values,' with our longstanding recognition that some regulation 'goes too far,'" the *Nollan* and *Dolan* decisions are different because "[t]hey provide an independent layer of protection in 'the special context of land-use exactions.'"[73] She added: "*Nollan* and *Dolan* thus serve not to address excessive regulatory burdens on

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69. *Koontz*, 133 S. Ct. at 2600 (alteration in original) (emphasis added at "specific, identifiable property interest") (citations omitted).

70. *Id.* at 2600-01 (citing Brown v. Legal Foundation of Washington, 538 U.S. 216, 243 n.2 (2003) (Scalia, J., dissenting).

71. *Id.* at 2602.

72. *Id.* at 2604 (Kagan, J., dissenting) (citations omitted).

73. *Id.* (citations omitted).

land use (the function of *Penn Central*), but instead to stop the government from imposing an 'unconstitutional condition'—a requirement that a person give up his constitutional right to receive just compensation 'in exchange for a discretionary benefit' 8having 'little or no relationship' to the property taken."[74] The dissent concluded that the unconstitutional conditions doctrine cannot apply to challenges to monetary exactions at all in the land use context.[75] Justice Kagan explained: "[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."[76]

The dissent also highlighted the ambiguity regarding the scope of the majority's opinion. Specifically, Justice Kagan was concerned that, by extending *Nollan* and *Dolan*'s heightened scrutiny to a simple payment demand, "the majority threatens the heartland of local land-use regulation and service delivery, at a bare minimum depriving state and local governments of 'necessary predictability.'"[77] She lamented that, "[b]y applying *Nollan* and *Dolan* to permit conditions requiring monetary payments–with no express limitation except as to taxes–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."[78] Justice Kagan was concerned that "the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly."[79] The dissent questioned the majority's position that the decision will have only limited impact on localities' land-use authority, because "the majority's refusal 'to say more' about the scope of its new rule now casts a cloud on

74. *Koontz*, 133 S. Ct. at 2604-05 (Kagan, J., dissenting) (citations omitted).

75. *Id.* at 2606-07, -09 n.3 (Kagan, J., dissenting).

76. *Id.* at 2609 (Kagan, J., dissenting) (alteration in original) (citation omitted)

77. *Id.* (Kagan, J., dissenting) (quoting E. Enters. v. Apfel, 524 U.S. 498, 542 (1998) (Kennedy, J., opinion concurring in judgment and dissenting in part)).

78. *Id.* at 2607 (Kagan, J., dissenting) (citations omitted).

79. *Id.* (Kagan, J., dissenting).

every decision by every local government to require a person seeking a permit to pay or spend money."[80]

E. *Koontz* Left Open the Question of Whether *Nollan/Dolan* Applies to Legislative Exactions

The majority in *Koontz* did not address the issue of whether legislatively applied exactions are also governed by *Nollan/Dolan*. Professor John Echeverria notes: "The majority opinion in *Koontz* is pointedly silent as to whether the ruling applies only to *ad hoc* fees or applies to fees imposed through general rules as well."[81] Professor Echeverria aptly predicts: "With respect to monetary fees, one issue that will preoccupy the lower courts in the years ahead is whether the *Koontz* ruling that monetary fees are subject to *Nollan/Dolan* applies to fees calculated and imposed, not in *ad hoc* proceedings, but through general legislation."[82] As discussed above, that ambiguity has led Justice Thomas to recently point out the "compelling reasons for resolving this conflict at the earliest practicable opportunity."[83]

For the reasons discussed below, this author recommends that the Court should follow Justice Kagan's suggestion in *Koontz* that the Court "approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed *ad hoc*, and not to fees that are generally applicable."[84]

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80. *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting).

81. John D. Echeverria, Koontz*: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 54-55 (2014).

82. *Id.* at 54.

83. Cal. Bldg. Indus. Ass'n v. City of San Jose, 136 S. Ct. 928, 929 (2016).

84. *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting) (citing as an example Ehrlich v. Culver City, 911 P.2d 429 (Cal. 1996)).

OUTLINE OF THE LEGAL ARGUMENTS AS TO WHY, EVEN AFTER *KOONTZ*, THE HEIGHTENED SCRUTINY IN *NOLLAN/DOLAN* SHOULD NOT APPLY TO GENERALLY-APPLIED LEGISLATIVE EXACTIONS

I. State And Federal Courts In California Have Affirmed That *Koontz* Did Not Address The Issue Of Whether *Nollan/Dolan* Applies To Generally Applied Legislative Fees.

A. *See California Building Industry Assn. v. City of San Jose* (2015) 61 Cal. 4th 435, 457 ("*California Building*"), *cert. den., Cal. Bldg. Indus. Ass'n v. City of San Jose* (2015) 136 S.Ct. 928.) 61 Cal.4th at p. 460 & fn 11 ["An additional ambiguity arises from the fact that the monetary condition in *Koontz*, like the conditions at issue in *Nollan* and *Dolan*, was imposed by the district on an *ad hoc* basis upon an individual permit applicant, and was not a legislatively prescribed condition that applied to a broad class of permit applicants. In this respect, the money payment at issue in *Koontz* was similar to the monetary recreational facility mitigation fee at issue in this court's decision in *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854 (*Ehrlich*), where we held that because of the greater risk of arbitrariness and abuse that is present when a monetary condition is imposed on an individual permit applicant on an *ad hoc* basis, the validity of the *ad hoc* fee imposed in that case should properly be evaluated under the *Nollan/Dolan* test. (*Ehrlich, supra,* at pp. 874–885 (plur. opn. of Arabian, J.); *id.* at pp. 899–901 (conc. opn. of Mosk, J.); *id.* at pp. 903, 907 (conc. & dis. opn. of Kennard, J.); *id.* at p. 912 (conc. & dis. opn. of Werdegar, J.).) The *Koontz* decision does not purport to decide whether the *Nollan/Dolan* test is applicable to legislatively prescribed monetary permit conditions that apply to a broad class of proposed developments. (*See Koontz*, *supra*, 570 U.S. at 268 (Kagan, J., dissenting).)

B. See *Building Industry Association - Bay Area v. City of Oakland*, 289 F. Supp. 3d 1056, 1058 (N.D.Ca., Feb. 5, 2018) ("*BIA*") ["The Court did not hold in *Koontz* that generally applicable land-use regulations are subject to facial challenge under the exactions doctrine; it held only that the exactions doctrine applies to demands for money (not merely demands for encroachments on property). In reaching this holding, the Court went out of its way to make clear that it was not expanding the doctrine beyond that. *See* 133 S. Ct. at 2602 ('This case does not require us to say more.'); *id.* at 2600 n. 2 ([T]his case does not implicate the question whether monetary exactions must be tied to a particular parcel of land in order to constitute a taking.'). *Koontz* involved an adjudication by local land-use officials regarding an individual piece of property, and throughout its decision the Court spoke of the exactions doctrine in those terms. For example, the Court stated: 'The fulcrum this case turns on is the direct link between the government's demand and a *specific parcel* of real property.' [570 U.S. at 613] (emphasis added). 'Because of that direct link,' the Court stated, 'this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the *specific* property at issue, thereby diminishing without justification the value of the property.' *Id.* (emphasis added); *see also id.* at [640-605] (noting that permit applicants are 'especially vulnerable' to government

coercion 'because the government often has broad discretion to deny a permit that is worth far more than property it would like to take')."]

II. The *Nollan/Dolan* Test Should Not Apply To Legislative Exactions That Are Generally Applied.

A. *Nollan* and *Dolan* did not involve generally-applicable legislative exactions.

1. In *Dolan*, the Chief Justice drew a distinction between generally-applicable legislative land use decisions and the adjudicatory decisions in that case:

a. *See Dolan,* 512 U.S. at 384-385 ["[T]he authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.' *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)."]

b. *Id.* at 385 ["The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially *legislative determinations classifying entire areas of the city*, whereas here the city made an *adjudicative* decision to condition petitioner's application for a building permit on an individual parcel." (Emphasis added).]

2. That distinction in *Dolan* addressed the dissent's argument that the Court was changing the burden of proof that traditionally applied to land use decisions.

a. *Id.* at p. 391 fn. 8 ["Justice Stevens' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. *See, e. g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926). Here, by contrast, the city made an *adjudicative decision* to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city. *See Nollan,* 483 U.S. at 836."]

b. *See* Winfield B. Martin, *Order for the Courts: Reforming the Nollan/Dolan Threshold Inquiry for Exactions*, 35 SEATTLE UNIV. L.REV. 1499, 1517 ["Chief Justice Rehnquist tethers the identification of legislative and adjudicative land use regulations to the question not of the method of implementation, but of whether the regulation has singled out individual property owners for special treatment. This distinction makes a natural threshold inquiry for *Nollan/Dolan* treatment-it lags regulations that pose a heightened risk of violating the *Armstrong* principle and therefore should not merit the deference to legislative bodies that the Court has found desirable. … The proposition, advanced by some critics, that all exactions be subjected to heightened scrutiny would unnecessarily sweep some legislatively imposed land use regulation into *Nollan/Dolan* examination that do not comport with the standard identified by

Chief Justice Rehnquist in *Dolan*. In that proposed scenario, the increased *Nollan/Dolan* scrutiny would impede the government's ability to engage in widespread land-use planning by endangering 'essentially legislative determinations classifying entire areas of the city,' rather than legislative determinations that focus on a smaller number of properties."]

3. The distinction drawn by the Chief Justice in *Dolan* between legislative and adjudicative decisions was necessary to address the presumptive constitutionality that the Court gives to legislative measures:

a. *See* Inna Reznik, *The Distinction Between Legislative And Adjudicative Decision In* Dolan v. City of Tigard, 75 N.Y.Y. L. Rev. 242, 274 (2000) ["Given the uncertainty over whether legislative land use decision-making is fairer than adjudicative processes, one may draw the conclusion that the 'rough proportionality' standard should be applied to all exactions without making the legislative/adjudicative distinction. However, such an extension of heightened scrutiny would be inconsistent with the *Dolan* Court's reasoning. The *Dolan* Court itself explained its creation of the 'rough proportionality' standard, which places the burden on the local government to justify the exaction, by limiting it to adjudication, as opposed to legislation which carries a presumption of constitutional validity. Therefore, the extension of the 'rough proportionality' test to all exactions would require new reasoning-currently unarticulated-which would be responsive to the *Dolan* dissent's argument that even the Court's current exactions review standard runs counter to accepted judicial review doctrine."]

b. *Id.* at 250-251 ["Therefore, in order to justify its standard and burden allocation, the Court characterized Tigard's exactions as adjudicative decisions, as opposed to legislative decisions that would deserve deference. The Court distinguished cases, such as *Village of Euclid v. Ambler Realty Co.* .... The Court characterized those cases as 'legislative determinations classifying entire areas of the city,' while asserting that the present case was 'an adjudicative decision to condition petitioner's application for a building permit on an individual parcel.' Thus, as a matter of doctrinal necessity, the Court limited its new 'rough proportionality' standard and burden shifting declaration to adjudicative government actions."]

4. The Court subsequently recognized that *Nollan* and *Dolan* involved adjudicatory decisions.

a. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 554 (2005) ["Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions."]

b. *Id.* at 547 ["The Court further refined this requirement in *Dolan*, holding that an adjudicative exaction requiring dedication of private property must also be '"roughly proportional" . . . both in nature and extent to the impact of the proposed development.'"]

c. *See Koontz,* 570 U.S. at 628 (Kagan, J., dissenting) ["The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed *ad hoc*, and not to fees that are generally applicable. *See, e.g., Ehrlich v. Culver City*, 12 Cal. 4th 854, 50 Cal. Rptr. 2d 242, 911 P. 2d 429 (1996). *Dolan* itself suggested that limitation by underscoring that there 'the city made an *adjudicative* decision to

condition petitioner's application for a building permit on an individual parcel,' instead of imposing an 'essentially legislative determination[ ] classifying entire areas of the city.'" (quoting *Dolan, supra,* 512 U.S. at p. 385).]

B. Because of the language in *Dolan* that distinguishes legislative decisions from adjudicative decisions, other courts have declined to apply the *Nollan/Dolan* test to generally applied legislative exactions.

1. *See California Building, supra,* 61 Cal. 4th at p. 460 & fn 11, cert. ["Our court has held that legislatively prescribed monetary fees that are imposed as a condition of development are not subject to the *Nollan/Dolan* test." (Citing *Ehrlich, supra,* 12 Cal.4th at 874–885 (plur. opn. of Arabian, J.); *id.* at pp. 899–901 (conc. opn. of Mosk, J.); *id.* at pp. 903, 907 (conc. & dis. opn. of Kennard, J.); *id.* at p. 912 (conc. & dis. opn. of Werdegar, J.); *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 663-671; *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 966–967.)]

2. *See BIA, supra,* 289 F. Supp. 3d at 1058 ["But the Supreme Court has only applied this exactions doctrine in cases involving a particular individual property, where government officials exercised their discretion to require something of the property owner in exchange for approval of a project. And the Court has consistently spoken of the doctrine in terms suggesting it was intended to apply only to discretionary decisions regarding individual properties." (Citing *McClung v. City of Sumner*, 548 F.3d 1219, 1227 (9th Cir. 2008), *cert. denied* (2009) 556 U.S. 1282; *Ehrlich, supra,* 12 Cal.4th 854, 876-81; id. at 899-900 (conc. opn. of Mosk, J.).)]

3. *See also, City of Olympia v. Drebick* (Wash. 2006) 126 P.3d 802, 803, 808 fn. 4; *Spinell Homes, Inc. v. Municipality of Anchorage* (Alaska 2003) 78 P.3d 692, 702; *Krupp v. Breckenridge Sanitation District* (Col. 2001) 19 P.3d 687, 695-696; *Home Builders Association of Central Arizona v. City of Scottsdale* (Ariz. 1997) 930 P.2d 993, 1000; *Cass Water Res. Dist. v. Burlington N. R.R. Co.* (N.D. 1995) 527 N.W.2d 884, 896.

C. Generally-applied legislative exactions are "financial burdens on property owners" that are not subject to *Nollan/Dolan*.

1. In *Koontz*, the Court distinguished two types of financial burdens. One type, which is governed by *Nollan/ Dolan*, "'operate[s] upon or alter[s] an identified property interest' by directing the owner of a particular piece of property to make a monetary payment." (570 U.S. at 613 (quoting *Eastern Enterprises v. Apfel,* 524 U.S. 498, 540 (1998) (opinion of Kennedy, J.))). That individualized financial burden was at issue in *Koontz*: "The fulcrum this case turns on is the *direct link* between the government's demand and a *specific parcel of real property*. Because of that *direct* link, this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property." (*Ibid.* (emphasis added).)

2. The second type of financial burden, not governed by *Nollan/ Dolan* and not part of the *Koontz* decision, involves "property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners." (570 U.S. at 615.) Those financial burdens describe legislative exactions that are generally applied because they do not target a "particular" or "specific parcel of real property." (*See Ehrlich, supra,* 12 Cal. 4th at 894 (con. opinion, Mosk, J.) ["But if a municipality can constitutionally impose a development tax as long as it is rationally based, why is a higher level of constitutional scrutiny required when, as in the case of generally applicable development fees, the 'tax' is earmarked for use in alleviating specific development impacts rather than for the general fund?"])

3. *Rogers Machinery, Inc. v. Washington County* (Or. 2002) 45 P.3d 966, 982 ["There is no principled basis on which to distinguish generally applicable development fees that fund the infrastructure expansion needed to support new development from other legislatively imposed and generally applicable taxes, assessments, and user fees."])

D. The constitutional rationales underlying *Koontz* do not apply to legislative exactions.

1. In *Koontz*, the Court considered the "realities of the permitting process" that underlie the application of the unconstitutional conditions doctrine, including the reality of an "extortionate" relationship between land use applicants and permitting agencies, and the "special vulnerability of land use permit applicants to extortionate demands for money." (570 U.S. at 619.)

2. That "extortionate" relationship is generally not a concern in the legislative context:

a. *See San Remo Hotel, supra,* 27 Cal.4th at 671 ["While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. *Ad hoc* individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls."]

b. *See also McClung v. City of Sumner, supra,* 548 F.3d at 1228; *City of Olympia v. Drebick* (Wash. 2006) 126 P.3d 802, 803, 808 n. 4; *Rogers Machinery, supra,* 45 P.3d at p. 982; *Krupp, supra,* 19 P.3d 687; *Home Builders Assn. of Central Arizona, supra,* 930 P.2d at 1000.

c. *See generally, Ehrlich, supra,* 12 Cal.4th at pp. 899–901 (conc. opn. of Mosk, J.)[explaining why "a somewhat higher level of constitutional scrutiny should be applied to a development fee when it is imposed 'neither generally nor ministerially, but on an individual and discretionary basis.'"]

E. Extending the *Nollan/Dolan* test to generally applied legislative fees would improperly "open to searching judicial scrutiny the wisdom of myriad government economic regulations, a task the courts have been loath to undertake pursuant to either the Takings or Due Process Clause." (*San Remo Hotel, supra,* 27 Cal.4th at 672.)

1. Justice Kagan warned not to extend *Nollan/ Dolan* "into the very heart of local land-use regulation and service delivery" and no to diminish "the flexibility of state and local governments to take the most routine actions to enhance their communities …." (*Koontz, supra,* 570 U.S. at 626 (Kagan, J., dissenting).)

2. *Cf. McClung, supra,* 548 F.3d at p. 1227-1228 [extending *Nollan/Dolan* scrutiny "raise[s] the concern of judicial interference with the exercise of local government police powers."])

F. Not applying *Nollan/Dolan* to adjudicative exactions does not give blind deference to legislative exactions.

1. Generally applied legislative exactions are still governed by the reasonable relationship test in Government Code section 66001, subdivision (a).

2. Generally applied legislative exactions are still governed by the regulatory takings analysis in *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104, 124. (*See McClung, supra*, 548 F.3d at 1227; *BIA, supra,* 2018 U.S.Dist.LEXIS 18822 at *3-*4, *7.)

III. CONCLUSION.

This author concludes that both lower courts and eventually the Supreme Court will find that the *Nollan/Dolan* test should not apply to legislative exactions that are generally-applied. The *Dolan* case itself drew a distinction between adjudicative and legislative regulations. Also, generally-applied legislative exactions are akin to the "financial burdens on property owners" that the Supreme Court has exempted from *Nollan/Dolan.* In addition, the constitutional rationales underlying *Koontz* simply do not apply to legislative exactions. Furthermore, extending the *Nollan/Dolan* test to generally applied legislative fees would improperly invite judicial scrutiny to the wisdom of a myriad of government economic regulations.

Thus, local legislative bodies in California that comply with the reasonable relationship requirement in the Mitigation Fee Act (Govt. Code §66001, subd. (a)) should be able to defend generally-applied development fees from constitutional challenges based on *Nollan/Dolan.*

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