THE 2013 TAKINGS TRIPLETS: FROM EXACTIONS TO FLOODING TO RAISIN SEIZURES—IMPLICATIONS FOR LITIGATORS

JAMES S. BURLING*

INTRODUCTION

The 2013 takings triplets of *Koontz*, *Horne*, and *Arkansas Game and Fish Commission* from the United States Supreme Court augur well for the future of property rights.[1] While there was nothing particularly revolutionary in any of the three decisions, a loss in any of these cases could have spelled some serious backsliding for the progress made in the past quarter-century by property rights advocates. Moreover, these decisions helped dissipate some of the pervasive property law pessimism that followed from the Court's *Kelo* decision in 2006.[2]

Property rights cases have had a long history of incremental two-steps-forward followed by one-step-back progress. *First English*'s doctrinal clarification of the concept of temporary takings was undercut by the extreme equivocation of *Tahoe-Sierra*.[3] The cautious optimism engendered by twenty years of growing respect for property rights at the state and federal level was cast into doubt with *Tahoe-Sierra* and then cut short by the Court's retreat into the past with *Kelo*.[4] In fact, entering into the 2013 Term, a dozen years had

* Director of Litigation, Pacific Legal Foundation, Sacramento, CA. For more information, see http://www.pacificlegal.org. Foundation attorneys represented Coy Koontz, Jr. before the United States Supreme Court.

1. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013); Horne v. Dep't of Agric., 133 S. Ct. 2053 (2013); Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012).

2. Kelo v. City of New London, 545 U.S. 469 (2005). For a dose of such pessimism, see Gideon Kanner, Kelo v. New London*: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201 (2006).

3. *Compare* First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A., 482 U.S. 304 (1987) (temporary taking compensation due for period of time that a regulation that constitutes a taking remains in place) *with* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (finding no temporary taking when land use moratoria are only "temporary" and where property will, eventually, regain its value).

4. While *Kelo* arguably followed precedents set in *Berman v. Parker*, 348 U.S. 26 (1954) (employing a standard of great deference to hold a taking of private property for private redevelopers a "public use") and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (same), the property rights bar had some hope that a judicial reawakening was in the offing.

elapsed since the Court had handed down a mostly clear-cut property rights victory in *Palazzolo*, but even that decision was compromised internally by competing concurrences.[5]

So, property rights advocates had some trepidation when the Court agreed to take three property rights cases for its 2013 Term. A loss in *Koontz* could have eviscerated the *Nollan* nexus requirement and the *Dolan* rough proportionality and burden-of-proof holdings for property-based unconstitutional conditions. A loss in *Arkansas Game & Fish Commission* could have spelled the end of all temporary takings, and left government agencies everywhere license to wreck havoc on real property so long as the wrecking did not last too long. And a loss in *Horne* could have augured further incomprehensible procedural barriers for litigants attempting to bring takings claims in various courts. As is now well-known, these setbacks did not occur. But what did these cases actually mean for the ability of property owners and government regulators to litigate cases dealing with property rights? That is the concern of this essay. But first a synopsis of the state of the law as we entered into the 2013 Term of the Supreme Court is in order.

I. THE STATE OF REGULATORY TAKINGS AND EXACTIONS BEFORE 2013

A. Partial, Physical, and Total Takings

In what is now considered the seminal partial regulatory takings case, the Court in *Penn Central Transportation Company v. City of*

For example, in Michigan, the state supreme court had overturned a controversial decision in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (holding the condemnation of a working-class neighborhood to make way for a private owned General Motors plant was a "public use") in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (overturning *Poletown*).

5. Palazzolo v. Rhode Island, 533 U.S. 606 (2001). *Compare* 533 U.S. at 633 (O'Connor, J., concurring) (suggesting that the regulatory state at the time of purchase could be relevant to a landowner's "investment-backed expectations" in a *Penn Central* analysis) *with* 533 U.S. at 637 (Scalia, J., concurring) (arguing that the regulations at time of acquisition have "no bearing" on whether there has been a taking). *See also* Sackett v. Envtl. Prot. Agency, 132 S. Ct. 1367 (2012) (finding wetlands compliance order judicially reviewable). While the landowner won in *Sackett*, it was on grounds of administrative law and due process and it was not a case advancing fundamental issues of property rights law.

New York held that three factors are particularly relevant to determining whether there has been a regulatory taking: the investment-backed expectations of the landowner, the economic impact of the regulation, and the character of the regulation.[6] This test applies when there has been less than a "total" taking of the use and value of the property, in which case *Lucas* applies.

In contrast to the equivocal nature of the *Penn Central* test, the Court has adopted two "categorical" rules-cases in which a taking will always be found. In 1978, the Court decided in *Loretto v. Teleprompter Manhattan CATV Corp.*[7] that a physical invasion, no matter how slight, was a taking. Here, the Court held that there was a taking when the invasion was only by some wires and a small cable box. Any infringement on the right to exclude was seen to be a taking.[8]

In *Lucas v. South Carolina Coastal Council*,[9] the Court held that a regulation that prohibited all use and value of the property was a total taking. The Court found that use of the property for residential development did not constitute a nuisance and was not proscribed by "background principles" of property law. Over time, however, the efficacy of this test has proved elusive because there are few circumstances where a regulation actually destroys *all* use and value. Moreover, some courts have held that even if use is destroyed, there is no taking so long as there is residual value.[10]

B. Procedural Hurdles to Bringing Takings Cases

Property rights are not like other constitutionally protected rights. Whether they deserve less constitutional protection or whether they

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6. 438 U.S. 104, 126 (1978). The meaning (or meaninglessness) of these "factors" has been widely debated. To some they are a pastiche of subjective and objective factors, which are not particularly well-suited to determining whether the government has actually taken private property. *See, e.g.*, Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. (forthcoming 2014). To others, the factors are a good start. *See, e.g.*, Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 860 (Cal. 1997) (adopting a ten-factor test).

7. 458 U.S. 419 (1982).

8. A similar result was reached in Kaiser Aetna v. United States, 444 U.S. 164 (1979) (taking of dredged channel that the Corps of Engineers demanded to be opened to the public).

9. 505 U.S. 1003 (1992).

10. *See, e.g.*, James S. Burling, *Can Property Value Avert a Regulatory Taking When Economically Beneficial Use Has Been Destroyed?*, *in* TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 451 (Thomas E. Roberts ed., 2002); James S. Burling, *Use Versus Value in the Wake of* Tahoe-Sierra, *in* TAKING SIDES ON TAKINGS ISSUES: THE IMPACT OF TAHOE-SIERRA 99 (Thomas E. Roberts ed., 2003).

really are a "poor relation" to other rights,[11] one thing is certain: the door to the federal courthouse is a lot harder to push through for property rights than other kinds of rights. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[12] the Court held that a regulatory takings claim seeking damages could be brought in federal court if (1) administrative procedures below have been completed, and (2) the plaintiff has first utilized available state procedures. The first prong makes sense in that it could be premature to bring any kind of taking claim unless it is known what actually can and cannot be done with a parcel of property.[13] But the second prong has proven to be far more problematic.[14] This is especially so in light of the decision in *San Remo Hotel, L.P. v. City and County of San Francisco*,[15] in which the Court held that if a litigant can first litigate a *federal* regulatory takings claim in state court, he must do so—even if this means the doctrine of res judicata will prevent the owner from ever litigating a federal takings claim in federal court.[16]

One hurdle that seems to have been removed is the so-called "notice rule," wherein a landowner who acquired property on notice of the existence of a regulatory scheme is otherwise precluded from

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11. While the Court found restrictions on "economic" rights to be deserving of less scrutiny for purposes of due process in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), the Court also suggested in *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994), that property rights were not a "poor relation" of other rights.

12. 473 U.S. 172 (1985).

13. But there are limits. As the Court explained in *Palazzolo v. Rhode Island*, 533 U.S. 606, 622 (2001), "[r]ipeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use."

14. *See, e.g.*, Gideon Kanner, *"[Un]Equal Justice Under the Law": The Invidiously Disparate Treatment of American Property Owners in Takings Cases*, 40 LOY. L.A. L. REV. 1065 (2007); J. David Breemer, *Overcoming* Williamson County*'s Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. LAND USE & ENVTL. L. 209 (2003).

15. 545 U.S. 323 (2005).

16. J. David Breemer, *You Can Check Out but You Can Never Leave: The Story of San Remo Hotel—The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen Claims for Federal Review*, 33 B.C. ENVTL. AFF. L. REV. 247 (2006). There may be exceptions to this prudential rule—such as when a local or state government first removes a claim from state to federal court and then argues that the claim must be dismissed because it is in the wrong court. *See, e.g.*, Sansotta v. Town of Nags Head, 724 F.3d 533 (4th Cir. 2013) (refusing to dismiss takings claims after removal to federal court).

challenging the application of the scheme. A number of claims foundered upon this doctrine until the Court decided *Palazzolo*, which held fairly explicitly that a purchaser of property subject to a regulation is not precluded from challenging the application of that regulation as a taking. "Future generations, too, have a right to challenge unreasonable limitations on the use and value of land."[17] Despite this rather emphatic holding, its force is somewhat mitigated by the dueling concurrences and the predilection of some courts to distinguish the case into meaninglessness.[18]

C. The Doctrine Unconstitutional Conditions and Property Rights

With the rise of the power of local governments to zone and regulate the use of private property in the wake of *Village of Euclid v. Ambler Realty Co.*,[19] governments have not been reluctant to use that power to exact concessions from landowners who seek permits. Pragmatic landowners will weigh the costs of delay and attorneys and usually decide to accede to the demands, regardless of how unjustified they might be. Nevertheless, some landowners will object out of principle. Examples of such landowners include the Nollans, Mrs. Dolan, and Coy Koontz, Sr. and his son, Coy Koontz, Jr.

Nollan v. California Coastal Commission[20] involved a demand that the Nollans dedicate to the public one-third of their beachfront land in exchange for a permit to replace a one-story bungalow with a two-story home. The Coastal Commission granted the permit with the condition attached, but the Nollans never accepted the permit. The Court held that a government may impose a condition upon the granting of a development permit if that condition ameliorates a direct negative impact caused by the development when that impact could justify the outright denial of the permit.[21]

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17. *Palazzolo*, 533 U.S. at 627.

18. *See supra* note 5 (discussing *Palazzolo* concurrences in context of *Penn Central* analysis). *See also* Guggenheim v. City of Goleta, 638 F.3d 1111 (9th Cir. 2009) (distinguishing *Palazzolo* on basis of manner of acquisition of property—which was not at all relevant to the basis of the Supreme Court's decision).

19. 272 U.S. 365, 388 (1926) (upholding area-wide zoning).

20. 483 U.S. 825 (1987).

21. *Id.* at 836–37.

> Although the Court [in *Nollan*] does a poor job of defining the parameters of the test, suggesting that it simply requires a correspondence between the government's purposes and its means, its reasoning and holding clearly show that the raw nexus test requires (1) a legitimate state interest or purpose; (2) a connection between that interest and the land use exaction chosen to address it; and (3) a minimal connection between the impacts of the proposed development and the land use exaction.[22]

In *Dolan v. City of Tigard*,[23] the City imposed two conditions in exchange for a permit to expand a plumbing store: dedicate riparian property to public access, and build a bicycle trail across the property. The Court held that the City had the burden of showing not only that there was a nexus between the conditions and impacts caused by the development, but also that the City must show the exactions to be "roughly proportional" to the impact.[24]

In response to the dissent's criticizing the decision for "abandoning the traditional presumption of constitutionality,"[25] the Court noted that it was not imposing this burden in the context of ordinary land use legislative zoning.[26] This statement has led to assertions that the "rough proportionality" standards of *Dolan* do not apply when exactions are imposed through a legislative act, such as affordable housing ordinances that require developers to set aside a set percentage of new units for below-market sale to lower-income people, or pay an in-lieu fee to a local housing authority instead.[27]

The Court in *Lingle v. Chevron* reiterated that *Nollan* and *Dolan* were special takings cases that followed from the doctrine of unconstitutional conditions.[28] The Court also noted that where a regulation fails to substantially advance a legitimate governmental interest, it may violate the Due Process Clause, but not necessarily

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22. 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, 378 (2002).

23. 512 U.S. 374 (1994).

24. *Id.* at 391.

25. *Id.* 512 U.S. at 405 (Stevens, J., dissenting).

26. *Id.* at 391 n.8 (majority opinion).

27. *See* James S. Burling & Graham Owen, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397 (2009), *reprinted in* 2010 ZONING AND PLANNING LAW HANDBOOK 631 (Patricia F. Salkin ed., 2010).

28. 544 U.S. 528, 547 (2005).

the Takings Clause.[29] Thus, because the "substantially advance" test is not the rationale of *Nollan* or *Dolan*, the vitality of those cases was not disturbed.

D. Koontz v. St. Johns River Water Management District*: The Latest Take on Regulatory Exactions*

1. Nineteen Years of Litigation Preceded the Supreme Court Decision

In 1972 Coy Koontz, Sr., purchased 14.9 acres of property near the intersection of two major roads near Orlando, Florida.[30] In 1984 the state adopted a comprehensive wetlands management scheme.[31] In 1994, Coy Koontz applied to develop 3.7 acres of his property.[32] The water management district determined that the property was in a "Riparian Habitat Protection Zone" and the development of the 3.7 acres would require mitigation.[33]

Although Coy Koontz agreed to impose a conservation easement upon his remaining 11 acres, the St. Johns River Water Management District demanded more.[34] Because 11 acres did not fulfill the District's one- to ten-acre mitigation formula, it demanded that Koontz either reduce his development to one acre or that he accede to a condition to spend up to $150,000 to improve the wetlands functions on district-owned property five to seven miles away from the project site.[35] Koontz refused and the District denied the permit.[36]

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29. *Id.*

30. 1 Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2592 (2013).

31. *Id.*

32. *Id.*

33. St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1224 (Fla. 2012). During the course of litigation, the District ultimately conceded that only 0.8 acres of the development area contained wetlands. Brief for Petitioner-Appellant at 5–8, Koontz v. St. Johns Water Mgmt. Dist., 77 So. 3d 1220 (Fla. Nov. 12, 2009) (No. SC09-713), 2009 WL 4227381, at *5–8. Moreover, the land contained no significant habitat. St. Johns Water Mgmt. Dist. v. Koontz, 5 So. 3d 8, 9 (Fla. App. 2009) ("The site's usefulness as an animal habitat has been severely reduced."); Joint Appendix, Plaintiff's Exhibit 8: BDA 2001 Wetlands Evaluation Report at 68 (Aug. 28, 2002), Koontz v. St. Johns River Water Mgmt. Dist., 2012 WL 7853775 (U.S. 2012) (No. 11-1447).

34. *Koontz*, 133 S. Ct. at 2592–93.

35. *Id.* at 2593.

36. *Id.*

Koontz filed suit toward the end of 1994. Ultimately, the trial court found that the conditions failed under *Nollan* and *Dolan* and ordered the District to give Koontz a permit and awarded $327,500 in damages under Florida Statutes § 373.617.[37] In 1998 the court of appeals found the rejection of the application was final agency action and the case was ripe.[38] The Florida Supreme Court reversed on two grounds. First, because Koontz never took the permit, the conditions had never, in fact, been imposed. And, second, it held that the holdings of *Nollan* and *Dolan* do not apply to the imposition of monetary exactions.[39]

2. The Supreme Court Reverses the Florida Supreme Court's Holding That Exactions May Be Challenged Only When a Permit Is Accepted

The United States Supreme Court granted Koontz's petition for writ of certiorari and reversed. The Court held, per all nine Justices, that the tests of *Nollan* and *Dolan* apply not only in circumstances where a permit is granted with conditions, but also in those circumstances where a permit is denied because an owner refuses to accede to the permit conditions. "[R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."[40] The Court continued to

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37. Koontz v. St. Johns River Water Mgmt. Dist., No. CI-94-5673, 2002 WL 34724740, at *10 (Fla. Cir. Ct. Oct. 30, 2002) (finding District failed to justify exaction under *Nollan* and *Dolan*); Koontz v. St. Johns River Water Mgmt. Dist., No. CI-94-5673, 2006 WL 6912444, at *2 (Fla. Cir. Ct. Feb. 21, 2006) (awarding damages); St. Johns Water Mgmt. Dist. v. Koontz, 5 So. 3d 8, 17 (Fla. App. 2009) (noting of award of $376,154 including interest).

38. Koontz v. St. Johns River Water Mgmt. Dist., 720 So. 2d 560, 562 (Fla. App. 1998) ("There is no requirement that an owner turned down in his effort to develop his property must continue to submit offers until the governing body finally approves one before he can go to court. If the governing body finally turns down an application and the owner does not desire to make any further concessions in order to possibly obtain an approval, the issue is ripe.").

39. 77 So. 3d 1220, 1230 (Fla. 2012) ("[T]he Nollan/Dolan rule with regard to 'essential nexus' and 'rough proportionality' is applicable only where the condition/exaction sought by the government involves a dedication of or over the owners's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought. . . .").

40. *Koontz*, 133 S. Ct. at 2595.

explain that the rationale behind the unconstitutional conditions doctrine is consistent with the application here:

> 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.[41]

Justice Kagan and three other Justices agreed with this basic principle: "The *NollanDolan* 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)."[42] The dissent, however, questioned whether under the facts of this case the permit had been denied because Koontz failed to accept the conditions or whether Koontz just halted ongoing negotiations.

3. The Supreme Court Finds That the Holdings of Nollan *and* Dolan *Apply to Monetary Exactions*

A five-Justice majority further held that monetary exactions should receive the same scrutiny given to exactions of land under *Nollan* and *Dolan*. The Court reasoned that *Nollan* and *Dolan* are special applications of the doctrine of unconstitutional conditions. Since government cannot simply demand a payment of money (outside the taxing power) it cannot demand the same money simply because it has the leverage of its permitting authority. But, recognizing that develooutpment can have negative external consequences, it is appropriate for government to demand ameliorating conditions—so long as they meet the appropriate tests. The Court held that this case is unlike other circumstances where government may demand

41. *Id.* at 2596.
42. *Id.* at 2603 (Kagan, J., dissenting).

money. Instead, here, "the monetary obligation burdened petitioner's ownership of a specific parcel of land."[43]

In response to suggestions from the District and the dissent that this case should be viewed as an alleged regulatory taking under the rubric of *Penn Central*, the Court responded that

> 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.[44]

The Court saw no need to explicate the distinction between taxes and exactions—finding it clear enough here and really a problem more in theory than reality: "[I]t suffices to say that despite having long recognized that 'the power of taxation should not be confused with the power of eminent domain,' . . . we have had little trouble distinguishing between the two."[45]

E. Vexing Questions About Exactions That Survive Koontz

1. Do Nollan *and* Dolan *Apply to Legislatively Imposed Exactions?*

In *Dolan* the Court tried to allay fears of government advocates and the dissent that all manner of property regulation would be subject to the heightened scrutiny of "rough proportionality" by distinguishing zoning regulations, noting:

> 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. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.[46]

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43. *Id.* at 2599 (majority opinion).
44. *Id.* at 2600 (citation omitted).
45. *Id.* at 2602 (citation omitted).
46. Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

To property rights advocates this passage has always been considered simply a means of distinguishing the particular facts in *Dolan* from general area-wide zoning schemes. But those with a more pro-government perspective have argued that this passage means first, that only individualized adjudicative decisions are subject to *Dolan* and, second, that *Dolan* applies only when the demanded exaction is land, as opposed to money.[47] In *Koontz* the Court made explicit that both *Nollan* and *Dolan* apply to circumstances beyond the dedication of real property exactions. But it did not have occasion to opine on whether *Nollan*, *Dolan*, and now *Koontz* should apply to legislative exactions.

This is an issue on which state courts are in disagreement. Some state courts, like California, have held that a legislatively imposed exaction, an in-lieu fee for public art, should be exempt from *Dolan*'s rough proportionality standard.[48] Others have subjected legislatively imposed fees to the heightened scrutiny of *Nollan* and *Dolan*, holding, for example, that "the character of the [condition] remains the type that is subject to the analysis in *Dolan* whether it is legislatively required or a case-specific formulation. The nature, not the source, of the imposition is what matters."[49]

As a practical matter the legislative-adjudicative distinction is a distinction that lacks precision because it can become notoriously difficult at the local planning level to objectively tell one from the other:

> In reality, the discretionary powers of municipal authorities exist along a continuum and seldom fall into the neat categories of a fully predetermined legislative exaction or a completely discretionary administrative determination as to the appropriate exaction.[50]

Suffice it to say that *Koontz* leaves this question open. However, considering that the exaction in *Koontz*—a ten-to-one mitigation

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47. For a discussion of this argument in the context of subsidized housing ordinances, *see* Burling & Owen, *supra* note 27.

48. *See, e.g.*, Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996), *cert. denied*, 117 S. Ct. 299 (1996) (reasoning that the arts fee was no different than other aesthetic regulations like paint color and landscaping).

49. J.C. Reeves Corp. v. Clackamas Cty., 887 P.2d 360, 365 (Or. Ct. App. 1994). For a more extended discussion of this issue, see Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487 (2006) and Burling & Owen, *supra* note 27.

50. Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 266 (2000).

measure—was pursuant to a broadly applicable regulatory fiat (that is, akin to a legislative act), there is little support in *Koontz* for the continuing vitality of the legislative exception. In fact, because the particular exactions in *Nollan and Dolan* were likewise pursuant to broadly applicable legislative acts, the derivation of this exception from the language in *Dolan* must be inherently suspect. If the rationale for the exception, as described in *Ehrlich*, stems from the inherently coercive nature of adjudicative permitting schemes,[51] then a serious analysis is warranted on the degree to which legislative acts demanding tribute from the small minority of landowners who might wish to develop their property contain an element of coercion.

One aspect of this debate must be acceded to by all sides in the debate: there is a clear conflict on this issue in the lower courts as well as in the academy and sooner or later the Supreme Court will need to take this up. The Court once came close, in the denial of a petition for writ of certiorari in *Parking Association of Georgia v. City of Atlanta*, where Justices Thomas and O'Connor questioned in dissent why it should matter what the governmental source of the exaction may be.[52] Until the Court takes this issue up, property owners will continue to argue against the exception, and government lawyers will seek to apply it.

2. After Koontz*, Is* Nollan *Satisfied If an Exaction Advances a Legitimate Public Purpose?*

Actually, this a trick question because *Nollan* has never been satisfied if an exaction merely satisfies a legitimate public purpose. Readers may recall that for a time the Court had held that a regulation effects a regulatory taking if it "fails to advance a legitimate public purpose" or if it destroys "economically viable use."[53] And, for a while, the holding in *Nollan* was sometimes justified under the rubric that an exaction that failed the *Nollan* nexus test was a regulatory taking because it failed to advance a legitimate government interest. But in *Lingle v. Chevron U.S.A. Inc.*,[54] the Court reversed itself and held that while a regulation that fails to substantially

51. *Ehrlich*, 911 P.2d at 438–39.
52. 515 U.S. 1116, 1116–18 (1995) (Thomas, J., dissenting).
53. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).
54. 544 U.S. 528 (2005).

advance a legitimate government interest might violate the Due Process Clause, it did not necessarily violate the Takings Clause.

But the Court also took pains in *Lingle* to note that this did not affect its holding in *Nollan*. In other words, the Court wrote, *Nollan* is still good law because it is an instantiation of the doctrine of unconstitutional conditions.[55] In *Koontz* the Court reiterated that the holding in *Nollan* derives from the Takings Clause because the unconstitutional condition "burden[s] the right not to have property taken without just compensation."[56] There you have it. *Nollan* is a regulatory takings case not because an exaction fails to substantially advance a legitimate public purpose (although it might not) but because a property owner cannot be forced to give up the right to receive just compensation for a taking as the price to pay for a government benefit or permit.

Moreover, the *Nollan* nexus test was *never* satisfied merely because an exaction simply happened to advance a legitimate governmental interest. Clearly, the beach easement in *Nollan* advanced the public purpose of creating more public beach. The problem was that the demand for more public beach was completely unhinged from any negative impact caused by the development of the Nollans' home. So the bottom line is that it is completely insufficient to a *Nollan* analysis whether an exaction happens to result in some public good or effects a public purpose. *Koontz* didn't change this—but it did solidify the force of *Nollan* that some saw having been limited after *Lingle*.

3. Must the Impact to Be Ameliorated Constitute a Public Nuisance?

No. *Nollan* held that an exaction or condition could be imposed *in lieu* of denying a permit if the exaction was related to the reason for denying the permit. But it also noted that the rule applied only where a permit denial would not by itself constitute a taking:

> The Commission argues that among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach

55. *Id.* at 548.

56. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2596 (2013).

> created by a developed shorefront, and preventing congestion on the public beaches. We assume, without deciding, that this is so—in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede these purposes, unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking.[57]

In other words, if a permit denial were to constitute a taking under *Penn Central*, then an exaction in lieu of that denial would not be justified under the *Nollan* rule because if the permit could not be lawfully denied, then the government has no business demanding an exaction for granting the permit.

Importantly, the external harms allegedly caused by the development in *Nollan* (the "psychological barrier" and beach congestion) were not clearly nuisances. The government can regulate all sorts of land uses that fall short of being nuisances—sometimes to prevent a harm and sometimes to create a public good. Indeed, in *Lucas* the Court noted that when it comes to permitting actions, there is little principled distinction between land use requirements that provide a public benefit and those that prevent a public harm.[58] But the Court also noted in *Lucas* that if a regulation was truly nuisance-preventing, with nuisance being defined by the "background principles" of a state's law of property, then the denial of the noxious use could not constitute a taking of the property, no matter how much use and value may be lost.[59]

Thus, a regulation prohibiting a genuine "background principle" nuisance is not a taking. A government agency may, however, substitute the prohibition of a nuisance for a conditioned permit. Thus, for example, a government could prevent the construction of a dam that might flood a neighbor's property (to use an example given in *Lucas*) and not be liable for a taking. But it also could, in theory,

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57. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 835–36 (1987) (footnote omitted).

58. Or as the Court put it, only a "stupid staff" would not be able to conjure up a harm-preventing rationale for a regulation. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1025 n.12 (1992).

59. *Id.* at 1029 ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.").

approve the dam so long as the nuisance flooding was ameliorated—perhaps by paying damages to the affected neighbors agreeable to being paid. Thus, while the harm to be prevented by a development permit denial could be, but need not be, a nuisance-like activity, the requirements of *Nollan* apply to any condition imposed as a substitution for an otherwise lawful permit denial.

4. Are Nollan*,* Dolan*, and Now* Koontz *Really Just Variations of the Same Test?*

No. In properly understanding and applying the tests, it is important to understand that *Nollan* and *Dolan* apply different tests to the imposition of exactions. *Nollan* requires that there be a connection, or nexus, between the impact of the development that could justify a permit denial and the exaction. In *Dolan* the nexus was established: expanding a plumbing store and creating more impervious surface could increase traffic and could increase the potential of downstream flooding. Assuming (and the Court did not decide) that those impacts could justify a denial of Mrs. Dolan's permit, then a measure to ameliorate traffic (the bicycle path) and a measure to ameliorate the flooding potential (dedication of land next to the creek) could easily satisfy the nexus test in *Nollan*. But this could quickly become absurd, as *Dolan* began to demonstrate.[60] As John Muir once observed: "When we try to pick out anything by itself, we find it hitched to everything else in the Universe."[61] Or as the trial court noted in *Koontz*: "When a butterfly flutters its wings in one part of the world, it can eventually cause a hurricane in another."[62] But *Nollan* must be more than an intellectual parlor game. Otherwise, a government agency could soon demand all manner of public benefit dedications so long as there was some remote connection to an adverse impact from the project. That is why the Court in *Dolan* imposed the *additional* test that the exaction-imposing entity must prove that the condition is roughly proportional to the denial-justifying impact of the project. *Koontz* did not change this.

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60. Or as Justice Scalia observed: "There are a lot of bike paths around Washington, and I've never seen people carrying shopping bags on their bikes." Transcript of Oral Argument at 27, Dolan v. City of Tigard, 512 U.S. 374 (1994) (No. 93-518), 1994 WL 664939.

61. JOHN MUIR, MY FIRST SUMMER IN THE SIERRA 110 (Sierra Club Books 1988) (1911).

62. Koontz v. St. Johns River Water Mgmt. Dist., No. CI-94-5673, 2002 WL 34724740, at *1 (Fla. Cir. Ct. Oct. 30, 2002) (citing to Edward Lorenz's *Chaos Theory*).

5. When Should an Exaction Be Challenged?

One of the procedural conundrums raised by the *Koontz* state supreme court decision involves timing. When should an exaction be challenged? Coy Koontz, Sr., filed his challenge after his permit was denied. During the course of the litigation, the District has taken great pains to point out that Koontz was never legally obligated to fulfill the conditions. While the Florida Supreme Court found this dispositive, the United States Supreme Court held that Koontz could challenge the condition when he could show (and the trial court held) that the permit was denied *because* he refused to accede to one of the conditions.

If the decision had gone the other way, this could have been the death knell for many challenges. That is because in some states, once a permit is accepted with conditions and a permittee takes the benefit of the permit, the permittee is estopped from challenging the conditions. For example, in *Pfeiffer v. City of La Mesa*,[63] a California Court of Appeals held that a permit condition could not be challenged once the permittee accepted the permit and began to accept its benefits.[64] Other states have declined to follow this rule.[65]

In Florida, the state supreme court's decision in *Koontz* created substantial uncertainty as to whether a permittee could ever challenge a permit condition if a condition could not be challenged when a permit is denied but also could not be challenged if the permit is granted under a rule similar to California's. In fact, Coy Koontz unsuccessfully sought a rehearing of the state supreme court's decision for clarification on this very point.[66] With *Koontz* holding that a condition may be challenged when a permit is denied because an applicant has refused to accept the condition, a challenge may proceed. However, in those jurisdictions holding that the ability to challenge a condition may be waived upon the acceptance of a permit, *Koontz*

63. 137 Cal. Rptr. 804 (1977).

64. As a result of the *Pfeiffer* decision, the state legislature adopted a statute creating a limited exception to *Pfeiffer*. *See* CAL. GOV'T CODE §§ 66000–66009 (West 2013). Incidentally, in *Nollan*, the Nollans came close to accepting the permit with attached conditions but refused the permit at the last minute, once they realized they could obtain pro-bono representation in a challenge to the condition. That enabled them to avoid the *Pfeiffer* rule.

65. *See, e.g.*, Town of Flower Mound v. Stafford Estates L.P., 135 S.W.3d 620 (Tex. 2004).

66. Motion for Rehearing, St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220 (Fla. 2011), *reh'g denied*, No. SC09-713, 2012 Fla. LEXIS 1 (Jan. 4, 2012) (on file with Pacific Legal Foundation).

doesn't change things. It is imperative that litigants seeking to challenge a permit condition learn first what effect the acceptance of a permit with conditions has on the ability to challenge the conditions in a particular jurisdiction.

6. Will Koontz *Result in Local Governments Refusing to Negotiate Permit Conditions for Fear of a Lawsuit?*

No. While this fear was expressed in Justice Kagan's dissent,[67] this seems overblown. Recall that the trial and appellate courts found that the permit had been denied *because* Koontz refused to accede to the permit condition and the case was therefore ripe.[68] In other words, there was nothing left to negotiate; Koontz was given a take it or leave it offer and he left it on the table. The negotiations were over. More importantly, a local government can easily couch its negotiations expressly in terms of "ideas to be explored," "non-binding suggestions," and the like. Only an incredibly "stupid staff" would set out a list of permit conditions and say "take it or leave it." And in denying a permit, the local government could say, "we're denying the permit because of the adverse impact caused by the project, and not because the applicant refuses to accede to certain suggested ameliorating conditions."

More importantly, because we must presume that local agencies act in good faith and are usually not averse to all development, and because local agencies have an incentive to work with local landowners in order to see that good projects are built, they also have every incentive to try to get some ameliorating exactions as part of the package. And landowners will not blithely let a permit be denied if they can instead accept harm-ameliorating conditions combined with a permit approval. In other words, both sides will continue to negotiate just as they have since 1987 when *Nollan* was decided.[69]

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67. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2610 (2013) (Kagan, J., dissenting).

68. *See supra* note 38 and accompanying text.

69. Development agreements have become a very common land use approval vehicle since *Nollan*. *See, e.g.*, David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After* Nollan *and* Dolan, 51 CASE W. RES. L. REV. 663 (2001); John J. Delaney, *Development Agreements: The Road from Prohibition to "Let's Make a Deal!"*, 25 URB. LAW. 49 (1993); Daniel J. Curtin, Jr. & Scott A. Edelstein, *Development Agreement Practice in California and Other States*, 22 STETSON L. REV. 761 (1993).

The give (by landowners) and take (by government officials) will continue. In short, for better or worse, rumors of the demise of government as usual following *Nollan*, then *Dolan*, and now *Koontz* have been greatly exaggerated.

7. Does Koontz *Open Up the Floodgates to Litigation Challenging User Fees and Taxes?*

No. With respect to fees, the Court put it best:

> It is beyond dispute that "[t]axes and user fees . . . are not 'takings.'" We said as much in County of Mobile v. Kimball . . . , and our cases have been clear on that point ever since. This case therefore 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]

Under the law of most states, fees must be related to the costs of administering the program for which fees are charged and that fact is not affected one way or the other by *Koontz*. *Koontz* is about exactions imposed to ameliorate harms that can justify a permit denial; it is not about normal permitting fees. If a landowner objects to a fee, there are existing avenues to call the fees into question; *Koontz* is just not one of the avenues.

As the Court put it in *Koontz*, this will not change:

> Finally, we disagree with the dissent's forecast that our decision will work a revolution in land use law by depriving local governments of the ability to charge reasonable permitting fees. Numerous courts—including courts in many of our Nation's most populous States—have confronted constitutional challenges to monetary exactions over the last two decades and applied the standard from *Nollan* and *Dolan* or something like it.[71]

F. Physical Invasions After Arkansas Game & Fish Commission v. United States

In *Arkansas Game & Fish Commission v. United States*,[72] the Corps of Engineers, to please farmers upstream from a dam, changed the

70. *Koontz*, 133 S. Ct. at 2601 (citations omitted).
71. *Id.* at 2602 (citations omitted).
72. 133 S. Ct. 511 (2013).

timing of its water releases for six years. This caused regular flooding of state property well into the growing season, causing the saturation and eventual destruction of 18-million board feet of timber that belonged to the State of Arkansas. The Court of Federal Claims awarded $5.7 million in damages, but the Federal Circuit reversed.[73]

The United States denied its liability saying that it had stopped the flooding after seven years and did not intend for the damage to occur in the first place. The United States argued that it could not be liable for a temporary flooding based on language in a 1924 Supreme Court case, *Sanguinetti v. United States*.[74] *Sanguinetti* held that "in order to create an enforceable liability against the government, it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land. . . ."[75] From this, the United States argued that to be compensable, such takings must be permanent.

A unanimous Supreme Court, in a decision written by Justice Ginsburg, disagreed and held that in a temporary physical invasion taking like this, there was no requirement that the flooding be permanent for liability to arise.[76]

The Court also gave short shrift to the reappearance of an argument that has appeared in virtually every takings case decided in the past quarter-century—that a finding of government liability will cause an end to government as we know it. The Court was not impressed:

> Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest. . . . We have rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment's instruction. While we recognize the importance of the public interests the Government advances in this case, we do not see them as categorically different from the interests at stake in myriad other Takings Clause cases. The sky did not fall after *Causby*, and today's modest decision augurs no deluge of takings liability.[77]

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73. *Id.* at 516–18.
74. 264 U.S. 146 (1924).
75. 133 S. Ct. at 520 (quoting Sanguinetti v. United States, 264 U.S. 146, 149 (1924)).
76. 133 S. Ct. at 520–21.
77. *Id.* at 521 (citations omitted).

Coming in a unanimous decision written by a "liberal" Justice, this portends well for advocates of property rights in that they may no longer have to work as hard to allay fears that justice for one landowner will be perceived as creating hardship for all.

The Court, however, also injected some uncertainty into what was a settled principle in physical invasion type cases—that government is per se liable for a taking when it physically intrudes on private property. In determining whether there is liability, the Court opined that factors relevant to the takings analysis might include "foreseeability," "intent" and, in a departure from every prior physical invasion case, the Court speculated in dicta that the *Penn Central* factors could be "relevant to the takings inquiry":

> We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection. When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking.
>
> Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action. . . . So, too, are the character of the land at issue and the owner's "reasonable investment-backed expectations" regarding the land's use.[78]

It is too soon to tell what the lower courts will make of this conflation of the *Penn Central* regulatory takings factors with the per se rules of physical invasions—concepts the Court previously told us were separate and divisible.[79] So far, at least in this case, the court of appeals has not taken the conflation beyond traditional flooding liability cases, ruling on remand that "intent" to flood was unnecessary for liability, only that the flooding be foreseeable, a concept

78. *Id.* at 522 (citations omitted).

79. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323 (2002) ("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'. . . .").

quite common in government flood liability cases.[80] Indeed, this holding is quite consistent with the law of other states that have cautioned against impressing the law of takings with tort doctrines such as intent.[81]

G. Are the Dancing Raisins Ripe?

In *Horne v. Department of Agriculture*,[82] a raisin-grower objected to the statutory marketing order requirement that he give a substantial percentage of his crop to the government in order to sell the remainder.[83] After failing to comply, Horne was assessed with fines of over $650,000 by an administrative law judge.[84] After administrative proceedings, dealing in part on the precise application of the statute to their activities, Horne sued in federal district court, arguing that the statute did not apply to him and that if it did it would effect a taking in violation of the Fifth Amendment.[85] The Ninth Circuit held, relying on takings ripeness doctrines, that the takings claim should have been filed in the Court of Federal Claims where relief was available under the Tucker Act.[86]

While much of the Supreme Court's unanimous decision turned on arcane statutory questions involving the distinction between raisin "handlers" and raisin "producers," the Court ultimately held that despite *Williamson County*, the marketing order's statutory scheme allowed the district court to hear the takings claim and thus the case had been properly filed in district court. The Court remanded the case for a determination of whether there was a taking. While the facts of this case are numbingly unique, we can take away the lesson that *Williamson County* is not an absolute barrier.

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80. "In order for a taking to occur, it is not necessary that the government intend to invade the property owner's rights, as long as the invasion that occurred was 'the foreseeable or predictable result' of the government's actions." Ark. Game & Fish Comm'n v. United States, 736 F.3d 1364, 1372 (Fed. Cir. 2013).

81. *See, e.g.*, Arvo Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 431, 435–38 (1969).

82. 133 S. Ct. 2053 (2013).

83. *Id.* at 2056.

84. *Id.*

85. *Id.* at 2059.

86. *Id.* at 2060.

CONCLUSION

Koontz did not effect a revolution in the law; it simply regularized the procedure and scope of the rules in *Nollan* and *Dolan*. But if Koontz had lost his case, then in time *Nollan* and *Dolan* would have been eviscerated as meaningful checks against unjustified demands in the permitting process; likewise, for *Arkansas Game and Fish* and *Horne*. None of these cases marked much of a change in the status quo. However, if the Court had adopted the federal government's crabbed interpretation of temporary physical invasions in *Arkansas Game and Fish*, then landowners would have ended up in a significantly worse place than they had been before these cases were decided. And even more landowners would have found themselves trapped in the ripeness quagmire of *Williamson County* if the Ninth Circuit's raisin ruling remained.

All governments now must do what some have been doing for a long time: follow the rules when a permit is denied and not treat monetary exactions as a means of evasion, compensate people for damages caused by foreseeable government flooding, and let the courts hear allegations of regulatory takings.

Koontz is particularly instructive. It is not too much to ask to require government agencies to prove the necessity and scope of conditions that are imposed as part of the development process. Landowners are not ATM machines or magic lamps to be rubbed by local planners. Many communities have many wishes for new and better public infrastructure. But these wishes must be fulfilled by the taxpayers, not just those who happen to be standing in line at the permit office.

There are still questions yet to be resolved when it comes to the application of the doctrine of unconstitutional conditions, but, in order to fulfill the guarantees in the Constitution against unfair treatment of landowners by opportunistic government agencies, those questions should largely be answered in a way that requires these agencies to justify what they take in exchange for permits—and to justify those demands in a manner that comports with *Nollan*, *Dolan*, and now *Koontz*. In other words, the constitutional way of doing things.

And we have not seen the last litigation over government liability for government-caused flood damages. While the government should

not be liable for every flood, there are many instances where flooding is the foreseeable consequence of government actions that move water from one (usually more populated) place to another (usually less populated) place.

Finally, the *Williamson County* ripeness doctrine remains a vexing barrier to justice in the federal courts for many litigants. *Horne* didn't put an end to *Williamson County*, but it did not expand its scope. The demise of that unfortunate doctrine must await another day.