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NOTE

KOONTZ V. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT: THE CONSTITUTIONALITY OF MONETARY EXACTIONS IN LAND USE PLANNING

John M. Newman*

I. Introduction

Planning, whether for the sake of economics, warfare, land use, or other purposes, seeks to set the best possible course for achieving a future outcome. We establish and execute plans of varying complexity and longevity on a daily basis, as do other species that intend to survive the inherent variables of life. Indeed, a desire for predictability—and the safety inherent in knowing what is coming next—is ingrained in the human psyche.

We generally recognize that planning the appearance and spatiality of the built environment, and providing for its harmonious interaction with the natural environment, is an important contributor to societal health, safety, and welfare. This notion became clear in the United States at the beginning of the twentieth century as industrial growth threatened health, swelling immigrant populations were perceived as a threat to safety, and the welfare of many appeared darkened by the shadow of looming cities.[1] While the stimuli for land use planning have evolved since the advent of zoning in the

* Law Clerk, United States District Court for the District of Montana. I wish to thank Professor Michelle Bryan for her assistance and thoughts, her intellectual challenges, and her unparalleled instruction. Thanks also to the editors and staff of the *Montana Law Review* for shaping this article into its final form, and to my colleagues in Geography and Land Use Planning for many years of constructive debate on community development and placemaking. Finally, I wish to thank my children for reminding me to rest, and my wife, Jaymi, for making this, and everything else in life, happen.

1. Barry Cullingworth & Roger W. Caves, *Planning in the USA: Policies, Issues and Processes* 46–47 (2d ed., Routledge 2003).

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1920s,[2] the underlying goals of protection and preservation remain solvent in the land use planning field to this day.

Yet, planning necessarily entails restriction—in some cases, a restriction so severe it operates to usurp property rights altogether. Planning lays bare one of the great tensions at the core of our own charter document—the United States government exists in part to "promote the general welfare" of its people,[3] yet the government is itself restricted in the manners in which it may go about that promotion.[4]

One absolutely fundamental limitation on government action, regardless of its aim, lies in the Takings Clause of the Fifth Amendment: the federal government is prohibited from appropriating private property for public use without justly compensating its owner.[5] By virtue of the Fourteenth Amendment, this same prohibition applies to state and local governments.[6]

Over time, the prohibition against taking private property has increased in complexity as the federal and state governments' use of innovative approaches to land use regulation have grown more numerous. In the current age of the highly developed administrative state, one particularly frequent occurrence of a government taking arises when a government regulation, by its operation, in effect takes private property.[7] A subset of so-called "regulatory takings" applies to "exactions," which occur when a governmental unit imposes some sort of condition before granting a landowner's request to develop her property, and the condition requires the landowner to give up some form of property.[8] These exactions are subject to heightened scrutiny because they present particularly fertile ground for government extortion.[9]

Exactions analysis, contoured in the United States Supreme Court's decisions in *Nollan v. California Coastal Commission*[10] and *Dolan v. City of Tigard*,[11] has generally applied when a governmental unit requires the aggrieved landowner to dedicate an interest in real property, such as a publicly dedicated trail across the developed property.[12] More recently, the

2. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

3. U.S. Const. preamble.

4. *E.g. id.* at amends. I, IV, V, VII, VIII.

5. *Id*. at amend. V.

6. *Id*. at amend. XIV.

7. Robert Meltz, Dwight H. Merriam & Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* 130 (Island Press 1999).

8. *Id.* at 142–143.

9. *Koontz v. St. Johns River Water Mgt. Dist.*, 133 S. Ct. 2586, 2594–2595 (2013).

10. 483 U.S. 825 (1987).

11. 512 U.S. 374 (1994).

12. *Nollan*, 483 U.S. at 836–837 (noting the "essential nexus" between a development condition/exaction and the impact that the imposition purports to address requires that a "permit condition [serve]

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Court modified this understanding in *Koontz v. St. Johns River Water Management District*[13] to include a monetary exaction, *i.e.* one where the landowner is required to pay a sum of money in lieu of dedicating an interest in real property, within the scope of heightened scrutiny outlined in *Nollan* and *Dolan*.

The overarching purpose of this paper is to examine the *Koontz* decision in its factual and legal context, explore possible theories for employing the doctrinal shift it created, and analyze one type of classic monetary exaction—cash in lieu of parkland dedication—under *Nollan* and *Dolan*, as extended by *Koontz*. Part II of the paper reviews the factual and procedural history of the case, along with the national split in legal authority that precipitated the Supreme Court's grant of certiorari. Part III describes two of the Court's pre-*Koontz* rulings that, while not expressly abrogated by the *Koontz* Court, certainly appear at odds with the majority opinion. Part IV reviews the majority and dissenting opinions in detail. Part V explores the likely impacts of the *Koontz* decision on some typical types of monetary exactions used in land use decisions, and suggests some practical limitations that should apply to the holding. Part VI examines a sampling of state statutory provisions that authorize monetary exactions in lieu of parkland dedications, and identifies strengths and weaknesses in those provisions in light of *Koontz*. Part VII concludes that, overall, while the *Koontz* decision may not invalidate state land use statutes or reverse local government decisions on any particularly large scale, the foothold it provides aggrieved developers and landowners may put a strain on local government resources due to increased legal challenges, and may negatively affect local governments' abilities to mitigate the effects of new development where challenges to monetary exaction programs prove successful. This paper suggests the strain is likely undue and unnecessary, there are ways to view and apply *Koontz* to avoid it, and there are ways states can amend cash-in-lieu statutes to minimize the effect of the holding.

II. CONTEXT OF THE *KOONTZ* DECISION

A. Factual and Procedural History

Koontz arose from an application for commercial development east of Orlando, Florida. Coy Koontz, Sr. ("Koontz"), who purchased the property

the same governmental purpose" as would be accomplished by banning the proposed development altogether); *Dolan*, 512 U.S. at 391 ("'[R]ough proportionality' best encapsulates . . . the requirement of the Fifth Amendment. No precise mathematical calculation is required, but [regulatory bodies] must make some sort of individualized determination that the required dedication is related both in nature an extent to the impact of the proposed development").

13. 133 S. Ct. 2586.

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in question in 1972, sought to develop the northern 3.7 acre section of his total 14.9 acres beginning in 1994. The property, located near the intersection of a secondary state highway and a toll-road approximately 40 miles west of Florida's east coast, consisted entirely of state-classified wetlands of varying development suitability.[14]

In order to proceed to develop the property, Koontz needed to obtain two permits. First, pursuant to Florida's Water Resources Act, he needed to obtain a Management and Storage of Surface Water permit.[15] Second, Koontz needed to obtain a Wetlands Resource Management permit pursuant to the Warren S. Henderson Wetlands Protection Act.[16] Koontz submitted both permit applications to the St. Johns River Water Management District ("District"), which was the statutorily-designated regional body responsible for reviewing development proposals with the potential to impact water resources.[17] Specifically, Koontz proposed to raise the base elevation of the northern quarter of the property, install a stormwater runoff detention pond, and encumber the remaining three-quarters of the property with a conservation easement in the District's name.[18]

The District rejected Koontz's proposal, but noted it would approve the project if he either: (a) reduced the development footprint to one acre, deeded the remaining 13.9 acres to the District, and modified both the stormwater management and site grading plans; or (b) without modifying the proposal, paid to make improvements to offsite District property.[19] Under the second alternative, Koontz could avoid dedicating additional land by paying money. Dissatisfied with the alternatives, Koontz filed suit in Florida Circuit Court alleging a regulatory taking.[20]

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14. *Id.* at 2592.

15. *Id.*; *see* Fla. Stat. §§ 373.403, 373.413 (2014) (authorizing state regulation of any "artificial . . . construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state," and conditioning of permits for such construction to avoid harm "to the water resources of the district").

16. *Koontz*, 133 S. Ct. at 2592; *see* Fla. Stat. § 373.414 (prohibiting development in wetland areas which runs contrary to the public interest and authorizing a district to impose mitigation measures, in part of the applicant's choosing, including but not limited to "onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks").

17. *Koontz*, 133 S. Ct. at 2592; *see* Fla. Stat. §§ 373.026, 373.036, 373.069 (creating water management districts and enumerating district powers and duties).

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

19. *Id.* at 2593 ("Specifically, petitioner could pay to replace culverts on one parcel or fill ditches on another. Either of those projects would have enhanced approximately 50 acres of District-owned wetlands. . . . [T]he District said it 'would also favorably consider' alternatives to its suggested offsite mitigation projects if petitioner proposed something 'equivalent.'").

20. *Id.*; *see* Fla. Stat. § 373.617(2) (confining trial court review "solely to determining whether final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation").

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The trial court initially granted the District's motion to dismiss for Koontz's failure to exhaust available administrative remedies.[21] However, following appellate reversal and remand, the trial court held that in light of Koontz's proposal to dedicate the majority of the site to the District, "any further mitigation in the form of payment for offsite improvements to District property lacked both nexus and rough proportionality to the environmental impact of the proposed construction."[22] When the intermediate appellate court upheld the trial court's ruling following the remand, the District appealed to the Florida Supreme Court.[23]

The Florida Supreme Court reversed, ultimately holding that the "essential nexus" and "rough proportionality" standards articulated in *Nollan* and *Dolan* apply only where: (a) "the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval"; or (b) "the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed."[24] In other words, because the District's second alternative sought what amounted to a cash payment from Koontz, albeit to perform specific improvements, rather than an interest in real property, and because the District ultimately *denied* Koontz's permit applications, the Florida Supreme Court deemed a *Nollan* and *Dolan* analysis inapposite. The United States Supreme Court granted certiorari in 2012, in part to resolve discrepant state and federal court interpretation of the applicability of the *Nollan* and *Dolan* analysis referenced in the Florida Supreme Court's decision.[25]

B. Split of Authority

In its opinion, the Florida Supreme Court described a continuum of how courts around the country have applied the *Nollan* and *Dolan* analysis.[26] Some courts have limited heightened scrutiny only to those cases involving dedications of land.[27] Others have applied heightened scrutiny to ad hoc impositions involving non-real property.[28] Still others have applied heightened scrutiny where a non-real-property-based condition results from

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

22. *Id.*

23. *Id.*

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

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

26. *St. Johns River Water Mgt. Dist.*, 77 So. 3d at 1229–1230.

27. *Id.* (citing *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008), *abrogated by Koontz*, 133 S. Ct. 2586).

28. *Id.* (citing *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996)).

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a generally applicable law. [29] The *Koontz* Court expressly rejected the former without adopting any of the limitations suggested by the latter, thereby neglecting to limit the extension of heightened scrutiny in any meaningful way.[30] The split of authority that in part influenced the Supreme Court's decision to grant certiorari is grounded in different views as to the objective protected by the Fifth Amendment's Takings Clause.

In *McClung v. City of Sumner*,[31] the Ninth Circuit held that exactions are limited to real property.[32] The case centered on a city ordinance that required property owners, upon applying to develop their land, to upgrade any adjacent municipal storm drainage facilities serving their parcels.[33] The court in part addressed whether the ordinance created a de facto monetary exaction by requiring developers to outlay cash for upgrades. The court noted that, even if the ordinance could be viewed as a monetary exaction arguendo, *Nollan* and *Dolan* would not apply because "[a] monetary exaction differs from a land exaction—'unlike real or personal property, money is fungible.'"[34] The court further concluded that the facilities expenditure compelled in the plaintiffs' case was the result of a legislative enactment and represented "neither an individual, adjudicative decision, nor the requirement that the [plaintiffs] relinquish rights in their real property."[35] As such, heightened scrutiny under *Nollan* and *Dolan*, indeed the Takings Clause altogether, had no place at the table. Rather, the court held that "any concerns of improper legislative development fees are better kept in check by the ordinary restraints of the democratic political process," as well as through substantive due process.[36] In short, the Fifth Amendment protects real property, and money is not properly characterized as real property under the Takings Clause.

Conversely, in *Ehrlich v. City of Culver City*,[37] the California Supreme Court expressed its view that the Takings Clause primarily serves to protect individuals from bearing essentially public burdens imposed by government.[38] *Ehrlich* involved Culver City's imposition of a $280,000 recreational facilities fee in exchange for allowing the plaintiff to develop a con-

29. *Id.* (citing *Town of Flower Mound v. Stafford Ests. L.P.*, 135 S.W.3d 620 (Tex. 2003)).

30. *See infra* pts. IV(A) & V(B).

31. 548 F.3d 1219.

32. *Id.* at 1227–1229.

33. *Id.* at 1222–1223.

34. *Id.* at 1228 (citing *U.S. v. Sperry Corp.*, 493 U.S. 52, 62 n. 9 (1989) ("If [a government deduction taken directly from a financial award] were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto*.")).

35. *Id.* at 1227.

36. *Id.* at 1228 (citations omitted).

37. 911 P.2d 429 (1996).

38. *Id.* at 444.

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dominium project.[39] Faced in part with the question of whether heightened scrutiny under *Nollan* and *Dolan* applies to this sort of monetary, "nonpossessory" exaction, the court couched its analysis in the following interpretation:

> One of the central promises of the takings clause is that truly public burdens will be publicly borne. Where the regulatory land use power of local government is deployed against individual property owners through the use of conditional permit exactions, the *Nollan* test helps to secure that promise by assuring that the monopoly power over development permits is not illegitimately exploited by imposing conditions that lack any logical affinity to the public impact of a particular land use. The essential nexus test is, in short, a "means-ends" equation, intended to limit the government's bargaining mobility in imposing permit conditions on individual property owners—whether they consist of possessory dedications or the exaction of cash payments—that, because they appear to lack any evident connection to the public impact of the proposed land use, *may* conceal an illegitimate demand—may, in other words, amount to out-and-out . . . extortion.
>
> Under this view of the constitutional role of the consolidated "essential nexus" and "rough proportionality" tests, *it matters little whether the local land use permit authority demands the actual conveyance of property or the payment of a monetary exaction*.[40]

Logically, if the Takings Clause's mention of "private property" imposes no actual property requirement, but instead generally guarantees individual freedom from shouldering more of the public weight than individually warranted, then it does not matter in a constitutional sense whether the individual gives more money or more land to the public than necessary—more than warranted is still more than warranted. However, the court went on to state that heightened scrutiny under *Nollan and Dolan*, while clearly applicable to situations "when a local government imposes special, discretionary permit conditions on . . . individual property owners," has not historically been applied when a development "exaction takes the form of a *generally* applicable development fee or assessment."[41]

Finally, the Texas Supreme Court in *Town of Flower Mound v. Stafford Estates Limited Partnership* applied the Takings Clause to generally-enacted legislation that, in aggregate, actually mimics adjudicative, one-off development conditions.[42] *Flower Mound* focused on a condition precedent to subdivision approval, which required the plaintiff development partnership to improve a road abutting its property.[43] The developer improved the road, at a cost of nearly $500,000, and sued the town for compensation

39. *Id.* at 434–435.

40. *Id.* at 444 (first emphasis in original, second emphasis added) (citations omitted).

41. *Id.* at 447 (emphasis in original).

42. 135 S.W.3d at 640–642.

43. *Id.* at 623–624.

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under a takings theory thereafter.[44] The Texas Supreme Court affirmed and rejected the town's argument that the requirement to upgrade the road, imposed pursuant to local subdivision regulations, operated as a use restriction and was therefore immune from scrutiny under *Nollan* and *Dolan*. Contrary to the *McClung* court's characterization of money as fungible non-property, the *Flower Mound* court held that the road upgrade requirement was "in no sense a use restriction . . . [but instead was] much closer to a required dedication of property—that being the money to pay for the required improvement."[45] The court then parted ways with the *Ehrlich* court as well, holding that a monetary exaction distinction based on the character of the imposition—legislative on the one hand versus ad hoc, or adjudicative on the other—is a distinction without a legitimate difference. The court opined that while it certainly makes sense to apply *Nollan* and *Dolan* to individualized monetary exactions, it also makes practical sense to apply heightened scrutiny to monetary exactions resulting from generally applicable laws.[46] The court theorized it is "entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others."[47] In short, the court concluded that a local government can extort through a regulatory or statutory tool, abused repeatedly over time, as easily as it can alone in a back room with a single developer looking for approval. Thus, the court found no legitimate reason for protecting one form of extortion while exposing the other to a more searching inquiry.

The preceding Takings Clause theories—heightened scrutiny under *Nollan* and *Dolan*: (1) does not apply to monetary exactions, (2) applies only to ad hoc monetary exactions, (3) applies to ad hoc and generally applicable monetary exactions—were squarely before the *Koontz* Court. The Court clearly denounced the first theory and, unfortunately, decided against adopting a theory as clear and complete as the latter two theories.

III. Prior Applicable Supreme Court Jurisprudence

Apart from *Nollan* and *Dolan* themselves, the primary question presented in *Koontz*—whether heightened scrutiny applies at all where an exaction is purely monetary—implicated a number of prior Supreme Court Takings Clause cases. Indeed, much of the limited scholarship written to-date on *Koontz* questions whether the decision itself is faithful to the line of

44. *Id.* at 624.
45. *Id.* at 635.
46. *Id.* at 641.
47. *Id.*

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cases preceding it.[48] Of particular interest are the Court's opinions in *Eastern Enterprises v. Apfel*[49] and *Lingle v. Chevron U.S.A., Inc.*[50]

In *Eastern Enterprises*, a plurality of the Court ruled that the Coal Act of 1992, as retroactively and burdensomely applied to a particular company, was unconstitutional.[51] The Act itself represented a federal governmental initiative to shore up monetary reserves in support of retiring coal mine workers, particularly those who worked for companies in operation before enactment of the Employee Retirement Income Security Act of 1974. Such companies, whether or not engaged in coal mining activities at the time of passage of the Coal Act in 1992, were required to fractionally contribute to employee retirement funds to guarantee some level of benefits for retiring former employees.[52] Eastern Enterprises, long since out of the coal business by 1992, was required to contribute some $5,000,000 to the fund, a burden held unacceptable in an opinion by Justice O'Connor.[53]

However, a majority of justices, including Justice Kennedy who concurred in the result but objected to the methodological path thereto, concluded that the Takings Clause was an inappropriate tool for striking down the challenged legislation.[54] As to using the Takings Clause in that manner, Justice Kennedy stated the following:

> Our cases do not support the plurality's conclusion that the Coal Act takes property. The Coal Act imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property. *It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest*. The Coal Act does not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so. To the extent it affects property interests, it does so in a manner similar to many laws; but until today, none were thought to constitute takings. To call this sort of governmental action a taking as a matter of

48. *E.g.* Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 S. Ct. Rev. 287 (2013); John D. Echeverria, Koontz*: The Very Worst Takings Decision Ever?* 22 N.Y.U. Envtl. L.J. 1 (2014).

49. 524 U.S. 498 (1998).

50. 544 U.S. 528 (2005).

51. 524 U.S. at 538 (plurality).

52. *Id.* at 511–515.

53. *Id.* at 529–530 ("[L]egislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of the liability is substantially disproportionate to the parties' experience. We believe that the Coal Act's allocation scheme, as applied to Eastern, presents such a case. We reach that conclusion by applying the three factors that traditionally have informed our regulatory takings analysis.").

54. *Id.* at 553–556 (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting), 539–543 (Kennedy, J., concurring in part and dissenting in part).

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> constitutional interpretation is both imprecise and, with all due respect, unwise.[55]

Though not binding precedent,[56] lower federal courts have generally adopted what was the majority view in *Eastern Enterprises*—that legislation imposing only a monetary burden cannot effect a taking under the Fifth Amendment.[57]

In *Lingle*, the Court very clearly enumerated the primary theories available to parties seeking redress for an uncompensated taking under the Fifth Amendment.[58] The State of Hawaii enacted legislation designed to protect individual gasoline service station operators in part by limiting the monthly rent oil companies can charge its lessees for operating company-owned stations.[59] Chevron sued the state over the statute, arguing at summary judgment that "the rent cap [did] not substantially advance any legitimate government interest," and was therefore a taking.[60] The parties argued this so-called "substantially advances" takings test through two appeals to the Ninth Circuit, until the case ultimately came before the Supreme Court on the question of the appropriate standard of review for a takings claim.[61]

Writing for a unanimous Court, Justice O'Connor explained that "[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of *private property*," but that "government regulation of *private property* may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster."[62] The Court proceeded to survey the flavors of takings claims, ultimately concluding that none relied upon the "substantially advances" test.[63] This is because the test improperly focuses on the validity of a piece of legislation, at the expense of adequately accounting for the magnitude of the burden placed on an aggrieved party by the allegedly-offensive government action. [64] The Court held that Fifth Amendment takings claims must proceed by alleging either: (a) "a 'physical' taking," (b) "a *Lucas*-type 'total regulatory taking,'" (c) "a *Penn Central* [ad hoc, non-*per se*] taking," or (d) "a land-use exaction vio-

55. *Id.* at 540 (Kennedy, J., concurring in part and dissenting in part) (emphasis added).

56. *See Marks v. U.S.*, 430 U.S. 188, 193 (1977).

57. *See e.g. Swisher Int'l Inc. v. Schafer*, 550 F.3d 1046, 1054–1056 (11th Cir. 2008); *Cmmw. Edison Co. v. U.S.*, 271 F.3d 1327, 1339 (Fed. Cir. 2001); *Parella v. Ret. Bd. of R.I. Employees' Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999).

58. 544 U.S. at 548.

59. *Id.* at 533.

60. *Id.* at 534.

61. *Id.* at 535–536.

62. *Id.* at 537 (emphasis added).

63. *Id.* at 543.

64. *Lingle*, 544 U.S. at 543 ("A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation.").

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lating the standards set forth in *Nollan* and *Dolan*."[65] The *Lingle* decision not only reduced clutter in the Court's takings jurisprudence, but also reinforced the property requirement as a threshold question in takings claims: a Fifth Amendment claim under the Takings Clause proceeds from the taking of private property from its owner.[66]

IV. Majority and Dissenting Opinions in *Koontz*

With the factual, procedural, and precedential stages set, the Supreme Court considered *Koontz* in the 2013 term. As this article is concerned with the Court's holding related to monetary exactions, the section of the holding that discusses the applicability of heightened scrutiny to denied land use development permits is not addressed.

A. Majority opinion and holding regarding monetary exactions

Justice Alito, writing for a five justice majority, held very simply 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."[67] Without openly rejecting the conclusion reached by a majority of justices in *Eastern Enterprises*—that financial burden alone does not support a takings claim—the *Koontz* majority stated that, in the land use exaction context, exempting financial burdens from takings analysis would permit local governments and regulators to impose conditions on property owners which entirely evade *Nollan* and *Dolan* substantiation.[68]

For example, a local government could offer a developer two options as conditions to permit approval: either dedicate real property or pay a monetary exaction in lieu of the dedication. The local government, according to the majority, could fashion the dedication requirement in a way that bears no essential nexus to any potential, legitimate reason for denying the permit, and is not roughly proportional to the impact of the development. The developer, under such manifestly unjust compulsion, would choose the cash-in-lieu option. However, without requiring local governments to craft cash options with *Nollan* and *Dolan* in mind, the local government could in effect force the developer to choose the option less protective of her Fifth Amendment rights. Similarly, the local government could compel the developer to choose the dedication option by designing a cash option that offends *Nollan* and *Dolan*. Under the unconstitutional conditions doctrine, such "options" represent a sort of constitutional Hobson's choice because the

65. *Id.* at 548.
66. U.S. Const. amend. V.
67. *Koontz*, 133 S. Ct. at 2603.
68. *Id.* at 2599.

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landowner may make a financially expedient choice that nonetheless violates a constitutional right.[69]

The majority cited the above rationale as support for two substantial and pivotal findings. First, Justice Alito declared that fees required and paid in lieu of real property dedications "are functionally equivalent to other types of land use exactions."[70] Second, and in an attempt to distinguish *Eastern Enterprises*, Justice Alito stated that the difference between the retirement contributions required in that case and the payments for offsite wetlands improvements in this case is that the former did "not operate upon or alter an identified property interest," whereas the latter do.[71] Indeed, that operation is the key—the majority noted that "[t]he fulcrum this case turns on is the *direct link* between the government's demand and a specific parcel of real property."[72]

The link between the monetary exaction and the specific parcel of land is "direct" in *Koontz*, according to the majority, because the exaction burdens Coy Koontz's "ownership" of that parcel.[73] Because the exaction was demanded in the context of Koontz owning a specific parcel:

> [the] 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*.[74]

The last point rests upon an assumption as to the rights protected by the Fifth Amendment and the Takings Clause, and implicates again the theories explained by the lower courts in the section above. The *Koontz* majority states that the monetary exaction at issue burdens ownership, and cites its own past decisions as well as Florida law for the proposition that "the right to receive income from land is an interest in real property."[75] While this may be true insofar as liens, leases, and other *existing* property interests tied

69. *Id.* at 2599.

70. *Id.* (citing Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 202–203 (2006)). Rosenberg notes that, nationally, courts eventually accepted in-lieu fees because of their "'equivalence' to other mandatory subdivision requirements." The cases cited in support of this statement, all dating from the 1960s and 70s, clearly precede the Supreme Court's cash-as-property policy statements in *Eastern Enterprises* and *Lingle*. Further, the courts in those cases refer to dedications of a certain amount of land or the equivalent value, in cash, of that land. Neither Rosenberg nor the cases he cites refer to any functional equivalency between real property and monetary exactions, merely value equivalency.

71. *Id.* (quoting *Eastern Enterprises*, 524 U.S. at 540 (Kennedy, J., concurring in part and dissenting in part)).

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

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

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

75. *Id.* at 2599–2600 (citing *Palm Beach City v. Cove Club Investors Ltd.*, 734 So.2d 379, 383–384 (Fla. 1999)).

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to real property are concerned, the Court in *Koontz*—without explicitly stating so—appears to include as a protectable property interest the right to develop and receive *speculative* income from a parcel of real property. This, in turn, implicates the quid pro quo of development regulation, by seemingly placing the property owner's development interest above the public's and government's interests in health, safety, and welfare.[76] Ultimately, while the majority concludes the monetary exaction at issue in *Koontz* burdened property, the exaction likely operated simply to reduce the net profit Koontz received from developing the property. Notably, the Court did not decide whether the options presented by the District satisfied *Nollan* and *Dolan*, and instead remanded the case to the Florida Supreme Court.[77]

B. Justice Kagan's dissent

Justice Kagan, writing for a four-justice dissenting minority, primarily took issue with the monetary exactions portion of the majority opinion and Justice Alito "run[ning] roughshod over *Eastern Enterprises*."[78] The main thrust of the dissenting argument relies on *Nollan* and *Dolan*'s focus on whether a government's appropriation of the thing exacted would constitute a taking outside the development permitting process.[79] Stated another way, "the *Nollan-Dolan* test applies only when the property the government demands during the permitting process is the kind it otherwise would have to pay for."[80] Because, pursuant to the majority opinion in *Eastern Enterprises*, the government may demand money in the manner it did in *Koontz* without compensating the payor, the demand itself is not and cannot be a taking under the Fifth Amendment.[81]

The dissent notes the magnitude of the practical difficulties likely to flow from the majority opinion, despite the majority's assurance otherwise; not the least of which is the potential for confusion between apparently permissible user fees and taxes versus the monetary exactions required to answer a more stringent calling.[82] Importantly, Justice Kagan suggests the

76. *See Ridgefield Land Co. v. Det.*, 217 N.W. 58 (Mich. 1928); *c.f. Bauman v. Ross*, 167 U.S. 548 (1897) (acknowledging that the public bears some social and economic burden for the development activities of individual landowners).

77. *Koontz*, 133 S. Ct. at 2603.

78. *Id.* at 2603–2604 (Kagan, Ginsburg, Breyer & Sotomayor, JJ., dissenting).

79. *Id.* at 2605 (quoting *Nollan*, 483 U.S. at 831 ("Had California simply required the Nollans to make an easement across their beachfront available to the public . . ., rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.") and *Dolan*, 512 U.S. at 384 ("[H]ad the city simply required petitioner to dedicate a strip of land . . . for public use, rather than conditioning the grant of her permit to develop her property on such a dedication, a taking would have occurred.")).

80. *Id.*

81. *Id.*

82. *Id.* at 2607–2609.

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majority holding might have been cabined by adopting a rule applying *Nollan* and *Dolan* where the imposition of a monetary exaction results from an ad hoc, adjudicative proceeding, as in *Ehrlich*.[83] Ultimately, the dissent summed up its issues with the majority opinion by stating:

> The majority's errors here are consequential. The majority turns a broad array of local land-use regulations into federal constitutional questions. It deprives state and local governments of the flexibility they need to enhance their communities—to ensure environmentally sound and economically productive development. It places courts smack in the middle of the most everyday local government activity. As those consequences play out across the country, I believe the Court will rue today's decision.[84]

V. The Likely Impact of *Koontz on Monetary Exactions*

Koontz very generally requires that monetary payments due in fulfillment of a condition precedent to development must share an essential nexus with and be roughly proportional to the impacts the development will have on a community. This section explores the nature and types of programs to which this standard will likely apply, the likely impact the standard will have on those programs, and theoretical means for diffusing that impact.

A. Typical monetary exactions in land use planning

The term "monetary exaction" is essentially synonymous with a fee or a "development charge" imposed as a condition of approval of a proposed land use. Such charges find their historical origin in a local government's need to have a developer pay for the provision of essential services to a site.[85] Over time, and largely in response to a drastic uptick in housing construction after World War II, local governments began imposing fees on developers not only to offset the costs of onsite services, but to mitigate offsite, community-wide impacts of additional housing development. At least two explanations support the proliferation of so-called "impact fees." First, local officials are pressured politically to keep the financial burdens of development confined to developers and newcomers so that taxpayers avoid absorbing those costs.[86] Second, "the expansion of popular concern for the environment . . . has eroded the traditional belief in the benefits of never-ending growth."[87] In short, society has come to recognize that while

83. *Koontz*, 133 S. Ct. at 2608 (Kagan, Ginsburg, Breyer & Sotomayor, JJ., dissenting).

84. *Id.* at 2612.

85. Cullingworth & Caves, *supra* n. 1, at 109 (noting that the typical services supported by imposed fees historically included "streets, sidewalks, street lighting, and local water and sewage lines" and that "[s]ervices external to the development were paid for by the appropriate suppliers").

86. *Id.* at 109–110.

87. *Id.* at 110.

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development is necessary to a degree, its limitation is a worthwhile consideration, and its primary costs should be borne by its primary beneficiaries.

Modern fee imposition practice at the state and local level covers an array of services and impacts, including "schools, transportation, area and regional street programs, day care, 'green' buildings, public safety, pollution mitigation, including stormwater drainage and flood control, wastewater treatment, parks and recreation, and affordable housing."[88] As subdivision development in particular proceeds fractionally, one parcel at a time, it is common for local governments to impose fees for certain services or impacts on individual subdividers, with the goal of collecting those fees and pursuing some aggregate project serving multiple subdivisions, rather than requiring each successive developer to contribute a small piece of land or particular stretch of infrastructure.[89] Park development is particularly well-suited for imposition of fees-in-lieu of physical dedications because park planning generally occurs more broadly than at the individual subdivision level.[90]

That in-lieu fee programs must be crafted and implemented in a manner that comports with *Nollan*, *Dolan*, and the Takings Clause is not necessarily the most pernicious aspect of Justice Alito's opinion in *Koontz*, again assuming the decision applies to both ad hoc and uniformly applicable fees. Indeed, nationally, many of these types of programs, and the statutes that authorize them, incorporate some level of analysis intended to establish both a nexus between the fee and the proposed development and proportionality of the fee value with the project's impact.[91] Instead, as Justice Kagan noted writing for the dissent, simply subjecting the range of local

88. James A. Kushner, *Subdivision Law & Growth Management* vol. 1, § 6:29 (2d ed. 2001) (footnotes omitted).

89. *Id.*

90. *Id.* at § 6:30 ("In many communities and neighborhoods, comprehensive park plans may rely on regional rather than neighborhood parks, or there may already be a large park developed or proposed on a neighboring tract. . . . In such cases it makes good sense to develop the park plan and, in lieu of land dedication, require the subdivider to pay a fee equal in value to the land dedication to support the park development program."). Certainly other programs with community-wide orientation are well-suited to in-lieu fee collection as well, including resource protection programs (open space, riparian/wetland, agricultural soils) and fire response.

91. *See e.g.* Cal. Gov. Code § 66477(a)(2) (2014) (Quimby Act); Cal. Gov. Code § 66477(a)(3)(B); Cal. Gov. Code § 66477(a)(3)(A); Cal. Gov. Code § 66477(a)(3)(B); *See also* Cullingworth & Caves, *supra* n. 1, at 111 (proposing a model basis for calculating fees as: "(1) the cost of existing facilities; (2) the means by which existing facilities have been financed; (3) the extent to which a new development has already contributed, through tax assessments, to the cost of providing existing excess capacity; (4) the extent to which new development will, in the future, contribute to the cost of constructing currently existing facilities used by everyone in the community or by people who do not occupy the new development; (5) the extent to which the new development should receive credit for providing common facilities that communities have provided in the past without to charge to other developments in the service area; (6) extraordinary costs incurred in serving the new development; and (7) the time-price differential in fair comparisons of amounts paid at different times").

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government programs imposing in-lieu fees to takings claims represents the primary on-the-ground threat of the *Koontz* decision.[92] If at least part of the impetus for many local government in-lieu fee programs flows from decreased operating funds and revenue, then forcing those same local governments to defend any or all of their programs against constitutional attacks will only exacerbate the problem that necessitated the programs in the first place.

B. Potential doctrinal limitations on Koontz

There may be more than one way to limit the extent to which *Koontz* applies to monetary exactions; the Court could itself prudentially limit how the decision applies in the future.[93] This section explores several avenues in this regard, from simply limiting *Koontz* to true in-lieu fees as in Koontz's case, to limiting based on the nature of the law authorizing the fee, to limiting through a vesting statute.

1. True in-lieu fees

One possible limitation on *Koontz* flows simply from a narrow reading and application of the decision. As discussed above, the *Koontz* majority held that heightened scrutiny applies to monetary exactions that are directly linked to an ownership interest in real property, i.e. when a "monetary obligation burden[s] . . . ownership of a specific parcel of land."[94] This could be read to mean that the link exists when, but for the option to pay a fee, a development condition would directly affect the extent of the *physical ownership* of the parcel in question. Thus, *Nollan* and *Dolan* could apply only to those instances where the proposed fee specifically stands in place of the dedication. When a local government calculates the dollar value of the in-lieu fee based upon the fair market value of the real property dedication that the fee replaces, the direct link is likely at its strongest, for the landowner is essentially paying market rate simply to maintain his ownership position. A benefit-of-the-doubt reading of *Koontz* suggests the majority may have implicitly intended to limit its holding to true in-lieu fee scenarios.[95]

92. *Koontz*, 133 S. Ct. at 2612 (Kagan, Ginsburg, Breyer & Sotomayor, JJ., dissenting).

93. Fennell & Peñalver, *supra* n. 48, at 339–347; Justin R. Pidot, *Fees, Expenditures, and the Takings Clause*, 41 Ecol. L.Q. 131, 135–136 (2014) (suggesting a distinction between fees and expenditures, the substantive difference between the two being that with the former the government actually acquires something, even if the intent is to immediately divest of that thing, while with the latter the government never gains possession).

94. *Koontz*, 133 S. Ct. at 2599 (majority).

95. *Id.* at 2601–2602 ("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*. . . . [The District] has maintained throughout this litigation that it considered [Koontz's]

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2. Legislative vs. ad hoc fees

Another possible limitation centers on the distinction between adjudicative and legislative development conditions. Generally, an adjudicative imposition flows from some "discretionary, piecemeal" decision or action on the part of a local government, while a legislative imposition flows from a "broad, prospective enactment," typically in the form of a zoning ordinance or set of subdivision regulations.[96] Indeed, the *Koontz* dissent urged precisely this limiting distinction—subjecting the former types of exactions to heightened scrutiny while leaving the latter to rest on some legitimate governmental interest under substantive due process.[97]

At least three reasons support the Supreme Court adopting this rule in future exactions cases. First and foremost, by favoring impositions resulting from legislative enactments, the Court would strongly support the rule of law, which itself "fosters freedom by increasing the predictability and intelligibility of the regulatory landscape within which the citizen operates and by constraining officials from exercising unfettered discretion."[98] For the most part, where an exaction flows from a duly enacted, publicly vetted law, it is more likely to be general, stable, and anticipated over time and from one landowner to the next.[99] Second, a robust, albeit varied, state-level jurisprudence exists regarding the distinction between legislative and adjudicative local government action.[100] Where state court treatment of the distinction is well-defined, local governments may find their in-lieu fee programs prone to fewer legal challenges, or at least that the programs are more apt to withstand those challenges. Finally, such a distinction "would successfully immunize taxes, broadly applicable fees, and many aspects of zoning from heightened scrutiny,"[101] while leaving open the possibility of a *Penn Central* challenge if those legislative conditions go too far.

Clearly the *Koontz* majority passed on the adjudicative/legislative distinction as a limitation on *Nollan* and *Dolan* in the monetary exaction context,[102] and the distinction itself is not foolproof.[103] However, employing

money to be a substitute for his deeding to the public a conservation easement on a larger parcel of . . . land.") (emphasis added); *see also* Elizabeth Tisher, Student Author, *Land-Use Regulation After* Koontz: *Will We "Rue" the Court's Decision?* 38 Vt. L. Rev. 743, 764 (2014) (suggesting that the Court may have applied the unconstitutional conditions doctrine in this case specifically "because the monetary demand . . . [was] a protected property interest under the Fifth Amendment").

96. Fennell & Peñalver, *supra* n. 48, at 340.

97. *Koontz*, 133 S. Ct. at 2608 (Kagan, Ginsburg, Breyer & Sotomayor, JJ., dissenting).

98. Fennell & Peñalver, *supra* n. 48, at 311, 341.

99. *Id.* at 341–342.

100. *Id.* at 342.

101. *Id.*

102. *See Koontz*, 133 S. Ct. at 2600–2602 (majority). Indeed, the *Koontz* majority found no reason to limit the scope of its decision because it "d[id] not affect the ability of governments to impose property

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the distinction as an initial filter on claims against local governments would, at the least, likely limit the number of complaints that county and city attorneys are called upon to answer, while still addressing the more insidious threat of local governments extortionately singling out particular developers in adjudicative settings.[104]

3. Vesting statutes

If the primary reason that heightened scrutiny applied in *Koontz* was because of the direct link between the exaction and a specific piece of property, then the statutory solution as it pertains to cash-in-lieu programs might be to somehow sever the direct link. Doing so may be impossible—local governments only demand development-related monetary exactions when an applicant seeks to develop land in some way, and so the exaction is always directly linked to some property-based action for which the applicant needs the government's approval. However, there may be room for such a limitation in state statutes governing vesting of development rights.

Another way of thinking about the relationship between a monetary exaction and a specific parcel of real property is to cast the exaction not as "diminishing . . . the value of the property"[105] at issue in the development proposal, but as potentially diminishing the profit derived from the development itself. Applying such a "potential-profit" exactions theory, the direct link exists not between the exaction and a specific property interest, but between the exaction and a specific *proposed property use*; the analysis begins to resemble the Court's ad hoc regulatory takings balancing.[106] Not-

taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners." *Id.* at 2601.

103. As the *Flower Mound* court noted, it is entirely possible that local governments could abuse and extort landowners seeking development permits through the use of some legislatively-enacted regulatory tool. *Town of Flower Mound*, 135 S.W.3d at 641. Fennell & Peñalver simply contend that extortion is less likely to occur when a bargain results from legislation as opposed to individualized negotiation. Fennell & Peñalver, *supra* n. 48, at 345–346.

104. Fennell & Peñalver, *supra* n. 48, at 320 (*Nollan* and *Dolan* principally serve the "goals of ferreting out bad government behavior that, among other things, might allow it to take from owners in a tricky or sneaky manner." (internal punctuation omitted)).

105. *Koontz*, 133 S. Ct. at 2600.

106. *See Penn C. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124–125 (1978) (identifying the particularly significant factors in ad hoc regulatory takings analysis as: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the government action," that is "a physical invasion" versus "a public program adjusting the benefits and burdens of economic life to promote the common good"); *see also* Israel Piedra, *Confusing Regulatory Takings with Regulatory Exactions: The Supreme Court Gets Lost in the Swamp of* Koontz, 41 B.C. Envtl. Aff. L. Rev. 555, 564 (2014) ("In cases such as *Koontz*, the governmental body in question is admittedly burdening the applicant's property interest when it conditions use of that property . . . on a monetary expenditure. This does not necessarily move the Court's analysis from the *Penn Central* test, however, which protects generally against excessive governmental regulation of property, to the more specific *Nollan*/*Dolan* framework." (footnotes omitted)). Of course

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withstanding that a property owner's future plans are factored into the *Penn Central* inquiry, it seems an inappropriate stretch to recognize a protectable property interest in a landowner's hopes, plans, or back-of-the-napkin sketches and calculations. Even assuming a Fifth Amendment shelter, it seems equally inappropriate to analyze infringement on a speculative property-based revenue stream under the Court's exactions jurisprudence as developed to this point.[107] This gets back to the theories of Takings Clause applicability—what does the Fifth Amendment protect? Property, the value of property, or the value one intends to extract from property given alignment of all logistical stars?[108]

The *Koontz* majority in part cited Florida law as specifically conferring a right to a revenue stream derived from private property.[109] Again, it was the direct link between the monetary exaction, the specific parcel of real property, and the burden imposed by the exaction on Coy Koontz's "ownership" of the property, which supported applying *Nollan* and *Dolan* to the exaction in the first place. But as discussed above, the underlying aspect of ownership affected in *Koontz* was not any of the traditional "bundle of sticks,"[110] but rather a right to profit contingent on local government acquiescence. What if state law, even a state constitution, could be drafted or revised to preempt such a contingent constitutional right?

Vesting statutes generally "create criteria for determining when a landowner has achieved or acquired a right to develop his or her property in a particular manner, which cannot be abolished or restricted by regulatory

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the *Penn Central* Court expressly noted its own affirmation of the "wide variety of contexts [in which] government may execute laws or programs that adversely affect recognized economic values." *Penn C. Transp. Co.*, 438 U.S. at 124.

107. *See* Pidot, *supra* n. 93, at 136–137; *see also* William L. Want, *Economic Substantive Due Process: Considered Dead is Being Revived by a Series of Supreme Court Land-Use Cases*, 36 U. Haw. L. Rev. 455, 479 (2014) (unflatteringly likening *Koontz* to *Lochner v. N.Y.*, 198 U.S. 45 (1905), and positing that "[p]rior to *Nollan* and *Dolan*, Supreme Court precedent held that property rights, like other economic rights, were to be examined by the courts under the rational basis standard").

108. Echeverria, *supra* n. 48, at 38–39 ("[T]he Court's takings jurisprudence does not protect wealth. It protects property . . . . Given this understanding of the scope of 'property' for the purposes of the Takings Clause, a condition requiring the payment of money cannot be regarded as 'functionally equivalent' to a condition exacting an interest in land."). Note that the *Koontz* majority gets to its "direct link" analysis only by first determining that "'in lieu of' fees are . . . functionally equivalent to other types of land use exactions." *Koontz*, 133 S. Ct. at 2599. Dispel functional equivalence, and the direct link is severed.

109. *Koontz*, 133 S. Ct. at 2600.

110. *See* Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 Envtl. L. 773, 774 n. 1 (2002) (noting that "the standard incidents of ownership include the rights to possession, use, management, income, capital, security, and transmissibility"); *see also U.S. v. Craft*, 535 U.S. 274, 278–279 (2002) ("A common idiom describes property as a "bundle of sticks"—a collection of individual rights which, in certain combinations, constitute property. State law determines only which sticks are in a person's bundle. Whether those sticks qualify as 'property' [for federal purposes] is a question of federal law.") (citations omitted).

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provisions subsequently enacted."[111] Vesting statutes are analytically grounded in estoppel, though courts have held them invalid as encroaching upon or restricting exercise of the police power.[112] The typical vesting statute requires some significant investment in the development project in order for the right to develop to become fixed in the landowner-applicant.[113] Whether investment in a particular project has risen to a level of significance sufficient to vest a right to develop is generally determined on a case-by-case basis.[114]

The above concepts, codified in detail in a state statutory scheme, could serve to determine when a landowner has invested enough in a particular project that imposing a constitutionally-infirm monetary exaction would burden her ownership of the particular parcel.[115] The statute could identify the point at which a developer's right to proceed with—and, ostensibly, profit from—a development project has vested to the extent a monetary exaction actually burdens a right, rather than simply an expectation.[116] The point at which the expectation becomes a right would be the point at which the "direct link" is established, and the point at which the exaction itself must satisfy *Nollan* and *Dolan* scrutiny.

VI. An Applied Example of *Koontz*: Cash in Lieu of Parkland Dedication

Exactions come due by virtue of legislative requirements may be constitutionally safer than those demanded as a result of some ad hoc negotiation during an adjudicative process. However, that safety may be negated if the legislation treats differently situated parties too similarly.[117] A solution,

111. Am. Plan. Ass'n, *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change* 8-95 (Stuart Meck ed., 2002) (available at http://perma.cc/R6UR-9KCS (https://www.planning.org/growingsmart/guidebook/print/pdf/ chapter8.pdf)).

112. *Id.* at 8-95 to 8-96. ("For the development rights to be vested, the government must have made a decision and the landowner must have, in good faith, relied, to his or her detriment, on that decision by making some improvement to the land or some other commitment of resources.").

113. *Id.* at 8-96.

114. *Id.*

115. Indeed, in the due process context, the United States Supreme Court identified state statutory schemes as the primary source of protectable property interests. *Bd. of Regents of St. Colleges v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.").

116. As to the subdivision application process, the Montana Supreme Court answered the question of when a development right vests as a protectable property interest for substantive due process purposes in *Kiely Constr. LLC v. City of Red Lodge*, 57 P.3d 836, 847–848 (Mont. 2002). The court held that a subdivider can establish a protected property interest as early as application for final subdivision plat approval, so long as all conditions upon which the local government approved the preliminary plat have been met.

117. Fennell & Peñalver, *supra* n. 48, at 321.

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then, could be a generally applicable (i.e. anti-extortionate, theoretically uncorruptible) legislative enactment with an abundance of predictable flexibility—enough to foreclose the vicissitudes of local government officials while avoiding unfair uniform treatment.[118] This section explores a sampling of state statutes authorizing local government acceptance of cash in lieu of dedications of real property for parks and recreational facilities, and identifies examples which strike a seemingly appropriate balance between prescription and discretion.

A. Parkland dedication generally

The Standard City Planning Enabling Act of 1928, in recommending the permissible scope of subdivision regulations, provided that while "planning commissions" should "be primarily concerned" with the "arrangement of streets," they should also "be empowered to take into account the adequate supply of open spaces for . . . recreation, . . . for healthful population densities, and for other public benefits."[119] The Act also provided that local governments may accept bonding "[i]n lieu of the completion of [required] improvements and utilities prior to the final approval of the plat."[120] The Act was not initially interpreted to permit cash payments in lieu of providing essential services, but over time the practice became legally acceptable.[121]

Parks are unique in the development context in at least two respects.[122] First, unlike many of the basic onsite improvements required to ensure that a project functions and can support residents or intended occupancies, park facilities may be located offsite and aggregated with other facilities in order to serve a greater portion of the population.[123] Second, while local govern-

118. *Id.* at 345 ("Where embedded bargains put broad discretion in the hands of regulators, and where regulators use that discretion to impose one-off exactions on landowners on a case-by-case basis, the mere fact that they do so pursuant to the language of a zoning code would not justify treating their impositions as 'legislative.' Particularly in the state courts, judges have shown a willingness to scrutinize legislative enactments that place unbridled discretion in the hands of land use administrators. But where the embedded bargains employ publicly available terms that are spelled out in detail and broadly available – as in incentive zoning – the scheme seems far more legislative in nature and the case for judicial scrutiny is weaker.") (footnotes omitted); *compare* Steven J. Eagle, *Koontz in the Mansion and the Gatehouse*, 46 Urb. Law. 1, 24 (2014) (noting that "fine-grained ordinances setting out requisites for development would be transparent," albeit subject to other potential challenges) *with* Robert H. Freilich & Neil M. Popowitz, *How Local Governments Can Resolve* Koontz*'s Prohibitions on Ad Hoc Land Use Restrictions*, 45 Urb. Law. 971, 980–983 (2013) ("[M]unicipalities must implement nonflexible, definitive, local legislative solutions to the flexibility questions generated by *Koontz*.").

119. Advisory Comm. on City Plan. & Zoning of the U.S. Dep't of Commerce, *A Standard City Planning Enabling Act* 27 n. 70 (Gov't Printing Off. 1928).

120. *Id.* at 28.

121. Rosenberg, *supra* n. 70, at 199–200 (footnotes omitted).

122. Am. Plan. Ass'n, *supra* n. 111, at 8-130.

123. *Id.*

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ments often own and operate improvements such as streets and sewer infrastructure and installation, special districts frequently operate park facilities, an arrangement that may require "a procedure for coordinating the needs of the school or park district with the exaction and impact fee powers of the local government."[124]

B. State parkland dedication statutes

Nationally, state statutory approaches to authorizing payments in lieu of parkland dedication vary greatly, both in the standards by which local government decisions are to be made and in the amount of discretion afforded local government officials. The following statutory examples represent a sort of discretion continuum, with full discretion and sparse legislative decision-making guidance on the one end, and highly circumscribed, finite legislative options on the other.

1. Washington

The State of Washington has taken an interesting approach to governing dedications and fees-in-lieu in the subdivision context.[125] At the outset, in order for the local government to approve a subdivision, the proposal itself must make provisions for parks and recreational facilities.[126] The local government may facilitate that provision by requiring "[d]edication of land to any public body, provision of public improvements to serve the subdivision, and/or impact fees."[127] However, the statute prohibits any "dedication, provision of public improvements, or impact fees . . . that constitutes an unconstitutional taking of private property."[128] The statute provides no further guidance as to how a local government might avoid a taking. Further, the statutory prohibition itself is likely gratuitous, presuming local government attorneys advise their governing body clients not to violate the Constitution as a matter of course.

2. Wisconsin

Similar to Washington state law, Wisconsin's park dedication statute provides no guidance as to methods for calculating in-lieu dedications, nor does it provide for any embedded discretionary options.[129] The statute states simply:

124. *Id.*
125. Wash. Rev. Code § 58.17.110 (2014).
126. *Id.* at § 58.17.110(2)(a).
127. *Id.* at § 58.17.110(2)(b).
128. *Id.*
129. Wis. Stat. § 236.45(6)(b) (2013).

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> Any land dedication, easement, or other public improvement or fee for the acquisition or initial improvement of land for a public park that is required by a municipality, town, or county as a condition of approval under this chapter [governing subdivision] must bear a rational relationship to a need for the land dedication, easement, or other public improvement or parkland acquisition or initial improvement fee resulting from the subdivision or other division of land and must be proportional to the need.[130]

This standard, while it incorporates a notion of proportionality akin to *Dolan*, its requirement of a "rational relationship" between any imposed exaction and a need for park facilities resulting from a subdivision may fall short of *Nollan*'s "essential nexus" test.[131] Again, though local government attorneys likely advise Wisconsin's governing bodies of the importance of findings, in the absence of guidelines for making a particularized determination, the statute invites unconstitutional local government discretion.

3. Maine

Similarly, Maine state law requires nothing more than a "reasonable" relationship between the impact of a proposed development and fees imposed as mitigation.[132] Local governments are authorized by statute to "requir[e] the construction of off-site capital improvements or the payment of impact fees instead of the construction."[133] Such improvements include "[p]arks and other open space or recreational areas."[134] Any fee imposed "must be reasonably related to the development's share of the cost of infrastructure improvements made necessary by the development."[135] Where a development proposes to utilize existing infrastructure installed by the local government, any fee imposed "must be reasonably related to the portion or percentage of the infrastructure used by the development."[136]

4. Montana

Generally, Montana law permits local governments to "require [developers] to pay or guarantee payment for part or all of the costs of extending capital facilities related to public health and safety, including but not lim-

130. *Id.*

131. *See Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442, 448 (Wis. 1965) ("[A] required dedication of land for school, park or recreational sites as a condition for approval of the subdivision plat should be upheld as a valid exercise of police power if the evidence reasonably establishes that the municipality will be required to provide more land for schools, parks and playgrounds as a result of approval of the subdivision.").

132. 30-A Me. Rev. Stat. Ann. § 4354 (2015).

133. *Id.*

134. *Id.* at § 4354(1)(A)(6).

135. *Id.* at § 4354(2)(A).

136. *Id.*

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ited to public roads, sewer lines, water supply lines, and storm drains to a subdivision," so long as the "costs . . . reasonably reflect the expected impacts directly attributable to the subdivision."[137]

In the context of subdivision review, local governments have flexibility in the manner in which they enforce the state law requirement that a developer dedicate parkland.[138] In unzoned areas or areas for which a growth policy does not prescribe density requirements, developers must dedicate a percentage of the total acreage they intend to develop as residential lots to parkland.[139] For example, where zoning or a growth policy do provide density standards, a governing body is authorized to require a parkland dedication consistent with public needs and in lieu of the formulas provided under § 76–3–621(1).

Local governments may, after conferring with and giving consideration to the preference of the developer of a particular subdivision, "determine suitable locations for parks and playgrounds" and "determine whether the park dedication must be a land donation, cash donation, or a combination of both."[140] Though state law requires local governments to use "dedicated money or land for development, acquisition, or maintenance of parks to serve the subdivision," the local government also has discretion to "use the dedicated money to acquire, develop, or maintain, within its jurisdiction, parks or recreational areas or for the purchase of public open space or conservation easements."[141] However, the local government may only exercise that discretion if "the park, recreational area, open space, or conservation easement is within a *reasonably close proximity* to the proposed subdivision; and . . . the governing body has formally adopted a park plan that establishes the needs and procedures for use of the money."[142] Beyond this primary discretionary provision, local governments may waive the statutory parkland dedication requirement if the subdivider proposes some acceptable alternative means of preserving land in the same or greater amounts as required under the dedication calculation formulas in § 76–3–621(1).[143]

The only reported decision of the Montana Supreme Court that implicates the state's parkland dedication statute did not address a challenge to the contents of the statute, let alone its constitutionality.[144] In *Fielder v. Board of County Commissioners*, the plaintiffs, aggrieved property owners, sued Sanders County, Montana in part over its acceptance of a cash dona-

137. Mont. Code Ann. § 76–3–510(1) (2013).
138. *Id.* at § 76–3–621.
139. *Id.* at § 76–3–621(1)(a)–(d).
140. *Id.* at § 76–3–621(4).
141. *Id.* at § 76–3–621(5).
142. *Id.* (emphasis added).
143. Mont. Code Ann. § 76–3–621(7)–(9).
144. *Fielder v. Bd. of Co. Comm'rs*, 162 P.3d 67, 70 (Mont. 2007).

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tion from the developer of a local subdivision project in lieu of dedication of real property.[145] On appeal of the district court's finding that the county's acceptance of the cash payment was not arbitrary, the 2007 Montana Supreme Court simply noted that state statute authorized the commissioners to act precisely as they did under the circumstances.[146] The court had no occasion to evaluate the statute, and indeed at that time there was no judicial indication that the statute was subject to heightened scrutiny under *Nollan and Dolan*.

In 1964, the Montana Supreme Court did review the constitutionality of the statutory predecessor to the above provisions.[147] However, the crux of the court's analysis in *Billings Properties Inc. v. Yellowstone County* received specific negative attention in *Dolan*, and calls into question the adequacy of the test presently codified at § 76–3–621.[148] In *Billings Properties*, the statute at issue contained no language instructing local governments as to the degree of connection between a development and its impacts on parks necessary to sustain a parkland dedication condition; the statute simply made clear that such a condition must flow from the police power.[149] Given the statute's shortcoming, the court proceeded, as did many other state courts at the time, from the deferential notion that any "exercise of the police power is gauged by a standard of reasonableness."[150] Not surprisingly, as to the constitutionality of Montana's parkland dedication statute, the court found it a reasonable authorization of local government protection of health, safety, and welfare.[151]

Nollan and *Dolan* specifically elected not to adopt a reasonableness standard, and thus a "reasonable" connection between the impact of a development and a parkland dedication condition imposed to mitigate it is insufficient.[152] Nevertheless, "reasonableness" is precisely the post on which Montana's cash-in-lieu statute pivots.[153] Local governments may spend "dedicated money to acquire, develop, or maintain . . . parks or recreational areas or for the purchase of public open space or conservation easements" anywhere within their jurisdiction, be it a 28 square mile city or a 2,800 square mile county, in part so long as "the park, recreational area, open

145. *Id.* at 68–69.

146. *Id.* at 70.

147. *Billings Properties, Inc. v. Yellowstone Co.*, 394 P.2d 182, 188–190 (Mont. 1964).

148. *Dolan*, 512 U.S. at 389 ("In some states, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice. We think [the standard in Montana, as quoted in *Billings Properties*] is too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose.").

149. *Billings Properties*, 394 P.2d at 184–185.

150. *Id.* at 186.

151. *Id.* at 187–188.

152. *Nollan*, 483 U.S. at 836–837; *Dolan*, 512 U.S. at 391.

153. Mont. Code Ann. § 76–3–621(5)(b)(i).

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space, or conservation easement is within a *reasonably close proximity* to the proposed subdivision."[154] Apart from the developed-area-percentage requirements in § 76–3–621(1), which would operate to determine the amount to be paid in lieu, this test on its own fails to accommodate an adequate "individualized determination that the required [monetary] dedication is related both in nature and extent to the impact of the proposed development."[155]

5. California

California law provides that "the dedication of land, or the payment of fees, or both, shall not exceed the proportionate amount necessary to provide three acres of park area per 1,000 persons residing within a subdivision."[156] However, where "the amount of existing neighborhood and community park area, as calculated pursuant to this subdivision, exceeds that limit, . . . the legislative body may adopt the calculated amount as a higher standard not to exceed five acres per 1,000 persons residing within a subdivision."[157] The alternative five-acre standard is discretionary on the part of a local government.[158] So long as the alternative standard is "consistent with the [local government's] general plan," meaning "considering all of its aspects . . . [the standard] will further the objectives and policies of the general plan," courts are unlikely to view adoption of the five-acre standard as an abuse of discretion.[159]

California law requires particularized findings in order for a local government to use fees collected in lieu of parkland dedication for an offsite purpose.[160] Notwithstanding those findings, the default local government use of land or fees must be in a manner that directly serves the proposed development.[161] However, the local government may use the fees offsite if: (1) the fees are used to develop parkland in an underserved neighborhood; (2) the local government holds a public hearing before using the fees; (3) the local government "makes a finding supported by substantial evidence that it is reasonably foreseeable that future inhabitants of the subdivision for which the fee is imposed will use the proposed park and recreational facilities in the neighborhood where the fees are used"; and (4) the fees are used

154. *Id.*

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

156. Cal. Gov. Code § 66477(a)(2).

157. *Id.*

158. *Homebuilders Ass'n of Tulare/Kings Cos., Inc. v. City of Lemoore*, 185 Cal. App. 4th 554, 568 (Cal. App. 5th Dist. 2010).

159. *Id.* at 569.

160. Cal. Gov. Code § 66477(a)(3)(B).

161. *Id.* at § 66477(a)(3)(A).

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within areas previously-identified in a park plan.[162] These provisions are not read to require that fees or land primarily benefit residents of a certain development, but merely to require that fees or land collected for park and recreational facilities are used for those purposes over all others.[163]

C. Bolstering cash-in-lieu of parkland statutes and conditions

The above sampling presages what is likely to be the practical long-term reality of *Koontz*—few, if any, states have codified cash-in-lieu of land dedication statutes capable of facially and apparently foreclosing a constitutional challenge under *Nollan* and *Dolan*. The California statute discussed above, with its extensive formulas for calculating land or money dedications and its numerous circumstantial options, likely strikes the right balance between flexibility on the one hand and the anti-extortion concerns of "generality, publicity, prospectivity, . . . congruence" and stability on the other.[164] Montana's statute fares similarly well, in that local governments are able to address conditions on the ground, yet are provided specific guidelines for doing so. While only the Washington statute expressly includes the federal Takings Clause standard in its text, the statute provides no guidance whatsoever as to how to meet that standard and ultimately sets the stage for primarily adjudicative exactions decisions.[165] Wisconsin's fee-in-lieu statute is similarly drafted and presents similar issues, as is Maine's statute.

Simply offering a developer a choice from a number of canned options does not necessarily curtail the possibility of local government imposing an unconstitutional condition in exchange for a permit. However, a statute authorizing a local government to offer a developer a choice between a formulaic exaction and one for which she is able to negotiate may be a viable alternative as well.[166] At bottom, the "sweet spot" from a regulatory sense likely resides in a statute codifying as many options as possible. Where

162. *Id.* at § 66477(a)(3)(B).

163. *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 484 P.2d 606, 612 n. 6 (Cal. 1971) ("It is difficult to see why, in the light of the need for recreational facilities described above and the increasing mobility of our population, a subdivider's fee in lieu of dedication may not be used to purchase or develop land some distance from the subdivision but which would also be available for use by subdivision residents. If, for example, the governing body of a city has determined, as has the city in the present case, that a specific amount of park land is required for a stated number of inhabitants, if this determination is reasonable, and there is a park already developed close to the subdivision to meet the needs of its residents, it seems reasonable to employ the fee to purchase land in another area of the city for park purposes to maintain the proper balance between the number of persons in the community and the amount of park land available.").

164. Fennell & Peñalver, *supra* n. 48, at 341–342. The authors' point here is well-taken: there is stability in legislation to the extent it remains unamended session-to-session.

165. Wash. Rev. Code § 58.17.110(2)(b).

166. Fennell & Peñalver, *supra* n. 48, at 350.

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everything is on the table from the moment a developer meets with a local government land use planner, and where a particularized determination is possible but discretion is bridled, a local government is unlikely to offend the Fifth Amendment under *Koontz*.[167]

Apart from how state statutes direct or authorize in-lieu fee collection, local governments would do well by supporting fee conditions with "nexus studies" specific to the resource or facility that the conditions address.[168] Not surprisingly in light of its extraordinary "reasonably foreseeable" requirement, California counties and municipalities provide the greatest number of examples of these types of studies.

The Merced Nexus Study, which focuses on the need for a pedestrian pathway connecting new residential development to area schools near the town of Snelling, California, states that the purpose of the study is "to determine the nexus (or reasonable relationship) between new development . . . and the need for the off-site walking route as a result of this new development."[169] The report first analyzes the nexus, then "calculates cost allocation for each land use, based on the proportionate share of the total facility use for each type of development."[170] The report sets out a series of findings, in line with California state law,[171] that the county must make before adopting the proposed fee:

[1] Identify the purpose of the fee.

[2] Identify how the fee is to be used.

[3] Determine how a reasonable relationship exists between the fee's use and the type of development project on which the fee is imposed.

[4] Determine how a reasonable relationship exists between the need for the public facility and the type of development project on which the fee is imposed.

167. At least one commentator suggests that *Koontz*'s most unfortunate effect will be a strain on the necessary and often mutually-advantageous relationship between the local government planner assigned to a given development project and the developer proposing that project. Julie A. Tappendorf & Matthew T. DiCianni, *The Big Chill? – The Likely Impact of* Koontz *on the Local Government/Developer Relationship*, 30 Touro L. Rev. 455, 471–472 (2014).

168. *See* Am. Plan. Ass'n, *Policy Guide on Impact Fees* 2–3 (Apr. 1997) (available at http://perma.cc/5JK7-QN6G (http://www.planning.org/policy/guides/pdf/impactfees.pdf)); Co. of Merced, Cal., *Nexus/Proportionality Study: Lakeview Estates Off-Site Walking Route* 2 (Jan. 2011) (available at http://perma.cc/57TC-A4RF (http://www.co.merced.ca.us/pdfs/env_docs/initial_studies/nexus_proportionality_study_020111.pdf)) [hereinafter *Merced Nexus Study*]; City of S.F. Plan. Dep't, *San Francisco Eastern Neighborhoods Nexus Study* I-7 to I-9 (May 2008) (available at http://perma.cc/BT9P-YKY4 (http://www.sf-planning.org/Modules/ShowDocument.aspx?documentid=1467)) [hereinafter *San Francisco Nexus Study*].

169. *Merced Nexus Study*, *supra* n. 168, at 2.

170. *Id.*

171. *See generally* Cal. Gov. Code §§ 66000–66008 (Mitigation Fee Act).

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[5] Demonstrate a reasonable relationship between the amount of the fee and the cost of the public facility attributable to the development on which the fee is imposed.[172]

Similar to the Merced Nexus Study, the San Francisco Nexus Study, commissioned as part of a multi-neighborhood rezoning and redevelopment effort in the eastern portion of the city, "analyzes the relationship, or nexus, between projected new development . . . resulting from the rezoning efforts and the cost of providing public facilities to meet increased demand from new residents and workers."[173] The study "calculates the cost or nexus amount for libraries, transportation, recreation and parks, and child care," which the city can then apply to development proposals on a per-unit basis.[174] The study outlines the following steps in calculating this per-unit "nexus amount":

Step 1 Estimate the existing household population, number of housing units and number of jobs per land use category.

Step 2 Project future household population, number of housing units, number of jobs, and other demand factors per land use category.

Step 3 Identify the portion of new residents and workers that will be served by each category of improvement or facility for the relevant service area.

Step 4 Determine facilities and/or improvements needed to serve the projected future population at the appropriate level.

Step 5 Estimate costs for facilities and the portion of these costs that is attributable to new development.

Step 6 Apportion these costs to residential and non-residential development according to the projected impact of each type of land use.[175]

The procedures employed by the local governments in the above two scenarios are ideal. The County of Merced and City of San Francisco commissioned the respective studies for the specific purpose of establishing the necessary connections and justifications for imposing fees required by *Nollan*, *Dolan*, and *Koontz*. Coupled with adequate public process—hearings, informational meetings, mailings, etc.—a local government would be well-positioned to withstand both due process and takings challenges to fee programs.

VII. Conclusion

The effects of the U.S. Supreme Court's decision in *Koontz* are far from understood at this early stage, but are likely to be complex and sweeping. The *Koontz* Court appears to have found a protectable property interest

172. *Merced Nexus Study*, *supra* n. 168, at 2.

173. *San Francisco Nexus Study*, *supra* n. 168, at I-1.

174. *Id.* at I-1, I-5–I-6.

175. *Id.* at I-8.

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in a landowner's speculative use of his property. The Court neglected, however, to include in its rationale any substantive limitations on the extension of heightened scrutiny under *Nollan and Dolan* into local government fee impositions. In the long term, because local government's best practice generally suggests justifying development conditions, the *Koontz* decision is not likely to invalidate state statutory schemes or local regulations en masse. However, the *Koontz* decision is likely to empower landowners and developers to bring constitutional challenges against those schemes and regulations, and may bring local governments into state and federal courts to defend land use takings claims with greater frequency than before the decision. This litigation pressure—additional burden on already-strained local government resources—may be the most lasting and detrimental effect of the decision.

Nonetheless, the U.S. Supreme Court, state and federal courts, or state and local governments may limit the reach of *Koontz*. Such limitations include but are not limited to: (1) applying heightened scrutiny under *Nollan and Dolan* only under facts similar to *Koontz*; (2) applying heightened scrutiny to adjudicative fees as opposed to legislative fees; and, (3) statutorily vesting a right to a stream of income from a proposed land use—and thus to monetary exactions takings claim—at a specific point in the development review process.

Park dedication as a condition of development approval is particularly vulnerable under *Koontz* because local governments often either demand a fee-in-lieu of real property or give the developer the option to pay the fee when it comes to parkland. Some states, like California and Montana, have existing statutory schemes that will likely put local governments in a good position to withstand constitutional challenges to park-related monetary exactions. Others, like Washington, Wisconsin, and Maine, likely do not in and of themselves provide enough guidance as to how local governments can successfully structure and implement fee-in-lieu of park dedication regulations. Ultimately, states and local governments are best served by adopting programs and conducting studies that discourage particularized bargains with landowners, while at the same time affording local government planners and permit applicants some degree of flexibility when choosing how to provide the services that a jurisdiction deems necessary to health, safety, and welfare.