Chapter 21
Koontz v. St. Johns River Water Management District Excerpt

The Supreme Court's 2013 decision in the *Koontz* case opens up a major set of elements for analysis of clashes between private and public rights. It was greeted by private property activists as a stunning victory, and by many environmental observers, and the media, as a serious blow against rational public land management policies. Weigh the texts and materials presented and cited in the following pages to draw conclusions, and lessons, from the circumstances of this soggy parcel in Florida.

Coy A. Koontz, Jr., v. St. Johns River Water Management District
Supreme Court of the United States
No. 11-1447, __U.S.__, 133 S. Ct. 2586 (2013)

Alito, J. Our decisions in *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard*, 512 U. S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994), provide important protection against the misuse of the power of land-use regulation. In those cases, we held that a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use. In this case, the St. Johns River Water Management District…did not approve [Koontz's] application on the condition that he surrender an interest in his land. Instead, the District, after suggesting that he could obtain approval by signing over such an interest, denied his application because he refused to yield. The Florida Supreme Court blessed this maneuver and thus effectively interred those important decisions. Because we conclude that *Nollan* and *Dolan* cannot be evaded in this way, the Florida Supreme Court's decision must be reversed.

In 1972, petitioner purchased an undeveloped 14.9-acre tract of land on the south side of Florida State Road 50, a divided four-lane highway east of Orlando. The property is located less than 1,000 feet from that road's intersection with Florida State Road 408, a tolled expressway that is one of Orlando's major thoroughfares.

A drainage ditch runs along the property's western edge, and high-voltage power lines bisect it into northern and southern sections. The combined effect of the ditch, a 100-foot wide area kept clear for the power lines, the highways, and other construction on nearby parcels is to isolate the northern section of petitioner's property from any other undeveloped land. Although largely classified as wetlands by the State, the northern section drains well; the most significant standing water forms in ruts in an unpaved road used to access the power lines. The natural topography of the property's southern section is somewhat more diverse, with a small creek, forested uplands, and wetlands that sometimes have water as much as a foot deep. A wildlife survey found evidence of animals that often frequent developed areas: raccoons, rabbits, several species of bird, and a turtle. The record also indicates that the land may be a suitable habitat for opossums.

The…[1972] Water Resources Act…divided the State into five water management districts and authorized each district to regulate "construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state." Fla. Stat. §373.403(5) (2010)). Under

the Act, a landowner wishing to undertake such construction must obtain from the relevant district a Management and Storage of Surface Water (MSSW) permit, which may impose "such reasonable conditions" on the permit as are "necessary to assure" that construction will "not be harmful to the water resources of the district." §373.413(1)).

In 1984, in an effort to protect the State's rapidly diminishing wetlands, the Florida Legislature passed the Warren S. Henderson Wetlands Protection Act, which made it illegal for anyone to "dredge or fill in, on, or over surface waters" without a Wetlands Resource Management (WRM) permit. §403.905(1) Under the Henderson Act, permit applicants are required to provide "reasonable assurance" that proposed construction on wetlands is "not contrary to the public interest," as defined by an enumerated list of criteria. §373.414(1). Consistent with the Henderson Act, the St. Johns River Water Management District, the district with jurisdiction over petitioner's land, requires that permit applicants wishing to build on wetlands offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere.

Petitioner decided to develop the 3.7-acre northern section of his property, and in 1994 he applied to the District for MSSW and WRM permits. Under his proposal, petitioner would have raised the elevation of the northernmost section of his land to make it suitable for a building, graded the land from the southern edge of the building site down to the elevation of the high-voltage electrical lines, and installed a dry-bed pond for retaining and gradually releasing stormwater runoff from the building and its parking lot. To mitigate the environmental effects of his proposal, petitioner offered to foreclose any possible future development of the approximately 11-acre southern section of his land by deeding to the District a conservation easement on that portion of his property.

The District considered the 11-acre conservation easement to be inadequate, and it informed petitioner that it would approve construction only if he agreed to one of two concessions. First, the District proposed that petitioner reduce the size of his development to 1 acre and deed to the District a conservation easement on the remaining 13.9 acres. To reduce the development area, the District suggested that petitioner could eliminate the dry-bed pond from his proposal and instead install a more costly subsurface stormwater management system beneath the building site. The District also suggested that petitioner install retaining walls rather than gradually sloping the land from the building site down to the elevation of the rest of his property to the south.

In the alternative, the District told petitioner that he could proceed with the development as proposed, building on 3.7 acres and deeding a conservation easement to the government on the remainder of the property, if he also agreed to hire contractors to make improvements to District-owned land several miles away. Specifically, petitioner could pay to replace culverts on one parcel or fill in ditches on another. Either of those projects would have enhanced approximately 50 acres of District-owned wetlands. When the District asks permit applicants to fund offsite mitigation work, its policy is never to require any particular offsite project, and it did not do so here. Instead, the District said that it "would also favorably consider" alternatives to its suggested offsite mitigation projects if petitioner proposed something "equivalent."

Believing the District's demands for mitigation to be excessive in light of the environmental effects that his building proposal would have caused, petitioner filed suit in state court.

Among other claims, he argued that he was entitled to relief under Fla. Stat. §373.617(2), which allows owners to recover "monetary damages" if a state agency's action is "an unreasonable exercise of the state's police power constituting a taking without just compensation."…

After considering testimony from several experts who examined petitioner's property, the trial court found that the property's northern section had already been "seriously degraded" by extensive construction on the surrounding parcels. In light of this finding and petitioner's offer to dedicate nearly three-quarters of his land to the District, the trial court concluded that any further mitigation in the form of payment for offsite improvements to District property lacked both a nexus and rough proportionality to the environmental impact of the proposed construction. It accordingly held the District's actions unlawful under our decisions in *Nollan* and *Dolan* .

The…State Supreme Court reversed, 77 So. 3d 1220 (2011). A majority…thought it significant that in this case, unlike *Nollan* or *Dolan*, the District did not approve petitioner's application on the condition that he accede to the District's demands; instead, the District denied his application because he refused to make concessions. Second, the majority drew a distinction between a demand for an interest in real property (what happened in *Nollan* and *Dolan*) and a demand for money….

[We] now reverse. [Prior] cases reflect an overarching principle, known as the "unconstitutional conditions" doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up. *Nollan* and *Dolan* "involve a special application" of this doctrine…. Our decisions in those cases reflect two realities of the permitting process. The first is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

A second reality of the permitting process is that many proposed land uses threaten to impose costs on the public that dedications of property can offset. Where a building proposal would substantially increase traffic congestion, for example, officials might condition permit approval on the owner's agreement to deed over the land needed to widen a public road. Respondent argues that a similar rationale justifies the exaction at issue here: petitioner's proposed construction project, it submits, would destroy wetlands on his property, and in order to compensate for this loss, respondent demands that he enhance wetlands elsewhere. Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack. See Village of Euclid v. Ambler Realty Co., 272 U. S. 365 (1926). *Nollan* and *Dolan* accommodate both realities by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a "nexus" and "rough

proportionality" between the property that the government demands and the social costs of the applicant's proposal.

Our precedents thus enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in "out-and-out…extortion" that would thwart the Fifth Amendment right to just compensation….

The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so….

The Florida Supreme Court puzzled over how the government's demand for property can violate the Takings Clause even though "'no property of any kind was ever taken,'" but the unconstitutional conditions doctrine provides a ready answer. 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.

Nor does it make a difference, as respondent suggests, that the government might have been able to deny petitioner's application outright without giving him the option of securing a permit by agreeing to spend money to improve public lands. Virtually all of our unconstitutional conditions cases involve a gratuitous governmental benefit of some kind, [*citing cases on healthcare, public employment, crop payments, business licenses*]. Yet we have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights. E.g., United States v. American Library Assn., Inc., 539 U. S. 194, 210, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit" (emphasis added and internal quotation marks omitted)); Wieman v. Updegraff, 344 U. S. 183, 191, 73 S. Ct. 215, 97 L. Ed. 216 (1952) (explaining in unconstitutional conditions case that to focus on "the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue"). Even if respondent would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights. See *Nollan* , 483 U. S., at 836-837, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (explaining that "[t]he evident constitutional propriety" of prohibiting a land use "disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition")….

At oral argument, respondent conceded that the denial of a permit could give rise to a valid claim under *Nollan* and *Dolan* , Tr. of Oral Arg. 33-34, but it urged that we should not review the particular denial at issue here because petitioner sued in the wrong court, for the wrong remedy, and at the wrong time.

Finally, respondent argues that we need not decide whether its demand for offsite improvements satisfied *Nollan* and *Dolan* because it gave petitioner another avenue for

obtaining permit approval. Specifically, respondent said that it would have approved a revised permit application that reduced the footprint of petitioner's proposed construction site from 3.7 acres to 1 acre and placed a conservation easement on the remaining 13.9 acres of petitioner's land. Respondent argues that regardless of whether its demands for offsite mitigation satisfied *Nollan* and *Dolan* , we must separately consider each of petitioner's options, one of which did not require any of the offsite work the trial court found objectionable.

Respondent's argument is flawed because the option to which it points—developing only 1 acre of the site and granting a conservation easement on the rest—involves the same issue as the option to build on 3.7 acres and perform offsite mitigation. We agree with respondent that, so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan* , the landowner has not been subjected to an unconstitutional condition. But respondent's suggestion that we should treat its offer to let petitioner build on 1 acre as an alternative to offsite mitigation misapprehends the governmental benefit that petitioner was denied. Petitioner sought to develop 3.7 acres, but respondent in effect told petitioner that it would not allow him to build on 2.7 of those acres unless he agreed to spend money improving public lands. Petitioner claims that he was wrongfully denied a permit to build on those 2.7 acres. For that reason, respondent's offer to approve a less ambitious building project does not obviate the need to determine whether the demand for offsite mitigation satisfied *Nollan* and *Dolan*….

The Florida Supreme Court held that petitioner's claim fails…because the subject of the exaction at issue here was money rather than a more tangible interest in real property…. We note as an initial matter that if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*…. Such so-called "in lieu of" fees are utterly commonplace, Rosenberg, The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees, 59 S. M. U. L. Rev. 177, 202-203 (2006), and they are functionally equivalent to other types of land use exactions. For that reason and those that follow, we reject respondent's argument and hold that so-called "monetary exactions" must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*…. This case…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….

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. See, e.g., Northern Ill. Home Builders Assn. v. County of Du Page, 649 N. E. 2d 384, 388-389 (1995); Home Builders Assn. v. Beavercreek, 729 N. E. 2d 349, 356 (2000); Flower Mound, 135 S. W. 3d, at 640-641. Yet the "significant practical harm" the dissent predicts has not come to pass….

We hold that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money. The Court expresses no view on the merits of petitioner's claim that respondent's actions here failed to comply with the principles set forth in this opinion and those two cases. The Florida Supreme Court's judgment is reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor…. The significant legal questions that the Court resolves today are whether *Nollan* and *Dolan* also apply when that case is varied in two ways. First, what if the government does not approve the permit, but instead demands that the condition be fulfilled before it will do so? Second, what if the condition entails not transferring real property, but simply paying money?

I think the Court gets the first question it addresses right. The *Nollan-Dolan* standard applies not only when the government approves a development permit conditioned on the owner's conveyance of a property interest (i.e., imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (i.e., imposes a condition precedent). That means an owner may challenge the denial of a permit on the ground that the government's condition lacks the "nexus" and "rough proportionality" to the development's social costs that *Nollan* and *Dolan* require. Still, the condition-subsequent and condition-precedent situations differ in an important way. When the government grants a permit subject to the relinquishment of real property, and that condition does not satisfy *Nollan* and *Dolan* , then the government has taken the property and must pay just compensation under the Fifth Amendment. But when the government denies a permit because an owner has refused to accede to that same demand, nothing has actually been taken. The owner is entitled to have the improper condition removed; and he may be entitled to a monetary remedy created by state law for imposing such a condition; but he cannot be entitled to constitutional compensation for a taking of property. So far, we all agree.

Our core disagreement concerns the second question the Court addresses. The majority extends *Nollan* and *Dolan* to cases in which the government conditions a permit not on the transfer of real property, but instead on the payment or expenditure of money. That runs roughshod over Eastern Enterprises v. Apfel, 524 U. S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998), which held that the government may impose ordinary financial obligations without triggering the Takings Clause's protections. The boundaries of the majority's new rule are uncertain. But it threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny. I would not embark on so unwise an adventure, and would affirm the Florida Supreme Court's decision…. If a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed, the government might desist altogether from communicating with applicants. That hazard is to some extent baked into *Nollan* and *Dolan* ; observers have wondered whether those decisions have inclined some local governments to deny permit applications outright, rather than negotiate agreements that could work to both sides' advantage. See W. Fischel, Regulatory Takings 346 (1995)….

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. I respectfully dissent.

COMMENTARY & QUESTIONS

1. The subsequent spins of *Koontz*. The *Koontz* decision was applauded with joy by private property rights activists and bemoaned by some eminent legal scholars as a major blow against land use regulation, "a huge win for land developers," and "a serious loss for local governments"…. [1] It's not at all clear that either polarity is correct.

What did the *Koontz* majority do? Essentially it merely said that monetary exactions would be held to the same *Nollan/Dolan* standards as physical and title exactions. Prof. Ruhl, who practiced and taught in Florida for a number of years, yawned….

> Decades ago…the Florida Supreme Court ruled as a matter of state constitutional law that impact fees (and land exactions of course) must withstand a "dual rational nexus test" that is in all respects the same as *Nollan/Dolan*…. Based on my observations while I was in Florida, I did not see any evidence that Florida's rule led to increased permit denials (anything but that was the case in Florida!), or that the burden on land use authorities was significant (I had a number of friends in planning departments whose jobs involved generating the data and analysis to support impact fee assessments, and it was a pretty routine process), or that it led to an explosion of litigation over impact fee assessments. Indeed, my sense was that cities and counties developed a sound methodology over time and once that was in place it deterred litigation and facilitated negotiation.[2]

Is there any reason why monetary exactions—long held to such standards in development fee cases—should not be required to be rationally related and proportional to the burdens being imposed by the permitted development? Shouldn't the legal system apply standards to define and prohibit extortions of either kind, whether physical-title or monetary?

On the other hand, given that courts and governmental officials are so unclear about the structure and semantics of property rights issues, it may well be that the "atmospherics" of the *Koontz* decision and its exaggerated characterizations in the media will in some cases chill the implementation of sound land use management programs. That, however, would be a psychological and political reaction, not a legal consequence of *Koontz*.

2. Koontz has been remanded; what will happen on remand? The Court majority rejected the theory of the Water District and the Florida Supreme Court that the *Nollan* and *Dolan* tests didn't apply to the proposed conditions. But that does not mean that the property will now be

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[1] As to the latter, see, for example, Prof. Echeverria's take on *Koontz*, published on the NY Times web version, June 27:
http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html

[2] Professor J.B. Ruhl, Vanderbilt University, email message to Envlawprofessors listserv, June 27, 2013.

Professor Jesse Richardson at West Virginia University asserts that "*Koontz* is actually a "pro-planning" decision. Careful, methodical, fact-based planning will be upheld. Planning that is not well-thought out and that is not supported by sound analysis will be rejected. Planners can't just arbitrarily impose monetary or other exactions, or request such exactions for other than sound planning reasons. That would be "arbitrary planning," not only an oxymoron, but a circumstance that would weaken the credibility (and thus authority) of planning. Good planners should be happy about *Koontz*." Id.

An extended commentary on the *Koontz* case by Professor Marc Poirier, Seton Hall University, is posted on the website's Supplementary Materials for Chapter 21.

developed without some offsetting environmental mitigation; rather the case is remanded for a Florida court's weighing of the various possible conditions' *Nollan/ Dolan* validity.

- [To understand the following commentary and questions, note the graphics. They show the physical layout of the Koontz property at issue and the satellite overview of the Orlando area with the relative locations and relevant vegetated watershed patterns linking the Koontz site with the two offsite mitigation offset sites. See the graphics file posted in the Chapter 21 Supplementary Materials in PDF format as "*21-OverallAerial-KoontzProperty-and-OffsetSites*."]

There were *three* proposed alternative conditions for allowing Mr. Koontz to fill some of his wetlands for development:
(1) if he develops only a one-acre portion of the land along the service road (filling .3 acre of wetland added to .7 acre of nonwetland property, noted in the graphics by yellow dashes and the violet-lined uplands) and doing some on-site mitigation.
(2) or if he agrees to repair or pay for repair of some crushed culverts to improve wetlands in the nearby Scott Preserve, part of the same linear wetlands watershed that would be diminished by a 3-acre filling of the Koontz property.
(3) or if he agrees to block or pay for blocking some crushed old drainage ditches to improve wetlands in the nearby Demetree Preserve, part of the same linear wetlands watershed that would be diminished by a 3-acre filling of the Koontz property.

On remand, attention will first turn to the two off-site mitigation proposals: will either of the two alternative offsite mitigation conditions survive the *Nollan/Dolan* tests? (If both are void, the issue will turn to whether the (1) one-acre option violates *Penn Central*, i.e. whether it is an invalid regulatory taking.)

During the agency hearing (posted in the website's Supp. Materials folder for Chapter 21—"*St.Johns River Water Mgmnt District Transcript*" at pages 1159-1162) the district's staff reported that either of the offsite mitigation proposals would involve "minimal" cost, merely physically repairing several crushed road culverts on the Scott Preserve parcel, or blocking several ditches that were draining water away from wetlands on the Demetree [*aka* "Little Big Econ State Forest"] tract. Either of these steps would improve conditions on about 50 acres of wetlands.

[We were not able to denote the exact sites of the proposed offsite culvert and ditch mitigations on the aerial graphic, but if you look at the forested line showing the watershed flowage path flowing upward—Northward—through the area and on to the Econlockhatchee, clearly linking all three locations, the mitigation-offset linkage of wetland acreage filled/restored is obvious. That presents a definitional decision for courts applying the *Nollan/Dolan* tests: What kind of "causal nexus" is required?—is it what we'd describe as "on-site direct" causation or does it include "logical offset mitigation" causation? (We'd vote for the latter form of mitigation analysis, as was done with the Exxon-Valdez mitigation noted below in this comment; otherwise, a strict on-site direct-causation rule would block many opportunities to approve rather than reject developments that require rationally-negotiated adjustments of the regulatory envelope.]

(1) Does improving water conditions on a nearby wetland to offset the derogated water conditions from Koontz's proposed wetlands-filling have a sufficient *Nollan* causal nexus?

Clearly it's not Koontz's proposed fill that crushed the Scott Preserve culverts nor put the drainage ditches in the Demetree wetlands. Does *Nollan* causality require direct, specific, causation? or does it suffice that the proposed offsite work will alleviate virtually the same kind of existing harm that Koontz's future wetlands filling will cause?

(2) As to the *Dolan* test, is each of the proposed mitigations "disproportionate" because mitigation to alleviate the harm caused by filling 3.7 acres of wetland, will benefit 50 acres? (That's the way Justice Alito frames the facts, though he refrains from deciding proportionality.) Or is *Dolan* "rough proportionality" to be determined in terms of the burden imposed by the magnitude of the [total] loss of 3.7 acres of wetland habitat, versus the [allegedly] minimal cost to Koontz of fixing culverts and blocking ditches? (That's probably what the Water Management District should argue on remand.)

The definition of what constitutes "offsetting mitigation" in such exaction cases—how much directness of causality, and what exactly needs to be roughly proportional—has not been addressed in these cases. But note, in the coursebook at page 136, the Alaska example of natural resource damage remediation:

> **Mitigation and substituted resources…** [W]here restoration [of dead salmon] was ecologically or economically infeasible,… environmentalists in the Alaska oil spill case, analogizing to CWA provisions, requested the establishment of a fund…for "the acquisition of equivalent [and additional] natural resources" as an alternative remedy…. Anticipatory mitigation was [ultimately] the approach taken in Alaska's Prince William Sound. The Trustees obligated almost $500 million of oilspill NRDs to buy up forests surrounding the Sound to prevent the drastic clearcutting that otherwise, laws or no laws, would have choked [salmon] spawning streams with erosion and debris and altered stream flows and water quality throughout the area. *Coursebook at page 136*.

Environmental offsetting deserves a more sophisticated analysis in court than the non-analysis to date of how the *Nollan/Dolan* tests are to be applied in these settings.

3. The vagaries and promiscuous semantic mix-ups of the word "takings." The vagaries in how we use the word "takings" constitute a fundamental problem in these cases of clashes between public and private rights. For one thing, the word is used both to identify the legal question, but also to indicate the answer: invalidity. But all laws constraining private actions "take" something, and most are not unconstitutional. A statement, "That constitutes a taking of private property," however, is almost universally understood as a verdict of invalidity. It would be far better if we all consistently used the more accurate rubric, weighing whether governmental acts are "*invalid* takings" or "*valid* takings." (Given lingual laziness, however, and the single word's political advantageousness to the privateering bloc, this suggestion is obviously unrealistic.)

Plus, "taking" is often applied indiscriminately to condemnation of title to physical property—which always requires compensation—and to regulatory non-physical-title constraints, which always restrict property rights to some degree but only rarely are declared unconstitutional requiring compensation or rescission.

But even more disruptive is how, in exaction cases like *Koontz,* the word "taking" is all too often applied to conflate two very different constitutional inquiries into one muddle.

Koontz is not a regulatory takings case, it's an exactions case, and exactions sound in substantive due process. The case would involve an invalid regulatory takings if the Water Management District's denial of a development permit would have violated the canonic *Penn Central* test: (1) excessive diminution—if there was in context no reasonable remaining economic value, and (2) an unreasonable frustration of investment-backed expectations—and (3) in addition, the public purpose served by the regulation (the avoided harm) did not outweigh the private diminution (Justice O'Connor's *Palazzolo* concurrence delineating the public-purpose third prong of *Penn Central*, in the coursebook at page 920, is a key element in such balances) then the regulation is invalid and it must yield or compensation be paid.

In *Koontz* there appears to have been no finding that the developable, non-wetlands one-acre portion of Koontz's land was not sufficiently profitable. (In *Palazzolo* where the regulation was sustained against a takings challenge, the record showed there was one buildable lot, out of 90, Lot 19.) So it's not an invalid regulatory taking.

Instead, most of the debate in *Koontz* is focused on the further question whether the agency-required exactions were in and of themselves valid. And the Court never decides that question. Rather it remands for the Florida courts to determine if the proposed exaction/s comport with *Nollan* and *Dolan*: "The Court expresses no view on the merits of petitioner's claim that respondent's actions here failed to comply with the principles [in *Nollan & Dolan*]," and in the clarifications in this majority opinion.

At its core, doesn't the majority decision merely hold that monetary exactions are subject to the same requirements of rational nexus and rough proportionality as property-interest exactions under *Nollan* and *Dolan*?

Judicial (and academic) use of the word "taking" oscillates promiscuously between its proper application in *Penn Central* situations—where the question is whether a government denial of permission to do something is void because it works an unconstitutionally excessive diminution of property value—and the further, completely different, question of the constitutional validity or invalidity of a condition required by a government agency in order to achieve approval of a permit that could otherwise be validly denied under *Penn Central*.

In *Dolan*, for example, the city quite clearly could have completely refused to allow the Dolan company to replace its existing hardware store with its large new commercial complex; the existing hardware store was quite profitable as it was, so under the *Penn Central* test there would have been no invalid regulatory taking if the city had just refused the expansion permit. But the city said it would allow the larger construction if two mitigating exactions were provided to offset traffic increases and floodway obstruction from the new larger complex. [*See*: coursebook at 927, and *Dolan* photo slides in the website's Supp. Materials]. The Supreme Court majority did not question the city's *Penn Central* validity; rather it invalidated the exactions, choosing this case to define a higher standard for exactions, a new requirement for a showing of rough proportionality in addition to a *Nollan* causal nexus (which the city had demonstrated).

4. The *Nollan/Dolan* test requires further definition of how to test *linkage*. The *Nollan/Dolan* tests do not turn on "takings" jurisprudence, where the *Penn Central* test governs, weighing the

property diminution resulting from regulatory decisions. Rather they address the further question of the quality and appropriateness of the exaction conditions' *linkage* to the regulatory decision, as discussed above in C&Q 2—What kind of "causal nexus" is required?—is it what we'd describe as "on-site direct" causation or does it include "logical offset mitigation" causation? Is the condition logically linked to the proposed action by the effects caused, and countered—and then "Is the condition's linkage of roughly the same dimension, proportionate, between the offset and the harm it mitigates, so as not to be extortionate?" (The latter inquiry poses the further question of how to assess comparatively the harmful impact and the mitigation in order to weigh *Dolan's* "rough proportionality"? A simple comparison of acreage totals—in *Koontz*, 3 acres of wetlands harmed versus 50 acres of wetlands improved—bypasses the issue of degree of harm, degree of improvement, and relative burdensomeness of the required mitigation.

Given the kind of rational basis inquiry required by *Nollan & Dolan*—having nothing to do with the amount of diminution—we'd say these "unconstitutional condition" exaction inquiries are further "add-on" tests, beyond the *Penn Central* "invalid takings" inquiry—i.e. they are substantive due process tests, pretty reasonable, and not at all a takings issue. Semantic hygiene, making that distinction, does a lot to clear up the theoretical messiness rampant in these decisions.

5. Rehnquistian shiftiness on burdens of proof? Justice Kagan implies that the *Koontz* majority decision "threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny." Does she mean that *Nollan/Dolan* review will constitute "strict scrutiny," requiring government to prove that each regulatory burden is "the least drastic means available," on a par with free speech and racial discrimination? That doesn't appear to be the case in post-*Nollan/Dolan* physical exaction cases.

Far more likely is that some courts in exaction reviews will trip into the procedural stratagem deployed by Justice Rehnquist in *Dolan* – shifting the burden of proof away from the plaintiffs attacking the exaction and onto the regulatory government entity. Rehnquist focused on exactions which are tailored by planners and regulatory officials to fit the needs of specific cases (as most are, and as modern planning practice strongly recommends); he called such exactions "adjudicative."

In *Dolan*, Justice Rehnquist said, the municipality's decision to require the particular exaction conditions alongside Dolan's expanded hardware complex in Tigard, Oregon, was not an "essentially *legislative* determination" previously set out in the zone ordinance for the entire city, but rather "here the city made an *adjudicative* decision to condition petitioner's application for a building permit on an *individual* parcel"—based on the traffic flows and flood-prone structures in that individual situation. 512 U. S. 374 at 385, emphasis added.

When an exaction is based on the individualized characteristics of the property at issue, Rehnquist held, the burden is on the government to prove causal nexus and proportionality, not upon the attacker to show that the *Nollan/Dolan* terms have been violated.

Rehnquist's differentiation echoed a legislative/adjudicatory distinction proposed in an earlier Oregon case (*Fasano v. Board of County Commissioners of Washington County*, 507 P.2d 23 (1973)),

a distinction that was subsequently rejected by Oregon's supreme court and most state courts that have addressed the issue. Challengers generally and appropriately bear the burden of proof on elements of alleged invalidity in judicial reviews, not the governments defending regulations otherwise properly promulgated, even where the particular requirement is individualized rather than "legislative."

Required conditions, whether monetary or title-physical, can indeed be specified in advance, legislatively, in one-size-fits-all terms by omni-prescient legislators, but modern land use (as in PUDs and other non-Euclidean structures) has usually found that thoughtfully-designed individualized requirements based on planning and negotiation, with individualized site analysis, are vastly preferable to static generic generalizations.

If courts adopt Rehnquist's shift in the traditional burden of proof, the likely result would be a greater inclination of municipalities to *reject* development applications, due to the prospect of having to bear the burden of proving the *Nollan/Dolan* validity of required conditions mitigating the developments' potential negative externalities.

6. Severability: Does it make a difference whether a government agency says "Yes, if…" or "No, unless…"? The "condition subsequent/condition precedent" distinction, as both *Koontz* opinions agree, makes no constitutional difference. As Justice Kagan writes:

> The *Nollan-Dolan* standard applies not only when the government approves a development permit conditioned on the owner's [prior] 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).

But the government agency's wording of exaction approvals—"No, unless…" or "Yes, if…"—can indeed make a tonal difference as to the *severability* question: if a court finds a proposed exaction to be unconstitutional, it is supposed to determine whether the entire permit is thereby rescinded, or whether the permit approval remains, with the offending condition severed away.

In determining severability, a court is supposed to determine the agency's original *intention*: "would it have approved the permit without the exaction?" (Severability jurisprudence, however, was ignored by Justices Scalia & Rehnquist in *Nollan* and *Dolan,* where they just peremptorily gave the property owners full unencumbered permission without considering agency intention.) In the severability inquiry, it can make a persuasive difference if the agency worded its exaction decision, "*Yes, if this exaction is provided*," or "*No! unless this exaction is provided*." With the offending exaction struck off, one seems to leave a Yes on the table; the other a No, by semantic implication.

7. Potential *remedies* if unconstitutionality is found on remand? The *Koontz* case on its facts is not like *Nollan* or *Dolan* where the agency had already officially granted permission to the applicant with stipulated exactions, so that the Court (ignoring the severability rules) simply could simply strike down the exactions and declare that the applicants could proceed without exactions.

It is particularly helpful here to make a distinction between the *Penn Central* inquiry ("Has there been an *invalid regulatory taking*?") and the *Nolllan/Dolan* inquiry ("Are both of the

proffered mitigating exactions constitutionally void [*substantive due process: SDP*] because they're insufficiently linked to Koontz's proposed action?").

Viz: If it is judicially determined that the suggested exactions are void under SDP as insufficiently linked to Koontz's proposed filling in causality and proportionality, then they cannot be required; they are inapplicable.

But that does not leave Koontz free to develop the 3.7 acres he wants to develop: Rather, it leaves Koontz with the District's first proffer of permission—*to develop just a one-acre portion* along the service road (because the District offered to allow a fill of .3 acre of Koontz's wetlands, added alongside his .7 acre of non-wetlands as noted in violet and dashed-yellow lines on the graphic). Our guess is that the regulatory one-acre-development permit—which clearly "takes" away Koontz's ability to develop all the 3.7 acres above the powerlines—would be a *valid* regulatory taking under *Penn Central* (like *Palazzolo* on remand). Development of that one-acre parcel could well be quite profitable, though a good deal less than if Koontz could fill all those wetlands. (We focus on the 3.7 acres above the powerlines because most of the rest of his 13-acre parcel is practically inaccessible back-land.)

But if by chance the one-acre regulatory option is struck down as an invalid regulatory taking, then the remedy is clarified: a federal court can nullify the denial of the application to develop 3.7 acres, and development on the 3.7 acres can proceed. Or if the state wishes to pay compensation under Florida law for a compensated taking of the right to fill those acres, then it can do so, either by eminent domain or by some other state court judicial process.