# *Koontz*: What it said, what it didn't say, and the implications for us in Washington State.

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**Presented by:**


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In the swirl of higher-profile decisions issued by the U.S. Supreme Court at the end of its 2013-2013 Term, most court watchers took little note of *Koontz v. St. Johns River Water Mgmt. Dist.*, ___ U.S. ____, 133 S. Ct. 2586 (2013). Government and land use lawyers paid attention, though, for good reason. *Koontz* altered part of the takings landscape many thought had been settled. This paper outlines that seemingly settled territory, explains how *Koontz* changed it, identifies key questions *Koontz* left unanswered, and offers some practical post-*Koontz* lessons for attorneys in Washington. The majority opinion in *Koontz* is provided as an appendix.

### A. The seemingly limited reach of the "essential nexus" and "rough proportionality" tests before *Koontz*.

The "unconstitutional conditions doctrine" is a fancy label applied to a simple concept: government may not punish people for exercising a constitutional right, or pressure them into giving up that right. A decision cited frequently for the doctrine—even though the phrase does not appear in the text—involved a claim by a professor that a public college refused to extend his contract because he criticized the school publicly. *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694 (1972). *Perry* reasoned:

> [The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which (it) could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526, 78 S. Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible.

*Id*., 408 U.S. at 597.

The Court began to apply this doctrine in the context of takings a quarter century ago. Again, the concept is simple. If the government wants, for example, to run a public trail through your property, it generally may do so only if it pays for an easement because the U.S. and Washington Constitutions hold that private property may not be taken for public use without just compensation. U.S. Const. Amend. 5; Wash. Const. art. 1, § 16. But what if you apply for a development permit and the government, as a condition of the permit, requires you to deed the trail easement without compensation? Or as some would put it, what if the government "exacts" your property from you through a permit condition?

Two milestone U.S. Supreme Court decisions imposed limits on this exaction power. In 1987, *Nollan v. California Coastal Commission* held an "essential nexus" must link a legitimate state interest and the condition exacted. 483 U.S. 825, 837, 107 S. Ct. 3141 (1987). Then in 1994, *Dolan v. City of Tigard* ruled that a nexus is not enough; the government must also show that the exaction is "roughly proportional" to the state interest. 512 U.S. 374, 391, 114 S. Ct. 2309. "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.*

After introducing the nexus and proportionality tests, the Court showed little interest in extending them beyond two key facts of *Nollan* and *Dolan*. First, the Court seemed unlikely to apply nexus and proportionality where the government *denied* a permit. In 1999, the Court said *Dolan* "was not designed to address, and is not readily applicable to, the much different questions arising where...the landowner's challenge is based...on denial of development." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 703, 119 S. Ct. 1624 (1999). The next year the Court declined to review a *Nollan/Dolan* challenge to a permit denial. *See Lambert v. City and County of San Francisco*, 529 U.S. 1045, 120 S. Ct. 1549 (2000) (Scalia, J., dissenting).

Second, the Court appeared to reject the idea of invoking *Nollan* and *Dolan* where a land use permit is conditioned on the payment of money, rather than the dedication of an interest in land. In that same 1999 decision, the Court observed "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use." *City of Monterey*, 526 U.S. at 702. In 2005, in resolving a different issue, the Court characterized *Nollan* and *Dolan* as being premised on—and seemingly limited to—a permit condition working a physical invasion of real property:

> A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests.....
>
> Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit.....
>
> In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking....
>
> *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings.

*Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539, 546-47, 125 S. Ct. 2074 (2005).

Although the Court did not expressly limit *Nollan* and *Dolan* to dedications, lower courts generally—although not uniformly—shied away from extending the doctrine on their own. *See, e.g., McClung v. City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008) ("A monetary exaction differs from a land exaction—'[u]nlike real or personal property, money is fungible.'"); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) (the *Nollan/Dolan* tests "are limited to the context of development exactions where there is a physical taking or its equivalent"); *City of Olympia v. Drebick*, 156 Wn.2d 289, 302, 126 P.3d 802 (2006) ("neither the United States Supreme Court nor this court has determined that the tests applied in *Nollan* and *Dolan* to evaluate land exactions must be extended to the consideration of fees"). *But see, e.g., Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620, 640 (Tex. 2004) ("we see

no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved"); *Ehrlich v. City of Culver City,* 12 Cal. 4th 854, 911 P.2d 429, 444 (1996) ("we reject the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions").

This is not to suggest the Court was silent about the relevance of the Takings Clause to the taking of money. For example, government appropriation of property in the form of interest on a bank account or a lien might trigger the Clause's requirement to pay just compensation. *See, e.g., Phillips v. Washington Legal Foundation,* 524 U.S. 156, 163-72, 118 S. Ct. 1925 (1998); *Armstrong v. United States*, 364 U.S. 40, 48-49, 80 S. Ct. 1563 (1960). Still, when deciding when to apply the *Nollan/Dolan* tests, the Court had not wandered beyond the taking of an interest in real property.

### B. What *Koontz* said…and declined to say.

*Koontz* altered this legal landscape in two fundamental ways by holding that *Nollan* and *Dolan* review could be triggered by certain permit *denials* (not merely the issuance of a permit with a condition) or the taking of *money* (not just a physical interest in land).

The factual and procedural saga preceding the Court's decision spanned almost two decades. *See Koontz*, 133 S. Ct. at 2591-93. Reduced to its relevant essence, the case stemmed from an application to develop a roughly 15-acre parcel comprising wetlands. The applicant proposed to develop 4 acres and, to comply with a statute requiring the mitigation of wetland loss, deed the government a conservation easement over the remaining 11 acres. According to the Court, the government said it would approve a permit under one of two alternatives: (1) the applicant develop only 1 acre and deed a conservation easement over the remaining 14; or (2) the applicant adhere to his original proposal of developing 4 acres and deeding 11, plus hire contractors to improve government wetlands elsewhere. When the government reportedly denied the permit because the applicant refused the alternatives, the applicant filed suit under a state law providing a cause of action for "an unreasonable exercise of the state's police power constituting a taking without just compensation." *Id*. at 2593.

#### 1. Permit denial: not a taking, but perhaps an "unconstitutional conditions claim predicated on the Takings Clause."

The government defended itself by stressing that it denied the permit—because it never actually exacted a condition from the applicant, the denial could not have implicated the Takings Clause. The government prevailed on this argument. The Court conceded that the permit denial thwarts any actual takings claim: "Where the permit is denied and the condition is never imposed, nothing has been taken…. [T]he Fifth Amendment mandates a particular *remedy*—just compensation—only for takings." *Id*. at 2597. Learning that it did not directly violate the Takings Clause was the extent of the good news for the government defendant.

The Court went further. It articulated a new "unconstitutional conditions claim predicated on the Takings Clause." *Id*. According to Justice Alito's majority opinion, this claim is available where the "denial of a permit is based on an unconstitutionally extortionate demand"—one that would have failed the nexus and proportionality tests of *Nollan* and *Dolan*

had it been imposed as a permit condition. Because "the unconstitutional conditions doctrine recognizes that [such a denial] *burdens* a constitutional right," *id.*, it must give rise to some claim.[1]

The Court provided no assurance that such a claim could yield monetary relief. "In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies." *Id.* Because the case was brought under a state statute, the Court remanded the matter to the state court to determine whether that law covers the newly-articulated "unconstitutional conditions claim predicated on the Takings Clause." "[T]he Court has no occasion to discuss what remedies might be available for a *Nollan*/*Dolan* unconstitutional conditions violation either here or in other cases." *Id.*

We are left to speculate about the availability of remedies for this new claim. Will landowners always be able to assert a claim under 42 USC § 1983, which provides a remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws," even though "an unconstitutional conditions claim predicated on the Takings Clause" involves no actual deprivation of the right to be compensated for a taking? The Court seems to suggest that a § 1983 remedy is available, given that other "unconstitutional conditions" cases were brought pursuant that statute and "[a]s 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." *Id.* at 2596. But even if those dots seem easy to connect, the Court declined to connect them.

Here in Washington, will landowners always be able to assert that this new claim finds redress through RCW Chapter 64.40, which provides a cause of action "to obtain relief from acts of an agency which are…unlawful, or exceed lawful authority"? RCW 64.40.020(1). Where "act" is defined as a decision "which *places* requirements, limitations, or conditions upon the use of real property," can a landowner seek redress for a decision that places no express requirement or condition on the use of property? *See* RCW 64.40.010(6) (emphasis added). Further litigation will resolve these questions.

The Court also provided no guidance on the key evidentiary question: what constitutes a pre-permit-denial demand sufficient to trigger an "unconstitutional conditions claim predicated

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[1] The Court seems unanimous on this point. Although the four-member dissent did not join any part of the majority opinion, Justice Kagan's dissenting opinion agreed that a claim could be available for a denial:

> 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.

*Id.* at 2603.

on the Takings Clause"? "This Court...has no occasion to consider how concrete and specific a demand must be to give rise to liability" for this claim. The Court remanded this issue too.

Assuming a landowner finds a relevant cause of action and clears the still-murky evidentiary hurdle to prove the government denied a permit because the landowner refused to accede to the government's demand, the central issue for this new claim will be whether the government demanded more than what would have passed muster as a permit condition under *Nollan* and *Dolan*. The Court assured governments that they "need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards…." *Id.* at 2599. A government can therefore presumably make as many additional, "extortionate" demands it wants because, "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." *Id*. at 2598.

**2. "Monetary exactions" are not immune from *Nollan/Dolan* review.**

The government defendant in *Koontz* also sought shelter by arguing that the subject demand was for the payment of money, not a physical interest in real property, and that *Nollan* and *Dolan* do not apply to an alleged "monetary exaction." *Id*. at 2598-99. The Court rejected that argument, holding 5-4 that "monetary exactions" must also satisfy the *Nollan/Dolan* tests.

The majority reasoned that the government's position would facilitate an end-run around *Nollan* and *Dolan*:

> Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value. Such so-called "in lieu of" fees are utterly commonplace…, and they are functionally equivalent to other types of land use exactions.

*Id*. at 2599. For the majority, a government command to relinquish funds linked to a specific parcel of real property triggers a *per se* takings analysis, functionally equivalent to a command for an easement. *Id*. Given the facts of *Koontz*, we can infer that there is no difference between a "monetary exaction" in the form of a direct payment of money to the government or, as the demand in *Koontz*, of expending funds to improve government property.

The majority responded to the dissent's concerns with an assurance that its holding "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." *Id*. at 2601. The majority was unconcerned about the task of distinguishing these exempt financial burdens from the "monetary exactions" subject to *Nollan* and *Dolan* review. Echoing Justice Stewart's famous "I know it when I see it" approach to pornography,[2] the majority admonished fretful critics "that

[2] Conceding his inability to define "hard-core pornography," Justice Stewart admitted: "[P]erhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

teasing out the difference between taxes and takings is more difficult in theory than in practice" and "we have had little trouble distinguishing between the two." *Id*. at 2601, 2602.

The majority's refusal to say more about the definition of "monetary exactions" leaves us looking down a potentially slippery slope, at the bottom of which is a world where most development regulations are subject to review under *Nollan* and *Dolan*. Consider these questions:

- Do "monetary exactions" include payments/expenditures to the government *only if* made in lieu of a demand for an easement? If there is no express or implied demand for an easement, are *Nollan* and *Dolan* relevant? This would be consistent with the facts of *Koontz* and the majority's professed motivation to prevent an end-run around *Nollan* and *Dolan*, but not necessarily with some of the majority's broader sweep of situations where "the government commands the relinquishment of funds linked to a specific, identifiable property interest." *Id*. at 2600. Must that interest be in the form of a physical interest in land?

- Do "monetary exactions" mean all payments/expenditures to the government that are not "property taxes, user fees, and similar laws and regulations"? If so, does this limit "monetary exactions" to applicant-specific permit decision decisions and exclude area-wide, legislative determinations? Such a limitation would build upon the reasoning of some federal and state courts when describing the limits of *Nollan* and *Dolan*. *See, e.g.*, *McClung*, 548 F.3d at 1227; *Ehrlich*, 911 P.2d at 443-44; *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 187 Ariz. 479, 930 P.2d 993, 1000 (Ariz. 1997). As the *Koontz* dissent observed, we have no answer to that question: "Maybe [the *Koontz*] majority accepts that distinction; or then again, maybe not." *Koontz*, 133 S. Ct. at 2608 (Kagan, J. dissenting).

- What about expenditures not conveyed to the government? If a landowner must expend funds to construct a storm water detention facility, the title to which the landowner retains, has the government "exacted" anything from the landowner within the meaning of *Nollan* and *Dolan*? At some points, the majority speaks in more limited terms, suggesting that there must be a transfer "from the landowner to the government." *Id*. at 2600. But elsewhere, the majority seems to embrace any situation where the government uses "land-use permitting to pursue governmental ends," *id*., even if those ends involve no actual transfer to the government.

- If nothing need be transferred to the government to trigger *Nollan/Dolan* review, what about "expenditures" in the form of lost a opportunity cost? If a permit condition requires a property owner not to develop certain wetlands, but does not demand the expenditure of any money or the conveyance of an easement or any other real property interest to the government, has the government "exacted" anything? What about a five-foot setback? A height limit? Any regulation that prevents the landowner from developing from the center of the Earth to the heavens, from property line to property line? After all, some of the majority's reasoning speaks of the apparent evil of "diminishing without justification the value of the property." *Id*.

Agreeing on a principled handhold somewhere along this slippery slope will require additional litigation.

### C. So what? Some lessons for us in Washington.

*Koontz* generated some sky-is-falling commentary from those concerned about government's ability to enforce sensible land use limitations. But history is littered with such dire predictions in the wake of other Supreme Court takings milestones: from the requirement to compensate for temporary takings,[3] to the holding that a complete deprivation of all economically beneficial use constitutes a *per se* taking,[4] to the nexus and proportionality requirements of *Nollan* and *Dolan*. Those predictions appear overwrought in hindsight. So too will panic over *Koontz*.

Although *Koontz* augurs a cloud of more litigation, the silver lining is the opportunity to provide reasonable answers to the questions *Koontz* left open. As we await those opportunities and answers, government and property-rights attorneys should keep at least four points in mind.

First, *Koontz* is not a radical departure for attorneys in Washington, where we have been living with RCW 82.02.020 for decades. Like the nexus and proportionality requirements *Koontz* extended to certain "monetary exactions," Washington has long required payments in lieu of dedications to be "reasonably necessary as a direct result" of the proposed development. RCW 82.02.020. Like *Koontz* shields taxes from *Nollan*/*Dolan* review, Washington also exempts Growth Management Act impact fees (which need only be "reasonably *related*" in type and degree to new development, and may be modified "based on principles of fairness") from the "reasonably *necessary* as a *direct* result" requirement. *Compare* RCW 82.02.020 *with* RCW 82.02.050(3), .070(5). In many respects, *Koontz* simply gives us in Washington an opportunity to welcome the rest of the country to our world.

Second, subjecting a permit decision to *Nollan* and *Dolan* review does not mean the government will lose. It is only an invitation to debate whether the decision satisfies nexus and proportionality requirements.

Third, because of those requirements, the essential lesson for governments is not new: don't overreach. Especially if tailoring mitigation for a specific project, and where that mitigation might involve a dedication of land to the government, a payment in lieu of that dedication, or the expenditure of money to improve government property, be prepared to demonstrate the nexus between the condition and the public interest behind your regulation, and that the type and magnitude of the condition is proportionate to the proposal's impact on that interest.

Finally, note the rhetoric of "extortion" peppering *Koontz*. Justice Scalia first introduced "extortion" to the mix in his majority opinion in *Nollan*. He used the word only once, quoting a New Hampshire Supreme Court decision to reject an argument that government could exact

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[3] *First English Evangelical Lutheran Church v. Cnty. of Los Angeles.*, 482 U.S. 304, 321 (1987).

[4] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027–32 (1992).

property whenever it had the authority to simply ban the proposed development: "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)). By contrast, *Koontz* used the word four times and not just to illustrate what could happen should the government overreach. Rather, *Koontz* started from the premise that government overreaches. *Koontz* extended *Nollan* and *Dolan* to "monetary exactions" expressly because the majority was "[m]indful of the special vulnerability of land use permit applicants to extortionate demands for money." *Koontz*, 133 S. Ct. at 2603. That mindfulness was not the product of the facts of *Koontz* (the Court remanded all factual issues) or any other case. As the dissent noted, "No one has presented evidence that in the many States declining to apply heightened scrutiny to permitting fees, local officials routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development's costs." *Id*. at 2908 (Kagan, J., dissenting). Nevertheless, five members of the U.S. Supreme Court seem to know in their guts that landowners need protection from government extortion.

"Extortion" is an emotional word. In the wake of *Koontz*, property-rights lawyers will likely cast government decisions as "extortionate." Government lawyers will need to show why the label doesn't stick. Part of their task will be to help judges understand the principled, limited reach of the phrase "monetary exaction" by answering the key questions *Koontz* left open. But given that *Koontz* starts from the premise that governments extort property owners, another part of government lawyers' task will be to avoid feeding that perception through bad facts—which, the proverb holds, lead to bad law. The best way to do that is to counsel government clients to spot and avoid situations where they might be overreaching.

**Justice ALITO delivered the opinion of the Court.**

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 (District) believes that it circumvented *Nollan* and *Dolan* because of the way in which it structured its handling of a permit application submitted by Coy Koontz, Sr., whose estate is represented in this Court by Coy Koontz, Jr.[FN1] The District did not approve his 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.

FN1. For ease of reference, this opinion refers to both men as "petitioner."

**I**

**A**

In 1972, petitioner purchased an undeveloped 14.9–acre tract of land on the ***2592** 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 same year that petitioner purchased his property, Florida enacted the Water Resources Act, which 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." 1972 Fla. Laws ch. 72–299, pt. IV, § 1(5), pp. 1115, 1116 (codified as amended at 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." 1972 Fla. Laws § 4(1), at 1118 (codified as amended at Fla. Stat. § 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. 1984 Fla. Laws ch. 84–79, pt. VIII, § 403.905(1), pp. 204–205. 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. See Fla. Stat. § 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***2593** 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." App. 75.

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."

**B**

The Florida Circuit Court granted the District's motion to dismiss on the ground that petitioner had not adequately exhausted his state-administrative remedies, but the Florida

District Court of Appeal for the Fifth Circuit reversed. On remand, the State Circuit Court held a 2–day bench trial. 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. App. to Pet. for Cert. D–3. 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. *Id.*, at D–11. It accordingly held the District's actions unlawful under our decisions in *Nollan* and *Dolan*.

The Florida District Court affirmed, 5 So.3d 8 (2009), but the State Supreme Court reversed, 77 So.3d 1220 (2011). A majority of that court distinguished *Nollan* and *Dolan* on two grounds. First, the 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. 77 So.3d, at 1230. ***2594** 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. 77 So.3d, at 1229–1230. The majority acknowledged a division of authority over whether a demand for money can give rise to a claim under *Nollan* and *Dolan*, and sided with those courts that have said it cannot. 77 So.3d, at 1229–1230. Compare, *e.g.*, *McClung v. Sumner*, 548 F.3d 1219, 1228 (C.A.9 2008), with *Ehrlich v. Culver City*, 12 Cal.4th 854, 876, 50 Cal.Rptr.2d 242, 911 P.2d 429, 444 (1996); *Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620, 640–641 (Tex.2004). Two justices concurred in the result, arguing that petitioner had failed to exhaust his administrative remedies as required by state law before bringing an inverse condemnation suit that challenges the propriety of an agency action. 77 So.3d, at 1231–1232; see *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So.2d 153, 159 (Fla.1982).

Recognizing that the majority opinion rested on a question of federal constitutional law on which the lower courts are divided, we granted the petition for a writ of certiorari, 568 U.S. ——, 133 S.Ct. 420, 184 L.Ed.2d 251 (2012), and now reverse.

## II

### A

We have said in a variety of contexts that "the government may not deny a benefit to a person because he exercises a constitutional right." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983). See also, *e.g.*, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59–60, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 78, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990). In *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), for example, we held that a public college would violate a professor's freedom of speech if it declined to renew his contract because he was an outspoken critic of the college's administration. And in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974), we concluded that a county impermissibly burdened the right to travel by extending healthcare benefits only to those indigent sick who had been residents of the county for at least one year. Those 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 that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005); *Dolan*, 512 U.S., at 385, 114 S.Ct. 2309 (invoking "the well-settled doctrine of 'unconstitutional conditions' "). 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. See *id.*, at 384, 114 S.Ct. 2309; *Nollan*, 483 U.S., at 831, 107 S.Ct. 3141. ***2595** 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, 47 S.Ct. 114, 71 L.Ed. 303 (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. *Dolan*, *supra*, at 391, 114 S.Ct. 2309; *Nollan*, 483 U.S., at 837, 107 S.Ct. 3141. 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. *Ibid.* (internal quotation marks omitted). Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.

**B**

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. We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine. See, *e.g.*, *Perry*, 408 U.S., at 597, 92 S.Ct. 2694 (explaining that the government "*may not deny* a benefit to a person on a basis that infringes his constitutionally protected interests" (emphasis added)); *Memorial Hospital*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (finding unconstitutional condition where government denied healthcare

benefits). In so holding, we have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.

A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval. Under the Florida Supreme Court's approach, ***2596** a government order stating that a permit is "approved if" the owner turns over property would be subject to *Nollan* and *Dolan*, but an identical order that uses the words "denied until" would not. Our unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent. See *Frost & Frost Trucking Co. v. Railroad Comm'n of Cal.,* 271 U.S. 583, 592–593, 46 S.Ct. 605, 70 L.Ed. 1101 (1926) (invalidating regulation that required the petitioner to give up a constitutional right "as a condition precedent to the enjoyment of a privilege"); *Southern Pacific Co. v. Denton*, 146 U.S. 202, 207, 13 S.Ct. 44, 36 L.Ed. 942 (1892) (invalidating statute "requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution"). See also *Flower Mound,* 135 S.W.3d, at 639 ("The government cannot sidestep constitutional protections merely by rephrasing its decision from 'only if' to 'not unless' "). To do so here would effectively render *Nollan* and *Dolan* a dead letter.

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,' " 77 So.3d, at 1225 (quoting 5 So.3d, at 20 (Griffin, J., dissenting)); see also 77 So.3d, at 1229–1230, 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. See *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). Virtually all of our unconstitutional conditions cases involve a gratuitous governmental benefit of some kind. See, *e.g., Regan,* 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (tax benefits); *Memorial Hospital,* 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (healthcare); *Perry,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (public employment); *United States v. Butler,* 297 U.S. 1, 71, 56 S.Ct. 312, 80 L.Ed. 477 (1936) (crop payments); *Frost, supra* (business license). 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,* ***2597** 483 U.S., at 836–837, 107 S.Ct. 3141 (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").

That is not to say, however, that there is *no* relevant difference between a consummated taking and the denial of a permit based on an unconstitutionally extortionate demand. Where the permit is denied and the condition is never imposed, nothing has been taken. While the unconstitutional conditions doctrine recognizes that this *burdens* a constitutional right, the Fifth Amendment mandates a particular *remedy*—just compensation—only for takings. In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies. Because petitioner brought his claim pursuant to a state law cause of action, the Court has no occasion to discuss what remedies might be available for a *Nollan*/*Dolan* unconstitutional conditions violation either here or in other cases.

**C**

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. Most of respondent's objections to the posture of this case raise questions of Florida procedure that are not ours to decide. See *Mullaney v. Wilbur,* 421 U.S. 684, 691, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *Murdock v. Memphis,* 20 Wall. 590, 626, 22 L.Ed. 429 (1875). But to the extent that respondent suggests that the posture of this case creates some federal obstacle to adjudicating petitioner's unconstitutional conditions claim, we remand for the Florida courts to consider that argument in the first instance.

Respondent argues that we should affirm because, rather than suing for damages in the Florida trial court as authorized by Fla. Stat. § 373.617, petitioner should have first sought judicial review of the denial of his permit in the Florida appellate court under the State's Administrative Procedure Act, see §§ 120.68(1), (2) (2010). The Florida Supreme Court has said that the appellate court is the "proper forum to resolve" a "claim that an agency has *applied* a ... statute or rule in such a way that the aggrieved party's constitutional rights have been violated," *Key Haven Associated Enterprises*, 427 So.2d, at 158, and respondent has argued throughout this litigation that petitioner brought his unconstitutional conditions claim in the wrong forum. Two members of the Florida Supreme Court credited respondent's argument, 77 So.3d, at 1231–1232, but four others refused to address it. We decline respondent's invitation to second-guess a State Supreme Court's treatment of its own procedural law.

Respondent also contends that we should affirm because petitioner sued for damages but is at most entitled to an injunction ordering that his permit issue without any conditions. But we need not decide whether *federal* law authorizes plaintiffs to recover damages for unconstitutional conditions claims predicated on the Takings Clause because petitioner brought his claim under *state* law. Florida law allows property owners to sue for "damages" whenever a state agency's action is "an unreasonable exercise of the state's police

power constituting a taking ***2598** without just compensation." Fla. Stat. Ann. § 373.617. Whether that provision covers an unconstitutional conditions claim like the one at issue here is a question of state law that the Florida Supreme Court did not address and on which we will not opine.

For similar reasons, we decline to reach respondent's argument that its demands for property were too indefinite to give rise to liability under *Nollan* and *Dolan.* The Florida Supreme Court did not reach the question whether respondent issued a demand of sufficient concreteness to trigger the special protections of *Nollan* and *Dolan*. It relied instead on the Florida District Court of Appeals' characterization of respondent's behavior as a demand for *Nollan*/*Dolan* purposes. See 77 So.3d, at 1224 (quoting 5 So.3d, at 10). Whether that characterization is correct is beyond the scope of the questions the Court agreed to take up for review. If preserved, the issue remains open on remand for the Florida Supreme Court to address. This Court therefore has no occasion to consider how concrete and specific a demand must be to give rise to liability under *Nollan* and *Dolan.*

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.*

**III**

We turn to the Florida Supreme Court's alternative holding that petitioner's claim fails because respondent asked him to spend money rather than give up an easement on his land. A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing. See *Rumsfeld,* 547 U.S., at 59–60, 126 S.Ct. 1297. For that reason, we began our analysis in both *Nollan* and *Dolan* by observing that if the government had directly ***2599** seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking. See *Dolan,* 512 U.S., at 384, 114 S.Ct. 2309; *Nollan,* 483 U.S., at 831, 107 S.Ct. 3141. The Florida Supreme Court held that petitioner's claim fails at this first step because the subject of the exaction at issue here was money rather than a more tangible

interest in real property. 77 So.3d, at 1230. Respondent and the dissent take the same position, citing the concurring and dissenting opinions in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998), for the proposition that an obligation to spend money can never provide the basis for a takings claim. See *post*, at 2605 – 2607 (opinion of KAGAN, J.).

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*. Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value. 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*.

**A**

In *Eastern Enterprises, supra*, the United States retroactively imposed on a former mining company an obligation to pay for the medical benefits of retired miners and their families. A four-Justice plurality concluded that the statute's imposition of retroactive financial liability was so arbitrary that it violated the Takings Clause. *Id.*, at 529–537, 118 S.Ct. 2131. Although Justice KENNEDY concurred in the result on due process grounds, he joined four other Justices in dissent in arguing that the Takings Clause does not apply to government-imposed financial obligations that "d[o] not operate upon or alter an identified property interest." *Id.*, at 540, 118 S.Ct. 2131 (opinion concurring in judgment and dissenting in part); see *id.*, at 554–556, 118 S.Ct. 2131 (BREYER, J., dissenting) ("The 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property"). Relying on the concurrence and dissent in *Eastern Enterprises*, respondent argues that a requirement that petitioner spend money improving public lands could not give rise to a taking.

Respondent's argument rests on a mistaken premise. Unlike the financial obligation in *Eastern Enterprises*, the demand for money at issue here did "operate upon ... an identified property interest" by directing the owner of a particular piece of property to make a monetary payment. *Id.*, at 540, 118 S.Ct. 2131 (opinion of KENNEDY, J.). In this case, unlike *Eastern Enterprises*, the monetary obligation burdened petitioner's ownership of a specific parcel of land. In that sense, this case bears resemblance to our cases holding that the government must pay just compensation when it takes a lien—a right to receive money that is secured by a particular piece of property. See *Armstrong v. United States*, 364 U.S. 40, 44–49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960); ***2600** *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601–602, 55 S.Ct. 854, 79 L.Ed. 1593 (1935); *United States v. Security Industrial Bank*, 459 U.S. 70, 77–78, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982); see also *Palm Beach Cty. v. Cove Club Investors Ltd.*, 734 So.2d 379, 383–384 (Fla.1999) (the right to receive income from land is an interest in real property under Florida law). The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property.[FN2] Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan* : the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental

ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.

> FN2. Thus, because the proposed offsite mitigation obligation in this case was tied to a particular parcel of land, this case does not implicate the question whether monetary exactions must be tied to a particular parcel of land in order to constitute a taking. That is so even when the demand is considered "*outside* the permitting process." *Post*, at 2607 (KAGAN, J., dissenting). The unconstitutional conditions analysis requires us to set aside petitioner's *permit application*, not his ownership of a particular parcel of real property.

In this case, moreover, petitioner does not ask us to hold that the government can commit a *regulatory* taking by directing someone to spend money. As a result, we need not apply *Penn Central* 's "essentially ad hoc, factual inquir[y]," 438 U.S., at 124, 98 S.Ct. 2646, at all, much less extend that "already difficult and uncertain rule" to the "vast category of cases" in which someone believes that a regulation is too costly. *Eastern Enterprises*, 524 U.S., at 542, 118 S.Ct. 2131 (opinion of KENNEDY, J.). Instead, petitioner's claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a "*per se* [takings] approach" is the proper mode of analysis under the Court's precedent. *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 235, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003).

Finally, it bears emphasis that petitioner's claim does not implicate "normative considerations about the wisdom of government decisions." *Eastern Enterprises*, 524 U.S., at 545, 118 S.Ct. 2131 (opinion of KENNEDY, J.). We are not here concerned with whether it would be "arbitrary or unfair" for respondent to order a landowner to make improvements to public lands that are nearby. *Id.*, at 554, 118 S.Ct. 2131 (BREYER, J., dissenting). Whatever the wisdom of such a policy, it would transfer an interest in property from the landowner to the government. For that reason, any such demand would amount to a *per se* taking similar to the taking of an easement or a lien. Cf. *Dolan*, 512 U.S., at 384, 114 S.Ct. 2309; *Nollan*, 483 U.S., at 831, 107 S.Ct. 3141.

**B**

Respondent and the dissent argue that if monetary exactions are made subject to scrutiny under *Nollan* and *Dolan*, then there will be no principled way of distinguishing impermissible land-use exactions from property taxes. See *post*, at 2607 – 2608. We think they exaggerate both the extent to which that problem is unique to the land-use permitting context and the practical difficulty of distinguishing between the power to tax and the power to take by eminent domain.

It is beyond dispute that "[t]axes and user fees ... are not 'takings.' " ***2601** *Brown, supra*, at 243, n. 2, 123 S.Ct. 1406 (SCALIA, J., dissenting). We said as much in *County of Mobile v. Kimball*, 102 U.S. 691, 703, 26 L.Ed. 238 (1881), and our cases have been clear on that point ever since. *United States v. Sperry Corp.*, 493 U.S. 52, 62, n. 9, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989); see *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44, 54 S.Ct. 599, 78 L.Ed. 1109 (1934); *Dane v. Jackson*, 256 U.S. 589, 599, 41 S.Ct. 566, 65 L.Ed. 1107 (1921); *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 614–615, 19 S.Ct. 553, 43 L.Ed. 823 (1899). 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.

At the same time, we have repeatedly

found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax. Most recently, in *Brown, supra*, at 232, 123 S.Ct. 1406, we were unanimous in concluding that a State Supreme Court's seizure of the interest on client funds held in escrow was a taking despite the unquestionable constitutional propriety of a tax that would have raised exactly the same revenue. Our holding in *Brown* followed from *Phillips v. Washington Legal Foundation,* 524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980), two earlier cases in which we treated confiscations of money as takings despite their functional similarity to a tax. Perhaps most closely analogous to the present case, we have repeatedly held that the government takes property when it seizes liens, and in so ruling we have never considered whether the government could have achieved an economically equivalent result through taxation. *Armstrong,* 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554; *Louisville Joint Stock Land Bank,* 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593.

Two facts emerge from those cases. The first is that the need to distinguish taxes from takings is not a creature of our holding today that monetary exactions are subject to scrutiny under *Nollan* and *Dolan*. Rather, the problem is inherent in this Court's long-settled view that property the government could constitutionally demand through its taxing power can also be taken by eminent domain.

Second, our cases show that teasing out the difference between taxes and takings is more difficult in theory than in practice. *Brown* is illustrative. Similar to respondent in this case, the respondents in *Brown* argued that extending the protections of the Takings Clause to a bank account would open a Pandora's Box of constitutional challenges to taxes. Brief for Respondents Washington Legal Foundation et al. 32 and Brief for Respondent Justices of the Washington Supreme Court 22, in *Brown v. Legal Foundation of Wash.*, O.T. 2002, No. 01–1325. But also like respondent here, the *Brown* respondents never claimed that they were exercising their power to levy taxes when they took the petitioners' property. Any such argument would have been implausible under state law; in Washington, taxes are levied by the legislature, not the courts. See 538 U.S., at 242, n. 2, 123 S.Ct. 1406 (SCALIA, J., dissenting).

The same dynamic is at work in this case because Florida law greatly circumscribes respondent's power to tax. See Fla. Stat. Ann. § 373.503 (authorizing respondent to impose ad valorem tax on properties within its jurisdiction); § 373.109 (authorizing respondent to charge permit application fees but providing that such fees "shall not exceed the ***2602** cost ... for processing, monitoring, and inspecting for compliance with the permit"). If respondent had argued that its demand for money was a tax, it would have effectively conceded that its denial of petitioner's permit was improper under Florida law. Far from making that concession, respondent has maintained throughout this litigation that it considered petitioner's money to be a substitute for his deeding to the public a conservation easement on a larger parcel of undeveloped land.[FN3]

> FN3. Citing cases in which state courts have treated similar governmental demands for money differently, the dissent predicts that courts will "struggle to draw a coherent boundary" between taxes and excessive demands for money that violate *Nollan* and *Dolan*. *Post,* at 2608. But the cases the dissent cites illustrate how the frequent need to decide whether a particular demand for money qualifies as a tax under state law, and the resulting state statutes and judicial precedents on point, greatly reduce the practical

> difficulty of resolving the same issue in federal constitutional cases like this one.

This case does not require us to say more. We need not decide at precisely what point a land-use permitting charge denominated by the government as a "tax" becomes "so arbitrary ... that it was not the exertion of taxation but a confiscation of property." *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1, 24–25, 36 S.Ct. 236, 60 L.Ed. 493 (1916). For present purposes, it suffices to say that despite having long recognized that "the power of taxation should not be confused with the power of eminent domain," *Houck v. Little River Drainage Dist.*, 239 U.S. 254, 264, 36 S.Ct. 58, 60 L.Ed. 266 (1915), we have had little trouble distinguishing between the two.

**C**

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. *Post*, at 2606 – 2607. 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*, 165 Ill.2d 25, 31–32, 208 Ill.Dec. 328, 649 N.E.2d 384, 388–389 (1995); *Home Builders Assn. v. Beavercreek*, 89 Ohio St.3d 121, 128, 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. *Post*, at 2607. That is hardly surprising, for the dissent is correct that state law normally provides an independent check on excessive land use permitting fees. *Post*, at 2608 – 2609.

The dissent criticizes the notion that the Federal Constitution places any meaningful limits on "whether one town is overcharging for sewage, or another is setting the price to sell liquor too high." *Post*, at 2607. But only two pages later, it identifies three constraints on land use permitting fees that it says the Federal Constitution imposes and suggests that the additional protections of *Nollan* and *Dolan* are not needed. *Post*, at 2608 – 2609. In any event, the dissent's argument that land use permit applicants need no further protection when the government demands money is really an argument for overruling *Nollan* and *Dolan*. After all, the Due Process Clause protected the Nollans from an unfair allocation of public burdens, and they too could have argued that the government's demand for property amounted to a taking under the *Penn Central* framework. See *Nollan*, 483 U.S., at 838, 107 S.Ct. 3141. We have repeatedly rejected the dissent's contention that other constitutional doctrines ***2603** leave no room for the nexus and rough proportionality requirements of *Nollan* and *Dolan*. Mindful of the special vulnerability of land use permit applicants to extortionate demands for money, we do so again today.

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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.

*It is so ordered.*