The *Koontz* Case: Implications in Washington State

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INTRODUCTION

The U.S. Supreme Court's recent decision in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), is one of the most significant Takings Clause decisions in decades.[1] In broad terms, the decision recognizes that the Takings Clause places strict limits on the municipal practice of exacting money (*e.g.*, "impact fees") from land-use applicants. The opinion holds that the government cannot use the permit process to compel landowners to give up land, money, or any other property as the "price" of obtaining development approval, unless the government can show that its demand is necessary to mitigate for some harmful impact caused by the proposed land use. The implications for Washington land-use law promise to be significant due to the fact that *Koontz* clarified several points of law that have confounded courts, practitioners, and scholars for years.

I. The Background: Constitutional Standards and Lower Court Splits

The *Koontz* case arose when Coy Koontz, Sr., sought permission to develop a small portion of his 14.9 acre undeveloped, commercial property located at the intersection of two major highways in Orlando.[2] The St. Johns River Water Management District ("the District"), a Florida land-use agency had designated his property a critical wetland, and demanded that, in addition to dedicating 11 acres of his land in a conservation easement, Mr. Koontz pay upwards of $150,000 to improve 50 acres of state-owned property miles away from his proposed development as a mandatory condition of receiving his permits.[3] When Mr. Koontz objected that the off-site mitigation demand was excessive, the agency denied his permits, rendering his property unusable.

Mr. Koontz filed a lawsuit in a Florida trial court, challenging the agency's off-site mitigation demand under two U.S. Supreme Court cases, *Nollan v. California Coastal Commission*[4] and *Dolan v. City of Tigard*.[5] Together, those cases hold that the government cannot condition approval of a land-use permit on a requirement that the owner dedicate private property to the public, unless the dedication is necessary to mitigate for impacts caused by the proposed development. A demand that does not satisfy those tests is simply an attempt to take property without payment of just compensation, and violates the Takings Clause.

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[1] U.S. Const. amend. V ("Nor shall private property be taken for public use, without just compensation.").

[2] Zoned for commercial use, the property is located in an area of intense residential and commercial development adjacent to State Road 50, a major arterial, and immediately east of Florida's East-West Expressway (S.R. 408). A drainage ditch that channels storm water runoff from the highway runs along the property's western edge. And an easement for high-voltage power lines is located about 300 feet south of the highway, bisecting the lot into northern and southern segments. *Koontz*, 133 S. Ct. at 2591-92.

[3] Florida's inclusion of portions of Mr. Koontz's land in the Riparian Habitat Protection Zone did not mean the land contained wetlands and/or riparian habitat. Instead, the designation created a legal presumption that any use of land within the zone would be harmful to such habitat, therefore requiring affected landowners to obtain environmental permits from the District. *See* Fla. Admin. Code r. 40C-4.301(2)(a)7; Fla. Admin. Code r. 40C-4.301(1), (2); Fla. Admin. Code r. 40C-41.063(5)(d)1, 4.

[4] 483 U.S. 825 (1987).

[5] 512 U.S. 374 (1994).

In *Nollan*, the California Coastal Commission required the Nollans, owners of beach-front property, to dedicate to the public an easement over their private beach as a condition of obtaining a permit to rebuild their home.[6] The Commission justified the dedication on the grounds that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a "wall" of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit,'" and would "increase private use of the shorefront."[7] The Nollans refused to accept the condition and brought a federal taking claim against the Commission in state court, arguing that the condition violated the Takings Clause because it bore no connection to the impact of their proposed remodel. The U.S. Supreme Court agreed, holding that the easement condition was invalid because it lacked an "essential nexus" to the alleged harmful impact.[8]

In *Dolan*, the City of Tigard imposed conditions on Florence Dolan's permit to expand her plumbing and electrical supply store that required her to dedicate some of her land for flood-control and a bicycle path.[9] Ms. Dolan refused the conditions and sued the city in state court, alleging that the development conditions violated the Takings Clause and should be enjoined. On review, the U.S. Supreme Court held that the City established a connection between both conditions and the impact of Ms. Dolan's proposed expansion under the nexus test, but nevertheless held that the conditions were unconstitutional. Even where a nexus exists, there still must be a "degree of connection between the exactions and the projected impact of the proposed development."[10] There must be rough proportionality—*i.e.*, "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[11] The *Dolan* Court held that the city had not demonstrated that the conditions were roughly proportional to the impact of Ms. Dolan's expansion and invalidated the permit conditions as violations of the Takings Clause.[12]

It would seem, therefore, that *Nollan* and *Dolan* would have provided an easy solution for Mr. Koontz. But, over the years, agencies devised ways to get around the constitutional requirements. For example, instead of demanding an interest in real property, agencies began imposing monetary obligations—*i.e.*, requirements that property owners pay a fee in lieu of the desired property dedication as a condition of obtaining a land-use permit. That strategy was successful in many jurisdictions. Because *Nollan* and *Dolan* involved interests in real property, and not monetary obligations, numerous courts held that the government did not have to demonstrate nexus and rough proportionality when exacting money or other non-real property

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[6] 483 U.S. at 827-28.
[7] *Id.* at 828-29 (quoting Commission).
[8] *Id.* at 837.
[9] 512 U.S. at 377.
[10] *Id.* at 386.
[11] *Id.* at 391.
[12] *Id.*

from land-use applicants.[13] Thus, at the time Mr. Koontz's case was winding its way through the courts, there was a significant split of authority about whether or not the Takings Clause protects a person's money to the same degree that it protects a person's land.[14]

The split of authority directly impacted Mr. Koontz's rights. The Florida trial and appellate courts concluded that the District's permit condition was subject to *Nollan* and *Dolan*, and found the demand for 50 acres of off-site mitigation to be unconstitutional because it lacked the necessary connection to any impacts of the development. The Florida Supreme Court disagreed and reversed the lower court decisions:

> [W]e hold that under the takings clauses of the United States and Florida Constitutions, the *Nollan/Dolan* rule with regard to "essential nexus" and "rough proportionality" is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed.[15]

The U.S. Supreme Court took review of the case in order to settle questions of federal constitutional law decided by the Florida court.[16]

II. Arguments of the Parties

Most of the parties' arguments were focused on characterizing the nexus and rough proportionality tests amongst the Supreme Court's case law, and explaining how the character of the tests impacts the parties' substantive and procedural rights. Mr. Koontz argued that the District's demand that he finance improvements to the government's property as a condition of permit approval was an exaction implicating the Takings Clause and, therefore, triggering review under the unconstitutional conditions doctrine. The doctrine, Mr. Koontz explained, has long been a staple of the U.S. Supreme Court's jurisprudence.[17] In its most basic formulation, the doctrine provides that government may not grant an individual a benefit or permit on the

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[13] *See*, *e.g., West Linn Corp. Park, LLC v. City of West Linn*, 428 Fed. Appx. 700 (9th Cir. 2011); *West Linn Corp. Park, LLC v. City of West Linn*, 240 P.3d 29, 45 (Or. 2010); *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008); *see also* Richard Epstein, *Introduction: The Harms and Benefits of* Nollan *and* Dolan, 15 N. Ill. U. L. Rev. 477, 492 (1995) (The lower courts "worked a pretty thorough nullification of *Nollan*, which was dutifully confined to its particular facts.").

[14] *Koontz*, 133 S. Ct. at 2594.

[15] *St. Johns River Water Mgmt. Distr. v. Koontz*, 77 So.3d 1220, 1230 (Fla. 2011)

[16] *Koontz*, 133 S. Ct. at 2594.

[17] *See Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 593-94 (1926) (Sutherland, J.) ("[T]he power of the state […] is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence."); *see also Doyle v. Continental Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) ("Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, *it has no power to impose unconstitutional conditions upon their doing so*.") (emphasis added).

condition that he surrender another constitutional right.[18] The doctrine shields citizens who seek a government benefit or permit from government "deals" that would strip them of their constitutionally protected rights, including the right to free speech, the right to free exercise of religion, and the right to be free from unreasonable searches.[19] Mr. Koontz argued that the Court made the doctrine applicable to the land-use permitting context in *Nollan* and *Dolan*.

As for the Florida Supreme Court's conclusion that monetary exactions are not subject to the same scrutiny as demands for real property, Mr. Koontz contended that nothing in the unconstitutional conditions doctrine, the Takings Clause, *Nollan*, or *Dolan* recognizes a relevant distinction among the *types* of permit exaction subject to the nexus and rough proportionality limitations. Government demands for real or personal property—both categories of property protected by the Takings Clause—are subject to the same limitations.

Application of the nexus and proportionality limitations does not depend upon *when* in the permit process the exaction is imposed. A decision to deny a permit application based on refusal to accede to an unlawful exaction and a decision to approve a permit application subject to acceptance of an unlawful exaction are substantively identical: In both cases, no permit issues unless and until the permit applicant agrees to waive his right to compensation for the confiscated property.

The District did not respond to Mr. Koontz's arguments based on the unconstitutional conditions doctrine. Instead, it characterized *Nollan* and *Dolan* as establishing a regulatory takings test—a distinctly different cause of action. The District then explained that a fundamental prerequisite of a regulatory takings claim is that the government has *in fact* taken property, either directly or through burdensome regulatory measures. Because the District denied Mr. Koontz's permit applications, the exaction remained unfulfilled and no taking had, in fact, occurred. Thus, the District insisted that its demand, which had formed the basis of its permit denial, cannot be subject to heightened scrutiny under the nexus and rough proportionality standards. Alternatively, the District argued that, as a matter of black letter law, a government demand obligating an individual to spend money on a public project can never result in a taking.

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[18] The doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz*, 133 S. Ct. at 2594; *see also* Richard A. Epstein, *Bargaining with the State* 5 (1993) (The doctrine holds that even if the government has absolute discretion to grant or deny any individual a privilege or benefit—such as a land-use permit, "it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

[19] James Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 407 (2009) (The unconstitutional conditions doctrine has been invoked in a wide range of cases in which "government has traded with people for their right to free speech, their right to freedom of religion, their right to be free from unreasonable searches, their right to equal protection, and their right to due process of law.").

III. The Decision

On June 25, 2013, the U.S. Supreme Court issued its opinion in the case, ruling in favor of Mr. Koontz on both questions. Justice Alito wrote the opinion for the Court, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. Justice Kagan filed an opinion concurring in part and dissenting in part, which was joined by Justices Ginsburg, Breyer, and Sotomayor.

The Court unanimously agreed that the nexus and proportionality tests of *Nollan* and *Dolan* constitute "'a special application' of the [unconstitutional conditions] doctrine that that protects the Fifth Amendment right to just compensation for property that the government takes when owners apply for land-use permits."[20] The Court explained that the nexus and proportionality tests place a limit on the government's authority to condition approval of a land use permit upon a dedication of property to a public purpose.[21] If a condition satisfies the tests, it is lawful; if not, it is unconstitutional.[22] The principles that undergird that rule "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."[23] Thus, the Court held "that a demand for property from a land-use permit applicant must satisfy the requirements of Nollan and Dolan even when the government denies the permit[.]"[24]

The Court split 5-4 on the question whether a demand for money is subject to *Nollan* and *Dolan*. The majority opinion ruled that a permit condition demanding money must satisfy nexus and proportionality.[25] The dissent, however, opined that different types of property should be provided differing degrees of protection under the Takings Clause.[26] Thus, while a demand for real property may be properly subject to heightened scrutiny under *Nollan* and *Dolan*, the dissent suggested that a demand for money should be subject to less scrutiny—if any at all.[27] The Court ultimately reversed and remanded the case for the Florida state courts to enter a decision consistent with the U.S. Supreme Court's opinion and to determine whether the District had preserved a series of factual and state-law questions for further consideration.[28]

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[20] *Koontz*, 133 S. Ct. at 2599.
[21] *Id*. at 2595.
[22] *Id*.
[23] *Id*. (A "contrary rule would be especially untenable … 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. … and would effectively render *Nollan* and *Dolan* a dead letter.").
[24] *Koontz*, 133 S. Ct. at 2603; *see also id*. at 2603 (Kagan, J., dissenting) ("I think the Court gets the first question it addresses right.").
[25] *Koontz*, 133 S. Ct. at 2603.
[26] *Koontz*, 133 S. Ct. at 2604-09 (Kagan, J., dissenting).
[27] *Id*. at 2609 n.3.
[28] *Id*. at 2603. In its briefing to the U.S. Supreme Court, the District argued that Mr. Koontz had "sued in the wrong court, for the wrong remedy, and at the wrong time" based on a variety of state law issues, such as administrative exhaustion, statutory remedies, and factual disputes. *Id*. at 2597. The Court declined to address those arguments,

IV. Implications for Washington

Already, commentators on both sides of the property rights debate are calling *Koontz* one of the most significant and far reaching property rights decisions in recent history.[29] Most of those proclamations focus on the immediate impact that the decision will have on the permitting process. But two legal issues decided in the case will likely make *Koontz* a long-lasting and important precedent for property owners. First, the Court's decision to resolve *Koontz* under the doctrine of unconstitutional conditions will provide aggrieved landowners with a cause of action that is substantively and procedurally distinct from a regulatory taking or due process claim. And second, the majority opinion recognized that one's money is private property subject to the protections of the Takings Clause, bringing an end to the argument that some types of property should be given less protection against uncompensated takings than other types of property.

Some critics, including the dissenting Justices, predict that the Court will come to "rue" its decision once it becomes apparent that subjecting impact fees to heightened scrutiny will "wreck land use permitting throughout the country".[30] Such an extreme reaction, however, is overblown and unwarranted. Jurisdictions across the nation have subjected monetary exactions to *Nollan* and *Dolan* scrutiny for decades.[31] And studies on the impact of *Nollan* and *Dolan* have repeatedly shown that subjecting exactions to heightened scrutiny does not forestall land-use regulation, permitting, or the practice of conditioning permit approvals.[32] Nonetheless, it is

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remanding them for the Florida state courts to determine whether they had been preserved and, if so, to resolve them. *Id*. at 2603.

[29] *See* Sophia M. Standyk, *A Fistful of Dollars—Exactions and Extortion*, 65(9) Planning & Envt'l Law 4, 4 (2013) ("*Koontz* represents a sea change in the rules[.]"); Ilya Somin, *Two Steps Forward for the 'Poor Relation' of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, George Mason Law & Economics Research Paper No. 13-48 (2013 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325529); John Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, Vermont Law School Faculty Working paper No. 28-13 (2013) (draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316406).

[30] *Koontz*, 133 S. Ct. at 2610.

[31] *See*, *e.g.*, *Toll Bros., Inc. v. Board of Chosen Freeholders of Burlington*, 944 A.2d 1, 4 (N.J. 2008); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 635, 639-40, 641-42 (Tex. 2004); *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821, 825 (N.Y. 2003), *cert. denied*, 541 U.S. 974 (2004)*; Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, 697-98 (Colo. 2001); *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 353-56 (Ohio 2000); *Benchmark Land Co. v. City of Battleground*, 972 P.2d 944, 950-51 (Wash. Ct. App. 2000); *aff'd*, 49 P.3d 860 (2002) (affirmed on sub-constitutional grounds); *Dowerk v. Charter Township of Oxford*, 592 N.W.2d 724, 728 (Mich. App. 1998); *Curtis v. Town of South Thomaston*, 708 A.2d 547, 660 (Maine 1998); *National Association of Home Builders of the United States v. Chesterfield County*, 907 F. Supp. 166, 167 (E.D. Va. 1995), *aff'd*, 92 F.3d 1180 (4th Cir. Va., 1996) (unpublished), *cert. denied*, 519 U.S. 1056 (1997); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995).

[32] *See* Steven P. Frank, *Yes in My Backyard: Developers, Government and Communities Working Together Through Development Agreements and Community Benefit Agreements*, 42 Ind. L. Rev. 227, 227 (2009) ("[D]irect negotiations between developers and local government are growing in prominence as a means of dispute resolution."); David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After* Nollan *and* Dolan, 51 Case W. Res. L. Rev. 663, 663 (2001) ("Formal agreements between landowners and local government respecting the use of land

beyond question that *Koontz* will have major implications for land-use planning and permitting. In Washington, which has a well-developed body of case law applying the nexus and proportionality tests to a variety of permit conditions, *Koontz* will mark a sea change in how an exactions case will be litigated.

A. *Koontz* Recognizes a Cause of Action for a Violation of the Doctrine of Unconstitutional Conditions

One of the most immediate impacts that *Koontz* will have on Washington practice is due to the Court's confirmation that the *Nollan* and *Dolan* tests constituted a special application of the unconstitutional conditions doctrine in the context of land-use permitting. Washington cases have applied the nexus and proportionality tests as (1) a regulatory takings doctrine,[33] (2) a due process doctrine,[34] or (3) statutory standards limiting local government authority to impose impact fees under RCW 82.02.020.[35] *Koontz* charts a different course by recognizing a claim that is substantively and procedurally distinct from the causes of action previously considered by Washington courts.[36]

Properly applied, the nexus and proportionality tests operate to address the realities of the permitting process. Permitting agencies enjoy broad discretion in considering development applications. When properly applied, an agency's permitting authority allows the government to demand that the owner mitigate for any negative impacts caused by a proposed development. But that same discretion can result in demands for dedications of property so onerous that, outside the exactions context, they would be deemed takings.[37] Such unfettered power exposes landowners to the type of unlawful coercion that the unconstitutional conditions doctrine protects against:

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have increased substantially over the past twenty-five years."); Ann E. Carlson & Daniel Pollack, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. Davis L. Rev. 103, 105 (2001) (concluding that despite initial "fears about the potentially chilling effects on land use practices . . . [t]he decisions seem to have nudged many localities into more systematic, comprehensive planning through the preparation of reports and studies justifying and documenting the rationale for exacting money or land from developers.").

[33] *Sparks v. Douglas Cnty.*, 127 Wn.2d 901, 908 (1995); *Burton v. Clark County*, 91 Wn. App. 505, 530 (1998).

[34] *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250 (2011).

[35] *See Trimen Dev. Co. v. King County*, 124 Wn. 2d 261 (1994); *Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649 (2008); *Cobb v. Snohomish County*, 64 Wn. App. 451 (1991).

[36] It appears that the Washington Supreme Court has never applied the unconstitutional conditions doctrine in the civil context, having only addressed the doctrine in dissent. *Van Dyke v. Thompson*, 95 Wn.2d 726 (1981) (Utter, J., concurring/dissenting) (Arguing that a rule conditioning the right to an administrative hearing upon payment of disputed money violates the doctrine.).

[37] *Dolan*, 512 U.S. at 384 ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred."); *Nollan*, 483 U.S. at 831 ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.").

> [L]and-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. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.[38]

Nollan and *Dolan* address 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."[39]

B. Substantive and Procedural Distinctions

1. Permit Conditions are Subject to Heightened Scrutiny

Koontz confirms that the nexus and proportionality standards require that courts subject challenged exactions to heightened scrutiny.[40] Washington courts, however, have been inconsistent in their application of *Nollan* and *Dolan*. Several cases recognize that the tests require elevated scrutiny.[41] But many decisions have treated the nexus and proportionality standards as rational basis tests.[42] For example, Division II of the Court of Appeals misapplied /misconstrued the *Nollan* and *Dolan* test as only requiring that the government demonstrate that a development condition be "reasonably necessary to achieve a legitimate government objective."[43] Any argument for a more lenient standard based should be foreclosed by *Koontz*.

2. Regulatory Takings Theories are Inapplicable

The distinction between a regulatory taking and a violation of the unconstitutional conditions doctrine raises a fine—but extremely important—point. The U.S. Supreme Court's regulatory takings theories focus on the degree to which the government interferes with an owner's rights in his or her property.[44] Over the years, the Court has developed several different

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[38] *Koontz*, 133 S. Ct. at 2594-95.
[39] *Id*. at 2595.
[40] *See*, *e.g.*, *Koontz*, 133 S. Ct. at 2604 (dissent).
[41] *See*, *e.g.*, *Sparks*, 127 Wn.2d 901; *Burton*, 91 Wn. App. 505.
[42] *See* Brian T. Hodges & Daniel A. Himebaugh, *Have Washington Courts Lost Essential Nexus to the Precautionary Principle?* Citizens' Alliance for Property Rights v. Sims, 40 Envt'l L. Rev. 829 (2010) (discussing Divisions I's misapplication of the nexus test as a rational basis test designed to determine whether an exaction is reasonably calculated to advance a government objective, rather than a test to determine whether the exaction is calculated to mitigate for an adverse impact caused by the proposed development).
[43] *See Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 272-74 (2011).
[44] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-38 (2005).

tests for determining when the government interference "goes too far" and effectively appropriates a person's rights in his or her property.[45] Unlike a claim for a regulatory taking, a property owner alleging a violation of the unconstitutional conditions doctrine need not show that the government actually exercised control over the demanded property.[46] Instead, the owner only needs to show that the demand, *if imposed directly*, would entitle the owner to just compensation.

As Justice Alito explained in the majority opinion, "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*."[47] Properly understood, the unconstitutional conditions doctrine defines a constitutional limitation on government authority. Thus, a violation of the doctrine occurs—and is ripe for review—the moment the government conditions a permit approval on an unlawful demand: "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."[48] And because the demand itself causes the injury, it does not matter whether the government ultimately succeeds in pressuring someone into forfeiting property as the "price" of securing a permit approval:

> [R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.[49]

It is, therefore, irrelevant whether the government could have denied the permit outright for some other reason because the "greater authority [to approve or deny a permit] does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights."[50]

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[45] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Two regulatory takings theories focus on "the severity of the burden that government imposes upon private property rights"—an inquiry that implicates questions about the extent of the economic impact of regulation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (regulation depriving property owner of all "economically beneficial use" of land effects a per se taking); *Penn Central Transp. Co. v. New York*, 483 U.S. 104, 124 (1970) (creating a multi-factor test for non-categorical regulatory takings designed to determine the extent of a regulation's impact on an owner's reasonable investment backed expectations). Another theory holds that just compensation is required if a regulation authorizes a physical occupation of private property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[46] *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005) (discussing the various regulatory takings theories).

[47] *Koontz*, 133 S. Ct. at 2596 (emphasis added).

[48] *Id*.

[49] *Id*. at 2595.

[50] *Id*. at 2596.

3. Due Process is Inapplicable

The *Koontz* decision will also foreclose courts from treating the nexus and proportionality tests as due process standards, where development conditions would be subject to minimal scrutiny determining whether the exaction advances a legitimate government interest.[51]

4. RCW 82.02.020 May Still Have Limited Applicability

Washington courts have long held that the nexus and proportionality standards were incorporated into the impact fee statute, RCW 82.02.020, which prohibits local governments from imposing taxes, fees, or charges on land development, unless those fees satisfy certain narrow exceptions:[52]

> Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation *shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings . . . or on the development, subdivision, classification, or reclassification of land.* However, this section does not preclude dedications of land or easements within the proposed development or plat which the county, city, town, or other municipal corporation can *demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply.*[53]

While RCW 82.02.020 will likely remain relevant as a tool for challenging permit conditions—due to the doctrine of avoidance of constitutional questions—its utility and applicability have diminished in recent years. For example, in *Citizens for Rational Shoreline Planning v. Whatcom County*, the Washington Supreme Court held that RCW 82.02.020 does not apply to mandatory permit conditions contained in a local government's shoreline regulations (because local shoreline plans are "state laws" and RCW 82.02.020 only applies to acts of local governments).[54] Similarly, in *Drebick v. City of Olympia*, discussed in more detail below, the Washington Supreme Court held that RCW 82.02.020 only applies to limited categories of impact fees.[55] Thus, *Koontz* should provide additional protection for landowners to challenge permit conditions beyond the purview of RCW 82.02.020.

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[51] *Kitsap Alliance of Prop. Owners*, 160 Wn. App. at 272.
[52] Wash. Rev. Code Ann. § 82.02.020 (West 2009); *see Isla Verde Int'l Holdings v. City of Camas*, 146 Wn. 2d 740, 753 (2002); *Sparks*, 127 Wash. 2d at 913 (adopting *Dolan* for RCW 82.02.020 analysis); *Trimen*, 124 Wn. 2d at 274 (finding exaction must satisfy *Dolan* rough proportionality test); *Cobb*, 64 Wash. App. at 467-68 (adopting *Nollan* for RCW 82.02.020 analysis); *see also* David L. Callies & Glenn H. Sonoda, *Providing Infrastructure for Smart Growth: Land Development Conditions*, 43 IDAHO L. REV. 351, 368 (2007) (discussing various state legislative applications of *Nollan* and *Dolan*).
[53] Wash. Rev. Code Ann. § 82.02.020 (West 2009) (emphasis added).
[54] 172 Wn.2d 384 (2011).
[55] 156 Wn.2d 289 (2006).

4. *Koontz* Limits/Expands Available Remedies

Typically, the remedy for a violation of *Nollan* and *Dolan* is invalidation of the permit condition and issuance of the land-use permit.[56] Washington courts have not had the occasion to consider other possible remedies. [57]

The fact that property need not actually be taken for the government to violate the unconstitutional conditions doctrine means that just compensation—a remedy mandated by the Takings Clause—will not always be available. [58]

In some cases, a permit condition will be consummated and property will change hands. In that circumstance, just compensation may be an appropriate remedy.[59] But where a permit is denied based on an owner's objection to an unlawful condition and the owner is not deprived of a property interest, a taking is not consummated and just compensation may not be available as a remedy.[60]

That is not to say, however, that there is no remedy when a permit is denied—far from it. Typically, the remedy for a violation of the unconstitutional conditions doctrine is issuance of the land-use permit without the unlawful exaction.[61] The *Koontz* decision, however, recognizes the government may also incur liability under state or federal statutes when it imposes a condition that burdens a property interest.[62]

A Washington landowner will have a variety of options for bringing a *Koontz* claim. If invalidation is sought, the property owner can allege that the exaction violates his or her constitutional rights under the Land Use Petition Act (LUPA).[63] If the case arises outside the scope of LUPA, the landowner could file a declaratory judgment action (similar to the *Citizens' Alliance for Property Rights v. Sims* lawsuit).

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[56] *Id*. at 2597; *id*. at 2603 (dissent).
[57] *See Burton v. Clark County*, 91 Wash. App. 505, 530 (1998) (holding that a landowner who successfully challenges an excessive exaction was not entitled to damages or attorney's fees because the issue was not adequately addressed in pleadings); *Isla Verde Int'l Holdings v. City of Camas*, 147 Wn. App. 454 (2008) (holding that damages under RCW 64.40 were not available because the state of the law regarding *Nollan* and *Dolan* was uncertain at the time the government imposed an unlawful exaction).
[58] *Id*. at 2597
[59] *Id*.
[60] *Id*.
[61] *Id*. at 2597; *id*. at 2603 (dissent).
[62] *Id*. at 2597. This conclusion is not unprecedented. On remand, the plaintiff in *Dolan* sought damages under 42 U.S.C. ' 1983, alleging that the city's unconstitutional conditions unlawfully burdened her property rights. The city settled the lawsuit for $1.4 million. *See* inversecondemntaion.com, *Regulatory Takings Pilgrimage, Part II* (http://www.inversecondemnation.com/inversecondemnation/2011/05/regulatory-takings-pilgrimage-part-ii.html) (last visited Sept. 17, 2013).
[63] RCW 36.70C.130(1)(f).

If damages are sought, the property owner can file a claim under RCW 64.40 or 42 U.S.C. ' 1983. Of course, an RCW 64.40 claim exposes the landowner to a host of problems, including a limitation on recoverable damages, a shifting attorney fee provision, time limitations, and limited applicability.[64] More than likely, experienced practitioners will seek damages under 42 U.S.C. ' 1983, alleging that an exaction deprived him or her of rights secured by the U.S. Constitution.[65] The *Koontz* majority seems to support such a claim: "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."[66]

6. *Koontz* Provides a Safe Harbor for Permitting Agencies

One aspect of the *Koontz* decision that should not go unnoticed by government or landowners is the Court's conclusion 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."[67]

C. *Koontz* Abrogates Ninth Circuit/Western District of Washington Precedent By Recognizing that Money is Property and is Protected by the Takings Clause

Perhaps the furthest-reaching issue decided in *Koontz* was the conclusion that certain government demands for money will categorically violate the Takings Clause.[68] At first blush, it may seem that this issue will not have a great impact in Washington, where our state courts have long subjected impact fees to similar scrutiny under RCW 82.02.020.[69] But a close review of Washington case law reveals that many monetary exactions may escape the standards of that statute. And, prior to *Koontz*, the federal courts have refused to subject monetary exactions to *Nollan* and *Dolan*.

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[64] *See*, *e.g.*, *Birnbaum v. Pierce County*, 167 Wn. App. 728 (2012) (an "act" may occur before the issuance of a permit decision; limitations period begins running after occurrence of the "act"); *Manna Funding, LLC v. Kittitas County*, 173 Wn. App. 1197 (2013) (a site specific rezone decision is not a "permit decision" under RCW 64.40; statutory damages are not available for misfeasance).

[65] State appellate decisions hold that a ' 1983 claim arising from a permit decision is subject to LUPA's 21-day limitations period. *See Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393 (2010). Whether that rule will hold up to a federal challenge is an open question, but for the time being, landowners should be aware of the limitations period.

[66] *Koontz*, 133 S. Ct. at 2589-90.

[67] *Id*. at 2598.

[68] *Id*. at 2600.

[69] S*ee Vintage Constr. Co., Inc. v. City of Bothell*, 83 Wash. App. 605, 607 (1996) ("RCW 82.02.020 regulates the imposition of local fees on developers. The statute . . . identifies two types of development fees that are permissible if the city can show they are reasonably necessary as the direct result of the development. One type is a fee in lieu of a dedication of land that the municipality could otherwise require. The other type is a fee to mitigate a direct impact caused by the development."); *Southwick v. City of Lacey*, 58 Wash. App. 886, 893 (1990) (finding legislature enacted RCW 82.02.020 to prevent local government from imposing general social costs of development on landowners).

In *City of Olympia v. Drebick*, the city demanded that Mr. Drebick pay a "transportation impact fee" of $132,328 as a condition to receiving a permit to build a four-story office building.[70] The so-called "impact fee" did not seek to offset an anticipated increase in traffic due to the constructions of a new office building. Instead, the city wanted money to pay for infrastructure improvements that were needed regardless of any new development. Washington's Supreme Court upheld the fees, concluding that general fees, imposed as permit conditions, were not subject to the constitutional limitations of *Nollan* and *Dolan*. The court then determined that, under the Growth Management Act and RCW 82.02, a general impact fee will be lawful so long as the developer receives some benefit from the city's use of the developer's money—a standard that is radically different from the heightened scrutiny required by *Koontz*.

In *McClung v. City of Sumner*, the Ninth Circuit upheld a permit condition requiring the owner of a small commercial property pay approximately $50,000 to upgrade the city's sewer pipes as a condition on a permit to convert residential properties into a sandwich shop.[71] The Ninth Circuit concluded that a demand for money should be subject to less protection than a demand for real property; therefore, it reviewed the permit condition under the forgiving, ad hoc standards of *Penn Central Transportation Co. v. City of New York*,[72] rather than subjecting the condition to heightened scrutiny required by *Nollan* and *Dolan*.[73]

Both decisions were abrogated by *Koontz*, which held that a person's money is private property protected by the Takings Clause.[74] The exception to that rule, contemplated by the 4-1-

[70] 156 Wn.2d 289.
[71] 548 F.3d 1219 (9th Cir. 2008).
[72] 483 U.S. 104, 124 (1970)
[73] 548 F.3d at 1225-28.
[74] *Koontz*, 133 S. Ct. at 2600; *see also Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231 (2003); *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 165-67, 172 (1998); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980); *Village of Norwood v. Baker*, 172 U.S. 269, 279 (1898).

4 plurality opinion *Eastern Enterprises v. Apfel*,[75] is inapplicable in the context of monetary exactions because permit conditions operate directly upon one's interest in land.[76]

> 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.[77]

Focusing on that "direct link," the Court held that "when the government commands the relinquishment of funds linked to a specific identifiable property interest such as … a parcel of real property, a *per se* [takings] approach" is the proper standard.[78]

Justice Alito explained that carving out a different rule for demands of money would make no sense. Monetary exactions—particularly, fees imposed "in lieu" of real property dedications—are "commonplace" and are "functionally equivalent to other types of land use exactions."[79] To subject monetary exactions to lesser, or no, protection would make it "very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*."[80] Furthermore, such a rule would effectively render *Nollan* and *Dolan* dead letters "[b]ecause the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standard, 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."[81]

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[75] 524 U.S. 498 (1998). The District insisted that, when Justice Kennedy's opinion is read in conjunction with the dissent, *Eastern Enterprises* created a bright line rule holding that "an obligation to spend money can never provide the basis for a takings claim." *Koontz*, 133 S. Ct. at 2599 (citing dissent at 2605-07). In *Eastern Enterprises*, the Court evaluated whether a federal statute that imposed retroactive financial liability on a former coal company to provide lifetime medical benefits for retirees violated the Takings Clause and/or Due Process Clause. *Eastern* Enterprises, 524 U.S. at 517-19 (O'Connor, J., plurality opinion). Justice O'Connor, writing for a plurality, concluded that the statute effected a regulatory taking of the company's money. *Id.* at 537-38 (joined by Rehnquist, Scalia, Thomas, JJ.). Justice Kennedy concurred in the judgment, but on the basis that the statute violated due process. 524 U.S. at 550 (Kennedy, J. concurring in part, dissenting in part). Justice Kennedy was of the opinion that the Takings Clause does not apply where the government imposes a general obligation to pay money that "does not operate upon or alter an identified property interest." 524 U.S. at 540 (Kennedy, J., concurring in the judgment and dissenting in part); *see aslo* 524 U.S. at 567-68 (Breyer, J., dissenting, joined by Stevens, Souter, Ginsburg, JJ.). Writing in dissent, Justice Stevens opined "whether the provision in question is analyzed under the Takings Clause or Due Process Clause, Eastern has not carried its burden of overcoming the presumption of constitutionality accorded to an act of Congress[.]" 524 U.S. at 552 (Stevens, J. dissenting, joined by Souter, Ginsburg, Breyer, JJ.).

[76] *Koontz*, 133 S. Ct. at 2599-2600 (The "fulcrum [*Koontz*] turns on is the direct link between the government's demand and a specific parcel of real property.").

[77] *Id*. at 2600

[78] *Id*. ("[A]ny such demand would amount to a *per se* taking similar to the taking of an easement or a lien.").

[79] *Id*. at 2599 ("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.").

[80] *Id*.

[81] *Id*.

D. Open Questions

The *Koontz* decision left several questions unresolved. Among these are questions about how far the decision will reach into monetary burdens, how concrete a demand must be before it can be challenged, and whether certain remedies are available to aggrieved landowners. Those questions, which largely turn on questions of state law and the unique facts of each case, will have to be decided on a case-by-case or jurisdiction-by-jurisdiction basis.

The *Koontz* dissent, citing a California state case that limited the nexus and proportionality tests to adjudicatively imposed exactions, posited that *Koontz* may or may not have left open the question whether *Nollan* and *Dolan* apply to generally applicable conditions.[82] That argument, of course, misses the proverbial forest for the trees. Although the permit decisions in *Nollan* and *Dolan* were issued through an adjudicative process, the conditions were mandated by generally applicable land-use regulations and policies. In *Nollan*, the Coastal Commission had enacted a policy requiring coastal property owners to dedicate an easement across their beaches to the public as a condition on any new development. And in *Dolan*, the city had enacted regulations requiring dedication of green space on new development. Indeed, the condition imposed in *Koontz* was imposed pursuant to local land-use regulations dictating mitigation ratios for development within designated wetlands. Although there are a few courts that have grasped onto this distinction for the purpose of narrowing the holdings of *Nollan* and *Dolan*, it is not likely to gain traction after *Koontz*.

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[82] *Koontz*, 133 S. Ct. at 2608 (citing *Ehrlich v. Culver City,* 911 P.2d 429 (Cal. 1996)).