
Nina Kumari Gupta

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Nina Kumari Gupta

The Fifth Amendment’s Takings Clause doctrine is continually being shaped and clarified through the opinions of the U.S. Supreme Court and the interpretation of those opinions by the lower courts. Where the lower courts disagree, the Supreme Court has stepped in to ensure consistency. Recently, however, in an attempt to elucidate whether the heightened scrutiny test developed in Nollan v. California Coastal Commission and Dolan v. City of Tigard applied to monetary exactions, the Court left more questions than answers. The Nollan/Dolan test requires that conditions imposed in exchange for a land use permit have an essential nexus and rough proportionality to the proposed activity. In its latest takings case, Koontz v. St. Johns River Water Management District, the Court expanded the Nollan/Dolan test to monetary exactions, yet failed to distinguish whether it applies to both adjudicative and legislatively imposed conditions. This Note argues that local governments and lower courts should adopt California’s approach, applying heightened scrutiny only to those monetary exactions that are imposed on an ad hoc basis. This Note further argues that this framework will reduce coercion, strengthen the political process, allow for efficient negotiation, and maintain consistency with the intent of the Court in Koontz. Finally, this Note concludes by predicting that in the near future, the Court will have to revisit the scope of Nollan/Dolan in order to provide predictability and clarity to local governments and developers across the country.

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INTRODUCTION

In Koontz v. St. Johns River Water Management District, the U.S.
Supreme Court decided that requirements for landowners to pay money as a
condition for development permits could constitute a taking.1 Shortly after the
Court’s decision was released, the national news media hailed the opinion as a

   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.”).
victory for landowners and property rights. Lawyers have predicted that Koontz will change the way permitting agencies conduct their business with land developers and make it easier for developers to challenge coercive behavior by the government. But most commentators are still uncertain about the practical effects Koontz will have on land development in the United States because of several unanswered questions in the Court’s reasoning.

In a five to four opinion, the U.S. Supreme Court held that government demands for monetary exactions must meet the tests applied in Nollan v. California Coastal Commission and Dolan v. City of Tigard, which require that any taking of property bear an essential nexus with and rough proportionality to the impacts of a proposed development. The dissent strongly criticized the Court’s holding for creating uncertain boundaries between monetary exactions and taxes. The dissent warned that the Court’s refusal to draw a clear line would cast “a cloud on every decision by every local government [that requires] a person seeking a permit to pay or spend money.”

The distinction between monetary exaction and taxes can be difficult to parse without a clear rule, but many states have been successfully implementing stricter scrutiny for monetary exactions without facing the issues with which the dissent was concerned. In light of the Court’s silence on how to draw this distinction, lower courts should adopt the California Supreme Court’s rule for distinguishing between monetary exactions and takings.


4. See Ken Kecskes, U.S. Supreme Court Rules Government Can Be Guilty of Taking When Denying a Land Use Permit or Requiring Monetary Payment as a Condition of Approval, REAL ESTATE COUNSEL (Sept. 11, 2013), http://realestatecounsel.net/tag/monetary-exactions/.

5. See Latham & Watkins Environment, Land & Resources Practice, Koontz Decision Extends Property Owners’ Constitutional Protections, CLIENT ALERT COMMENT., no. 1560, July 2013, at 1, 2–3 (“[T]he Court did not answer whether different standards apply to ad hoc fees and legislatively imposed fees.”).


8. Id. at 2608.


10. See infra Part III.C.
only draws a clear line that is easy for local governments to apply, but it is also mentioned by both the majority and dissent in Koontz as a possible interpretation of the decision in that case.\textsuperscript{11}

Understanding the implications of Koontz will be critical to determining how, or if, states must modify their current rules on monetary exactions. Clarifying Koontz will also better inform land developers of their rights and governmental permitting agencies of their boundaries. In light of the Court’s silence on whether heightened scrutiny applies to legislatively determined conditions in addition to conditions imposed on an ad hoc basis, this Note examines the possible interpretations of Koontz, and suggests resolving this ambiguity by using California’s standard.

Part I describes the factual background of Koontz and explains the Court’s reasoning for subjecting monetary exactions to strict scrutiny and the dissent’s criticism of this new rule. In order to situate Koontz within the larger framework of takings law, Part II explains the development and application of heightened scrutiny for monetary exactions and the significance of Koontz. Part III addresses the concerns of the Koontz dissent by examining states’ varying standards for monetary exaction claims, focusing in particular on California’s bifurcated rule. Finally, Part IV advocates for the widespread adoption of California’s rule to increase predictability and efficiency for landowners and local governments alike.

I. FITTING Koontz INTO EXISTING TAKINGS DOCTRINE

Koontz’s significance is best appreciated with a basic understanding of the Takings Clause and the Nollan/Dolan doctrine. Before describing the details of Koontz, this Part will address the different types of takings recognized by the federal government and how monetary exactions fit into the current framework. It will then explore the idea of heightened scrutiny, where it came from, and why there is still disagreement about how it should be applied.

A. Monetary Exactions Within the Fifth Amendment’s Takings Clause

The Fifth Amendment’s Takings Clause of the U.S. Constitution provides that private property cannot be taken for public use “without just compensation.”\textsuperscript{12} The Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”\textsuperscript{13} “Private property” in the

\textsuperscript{11} See infra Part IV.A.

\textsuperscript{12} U.S. CONST. amend. V.

\textsuperscript{13} Armstrong v. United States, 364 U.S. 40, 49 (1960).
Takings Clause has been defined as encompassing numerous interests in land, including water, mineral, and airspace rights, as well as tangible and intangible personal property such as money. Three types of actions by the government have been recognized as violating the Takings Clause: physical invasion, regulatory takings, and exactions. In Koontz, the issue revolved around an exaction.

Exactions are a combination of regulatory and physical takings, and are conditions the government imposes on landowners who want to develop their property. The government will often condition a land use permit on the landowner (1) giving up part of her land for public purposes such as an easement across her land, known as a physical exaction, and/or (2) paying a fee to compensate for the estimated impacts of a development, known as a monetary exaction. The rationale behind exactions law emerges from the unconstitutional conditions doctrine. This doctrine states that the government may not condition a benefit, such as receiving a permit, on the beneficiary surrendering a constitutional right, “even if the government may withhold that benefit altogether.”

Previous cases, such as Dolan, have addressed the unconstitutional conditions doctrine as it applies to physical exactions, but Koontz was the first

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16. A taking may also occur when the government regulates private property if it destroys the property owner’s beneficial issues. See Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (noting that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking”). For interpretations of when regulations go “too far,” see Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) (holding that when government regulation eliminates any economic use of the property there is a total taking); Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978) (establishing a balancing test of the regulations’ economic impact, extent to which it interferes with distinct investment backed expectations, and the character of the governmental action).


19. See 2 PATRICIA E. SALKIN, AM. LAW. ZONING § 16:8 (5th ed. 2014) (“The doctrine of exactions . . . applies in cases in which land use permits are conditioned upon compliance with some condition or restriction placed on the land . . . .”).


21. See SALKIN, supra note 19, § 16:8 n.3.

22. Kathleen M. Sullivan, Unconstitutional Conditions, 102 HARV. L. REV. 1413, 1415 (1989); see also Dolan, 512 U.S. at 385 (“[T]he government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.”).
Supreme Court decision to address whether the unconstitutional conditions doctrine, and ultimately the Nollan/Dolan doctrine, specifically applies to monetary exactions. Under Nollan and Dolan, exaction conditions are takings if they lack either an essential nexus to or rough proportionality with the impact of the proposed development. Before Koontz, some state courts only imposed Nollan/Dolan requirements on exactions applying to physical land, rather than money, due to differing interpretations of the Supreme Court’s decisions in Nollan and Dolan and subsequent opinions. Other states, however, applied the requirements to both physical and monetary exactions.

B. Heightened Scrutiny for Exactions: Development of the Nollan/Dolan Doctrine

1. “Essential Nexus”: Nollan v. California Coastal Commission

The heightened scrutiny test for exactions began to form with Nollan’s requirement that there be an essential “nexus between” the conditions imposed and the purpose or impact of the development. The Nollans had leased a beachfront property in California, sandwiched between two oceanside public beaches. In order to demolish the bungalow on their land, a condition of their option to purchase the property, they were required to obtain a permit from the California Coastal Commission. But the Commission staff recommended that the permit be granted “subject to the condition that they allow the public an easement to pass across a portion of their property” in order to allow greater beach access between the two public beaches. When the Nollans protested this condition, the Commission overruled their petition, reiterating that the permit would be granted only if the Nollans granted the requested easement.

The Court held that conditioning the Nollans’ permit on their granting an easement was not a valid exercise of land use regulation because the condition

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23. See infra Part II.C for a discussion of the majority’s holding.
25. See Dolan, 512 U.S. at 391.
26. See, e.g., Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696 (Colo. 2001) (declaring that Colorado’s regulatory takings statute codifies the Nollan/Dolan test “the statute explicitly declines to apply the test to ‘any legislatively formulated assessment, fee, or charge . . . .’”); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999) (“[W]e 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.”); Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005) (stating that “Nollan and Dolan both involved dedications of property so onerous that, outside the exactions context, they would be deemed per se physical takings”).
27. See infra Part III.B. for an overview of states that applied Nollan/Dolan to monetary exactions.
28. See Nollan, 483 U.S. at 837 (“[U]less 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.’”)
29. Id. at 827.
30. Id. at 828.
31. Id.
32. Id.
did not serve public purposes related to the permit requirement. This “lack of nexus between the condition and the original purpose” of the building permit creates an invalid land use regulation amounting to extortion. The Court concluded by stressing that even absent such a nexus, the government could use its power of eminent domain to take an easement across the Nollans’ property to advance the public interest, so long as it paid just compensation. Otherwise, such action would constitute an unconstitutional taking.

2. “Rough Proportionality”: Dolan v. City of Tigard

The Court developed the second part of the heightened scrutiny test in Dolan by requiring a “rough proportionality” between the required exaction and the impact of the proposed development, in addition to an essential nexus. Dolan owned a plumbing and electric supply store that included a gravel parking lot and partly sat within a hundred-year floodplain. When Dolan applied to the city for a permit to double the size of her store and pave the parking lot, the city’s planning commission granted her petition on the condition that she dedicate a storm drainage system and public pedestrian/bicycle pathway along the applicant’s flood plain property. This would have encompassed approximately 10 percent of her property.

The Court held that the Fifth Amendment required rough proportionality, and the city did not meet this requirement. Although the Court said that the government’s goals of mitigating flooding and traffic congestion were justifiable, it emphasized that imposing this burden on the developer was not the correct way to meet such goals. The rough proportionality test need not be an exact calculation, but it does require that governments make individualized determinations that any conditions are sufficiently related to the impacts of the

33. Id. at 837 (“[T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of ‘legitimate state interests’ in the takings and land-use context, this is not one of them.”).
34. Id.
35. Id. at 841–42.
36. See Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (“We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment. 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.”).
37. Id. at 379.
38. Id. 379–80.
39. Id. at 380.
40. Id. The Court expressly refuses to use the term “reasonable relationship” to describe its test, despite the fact that many inferior courts used it in defining the doctrine. Id. at 391. The Court believed that the term “reasonable relationship” was too similar to “rational basis,” which is the minimum level of scrutiny under the Fourteenth Amendment’s Equal Protection Clause. Id. This conscious decision suggests that a more substantial connection than rational basis is required to satisfy proportionality.
41. See id. at 394–96.
3. Eastern Enterprises v. Apfel

The Court first applied the Nollan/Dolan test to monetary exactions in Eastern Enterprises. In this case, a federal statute required a former coal operator to fund health benefits for retired miners who had worked for the company prior to the company’s exit from the coal industry. The plurality held that the federal statute imposed a severe retroactive liability that was substantially disproportionate to the company’s experience in the mining field, and therefore failed the Nollan/Dolan test. In coming to this conclusion, the Court clarified that economic regulations could be a taking and that “justice and fairness” should be used to evaluate whether economic injuries must be compensated by the government. The concurrence argued, however, that the statute did not operate upon an identified property interest and simply imposed a requirement to pay without specificity as to how the entity needed to pay, through property or otherwise. The dissent similarly critiqued the plurality’s views, claiming that the creation of a general liability to pay could not be the basis of a takings action, especially where the government has targeted no identifiable monetary fund or piece of land.

Eastern Enterprises therefore left us with two different ideas of when the Nollan/Dolan heightened requirements apply to monetary exactions and what constitutes an exaction. When the Court is not able to reach a majority, the resulting binding law is considered to be the common viewpoints of those who agreed with the judgment. So although the plurality found a taking, five Justices “agreed that the Takings Clause applies only to interferences with specific assets, and ruled that regulation reducing general wealth must be challenged under the Due Process Clause.” But the lower courts have been

42. Id. at 391.
43. See E. Enters. v. Apfel, 524 U.S. 498, 537 (1998) (“When, however, that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers’ conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause.”); id. at 554 (Breyer, J., dissenting) (“The ‘private property’ upon which the Clause traditionally has focused is a specific interest in physical or intellectual property.”).
44. See id. at 538 (majority opinion).
45. See id. at 528–29.
46. Id. at 523.
47. Id. (citing Andrus v. Allard, 444 U.S. 51, 65 (1979)).
48. Id. at 540 (Kennedy, J., concurring in the judgment and dissenting in part).
49. Id. at 555 (Breyer, J., dissenting).
50. See Marks v. United States, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”) (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).
split over how to interpret *Eastern Enterprises*. In light of this, *Eastern Enterprises*' plurality judgment is impactful by expanding takings law to monetary exactions and providing enough uncertainty in the lower courts for the Court to take up this question in *Koontz*.

II. *KOONTZ V. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT*

A. Factual Background: The Fight to Develop 3.7 Acres of Land

In 1972, Coy Koontz, Sr. purchased 14.9 acres of undeveloped land on the south side of Florida State Road 50. The state had classified this property as wetlands. In the same year that Koontz purchased his land, Florida enacted the Water Resources Act, which divided the state into five water management districts and authorized the districts to regulate all construction related to “waters in the state.” Under this law, a landowner had to obtain a management and storage of surface water permit from the local district to undertake any construction connected to Florida waters. These permits were allowed to impose “reasonable conditions” to ensure that such construction would not “be harmful to the water resources of the district.” Another state law enacted in 1984 required that landowners wishing to dredge or fill wetlands obtain an additional permit, the wetlands resource management permit, and provide a “reasonable assurance” that proposed construction would not be “contrary to the public interest.” Applying this law, the defendant St. Johns River Water Management District required that permit applicants wanting to build on wetlands offset the resulting environmental damage by “creating, enhancing, or preserving wetlands elsewhere.”

Koontz applied for both types of permits in order to dredge and fill the northern 3.7 acres of his land. Koontz offered to mitigate any environmental effects of the project by deeding to the District a conservation easement on the remainder of his land, approximately 11.2 acres. The District believed this 11.2-acre easement was inadequate mitigation, and told Koontz that it would issue him a permit only if he agreed to one of two options.

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54. Id. at 2592.

55. Id. (citing FLA. STAT. § 373.403(5) (West 2013)).

56. Id.

57. Id. (citing FLA. STAT. § 373.413(1)).


60. Id.

61. Id.

62. Id. at 2592–93.

63. Id. at 2593.
proposed that Koontz either (1) reduce the size of his development to one acre and deed to the District a conservation easement on the remaining 13.9 acres, or (2) keep his current development plans, deed to the District a 11.2 acre conservation easement, and make improvements to District-owned wetlands a few miles away. Koontz, believing these demands were excessive, filed a claim in state court for relief under Florida Statutes section 372.617(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. Journey to the U.S. Supreme Court**

The Florida trial court held that requiring Koontz to further mitigate his development by paying for offsite improvements to state wetlands “lacked both a nexus and rough proportionality to the environmental impact of the proposed construction” and was thus unlawful under the Nollan/Dolan test. The Florida District Court of Appeal affirmed the trial court’s holding, but on further appeal, the Florida Supreme Court reversed the decision. In reversing the court below, the Florida Supreme Court drew a distinction between a demand for real property, as was the case in both Nollan and Dolan, and a demand for money, which was at issue in Koontz. The U.S. Supreme Court granted certiorari to resolve the question of whether monetary exactions are subject to a Nollan/Dolan heightened scrutiny analysis, a question of federal constitutional law that had divided the lower courts.

**C. Held: Monetary Exactions Must Meet Heightened Scrutiny**

64. *Id.* Specifically, the District’s staff informed Koontz that “they would recommend denial of the permit applications unless, in addition to the eleven-acre dedication, he agreed to finance the restoration and enhancement of at least 50 acres of wetlands on District-owned property located miles away, by replacing culverts or plugging ditches, and building a new road.” Petitioner’s Brief on the Merits at 5, *Koontz*, 133 S. Ct. 2586 (No. 11-1447), at *5. The cost of the off-site work was “estimated to be in the range of $10,000 (the District’s estimate) to between $90,000 and $150,000 (Koontz’s expert’s estimate).” Petition for Writ of Certiorari at 3–4, *Koontz*, 133 S. Ct. 2586 (No. 11-1447), 2012 WL 1961402, at *3–4.

65. *Koontz*, 133 S. Ct. at 2593. It is interesting to note that although the U.S. Supreme Court did not consider the merits of this specific case, instead addressing a wider issue of law, Koontz has a high chance of losing his case on remand. According to the District in its initial briefs, Koontz “did not collaborate with the District to find an agreeable resolution” even when the “District encouraged him to develop his own alternatives.” See Respondent’s Brief in Opposition at 3, 5, *Koontz*, 133 S. Ct. 2586 (No. 11-1447), 2012 WL 3142655, at *3, *5. The District may therefore have not “required” Koontz to pay a monetary exaction at all. But this question, as well as whether the conditions met the heightened scrutiny test, are factual questions to be left to the jury.


68. *Id.* at 2594.

69. *Id.*
The majority opinion in *Koontz* reversed the Florida Supreme Court’s judgment through two significant holdings. First, the Court held that under the unconstitutional conditions doctrine, government demands for money from a land use permit applicant must satisfy the *Nollan/Dolan* requirements. Second, the Court held that *Nollan/Dolan* requirements must be followed regardless of whether the permit is approved subject to a condition or rejected for failure to satisfy the condition, a proposition with which the dissent also agreed.

The doctrine of unconstitutional conditions holds that “the government may not deny a benefit to a person because he exercises a constitutional right.” The Court held that *Nollan* and *Dolan* involved a “special application” of this doctrine, protecting the Fifth Amendment right to just compensation when the government takes a land use permit applicant’s property. Requiring a person to cede his or her constitutional right to just compensation under the Takings Clause “in the face of coercive pressure” is impermissible, the Court reasoned. The Court noted that applying the *Nollan/Dolan* requirements to situations involving land use permit applications prevents the government from making unreasonable and extortionate demands on applicants, who otherwise might surrender their right to just compensation in order to develop their land. This application also allows governments to mitigate the real impacts and public costs of development as long as its requests have an essential nexus and rough proportionality to these impacts.

The Court concluded the *Nollan/Dolan* requirements must, therefore, extend to monetary exactions to prevent a violation of the unconstitutional conditions doctrine. As the Court reasoned, applying the doctrine to monetary exactions will also prevent governments from charging excessive “in lieu of” fees, through which a property owner could be forced to pay for the value of an easement that he refused to surrender. In distinguishing the facts of *Koontz* from the situation in *Eastern Enterprises*, upon which the dissent relied, the Court argued that a demand for money related to a real property interest burdened Koontz’s ownership of his land. Under the majority’s approach, the *Nollan/Dolan* approach is valid only in the limited situation where the government requires the “relinquishment of funds linked to a specific, identifiable property interest,” and thus it does not extend to any time a

70. See *id.* at 2591.
71. *Id.* at 2603.
72. *Id.* at 2596.
73. *Id.* at 2603.
74. *Id.* (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983)).
75. *Id.*
76. *Id.* at 2596.
77. *Id.* at 2595.
78. *Id.* at 2594–95.
79. See *id.* at 2599.
80. *Id.* at 2599.
government requires someone to spend money. 81

Second, the majority further held that Nollan/Dolan requirements apply regardless of whether a permit is approved, conditioned on the taking of property, or denied for an applicant’s refusal to give up the demanded property. 82 Even when no property is actually taken, the Fifth Amendment’s Takings Clause is violated where the government’s demands threaten to deny an applicant just compensation and require forfeiture of constitutional rights. 83 The Court explains that even if there were only one alternative given to Koontz that did not involve a taking, the District would have satisfied the Nollan/Dolan requirements. 84 But because the only alternative was to modify the project to only one acre, Koontz had no true constitutional mitigation alternatives. 85 The unconstitutional conditions doctrine was violated because these extortionate demands for property burden the right not to have property taken without just compensation. 86

The Court concluded its analysis by responding to some of the concerns and criticisms presented by the dissent. 87 Although the Court refused to provide a bright-line distinction between impermissible land use exactions and property taxes, 88 it affirmed that taxes and user fees are not takings, and that local governments would still be able to impose property taxes, user fees, and similar regulations that may impose financial burdens on property owners. 89 The Court further contended that distinguishing between taxes and takings is “more difficult in theory than in practice” and that numerous states, including California, have successfully applied Nollan/Dolan’s heightened scrutiny to monetary exactions without “significant practical harm.” 90

Ultimately, the Court remanded the factual question of whether the District’s imposed an adequate demand on Koontz to trigger Nollan/Dolan. 91 The Court stated that it had “no occasion to consider how concrete and specific a demand must be to give rise to liability under Nollan and Dolan.” 92 If there were a demand, then the Nollan/Dolan test would be triggered. 93 Given that the Florida District Court of Appeals believed the demand was sufficient, it is very likely that on remand the District’s demands will be held to Nollan/Dolan heightened scrutiny, and the holding will turn on whether the Nollan/Dolan test

81. Id. at 2600.
82. Id.
83. Id. at 2596.
84. Id. at 2598.
85. Id.
86. Id. at 2589–90.
87. Id. at 2602–03.
88. Id. at 2600.
89. Id.
90. Id. at 2602.
91. Id. at 2598.
92. Id.
93. See id.
was satisfied.94

D. The Dissent’s Critique of the Majority Opinion as Uncertain, Impractical, and Expansive

The dissent asserted that Koontz was not entitled to monetary damages for three reasons: (1) ordinary financial obligations do not trigger the Takings Clause’s protections; (2) the District never demanded money or land in exchange for a permit; and (3) a taking never occurred.95

The “core disagreement,” according to the dissent, was whether Nollan/Dolan requirements apply to the payment and expenditure of money.96 The dissent argued that Eastern Enterprises makes it clear that the “government may impose ordinary financial obligations without triggering the Takings Clause’s protections.”97 The dissent reasoned that governments only commit a taking when they appropriate specific property interests, not when they simply require an applicant to pay or spend money.98 As the dissent concluded, no taking occurred in Koontz because the District never demanded anything from the applicant, noting that to constitute a taking, such demands must be unequivocal, not mere suggestions on how to meet permitting criteria.99 Without this distinction, the dissent argued that governments would cease to negotiate with applicants for fear of imposing a demand.100 Moreover, applying Nollan/Dolan to situations where no actual demands are made would be counterproductive and cause more permits to simply be denied outright.101

The dissent therefore concluded that the District was simply making a suggestion to Koontz in order to come into compliance, even welcoming additional proposals on how the damage could be mitigated.102 Finally, the dissent argued that there was no taking because the District never took any of Koontz’s money or property, leaving no opportunity for just compensation.103

Throughout its opinion, the dissent cautioned that the Court’s new rule was uncertain, impractical, and would subject a “vast array” of land use regulations to heightened constitutional scrutiny because the distinction between monetary exactions and taxes would be hard to apply.104 Although the Court acknowledged that taxes are not takings, the dissent believed the majority’s rule, making “a simple demand to pay money—the sort of thing often viewed as a tax . . . count as an impermissible ‘exaction,’” would make it

94. See id.
95. Id. at 2604 (Kagan, J., dissenting).
96. Id. at 2603.
97. Id. at 2603–04.
98. Id. at 2612.
99. Id. at 2609–10.
100. See id. at 2610.
101. Id. at 2611.
102. Id. at 2610.
103. Id. at 2612.
104. Id. at 2604, 2607.
difficult for anyone to tell the two apart.\textsuperscript{105} The dissent emphasized its concerns by referencing how courts often “reach opposite conclusions about classifying nearly identical fees.”\textsuperscript{106} The dissent concluded by referencing a rule adopted by several states, including California, which would apply the \textit{Nollan}/\textit{Dolan} conditions only to permitting fees that are imposed on an ad hoc basis, but not to fees that are generally applicable.\textsuperscript{107} Although not directly \textit{endorsing} this distinction, the dissent also did not oppose its application, as it did with the majority’s ambiguous standard.\textsuperscript{108}

### III. CATEGORIZING MONETARY EXACTIONS

The Court’s extension of heightened scrutiny to monetary exactions is the logical choice for preventing local governments from making extortionate demands. But the dissent’s concerns are not without merit. The distinction between taxes and takings has not always been as obvious as the Court might like to believe,\textsuperscript{109} and the Court made very clear in \textit{Koontz} that it did not intend to clear up any of the confusion.\textsuperscript{110} Although the dissent disagreed with the Court’s holding, its concerns—namely, wishing the Court had said more—will no doubt be on the minds of many states and local governments as they try and figure out how this ruling will affect them. Most importantly, local governments will likely want to know what they can do to avoid \textit{Koontz}-style litigation.\textsuperscript{111} But the solution to interpreting the Court’s silence lies in the case law cited by both the majority and the dissent. Both rely on California’s heightened scrutiny rule presented in \textit{Ehrlich v. City of Culver City},\textsuperscript{112} as a feasible interpretation.\textsuperscript{113} Thus, local governments will be able to avoid

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\textsuperscript{105} Id. at 2607.
\textsuperscript{106} Id. at 2608.
\textsuperscript{107} Id.
\textsuperscript{108} See id.
\textsuperscript{109} Academic scholarship has focused much attention on parsing the lines between taxes and takings, with some scholars developing their own rules that they believe courts should apply. See generally Eric Kades, \textit{Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application}, 97 NW. U. L. REV. 189, 190–91 (2002) (discussing his Continuous Burden Principle, calling “taxes” constitutional takings unless they “impose burdens such that there are no large jumps—discontinuities . . . between the burden imposed on any taxpayer and the next-most-burdened taxpayer”). \textit{See also} RICHARD A. EPSTEIN, \textit{TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN} 297–300 (1985) (arguing the more extreme view that progressive income taxes violate the Takings Clause); Eduardo Moisés Peñalver, \textit{Regulatory Taxings}, 104 COLUM. L. REV. 2182, 2201–02 (2004) (concluding that “highly unequal property taxes will be upheld as long as the basis for the unequal treatment is not wholly arbitrary” and citing California’s Proposition 13, which has caused a big discrepancy in property taxes on new homeowners and established homeowners).
\textsuperscript{110} \textit{Koontz}, 133 S. Ct. at 2601.
\textsuperscript{112} \textit{Ehrlich v. City of Culver City}, 911 P.2d 429 (Cal. 1996).
\textsuperscript{113} See Part IV.A. \textit{infra} for a discussion of the importance of \textit{Ehrlich} in both the \textit{Koontz} majority and dissent.
Koontz’s ambiguity by complying with long-established principles of California development law.

A. The Dissent’s Feared Uncertainty in Distinguishing Monetary Exactions from Taxes Is Unwarranted

The dissent worries that there is no clear distinction made between what is a tax or a taking. Justice Kagan remarked that “[t]he boundaries of the majority’s new rule are uncertain. But it threatens to subject a vast array of land use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny.” Without “saying more,” the dissent argues that there would now be a cloud cast on “every decision by every local government to require a person seeking a permit to pay or spend money.”

But the dissent provided no evidence of cases where this distinction had been particularly hard to make. In fact, in the case of Koontz, the District never so much as claimed that it was levying a tax. Even if the District had tried to levy a tax, many states reserve this power to the legislature. While the Court did not address the question of whether the District could have simply imposed a tax on Koontz, it did emphasize that its decision did not affect the “ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners.”

The Court actually seemed to suggest that the main dispute in Koontz might be one of form over substance, explaining that the Court had found a taking in some cases even where a condition functioned like a tax. One approach to distinguishing between taxes and a taking in the land development context might be to limit the power of permitting agencies to tax without discretion.

The real problem with the Court’s opinion is not that there is no way to systematically categorize permissible versus impermissible monetary takings. Rather, it is that there are three possible ways in which the Koontz decision could be implemented and little guidance on which one of these applications would best match the Court’s intent.

B. Many States Have Been Effectively Applying the Nollan/Dolan Heightened Scrutiny Test to Monetary Exactions

Although this Note argues that the California rule should serve as a guide

114. See supra note 109 for an overview of the scholarly debates surrounding distinguishing taxes from takings.
116. Id. at 2608.
117. See id. at 2593 (majority opinion).
118. Id. at 2601 (describing Washington state law).
119. Id.
121. This solution is discussed in further depth in the context of California’s rule in Ehrlich infra Parts III.C. and IV.
for other states, it is important to note the range of approaches that states have employed in applying heightened scrutiny to monetary exactions. The first approach, adopted in California, applies heightened scrutiny whenever the government is allowed to make ad hoc decisions regarding an exaction’s amount. On the other hand, if the amount is determined legislatively and applies equally to a large group, then deference is given to the local agency and the Nollan/Dolan test does not apply. The second approach, which Texas has adopted, requires that heightened scrutiny be applied to all monetary exactions, whether decided on a legislative or ad hoc basis. These two approaches, while similar in applying heightened scrutiny to monetary exactions, are fundamentally different when it comes to interpreting whether a condition is impermissible. For instance, if the state legislature enacted a statute requiring all developers who wish to build on wetlands to pay X amount of money, heightened scrutiny would be applied in Texas but not in California. Yet because the Koontz court refused to define more clearly exactly what situations and how broadly the Nollan/Dolan rule now applies, governments would not know whether to apply strict scrutiny in such a case.

Below is an overview of how various states apply heightened scrutiny.

<table>
<thead>
<tr>
<th>Case Name/Citation</th>
<th>State</th>
<th>Disposition</th>
<th>Cited in Koontz?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Home Builders Ass’n v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997)</td>
<td>Arizona</td>
<td>The court held that Dolan did not apply to the city’s water resource development fee because it was a generally applicable legislative decision instead of an adjudicative decision.</td>
<td>Yes, by Dissent</td>
</tr>
</tbody>
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</tr>
</thead>
<tbody>
<tr>
<td>Ehrlich v. City of Culver City, 911 P.2d 429 (Cal.)</td>
<td>California</td>
<td>The court held that heightened scrutiny applies to monetary exactions if they are imposed</td>
<td>Yes, by Majority and</td>
</tr>
</tbody>
</table>

122. See Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996) (“When such exactions are imposed—as in this case—neither generally nor ministerially, but on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny of Nollan and Dolan is triggered.”).

123. See Ehrlich, 911 P.2d at 444 (“[L]egislatively formulated development assessments imposed on a broad class of property owners . . . may indeed be subject to a lesser standard of judicial scrutiny than that formulated by the court in Nollan and Dolan because the heightened risk of the ‘extortionate’ use of the police power to exact unconstitutional conditions is not present.”).

124. This table is not exhaustive of all state policies. It is meant to represent a sampling of different ways that states have given monetary exactions heightened scrutiny. It is sorted alphabetically by state.
on an individual and discretionary basis, but does not apply if the exactions are generally applicable.

<table>
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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 695–96 (Colo. 2001)</td>
<td>Colorado</td>
<td>Colorado statute explicitly prohibited the application of Nollan/Dolan to legislatively formulated assessments, fees, or charges imposed on a broad class of property owners. The court found that this distinction was supported by federal case law and cited to Ehrlich and other states who have adopted this rule.</td>
<td>Yes, by Dissent</td>
</tr>
<tr>
<td>Northern Ill. Home Builders Ass’n, Inc. v. County of Du Page, 165 Ill. 2d. 25 (1995)</td>
<td>Illinois</td>
<td>The court held that a county ordinance imposing transportation impact fees on new development, using a fee formula, complied with road improvement impact fee law, generally accepted standards, and was proportional to the impact of the development.</td>
<td>Yes, by Majority</td>
</tr>
<tr>
<td>Toll Bros., Inc. v. Board of Chosen Freeholders, 944 A.2d 1, 4–5 (N.J. 2008)</td>
<td>New Jersey</td>
<td>The court held that a planning board violates local ordinance when an unrelated condition or an exaction in excess of its proportional share is imposed. This applies regardless of any agreement between the developer and the municipality.</td>
<td>No</td>
</tr>
<tr>
<td>Twin Lakes Dev. Corp. v. Town of Monroe, 801 N.E.2d 821, 825 (N.Y. 2003)</td>
<td>New York</td>
<td>A fixed fee of $1500 per residential lot in lieu of parkland dedication was determined to not be a taking, and Nollan/Dolan was applied.</td>
<td>No</td>
</tr>
<tr>
<td>Case Name/Citation</td>
<td>State</td>
<td>Disposition</td>
<td>Cited in Koontz?</td>
</tr>
<tr>
<td>Home Builders Ass’n of Dayton v. Beavercreek, 729 N.E.2d 349 (Ohio)</td>
<td>Ohio</td>
<td>The court required a dual rational nexus test based on Nollan and Dolan, a showing of a reasonable relationship between the city’s interest and</td>
<td>Yes, by Majority</td>
</tr>
</tbody>
</table>

Table 1, Cont’d
the development impact, and a showing of a reasonable relationship between the impact fee imposed and the benefits of the condition to the developer.


Oregon

A traffic impact fee, authorized by the county and city, was not subject to heightened scrutiny, and the court held that no individual determinations must be made before assessing a fee.

No


Texas

The court considered *Ehrlich* but decided not to adopt its bright-line rule, arguing that it is not always possible to separate legislative and adjudicative decisions.

Yes, by Majority


Washington

The court held that a city could not require a developer to make improvements on adjacent land because the ordinance granting authority did not demand that this condition be met, instead making it optional for the developer.

No

In addition to these two approaches, the Court’s opinion in *Koontz* also gives rise to a third possible interpretation not currently being used in any state applying heightened scrutiny to monetary exactions. This interpretation would apply the *Nollan/Dolan* test to any situation in which a local government demands money from a land use permit applicant, even in the course of negotiation. This would be a very strict reading of *Koontz*, but a possible one nonetheless. Although this is unlikely to be what the Court had in mind in extending heightened scrutiny to monetary exactions, this sort of approach is precisely what the dissent feared would result from the Court’s silence.125

C. California Has Drawn a Clear Line When Heightened Scrutiny Should Apply

California faced a factually similar situation to *Koontz* in *Ehrlich*, where a local government demanded that a developer pay money to replace recreational facilities that would be eliminated by the construction of an office park.126

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125. The dissent fears that this is how the rule will be interpreted, and that some local governments will “deny permit applications outright, rather than negotiate agreements that could work to both sides’ advantage.” See *Koontz*, 133 S. Ct. at 2610 (Kagan, J., dissenting). The dissent therefore urges that *Nollan/Dolan* be reserved “for reviewing only what an official demands, not all he says in negotiations.” Id.

126. See *Ehrlich*, 911 P.2d at 434–35.
After the U.S. Supreme Court remanded the case in light of the then-recent decision in *Dolan*, the California Supreme Court granted review to decide the extent to which *Nollan* and *Dolan* applied to monetary exactions imposed on development permits. Applying *Dolan* and *Nollan*, the court found that monetary exactions imposed on an ad hoc basis must be roughly proportional to and have an “essential nexus” with the impact of the proposed development. While the fee imposed to mitigate the loss of recreational facilities was held to have an essential nexus to the development permit, the amount of the fee demanded could not be justified as being proportional to the development’s impact. Through its holding, the court established clear precedent in California that this heightened scrutiny would apply to monetary exactions if they were imposed on an individual and discretionary basis.

*Ehrlich* represents a situation similar to the one in *Koontz*, where a local government requires a developer to pay an individualized and discretionary amount of money in order to improve public resources. But what if the monetary exaction was neither individualized nor discretionary? In a subsequent case, *San Remo Hotel L.P. v. City & County of San Francisco*, the monetary exaction in question was a development fee applied to every residential hotel in the city, without any administrative discretion or discrimination. The California Supreme Court held that heightened scrutiny was unnecessary in *San Remo Hotel* because the plaintiff was not made to bear a disproportionate public burden, nor was the plaintiff being singled out. This provision was a legislatively imposed ordinance, but unlike in *Koontz*, this ordinance provided no room for local governments to impose differential treatment.

Based on *Ehrlich* and *San Remo Hotel*, California courts have bifurcated their process for determining whether an impermissible monetary exaction has occurred. The key to understanding this distinction is to focus on whether there is a discretionary aspect to the conditions imposed on the developer. If the conditions were individually determined or ad hoc, then the court will always apply heightened scrutiny to protect developers’ property rights. If the conditions imposed are the same across a large group of similarly situated individuals or groups, then the court is more likely to give deference to the local government.

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127. See id. at 432.

128. See id. at 433.

129. Id.

130. See id. at 444.

131. See id. at 434–35.


133. All development fees in California, however, still have to bear a reasonable relationship to the purpose for which it is charged. See CAL. GOV’T CODE § 66001 (West 2014).

134. See *San Remo Hotel L.P.*, 41 P.3d at 104 (“[T]he HCO does not provide City staff or administrative bodies with any discretion as to the imposition or size of a housing replacement fee.”).

135. See *Ehrlich*, 911 P.2d at 444.

136. See id.
IV. ALTHOUGH THE COURT REFUSES TO DRAW AN EXACT LINE, COURTS SHOULD ADOPT CALIFORNIA’S RULE, AS IT BEST SERVES THE INTERESTS OF THE TAKINGS CLAUSE

A. California’s Standard Referenced by the Koontz Majority and Dissent

The Takings Clause exists to prevent the government from imposing disproportionate burdens on certain individuals. California’s distinction between legislatively imposed and discretionary conditions aims to ensure that if there is a burden, the burden is applied generally rather than individually. In its opinion in Koontz, however, the Court refused to address a number of issues. First, the Court refused to draw a line establishing what conditions would constitute a takings versus a tax, as the Court decided that the facts of the case did not require the establishment of clear standards when there had been “little trouble distinguishing between the two.” The Court did not consider whether the specific facts in Koontz constituted an impermissible monetary exaction, instead remanding this issue to the Florida state courts. Nor did the Court clearly express where the line between monetary exactions and taxes should be drawn, suggesting instead that this was not a difficult question.

Despite all of this uncertainty, the Court managed to provide one piece of guidance at the end of its opinion, by referencing the California Supreme Court’s standards. Although this reference was not an official endorsement of the California standards, it does represent an unobjectionable application of Koontz, according to the Court. This reference should not be taken lightly, given the absence of other guidance.

Even Justice Kagan, in the dissenting opinion, discussed California’s standard as articulated in Ehrlich as a possible interpretation of the majority opinion, stating that “[t]he majority might, for example, approve the rule, adopted in several States, that Nollan and Dolan apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable.” Given that both the majority and the dissent either referenced or impliedly endorsed California’s approach, other states would be wise to adopt such a rule.

In addition to being the only point of reference mentioned by the Court, California’s approach has a number of benefits, which I discuss below: reducing coercion, strengthening the political process, and allowing for more efficient negotiation.

138. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2589, 2602 (2013) (“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.’”).
139. Id.
140. Id. at 2601 (“[T]easing out the difference between taxes and takings is more difficult in theory than in practice.”).
141. Id. at 2602 (“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.”).
142. Id. at 2608 (Kagan, J., dissenting).
B. California’s Standard Reduces Coercion

When a landowner wishes to develop her land, she must obtain at least one, and often several, land development permits, depending on the specific development. \(^{143}\) These permits, given out by local governments, are often highly discretionary, \(^{144}\) leading to fears of coercion. \(^{145}\) If, for example, a developer wishes to build an office building on a plot of land that she owns, it is up to the local planning agency to decide whether to issue a permit and on what terms that permit will be given. For big developers with lots of money and local government connections, this may prove to be only a minor concern. But given that many developers may lack this political leverage, local governments are positioned to unilaterally block a development unless a developer accedes to the local government’s demands. \(^{146}\) And although local governments have the right to require developers to mitigate negative impacts from their proposed developments, \(^{147}\) these mitigation methods must be related to the harm caused. \(^{148}\)

One benefit of the California standard is that it will help reduce coercion by setting a higher bar for local governments wanting to impose individualized conditions on developers. Local governments will have to make sure their discretionary demands have an essential nexus and are roughly proportional, or face invalidation through litigation. By drawing a clear line of validity for monetary exactions, developers will also be more informed of their rights and less likely to be taken advantage of by local governments that know they can extract more from the developer. Local governments are also often vulnerable

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144. See CAL. CODE REGS. tit. 14, § 15357 (West 2014) (defining a “discretionary project” as “a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations”).

145. See Koontz, 133 S. Ct. at 2594–95 (reflecting the majority’s concerns). Land use control is often thought of as “the government activity ‘most closely associated with corruption in the public’s mind.’” Alejandro Esteban Camao, Mastering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions—Installment One, 24 STAN. ENVTL. L.J. 3, 43 (2005).

146. See Carol M. Rose, Planning and Dealing: Piecemeal Land Controls As Problem of Local Legitimacy, 71 CALIF. L. REV. 837, 841 (1983) (“[L]egal scholars have complained that local land decisions can make a mockery of orderly and predictable planned development . . . that neither safeguard the surroundings for present and future residents, nor enable those residents and would-be developers to predict future actions.”).

147. See Ehrlich v. City of Culver City, 911 P.2d 429, 449 (Cal. 1996) (“In both Nollan and Dolan, the court conceded that the development project at issue would have negative effects that the city could mitigate using its police power.”).

to political pressures when making land use decisions. Political pressure is further increased if the relevant decision makers are elected. By eliminating the ability of local governments to impose ad hoc monetary exactions that are not subject to heightened judicial scrutiny, such vulnerability would be less harmful, since local governments would have to justify their exactions. This would increase the predictability of conditions for developers, and reduce pressure on local governments to make individual determinations for each permit they issue. Instead, the emphasis would shift toward the legislative process, as explored below.

C. California’s Standard Strengthens the Political Process

By requiring all discretionary conditions to meet the Nollan/Dolan test, local governments would have to rely more on the legislative process to implement development conditions. This would result in more accountability, public input, and transparency. Instead of a potentially unelected individual or group making these important decisions, there would be elected officials responsible for representing their constituents making broad decisions based on public policy, rather than individual cases. Oftentimes the passing of legislation also allows for periods of public comment where people with strong views may bring their concerns to the attention of decision makers. Ultimately, relying on legislative determinations will be more reflective of what the general public wants because representatives will be less likely to approve decisions that would get them voted out of office.

Of course, relying on the legislative system may not be perfect in terms of ensuring that the public interest is met. For instance, local governments sometimes enter into “development agreements”: long-term, binding contracts that give a project developer a vested right to develop property, in exchange for providing various public benefits. Most states’ development agreement enabling statutes “do not expressly allow other public actors, such as neighboring local governments, counties, or state or federal agencies or districts to be parties to development agreements.” Most of the negotiations will therefore likely happen before any public hearing, to the exclusion of public input, when both the local agency and the developer are happy with the proposal. This raises the question of what effect, if any, public participation plays in shaping land use negotiations. Additionally, some community members, including low-income and minority residents, may not have equal access to public meetings even when public participation does play a more meaningful role. Local officials may also be susceptible to political

151. Camacho, supra note 145, at 22.
152. Id. at 39.
These concerns, however, are present in the status quo of most local planning and are not unique to California’s approach.

D. California’s Standard Allows for Efficient Negotiation

As mentioned above, the goal of the Fifth Amendment is to make sure that no one person is forced to bear a disproportionate public burden, which can easily happen if local governments are allowed to make unilateral decisions. When, however, the decisions are bilateral and developers and local governments are given opportunities to bargain and negotiate the best terms for mitigating a project’s impacts, the results will likely be more beneficial to both parties. There are three approaches local governments can use when issuing land development permits. The first is the traditional method that local governments use in land planning, known as the “command and control” approach. This approach requires decision makers to create rules for “all properties and contexts,” with no emphasis on bargaining or involving third parties. The second approach is to apply an established law to determine what, if any, monetary exactions are required. The final approach is one where the local government enters into negotiations with the developer to establish terms to which both the government and the developer agree. By adopting California’s standard, local governments would be relying on statutes and ordinances to determine whether to impose a monetary exaction. Where there is no law on point, local governments would still be able to make ad hoc determinations as long as the Nollan/Dolan heightened scrutiny requirements were met.

Developers and local governments often negotiate the terms of a development’s mitigation plan. California’s standard allows this negotiation to continue by not categorizing such negotiated terms as a condition. In Koontz, the plaintiff argued that the District never planned on negotiating with Koontz over permit requirements, and simply set a condition instead. Negotiation can lead to more efficient results, and help local governments receive value they might not have otherwise received based on purely legal requirements. This negotiation process might even result in surprising net benefits because developers might be more willing to make concessions than would otherwise be required under the state’s laws. Adoption of California’s rule would encourage local governments and developers to negotiate more favorable terms, knowing that whatever existing law is in place ensures a baseline level of mitigation. For example, developers could choose to build a

153. See id. at 43.
154. See id. at 8.
156. See George B. Speir, Will Koontz Mean Big Changes or Business as Usual for Real Estate Development in California?, 24 MILLER & STARR REAL ESTATE NEWSALERT, no 1., Sept. 2013, at 1, 8–9.
park on a piece of government land in exchange for a building permit, despite the lack of an essential nexus, if there is no statute on point and the local government values the park as much as other comparable mitigation measures.

Despite the many benefits of negotiation, this process has also been criticized as cutting the public out of the discussion, since it allows developers and local governments to negotiate directly with each other.158 And although a mutually agreeable resolution may be reached, interested and affected third parties may not be able to express their views.159 These concerns, however, may be overstated since local governments are still required to hold public meetings and accept public comments on certain development projects.160

Unlike the California rule, a different interpretation of Koontz would subject the results of a negotiation to heightened scrutiny. This interpretation is very limiting, and ignores the benefits of negotiation. The California approach, in contrast, offers permit-issuing agencies three options: (1) to implement legislatively enacted monetary exactions requirements, which are not subjected to heightened scrutiny,161 (2) to impose conditions on an ad hoc basis, provided such conditions have an essential nexus and are roughly proportional to the proposed action162 or (3) to negotiate with a developer. By engaging in negotiations, developers would retain their rights to have heightened scrutiny applied to monetary exactions, but they would be allowed to contract around this requirement if it best serves both parties’ interests, and if there is no law on point. This flexibility and emphasis on collaboration is likely to spur more negotiation within the land development context and reduce the number of lawsuits.

While negotiation might not be perfect, bilateral decisions are preferable to unilateral determinations. Permit-issuing agencies would have greater incentive to reach agreements with developers because the alternative of going through the legislative process is more time consuming and political. Developers would similarly be more open to negotiating with the agencies in the hope that they could enter an agreement in which they could pay an efficient amount of monetary exactions that may not meet the Nollan/Dolan test, but would allow for agency permit approval. These negotiations would also help reduce the coercive nature of monetary exactions, since any ad hoc or individualized determinations would be negotiated against the backdrop of the

158. See Camacho, supra note 145, at 36.
159. Id. at 37.
160. See N.J. STAT. ANN. § 40:55D-10 (West 2014) (New Jersey requires that “[t]he municipal agency shall hold a hearing on each application for development, adoption, revision or amendment of the master plan . . . ”); TEX. LOC. GOV’T CODE ANN. § 212.134(a) (West 2014) (Texas requires that “[b]efore a moratorium on property development may be imposed, a municipality must conduct public hearings . . . ”). See also CAL. GOV’T CODE § 54953 (West 2014) (“All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting . . . ”).
161. See San Remo Hotel L.P. v. City & Cnty. of San Francisco, 41 P.3d 87, 104 (Cal. 2002).
162. See Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996) (requiring the Nollan/Dolan requirements be met for ad hoc conditions).
rugged Nollan/Dolan test that will always be available if negotiations were unsuccessful.

CONCLUSION

Many commentators have hailed the Koontz decision as a major victory for property owners. But as this Note argues, the Court has failed to articulate under what circumstances this heightened scrutiny standard will apply to monetary exactions. Will it apply to legislatively imposed monetary exactions? Will it apply only when local governments make ad hoc decisions? Or will it even go so far as to limit developers and local governments from engaging in negotiations and agreeing to conditions that would not meet this heightened scrutiny? In light of this uncertainty, it is prudent to identify an interpretation of the Court’s holding that can be easily understood and applied, and would most likely be upheld if the Court were to take up this issue again.

There has been a “marked shift in local government financing away from the use of general revenue taxes and toward . . . exactions.” Accordingly, this is not likely to be the last time that the Court will have to address the issue of applying heightened scrutiny to monetary exactions. With different states applying heightened scrutiny to different degrees, I predict that the Supreme Court will revisit Koontz in the coming years as the decision is used to both justify and criticize a wide spectrum of local government actions. But until the Court says more, using California’s rule will likely provide the best means of predictability to developers and local governments alike. Perhaps most importantly, such a rule would be upheld upon further clarification of the monetary exactions and takings doctrines.


We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.