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Timothy M. Mulvaney, *Proposed Exactions*, 26 J. Land Use & Envtl. L. 277 (2011).
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PROPOSED EXACTIONS

TIMOTHY M. MULVANEY*

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I. INTRODUCTION

In the abstract, the site-specific ability to issue conditional approvals offers local governments the flexible option of permitting a development proposal while simultaneously requiring the applicant to offset the project's external impacts.[1] However, the U.S. Supreme Court curtailed the exercise of this option in *Nollan v.*

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* Associate Professor of Law, Texas Wesleyan University School of Law. Thank you to J.B. Ruhl and the participants in the April 23, 2010 conference at Florida State University College of Law for their guidance. Further, thank you to Mark Fenster, Keith Hirokawa, John Martinez, Jessica Owley, Andrew Schwartz, and Laura Underkuffler for providing insightful comments on earlier drafts. Finally, thank you for the observations provided by those researchers operating under National Oceanic and Atmospheric Administration award number NA10OAR4170078.

1. *See* Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 615 (2004) [hereinafter *Takings Formalism*] ("[I]ndividualized . . . exactions constitute a flexible, open-ended set of conditions that serve regulatory and persuasive functions by offering both to internalize at least some of the external costs of development and to make a proposed land use either sufficiently attractive or minimally unattractive to decision makers and the voting public."). For purposes of this Article, the term "approvals" encompasses successful applications for zoning modifications, subdivision, variances, construction permits, and the like.

California Coastal Commission[2] and *Dolan v. City of Tigard*[3] by establishing a constitutional takings framework unique to exaction disputes. This exaction takings construct has challenged legal scholars on several fronts for the better part of the past two decades.[4] For one, *Nollan* and *Dolan* place a far greater burden on the government in justifying exactions it attaches to a development *approval* than it has placed on the government in justifying the underlying regulations by which such approval could be *withheld*. Moreover, there remain a series of unanswered questions regarding the scope and reach of exaction takings scrutiny that plague the development of a coherent body of law upon which both landowners and regulators can comfortably rely. This Article explores whether these problems are augmented where the exaction takings construct that is ordinarily applied when an exaction is imposed is also applicable at the point in time when an exaction is merely proposed.

This temporal issue has received little judicial treatment to date. Indeed, when a Florida appellate court recently faced the question in *Koontz v. St. John's River Management District*,[5] it had only the cursory analysis of two lower court opinions out of Arkansas[6] and a dissent from the denial of certiorari at the U.S. Supreme Court[7] on which to rely. In *Koontz*, a permit applicant sought to develop protected wetlands.[8] While the regulating body could have exercised its authority to deny this request, it instead identified several possible exactions that, if accepted by the applicant, could allow for the development to proceed.[9] The applicant, however, refused these proposals, and the government ultimately

2. 483 U.S. 825 (1987).

3. 512 U.S. 374 (1994).

4. For a general sampling of this scholarship, see Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991); David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243 (1997); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1 (2000); Fenster, *Takings Formalism*, *supra* note 1; Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729 (2007) [hereinafter *Constitutional Shadow*]; Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L.J. 525 (2009) [hereinafter *Stubborn Incoherence*]; Timothy M. Mulvaney, *The Remnants of Exaction Takings*, 33 ENVIRONS ENVTL. L. & POL'Y J. 189 (2010).

5. Koontz v. St. Johns River Water Mgmt. Dist. (*Koontz IV*), 5 So. 3d 8 (Fla. 5th DCA 2009).

6. *See* William J. Jones Ins. Trust v. City of Fort Smith, 731 F. Supp. 912 (W.D. Ark. 1990); Goss v. City of Little Rock, 151 F.3d 861 (8th Cir. 1998).

7. *See* Lambert v. City & Cnty. of S.F., 120 S. Ct. 1549 (2000) (Scalia, J., Kennedy, J., & Thomas, J., dissenting from the denial of certiorari).

8. *Koontz IV*, 5 So. 3d at 9-10.

9. *Id.* (citing St. Johns River Water Mgmt. Dist v. Koontz (*Koontz II*), 861 So. 2d 1267, 1269 (Fla. 5th DCA 2003)).

denied the development request outright.[10] At the appellate level, the developer prevailed on the rather unusual theory that the government had *proposed* exactions that amounted to an unconstitutional taking for which compensation is due.[11]

In an effort to situate the discussion of this proposed-versus-imposed inquiry, Part II analyzes the contours of property's multiple dimensions—broadly labeled by one scholar as theory, space, stringency, and time[12]—as they arise in exaction takings contests. It suggests that issues of temporality stand as the most perplexing, unsettled, and multi-faceted of these dimensions.[13] Nearly all takings disputes implicitly involve the temporal question of whether, and the extent to which, property interests may be refined in light of social, political, economic, scientific, or technological developments.[14] Yet deducing property's temporal characteristics also plays an important role in at least two other contexts that are particularly relevant to the realm of exactions. First, it establishes the relevance of the varying levels of delay between a regulatory action and the external impact that regulation is intended to cure.[15] Second, it defines the point in time—be it upon the proposition or imposition of regulatory action—when property's other dimensions attach as to any particular takings claimant. While the former will be addressed in a forthcoming project, this Article focuses on the latter.

Part III starts with an examination of the limited judicial treatment on the question of whether claimants should be entitled to takings relief based upon the mere proposition of an exaction. The Part then moves beyond the surface analysis in the few reported decisions addressing this issue by identifying and exploring the competing normative justifications underlying it. It offers three

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10. *Id.* at 10 (citing *Koontz II*, 861 So. 2d at 1269).

11. *Id.* at 8-12 (affirming the trial court decision finding a taking). The matter is now pending before the Florida Supreme Court. *See* St. Johns River Water Mgmt. Dist. v. Koontz, 15 So. 3d 581 (Fla. 2009) (granting certiorari).

12. *See* LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 15-33 (2003); Laura S. Underkuffler-Freund, *Takings and the Nature of Property*, 9 CAN. J.L. & JURISPRUDENCE 161, 169-82 (1996).

13. *See infra* notes 35-60 and accompanying text.

14. *Compare* Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., 130 S. Ct. 2592, 2610 (2010) (plurality opinion) (suggesting that a judicial change in the common law could amount to an unconstitutional taking even if that change is predictable), *with* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1069-70 (1992) (Stevens, J. dissenting) ("[O]ur ongoing self-education produces similar changes in the rights of property owners: New appreciation of the significance of endangered species; the importance of wetlands; and the vulnerability of coastal lands, shapes our evolving understandings of property rights." (citations omitted)). For an assessment of this aspect of temporality in a recent article, see Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247 (2011), *available at* http://www.yalelawjournal.org/images/pdfs/946.pdf.

15. *See* Timothy M. Mulvaney, Address at Albany Law School, Northeast Regional Scholarship Workshop, Time and Exactions (Feb. 5, 2011).

reasons to suggest that only upon the imposition of an exaction should the existing exaction takings construct attach as to any individual permit applicant. First, where a proposed exaction is refused or withdrawn, no property has been taken.[16] Second, judicial speculation on the substantive worth of hypothetical exactions suggests such matters are not suitable for review.[17] Third, burdening governmental entities with possible takings liability for statements made during pre-decisional negotiation sessions places a chilling effect on regulator-landowner coordination.[18]

Part IV contends that validating the proposed exactions theory, as select lower courts have done, constrains governmental entities' use of exactions as a tool responsive to the impacts associated with the topic of this journal volume: sea level rise. Described as a "slow-motion flood,"[19] rising waters are gradually inundating low-lying lands and eroding beaches, such that the increased storm surge associated therewith poses major public safety and environmental risks.[20] Theoretically, exactions could, at least in part, counter these impacts. However, subjecting exactions that are merely proposed to takings suits could depress cooperation between regulators and landowners. This, in turn, could forestall the development of new, creative, collaborative solutions to a complex phenomenon that both parties still do not fully understand.

The Article concludes in Part V that uncertainty remains with respect to the temporal issue of whether the exaction takings construct attaches at the moment an exaction is merely proposed. This uncertainty is hindering the ultimate employment of exac-

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16. *See infra* notes 132 to 136 and accompanying text.

17. *See infra* notes 137 to 149 and accompanying text.

18. *See infra* notes 150 to 156 and accompanying text.

19. Josh Harkinson, *Buh Bye East Coast Beaches: Which Part of the Atlantic Coast Will Be Swallowed By the Sea?*, MOTHER JONES (Apr. 27, 2010, 2:00 PM) (quoting James Titus, EPA Project Manager for Sea Level Rise), http://motherjones.com/environment/2010/04/climate-desk-sea-level-rise-epa.

20. *See, e.g.*, Donald Scavia et al., *Climate Change Impacts on U.S. Coastal and Marine Ecosystems*, 25 ESTUARIES 149, 152-53 (2002); U.S. CLIMATE CHANGE SCI. PROGRAM, COASTAL SENSITIVITY TO SEA LEVEL RISE: A FOCUS ON THE MID-ATLANTIC REGION 2 (2009), *available at* http://epa.gov/climatechange/effects/coastal/sap4-1.html; J.G. TITUS, ET AL, EPA 430R07004, BACKGROUND DOCUMENTS SUPPORTING CLIMATE CHANGE SCIENCE PROGRAM SYNTHESIS AND ASSESSMENT PRODUCT 4.1: COASTAL ELEVATIONS AND SENSITIVITY TO SEA LEVEL RISE i (J.G. Titus & E.M. Strange, eds. 2008), *available at* http://epa.gov/climatechange/effects/coastal/background.html; *Climate Change 2007: A Synthesis Report*, IPCC, http://www.ipcc.ch/publications_and_data/ar4/syr/en/spms3.html; JAMES G. TITUS & VIJAY K. NARAYANAN, EPA 230-R-95-008, THE PROBABILITY OF SEA LEVEL RISE (1995), *available at* http://epa.gov/climatechange/effects/coastal/slrmaps_probability.html; Robert J. Nicholls et al., *Coastal Systems and Low-Lying Areas*, *in* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 315, 317-356 (Martin Perry et al. eds., 2007); E. ROBERT THIELER & ERIKA S. HAMMER-KLOSE, U.S. GEOLOGICAL SURVEY, OPEN-FILE REPORT 00-179, NATIONAL ASSESSMENT OF COASTAL VULNERABILITY TO FUTURE SEA-LEVEL RISE: PRELIMINARY RESULTS FOR THE U.S. GULF OF MEXICO COAST (2006), *available at* http://pubs.usgs.gov/of/2000/of00-179/index.html.

tions as a component of local government land use controls. This Article solicits the judiciary to provide explicit, reasoned guidance respecting the content of the temporal characteristics of property in exaction takings law. Until then, the discretionary governmental power to condition development approvals—particularly as a tool to adapt to sea level rise—will continue to raise indeterminate and unnecessary takings liability risks.

II. TEMPORALITY IN EXACTION TAKINGS LAW

This Part first suggests that the U.S. Supreme Court's exaction takings jurisprudence provides little explicit examination of the property interest at stake. It then explores the underlying content of this property interest through the lens of property's multidimensional features. It deduces that issues of temporality stand as the most complicated and unsettled of these features.

A. Précis on Nollan and Dolan

In *Nollan*, the state did not meet its burden of proving that a condition requiring a beach access pathway bore an "essential nexus" to the impacts caused by the development.[21] *Dolan* added an additional requirement to *Nollan's* nexus test in compelling a town to prove that the cost of dedicating a strip of land for flood control and a public bicycle path was "rough[ly] proportion[ate]" to the benefits the strip would provide to the public in offsetting flooding and traffic resulting from the development.[22] Yet while the legal validity of any takings claims depends "upon what [one] consider[s] property, as a substantive matter, to be[,]"[23] neither decision proved a beacon of clarity on this score.

The impacts occasioned by the proposed development in *Nollan* included blocking (1) the public's view of the ocean and (2) "the public's sense that it may have physical access to the beach" seaward of Nollan's house.[24] The Court concurrently implied that the property interest at stake was an absolute right to prohibit per-

21. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828, 837 (1987).

22. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (holding that "the city must make some sort of individualized determination" regarding the quantitative nature of the condition).

23. *See* UNDERKUFFLER, *supra* note 12, at 18. *See also* Underkuffler-Freund, *supra* note 12, at 165 ("Until we know what the property [interest] at stake is, it is impossible to evaluate whether it has been taken, or whether compensation for its loss should be paid.").

24. *Nollan*, 483 U.S. at 865 (Blackmun, J., dissenting). *But see* C.B. MACPHERSON, PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 201 (1978) (suggesting, pre-*Nollan*, that the right to exclude others is no more the essence of property than the right not to be excluded).

manent access by others;[25] a right to prohibit temporary access by others;[26] a right to build on one's property;[27] and a right to otherwise use one's property.[28] Therefore, the Court identified the particularized property interest at stake in a variety of incompatible ways. Nonetheless, the Court proceeded to hold that, by failing to exhibit the required "essential nexus" between the end advanced by the exaction and any justification offered for requiring a development permit in the first place, the government "took" the property interest at issue—whatever that property interest was.[29]

Seven years after *Nollan*, the *Dolan* majority simultaneously avowed that the property interest at stake involved the right to use of the entire property;[30] the right to use the regulated portions of the property;[31] and the right to exclude others from the regulated portions of the property.[32] After what one scholar referred to as this "superficial gloss"[33] over determining what constituted the allegedly taken property interest, the Court proceeded to focus on the takings question and remanded for consideration under the newly-established proportionality test.[34]

B. Characteristics of the Property Interest at Stake in Exaction Takings Disputes

The failings of *Nollan* and *Dolan* can be illuminated with the assistance of a model espoused by Laura Underkuffler. Underkuffler asserts that property consists of four dimensions: theory,

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25. *See Nollan*, 483 U.S. at 831 ("an easement across their beachfront available to the public on a permanent basis . . .").

26. *Id.* at 832 ("a . . . continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises") (footnote omitted).

27. *Id.* at 833 n.2.

28. *Id.* at 834 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

29. *See id.* at 841-42.

30. Dolan v. City of Tigard, 512 U.S. 374, 400 (1994).

31. *Id.* at 389-90.

32. *Id.* at 393.

33. *See* UNDERKUFFLER, *supra* note 12, at 154.

34. *Dolan*, 512 U.S. at 396. On remand, even after the city no longer was asking for a dedication of property but rather only an easement, an Oregon trial court concluded that the city could not meet its burden under the "rough proportionality" test. The parties ultimately resolved the matter via settlement, with the city agreeing to pay Dolan nearly $1.5 million for the relevant strip of property. Randall T. Shephard, *Takings Law: Do We Really Want More Judicial Intervention in State Land Use Regulation?*, 1 GEO. J.L. & PUB. POL'Y 99, 102 n.22 (2002) (citing *City of Tigard Will Pay Dolans $ 1.5 Million in Bikepath "Takings" Case*, BUS. WIRE, Nov. 21, 1997); Richard Duane Faus, *Exactions, Impacts Fees, and Dedications—Local Government Responses to* Nollan/Dolan *Takings Law Issues*, 29 STETSON L. REV. 675, 676-77 (2000); Samuel H. Weissbard & Camellia K. Schuk, *Taking Issue with Taking by Regulation*, COM. INVESTMENT REAL ESTATE (Nov. – Dec. 1998), *available at* http://www.ccim.com/cire-magazine/articles/taking-issue-taking-regulation; Dolan v. Tigard: *Owner Gets $1.4 Million From City—at Last!*, REALTOR MAG., (July 1, 1998), *available at* http://www.realtor.org/archives/lawyoujul1998b.

space, stringency, and time. The *theoretical dimension* involves a decision reflecting the incidents of ownership.[35] The *spatial dimension* identifies those "objects," or types of interests, to which the chosen theory of rights applies.[36] The *stringency dimension* relates to the level of protection afforded to the identified private interest in light of competing societal interests.[37] And the *temporal* dimen-

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35. *See* UNDERKUFFLER, *supra* note 12, at 16. This dimension requires a universal theory of individual rights (lest any idea of property be void of meaning). *See also* Susan Eisenberg, Comment, *Intangible Takings,* 60 VAND. L. REV. 667, 702-03 (2007) (discussing the role of a universal theory for defining property rights). Such a theory could, for instance, be grounded in positivist notions of the law, historical understandings, ordinary meaning, custom, or reasonable and justified expectations. *See* UNDERKUFFLER, *supra* note 12, at 19-21. *See also* Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates,* 72 U. CHI. L. REV. 1237, 1239 n.9 (2005); Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations,* 30 HARV. ENVTL. L. REV. 309, 310-14 (2006) (describing conceptions of what "ownership" means to partially define property rights).

36. *See* UNDERKUFFLER, *supra* note 12, at 21 ("If we choose, for example, the property holder's 'reasonable expectations' as the theoretical dimension for our conception of property, the question arises: 'reasonable expectations *with respect to what?*' If we choose legal rules as the theoretical dimension for our conception of property, the question arises: 'legal rules *as applied to what?*'"). Underkuffler contends that the spatial dimension is relevant on both a conceptual and a geographic scale. *See* Underkuffler-Freund, *supra* note 12, at 171 ("The chosen theory of rights has meaning only with reference to a geographically or otherwise conceptually described field of application."). The "parcel as a whole" debate in regulatory takings jurisprudence provides an appropriate example on the geographic scale. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978) ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. . . . [T]his Court focuses . . . on the nature and extent of the interference with rights in the parcel as a whole . . . ."); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) (supporting the statement in *Penn Central* that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole); Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002) (quoting *Penn Cent.*, 438 U.S. at 130-31) ("in regulatory takings cases [the judiciary] must focus on 'the parcel as a whole'"). *But see* Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1380-81 (Fed. Cir. 2000) (declaring the relevant parcel to be the 50.7 regulated acres rather than the entire 311.7 acre parcel owned by the plaintiff); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (finding that the relevant parcel for takings purposes did not include portions of the parcel sold before promulgation of the regulation at issue). *See also* Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine,* 24 CARDOZO L. REV. 93, 110 n.65 (2002) [hereinafter *Virtue of Vagueness*] ("In a takings claim based on loss of value, the loss must be examined relative to a 'before' picture of what was initially at stake."); James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners,* 57 MD. L. REV. 1279, 1348 (1998) ("A setback of one foot . . . might deny all beneficial use to that first foot of land, yet barely impair the use of the remaining land.").

37. UNDERKUFFLER, *supra* note 12, at 25. For example, the Supreme Court, having on several occasions chosen a theory of rights grounded in the "bundle of rights" metaphor, has categorized the "right to exclude" as "one of the most essential sticks" in that bundle. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). Necessarily, then, there must be sticks within that bundle that are afforded a lesser degree of protection than the right to exclude. *See* UNDERKUFFLER, *supra* note 12, at 25. Indeed, the Court in another case seemingly acknowledged the same, stating that an ordinance limiting land to single-family dwellings does *not* "extinguish a fundamental attribute of ownership[.]" Agins v. City of Tiburon, 447 U.S. 255, 262 (1980) (citing *Kaiser Aetna,* 444 U.S. at 179-80). Outside of the real property context, the stringency with which property rights are protected also might differ depending upon the kinds of objects at issue. For example, money is less protected than real property

sion, according to Underkuffler, reflects whether, and the extent to which, property rights can be modified in light of evolutional societal change.[38] If courts directly contemplate the choices they are making within each dimension, their holdings are more likely to seem principled.[39] In other words, attentiveness to these four dimensions of property forces the judiciary to acknowledge at least some of the underlying choices made in takings cases.[40] However, in both of its seminal exaction takings decisions, the U.S. Supreme Court did not overtly acknowledge the content ascribed to each dimension of the property interest that it deemed taken.

It appears that, in *Nollan*, the Court simultaneously selected two distinct *theories* of rights, without delineating the contours of either theory or suggesting how any distinctions between the two might be reconciled. First, it chose a theory of property as circumscribed by its "ordinary meaning."[41] However, the Court only explicitly defined "ordinary meaning" in the negative; it stated that "ordinary meaning" does *not* connote the landowner's reasonable expectations with respect to use restrictions, as Justice Brennan had defined it in a dissenting opinion.[42] Second, the Court resorted

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in light of its fungible nature. *See, e.g.*, E. Enters. v. Apfel, 524 U.S. 498, 555 (1998) (Breyer, J., dissenting); United States v. Sperry Corp., 493 U.S. 52, 62 n.9 (1989). It also may differ in light of the different contexts in which ownership rights to a given object appear. For example, a chair with which one has a personal attachment because it is a family heirloom may be more protected than the same chair—from a physical standpoint—that is replaceable with one of equal value. UNDERKUFFLER, *supra* note 12, at 27 (citing Margaret Jane Radin, *Property and Personhood*, 34 STAN L. REV. 957, 1007 (1982)).

38. *See* UNDERKUFFLER, *supra* note 12, at 29-30. If one chooses a theory of rights grounded in ordinary meaning, however, it is difficult to distinguish Underkuffler's description of the theoretical dimension with that of the temporal dimension. This Article suggests that the temporal nature of property, particularly in exaction takings cases, consists of several important sub-elements that separate it from choices surrounding a theory of rights. *See infra* text accompanying notes 58-60.

39. It suffices to say that the more the content afforded each dimension of such choices is made transparent, the better off all members of society will be—from judges to legislators to regulators to private citizens—in fashioning their own perspectives on the competing interests at work in takings disputes. Without an explicit assessment of the content of each dimension, individuals "lose the opportunity to evaluate consciously the social and political choices that all property involves." UNDERKUFFLER, *supra* note 12, at 62 (comparing a conception of property that recognizes competing interests amidst a fluid landscape and "explicitly assess[es]" the "choices for its dimensions of theory, space, stringency, and time" with a conception of property that views property as "protection" and "tends to deny or obscure these [dimensional] choices" without asking "*why* or *how* such protection exists"). This lost opportunity supports a "dangerous (and naïve) illusion that protection of property is 'impartial' in nature . . . ." Underkuffler-Freund, *supra* note 12, at 202.

40. *See* UNDERKUFFLER, *supra* note 12, at 155 ("Awareness of the dimensions that property involves would . . . force an awareness of the choices that we—as a society—are making in [takings] cases, either explicitly or by default.").

41. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987).

42. *Id.*

to a theory of rights grounded in the "bundle of rights" metaphor.[43] The *Dolan* majority cited favorably to the Court's earlier reliance on this metaphor, without further explanation.[44] Yet while the Court has previously held that the "bundle" includes the generally-described rights of possession, use, exclusion, and disposition,[45] the "sticks" that make up this bundle have been so vociferously debated that some suggest the metaphor is of trivial meaning.[46] Complicating *Nollan*'s, and, by affirmation, *Dolan*'s, rather perplexing selection of the "ordinary meaning" *and* "bundle of rights" theories, the U.S. Supreme Court in other recent takings cases has chosen theories grounded in the right to "anticipated gains,"[47] the right to use as limited by background principles of state property law,[48] and the rights as determined by the "existing rules or understandings that stem from an independent source such as state law[.]"[49]

Similarly, the Court has not definitely interpreted the *spatial* dimension of property rights in the exactions context. Rather, it has sent only vague signals in identifying the categories of exactions to which the *Nollan* and *Dolan* paradigm apply. Several commentators have drawn from dicta in recent Supreme Court decisions to suggest that the relevant "space" includes only those exactions that are adjudicative in nature[50] or require public occu-

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43. *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982)). Justice Brennan's dissenting opinion suggested the same. *See id.* at 857 (Brennan, J., dissenting) ("[S]tate law is the source of those strands that constitute a property owner's bundle of . . . rights.").

44. Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

45. *See* United States v. Gen. Motors Corp., 323 U.S. 373, 377-78 (1945). *See also* Underkuffler-Freund, *supra* note 12, at 169 ("Theories that have appeared, at various times [in U.S. Supreme Court opinions], include the 'bundle' of 'traditionally' or 'commonly' recognized rights to possess, use, transport, sell, donate, exclude, or devise[.]"(footnote omitted)).

46. *See, e.g.*, Craig Anthony (Tony) Arnold, *Legal Castles in the Sand: The Evolution of Property Law, Culture, and Ecology in Coastal Lands*, 61 SYRACUSE L. REV. (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1701626.

47. Andrus v. Allard, 444 U.S. 51, 66 (1979). *See also* E. Enters. v. Apfel, 524 U.S. 498, 528-29 (1998).

48. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).

49. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

50. *See* Fenster, *Takings Formalism*, *supra* note 1, at 628 (citing City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999)) (suggesting that dicta in *Del Monte Dunes* "seemed to limit nexus and proportionality to a subset of land use conditions" that are adjudicative in nature); Poirier, *Virtue of Vagueness*, *supra* note 36, 107 n.55 (contending that *Del Monte Dunes* limits the application of *Nollan* and *Dolan* to individualized determinations); Robert H. Freilich & Jason M. Divelbiss, *The Public Interest is Vindicated*: City of Monterey v. Del Monte Dunes, 31 URB. LAW. 371, 380 (1999) (suggesting that *Del Monte Dunes* establishes that the *Nollan* and *Dolan* threshold is limited to "the [n]arrow [c]ategorical [e]xceptions of [t]itle or [e]xaction [t]akings"); Mulvaney, *Remnants of Exaction Takings*, *supra* note 4, at 212-14 (suggesting that there is a strong implication in the U.S. Supreme Court's unanimous 2005 opinion in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528

pation of private lands.[51] (Both the beach access way exaction in *Nollan* and the bicycle path exaction in *Dolan* were arguably adjudicative,[52] and both clearly required public occupation of previously private lands.) Yet other commentators suggest that the nexus and proportionality threshold is equally applicable to legislatively-imposed exactions,[53] or to exactions that do not re-

(2005) that the *Nollan* and *Dolan* tests do not apply to conditions imposed through the legislative process).

51. As with the adjudicative-versus-legislative distinction, some scholars contend that there is a strong implication in *Del Monte Dunes* and *Lingle* that the *Nollan* and *Dolan* tests do not apply to conditions that are not physically invasive. *See, e.g.*, Fenster, *Takings Formalism*, *supra* note 1, at 635-36; John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047, 1077-79 (2000) [hereinafter *Takings and Errors*]; John D. Echeverria, *Revving the Engines in Neutral:* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 29 ENVTL. L. REP. 10682, 10692 (1999); Mulvaney, *Remnants of Exaction Takings*, *supra* note 4, at 214.

52. *But see* Mulvaney, *Remnants of Exaction Takings*, *supra* note 4, at 227 (suggesting that both *Nollan* and *Dolan* could be considered generally applicable legislative schemes, whereby the facts in those cases would fail to meet the stated circumstances in which their tests apply).

53. *See, e.g.*, Steven J. Eagle, Del Monte Dunes, *Good Faith, and Land Use Regulation*, 30 ENVTL. L. REP. 10100, 10103-05 (2000) ("It seems highly unlikely that the Supreme Court would unanimously declare through dicta in *Del Monte Dunes* that the *Dolan* 'rough proportionality' principle should not develop to meet the exigencies of cases as they arise, much less to deal with deliberate municipal circumventions."); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 401-02 (2002); Christopher T. Goodin, Note, Dolan v. City of Tigard *and the Distinction Between Administrative and Legislative Exactions: "A Distinction Without A Constitutional Difference,"* 28 U. HAW. L. REV. 139, 158-67 (2005); David L. Callies & Christopher T. Goodin, *The Status of* Nollan v. California Coastal Commission *and* Dolan v. City of Tigard *After* Lingle v. Chevron U.S.A., Inc., 40 J. MARSHALL L. REV. 539, 563-64 (2007); Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487, 501-21 (2006) (arguing that the Takings Clause does not distinguish between branches of government, such that legislative and adjudicative exactions should receive the same level of judicial scrutiny); James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397, 407-17 (2009) (arguing that *Lingle* supports subjecting legislatively-imposed exactions to heightened judicial scrutiny).

For a review of the pre-*Lingle* judicial split on this issue of legislative versus adjudicative exactions, compare Garneau v. City of Seattle, 147 F.3d 802, 811 (9th Cir. 1998) (expressing "considerable doubt" about the applicability of *Dolan*'s rough proportionality standard to "legislative, as opposed to administrative exactions") (footnote omitted), San Remo Hotel L.P. v. City & Cnty. of San Francisco, 41 P.3d 87, 105-11 (Cal. 2002) (holding that *Nollan* and *Dolan's* heightened scrutiny did not apply to broad legislation establishing a formula for housing replacement fee conditions), Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park & Rec. Dist., 62 P.3d 404, 413 (Or. Ct. App. 2003) (holding that the *Dolan* "rough proportionality" test did not apply in determining whether system development charge was a taking), Home Builders Ass'n. of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997), Arcadia Dev. Corp. v. City of Bloomington, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996), Southeast Cass Water Res. Dist. v. Burlington N. R.R. Co., 527 N.W.2d 884, 896 (N.D. 1995), Waters Landing L.P. v. Montgomery Cnty., 650 A.2d 712, 724 (Md. 1994), and Parking Ass'n of Ga., Inc. v. City of Atlanta, 450 So. 2d 200, 203 n.3 (Ga. 1994), with Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 389 (Ill. App. Ct. 1995) (applying *Dolan* to legislatively imposed property development conditions), Dudek v. Umatilla Cnty., 69 P.3d 751, 756 (Or. Ct. App. 2003) (distinguishing a legislatively adopted exaction scheme where the ordinance grants discretion to the county to determine the extent of the exaction, to which *Nollan* and *Dolan* apply, from a legislatively determined impact fee charge, to which they do not), and Lincoln

quire physical public occupation, such as conservation restrictions and impact fees.[54]

City Chamber of Commerce v. City of Lincoln City, 991 P.2d 1080, 1082 (Or. Ct. App. 1999) (applying *Dolan* to an ordinance requiring fees for roads and other infrastructure as development permit conditions). Of note, Justices O'Connor and Thomas dissented from the U.S. Supreme Court's denial of a petition for certiorari in a matter where the Georgia Supreme Court declared that the heightened scrutiny of *Nollan* and *Dolan* is not applicable to legislatively-imposed exactions, but only those that are adjudicatively-imposed. *See* Parking Ass'n of Ga., Inc. v. City of Atlanta, 515 U.S. 1116, 1117–19 (1995) (Thomas, J. & O'Connor, J., dissenting from the denial of certiorari).

For post-*Lingle* cases on this legislative versus adjudicative question, compare Wolf Ranch L.L.C. v. City of Colo. Springs, 207 P.3d 875, 880 (Colo. App. 2008), *aff'd*, 220 P.3d 559 (Colo. 2009) (holding that legislatively formulated exactions applying to broad classes of landowners do not require a showing of an essential nexus and rough proportionality), and McClung v. City of Sumner, 548 F.3d 1219, 1227-28 (9th Cir. 2008) (holding that the *Nollan* and *Dolan* tests are inapplicable to cases that do not involve individual, adjudicative decisions nor the physical appropriation of private land), with B.A.M. Dev. L.L.C. v. Salt Lake Cnty., 128 P.3d 1161, 1170-71 (Utah 2006) (holding that prior to the enactment of a Utah statute codifying a "rough proportionality" treatment of all development exactions, *Nollan* and *Dolan* applied to both adjudicative decisions and general land-use ordinances).

54. *See, e.g.*, Breemer, *supra* note 53, at 402-05. The lower courts continue to debate the issue. For pre-*Lingle* cases on this question, compare Kitt v. United States, 277 F.3d 1330, 1336 (Fed. Cir. 2002) (quoting Commonwealth Edison Co. v. United States, 271 F.3d. 1327, 1340 (Fed. Cir. 2001)) ("'the mere imposition of an obligation to pay money . . . does not give rise to a claim under the Takings Clause of the Fifth Amendment'"), *Garneau*, 147 F.3d at 811 (expressing "considerable doubt" about the applicability of *Dolan*'s rough proportionality standard to "fee exactions, as opposed to physical exactions"), Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1995) (declaring that *Dolan*'s heightened scrutiny is inapplicable to fees imposed as a condition of a landowner's exercise of her property rights to hunt on her own land because no physical occupation occurred), Atlas Corp. v. United States, 895 F.2d 745, 757-758 (Fed. Cir. 1990) (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491-92 (1987)) (conditioning approval on expenditures is not a taking), *Home Builders Ass'n of Cent. Ariz.*, 930 P.2d at 1000 (citing Commercial Builders v. Sacramento, 941 F.2d 872 (9th Cir. 1991)) (finding a water resource development fee not subject to *Dolan*'s heightened scrutiny), and McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995) (declining to apply *Dolan* beyond property dedications to impact fees), with *Garneau*, 147 F.3d at 815 n.5 (O'Scannlain, J., concurring in part and dissenting in part) (citing *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994)) (asserting that U.S. Supreme Court's vacation and remand in *Ehrlich* soon after *Dolan* suggests *Dolan* applies to imposed fees), Town of Flower Mound v. Stafford Estates L.P., 135 S.W.3d 620, 635 (Tex. 2004) (applying *Dolan* to traffic impact fee imposed ad hoc to improve an existing public road), Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 695 (Colo. 2001) (applying *Dolan* to sanitation fee), Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996) (applying *Dolan* to recreation fee), N. Ill. Home Builders Ass'n v. Cnty. of DuPage, 649 N.E.2d 384, 390-91 (Ill. 1995) (applying *Dolan* to transportation impact fees), Trimen Dev. Co. v. King Cnty., 877 P.2d 187, 194 (Wash. 1994) (applying *Dolan* to park fees), Benchmark Land Co. v. City of Battle Ground, 972 P.2d 944, 950 (Wash. App. 1999) (deciding that *Nollan* and *Dolan* apply "where the City requires the developer as a condition of approval to incur substantial costs improving an adjoining street"), J.C. Reeves Corp. v. Clackamas Cnty., 887 P.2d 360, 365-66 (Or. Ct. App. 1994) (applying *Dolan* to transportation impact fees), and Dowerk v. Charter Twp. of Oxford, 592 N.W.2d 724, 728 (Mich. Ct. App. 1998) (applying *Dolan* to extension and upgrade of private roads).

For post-*Lingle* cases on this question, compare Norman v. United States, 429 F.3d 1081, 1089-90 (Fed. Cir. 2005) (holding that that *Nollan* and *Dolan* only apply to permit conditions that require a physical invasion of property), and City of Olympia v. Drebick, 126 P.3d 802, 808 (Wash. 2006) (holding that the tests applied in *Nollan* and *Dolan* should not be extended to impact fees imposed to mitigate the direct impacts of new development or general growth impact fees imposed pursuant to statutorily-authorized ordinances), with Ocean Harbor House Homeowners Ass'n v. Cal. Coastal Comm'n, 77 Cal. Rptr. 3d 432, 449-

In analyzing *Nollan* and *Dolan*, one can say with certainty that only the *stringency* dimension of property has been explicitly addressed in any detail. Whatever theory of rights is utilized, in whatever conceptual space those rights apply, the judiciary is to review any alleged infringement of those rights via an exaction with an intermediate level of scrutiny. That is, the government bears the burden of establishing compliance with the "essential nexus" and "rough proportionality" tests.[55] And even within the stringency dimension, the precise nature of the nexus and proportionality tests remains subject to debate.

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50 (Cal. Ct. App. 2008) (holding that under California law, the *Nollan* and *Dolan* tests apply to permit conditions that require land dedication and ad hoc mitigation fees).

Some commentators even have contended that the *Nollan* and *Dolan* opinions indicate the Court's willingness to authorize an expanded field of substantive challenges to the validity of final governmental acts far beyond exactions. *See, e.g.*, Jan G. Laitos, *Takings and Causation*, 5 WM. & MARY BILL RTS. J. 359, 377-78 (1997) (suggesting that the *Nollan* and *Dolan* analysis should apply to all governmental actions that affect private property interests); Edward J. Sullivan, *Substantive Due Process Resurrected through the Takings Clause:* Nollan, Dolan, *and* Ehrlich, 25 ENVTL. L. 155 (1995). *But see* Richard J. Ansson, Jr., Dolan v. Tigard's *Rough Proportionality Standard: Why This Standard Should Not Be Applied to an Inverse Condemnation Claim Based upon Regulatory Denial*, 10 SETON HALL CONST. L.J. 417, 425-434 (2000).

55. For scholarly articles referring to the *Nollan* and *Dolan* threshold as a form of "intermediate scrutiny," see, for example, Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1516-17 (2006) (discussing academic debate on the benefits and burdens of applying the intermediate scrutiny required by *Nollan* and *Dolan* to exactions); Note, *California Court of Appeal Finds* Nollan's *and* Dolan's *Heightened Scrutiny Inapplicable to Inclusionary Zoning Ordinance.*—Home Builders Ass'n of Northern California v. City of Napa, 108 Cal. Rptr. 2d 60 (Cal. Ct. App. 2001), 115 HARV. L. REV. 2058, 2058-59 (2002) (discussing a California Court of Appeal's refusal to apply intermediate scrutiny in accordance with *Nollan* and *Dolan* to exactions in support of inclusionary zoning); Charles M. Haar & Michael Allan Wolf, Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2184-87 (2002) (suggesting that, in *Nollan* and *Dolan*, the Rehnquist Court, "lowered the bar . . . for private property owners challenging government regulation of land" by calling for a more significant level of scrutiny than had previously been required in land use cases and placing the burden of proof on the defendant government); Fenster, *Takings Formalism*, *supra* note 1, at 622 ("*Nollan's* and *Dolan's* 'essential nexus' and 'rough proportionality' tests require courts to apply heightened scrutiny to challenged land use regulations"); Breemer, *supra* note 53, at 385 (citing *Ehrlich v. City of Culver City*, 911 P.2d 429, 439 (1996)) (discussing the need for application of the intermediate standard of scrutiny formulated by the Court in *Nollan* and *Dolan* to curtail the government's abusive use of its discretionary land use and police powers); Otto J. Hetzel & Kimberly A. Gough, *Assessing the Impact of* Dolan v. City of Tigard *on Local Governments' Land-Use Powers*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 219 (David L. Callies ed., 1996) (stating that *Nollan* and *Dolan* "clearly signalled the Court's determination to provide greater protection for private property rights" through the application of intermediate judicial scrutiny); Andrew W. Schwartz, Deputy City Attorney, S.F., Cal., Address at Georgetown Univ. Law Ctr., Litigating Regulatory Takings Claims: The Application of *Nollan/Dolan* Heightened Scrutiny to Legislative Regulations and "Unsuccessful Exactions," (Oct. 28-29, 1999); Donald C. Guy & James E. Holloway, *The Direction of Regulatory Takings Analysis in the Post-*Lochner *Era*, 102 DICK. L. REV. 327, 346 (1998) (stating the Court's nexus and proportionality tests represent the application of heightened judicial scrutiny). *See also* STEVEN J. EAGLE, REGULATORY TAKINGS § 7-10(b)(7) (3d ed. 2005).

Openly affording content—imprecise at that—to but one of the first three dimensions of the property interest at stake in exaction takings disputes hardly establishes a coherent and consistent paradigm in which regulators and individual property owners can be expected to comfortably co-exist.[56] Not surprisingly, the content afforded by the Supreme Court to these first three dimensions has provoked a significant amount of critical legal scholarship.[57] However, the *temporal* dimension has gone largely undetected within exactions jurisprudence, and, likely as a result, has not been fully explored in the academic literature. In this light, it is the temporal features of property to which the remainder of this Article is dedicated.

The content afforded the temporal dimension is important on several fronts. As Underkuffler suggests, it affects whether, and the extent to which, property interests may be refined in light of subsequent collective action responsive to political, economic, scientific, or technological developments.[58] Yet decisions respecting property's temporal characteristics also play an important role in at least two other contexts in exaction taking law. First, defining property's temporal features establishes the relevance of the varying levels of delay between an exaction and the external impact that exaction is intended to cure.[59] Second, it determines the point in time when property's theoretical, spatial, and stringency characteristics attach as to any particular exaction takings claimant.[60] The following Part considers this latter element of property's temporal dimension.

III. PROPOSED-VERSUS-IMPOSED EXACTIONS

The first section below explores the limited judicial treatment on the temporal question of whether the *Nollan* and *Dolan* construct attaches at a point in time *prior to* the government's imposition of an exaction. The second section goes beyond the cursory analysis in these reported decisions by exploring

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56. *See, e.g.*, Poirier, *Virtue of Vagueness*, *supra* note 36, at 107 n.55 (suggesting that *Nollan* and *Dolan* articulate tests "that are hardly beacons of clarity . . ."); Fenster, *Takings Formalism*, *supra* note 1, at 613-14, 628 (describing *Nollan* and *Dolan* as "somewhat inexact" and contending that "state and lower federal courts lack guidance on, and continue to disagree about, the precise boundaries of the category of regulations to which the exactions rules apply").

57. *See, e.g.*, *supra* notes 35-37 and accompanying text.

58. *See* UNDERKUFFLER, *supra* note 12, at 29-30. *See also supra* note 14 and accompanying text.

59. *See* Mulvaney, Time and Exactions, *supra* note 15.

60. *See infra* notes 61-169 and accompanying text.

the competing normative positions pertinent to resolution of this temporal question.

A. The Limited Judicial Treatment of the Proposed-Versus-Imposed Exaction Inquiry

The factual circumstances of *St. John's River Management District v. Koontz*,[61] recently decided by a Florida appellate court, serve as an appropriate template to explore this temporal element. Coy Koontz applied to the St. Johns River Management District (the "District") for a dredge-and-fill permit to construct a commercial shopping center on 3.7 acres of his 14.2-acre lot.[62] The permit was necessary because nearly Koontz's entire property lies within the Riparian Habitat Protection Zone of the Econlockhatchee River Hydrologic Basin ("Basin").[63] Koontz's proposed development within the Basin would require the destruction of 3.4 acres of protected wetlands and 0.3 acres of protected uplands.[64] In his development application, Koontz offered to mitigate the wetland loss by restricting from development the remaining undeveloped portion of the largely wetland property (a total of 10.5 acres) through a conservation easement.[65]

In assessing the District's response to Koontz's permit application, it is important to identify the baseline: the District at all times retained the regulatory authority to prohibit use of the property to protect the health and safety of the public by preserving the ecosystem services that Koontz's property, in its natural state, provides.[66] In this instance, however, the District proved willing to discuss possible avenues for mitigating the impacts of the proposed development through imposition of an exaction.[67] Yet Koontz's mitigation proposal (placing a conserva-

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61. *Koontz IV*, 5 So. 3d 8 (Fla. 5th DCA 2009).

62. *Id.* at 9-10. Technically, Koontz applied for both a dredge-and-fill permit and "a management and storage of surface waters permit . . . ." *Id.* at 10 (citing *Koontz II*, 861 So. 2d 1267, 1269 (Fla. 5th DCA 2003)). The distinction between the two is not relevant to the issues addressed herein.

63. *Id.* at 9-10.

64. *Id.* at 10.

65. *Id.* at 9-10. There is no mention in the public record of Koontz offering to offset the loss of protected uplands, nor of the government requesting that Koontz do so.

66. *See* Koontz v. St. Johns River Water Mgmt. Dist. (*Koontz III*), 720 So. 2d 560, 561 (Fla. 5th DCA 1998) (affirming the District's statutory authority to designate the affected land as a protected hydrological basin). For examples of prominent scholarship on the emerging notion of ecosystem services, see J.B. Ruhl & James Salzman, *The Law and Policy Beginnings of Ecosystem Services*, 22 J. LAND USE & ENVTL. L 157 (2007), and Keith H. Hirokawa, *Three Stories About Nature: Property, the Environment, and Ecosystem Services*, 62 MERCER L. REV. (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809035.

67. *See Koontz IV*, 5 So. 3d at 10.

tion restriction on the 10.5 acres upon which he did not propose to build) amounted to less than one-third of that required by the District's conservation guidelines.[68]

In informal discussions with Koontz, the District stated that it was willing to grant the development permit on the condition that Koontz perform offsite mitigation.[69] For example, the District suggested that Koontz agree to plug ditches, replace damaged culverts, or perform some equivalent mitigating act on nearby properties within the Basin.[70] Alternatively, the District proposed that Koontz could avoid performing any off-site wetlands mitigation by reducing the size of his project to the point where the destruction of protected territory would be limited to one acre.[71]

Koontz rejected these propositions by the District;[72] he would only agree to his original, self-proposed condition to deed-restrict the remaining portion of his property for conservation purposes after construction of his entire 3.7-acre proposed development.[73] Concluding that Koontz's self-proposed condition would not offset the wetland loss associated with the project, the District denied the permit application outright.[74] In the denial order, the District reiterated its suggested mitigation options, as well as the project design alternative, that would make Koontz's development permissible.[75]

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68. Petitioner-Appellant's Initial Brief on the Merits, at 2, *Koontz IV*, 5 So. 3d 8 (SC09-713), 2009 WL 4227381 (citation omitted).

69. *Id.* at 3 (citation omitted).

70. *Id.* at 3-4 (citations omitted).

71. *Id.* at 4 (citation omitted). The District's mitigation guidelines call for a 10:1 mitigation ratio. *Id.* at 7-8. It is questionable whether these guidelines—or at least St. Johns' application of them—are sufficiently protective of wetland resources under Florida's Environmental Resource Permitting Program, which states that "[t]he mitigation must offset the adverse effects caused by the regulated activity." FLA. STAT. § 373.414(1)(b) (2010). Existing law prohibits the destruction of wetlands, yet St. Johns apparently contends that its guidelines allow a developer to destroy one acre of wetlands he owns for every ten acres of wetlands he owns but does not destroy. To actually offset the destruction of one wetland acre (upon which development is otherwise prohibited), it seems more appropriate that the government demand that an applicant create a certain multiple number of acres of *new* wetlands (based on the likelihood of their surviving the tenuous process of converting uplands to wetlands), restore degraded wetlands, enhance the functionality of existing wetlands, or place a conservation restriction on upland wetlands buffers or wetlands that for some reason are not protected by existing law. *See generally* Jessica Owley Lippmann, *The Emergence of Exacted Conservation Easements*, 84 NEB. L. REV. 1043 (2006); David C. Levy & Jessica Owley Lippmann, *Preservation as Mitigation under CEQA: Ho-hum or Uh-oh?*, 14 ENVTL. L. NEWS 18 (2005).

72. *Koontz IV*, 5 So. 3d at 10. *See also id.* at 16 (Griffin, J., dissenting) ("Mr. Koontz apparently thought [development of 3.7 acres, preservation of the balance, and offsite mitigation to enhance existing wetlands by cleaning some culverts and ditches] was OK, except for the part about the culverts and ditches . . . .").

73. *Id.* at 10 (citing *Koontz II*, 861 So. 2d 1267, 1269 (Fla. 5th DCA 2003)).

74. *See id.*

75. Petitioner-Appellant's Initial Brief on the Merits, at 2-4.

Koontz did not seek an administrative hearing to question the validity of the proposed mitigation demands, as authorized under Florida's Administrative Procedure Act.[76] Instead, he filed suit in the State's circuit court under the rather unusual theory that the District had *proposed* conditions that amounted to an unconstitutional taking for which compensation would be due.[77]

Before trial, the parties stipulated that the denial order did not deprive Koontz "of all or substantially all economically [viable] . . . use of [his] property."[78] In light of this stipulation, Koontz necessarily retained property that was economically valuable and available for certain non-trivial uses.[79] Therefore, Koontz would be highly unlikely to prevail under the "essentially ad hoc" balancing test set forth in *Penn Central* that is ordinarily applicable in regulatory takings cases.[80] The question that remained is one of a tem-

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76. *See* FLA. STAT. § 120.57(1)(b) (2010). At such an administrative hearing, environmental organizations and other interested parties have standing to participate in the scientific, procedural, and policy questions surrounding issues such as wetlands mitigation. *See id.* However, such groups are not afforded the same participatory rights in civil actions, such as the one that Koontz pursued here. *See, e.g.,* Racing Props., L.P., v. Baldwin, 885 So. 2d 881, 883 (Fla. 3d DCA 2004). *See also* McMahon v. Geldersma, 317 S.W.3d 700, 705 (Mo. Ct. App. 2010) (quoting State *ex rel.* Nixon v. Am. Tobacco Co., 34 S.W.3d 122, 127 (Mo. 2000)) ("In the absence of a statute conferring an unconditional right to intervene, an applicant seeking intervention must file a timely motion showing three elements: '(1) an interest relating to the property or transaction which is the subject of the action; (2) that the applicant's ability to protect the interest is impaired or impeded; and (3) that the existing parties are inadequately representing the applicant's interest.'"); *In re* Devon Energy Prod. Co., 321 S.W.3d 778, 783 (Tex. Ct. App. 2010) (citing *In re* Union Carbide Corp. 273 S.W.3d 152, 155 (Tex. 2008)) ("To constitute a justiciable interest, the intervenor's interest must be such that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent of at least a part of the relief sought in the original suit.").

77. *See Koontz III*, 720 So. 2d 560, 561 (Fla. 5th DCA 1998).

78. Petitioner-Appellant's Initial Brief on the Merits, at 4-5 (citation omitted).

79. Koontz originally contended that the government's proposed exactions "did not serve a substantial purpose[,]" were "so excessive" and "[un]necessary[,]" and "without basis." Joint Pre-Trial Statement at 7 Koontz v. St. Johns River Water Mgmt. Dist. (Aug. 2002) (No. Cl-94-5763) (on file with author). He grounded these contentions in the U.S. Supreme Court's test, announced in Agins v. Tiburon, 447 U.S. 255 (1980), that a regulatory decision that fails to "substantially advance" a legitimate state interest amounts to an unconstitutional taking. Petitioner-Appellant's Initial Brief on the Merits at 30. However, a unanimous Supreme Court rejected the *Agins* test as an appropriate takings inquiry in 2005, suggesting it instead sounds in due process. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540 (2005). While the exactions tests of *Nollan* and *Dolan* seemingly required application of the very substantive analysis rejected in *Lingle*, *Lingle* preserved *Nollan* and *Dolan's* tests in the "special context" of exactions. *Id.* at 538, 548. Apparently, after *Lingle*, Koontz successfully converted his claim to fit the high court's salvaged exaction takings jurisprudence. This mid-litigation conversion is fodder for additional future scholarship. For general assessments of *Lingle's* impact upon exaction takings jurisprudence, see John D. Echeverria, Lingle *Etc., The U.S. Supreme Court's Takings Trilogy*, 35 ELR 10577 (2005); Fenster, *Stubborn Incoherence*, *supra* note 4; Mulvaney, *Remnants of Exaction Takings*, *supra* note 4.

80. 438 U.S. 104, 124 (1978) (stating that, where facing a traditional regulatory takings claim, courts must engage in an "essentially ad hoc, factual inquir[y]" by considering the degree to which the claimant's property interest is impaired, the import of the interest advanced by the government's regulatory act, and the fairness in asking the

poral nature: is the *Penn Central* balancing inquiry supplanted by the more probing scrutiny of the U.S. Supreme Court's exaction takings jurisprudence at the point in time where the government *offers* mitigation options before ultimately issuing a denial? Answering this question in the affirmative would mean that the theoretical, spatial, and stringency features of property attach as to any particular owner at the instant of the proposed exactions. In Koontz's case, this would obviously improve his chances of prevailing, for he could avail himself of the "intermediate scrutiny" of the *Nollan* and *Dolan* test, instead of the lower level of scrutiny of a *Penn Central* analysis.[81]

Nearly all of the many lower court applications of the U.S. Supreme Court's exaction takings construct have addressed final permit approvals.[82] Indeed, prior to *Koontz*, it appears that in only three instances—a federal district court opinion, a federal circuit court opinion, and in a U.S. Supreme Court Justice's dissent from a denial of certiorari—did members of the judiciary assert that a proposed exaction could, in and of itself, implicate the Takings Clause.[83] And across these three cases, the opinions provide thin

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claimant to bear this burden rather than the public); Brown v. Legal Found. of Wash., 538 U.S. 216, 233-35 (2003) (quoting *Penn Central*, 438 U.S. at 124) ("Our regulatory takings jurisprudence . . . is characterized by 'essentially ad hoc, factual inquiries' . . . ."); Palazzolo v. Rhode Island, 533 U.S. 606, 616 (2001). *See also* Fenster, *Takings Formalism*, *supra* note 1, at 612 ("The general default standard that applies to the majority of takings claims . . . employs a relatively low level of scrutiny and balances a number of factors in an ad hoc, open-ended inquiry.").

81. Still, it is unclear whether the stringency of the nexus and proportionality tests applies within the space that *Koontz* asserts, namely, on-site conservation and the funding of off-site mitigation. *See supra* note 54 and accompanying text.

82. For a sampling of the most recent reported exaction takings cases that have received attention in the academic literature, all of which involve the *issuance* of conditional permits, see McClung v. City of Sumner, 548 F.3d 1219 (9th Cir. 2008); Norman v. United States, 429 F.3d 1081 (Fed. Cir. 2005); Town of Flower Mound v. Stafford Estates L.P., 135 S.W.3d 620 (Tex. 2004); Wolf Ranch L.L.C. v. City of Colo. Springs, 207 P.3d 875 (Colo. App. 2008), *aff'd*, 220 P.3d 559; Ocean Harbor House Homeowners Ass'n v. Cal. Coastal Comm'n, 77 Cal. Rptr. 3d 432 (Cal. Ct. App. 2008).

83. An amici of Koontz, in its brief to the Florida Supreme Court, submitted without explanation that there are four additional cases on point supportive of answering this question in the affirmative. *See* Brief of Fla. Home Builders Ass'n & Nat'l Ass'n of Home Builders as Amici Curiae Supporting Respondent at 10-11, *Koontz IV*, 5 So. 3d 8 (SC09-713) 2010 WL 262547. However, each of the four appears inapposite. The first, decided before *Nollan* and *Dolan*, involved only a facial challenge to an ordinance, from which the applicant had received a variance. Lee Cnty. v. New Testament Baptist, 507 So. 2d 626, 627 (Fla. 2d DCA 1987). In the second, a court applied *Nollan* where the government issued an order stating that if the developer did not submit a sufficient alternative re-design plan, the developer's road access permit *would be issued* with a condition requiring a public access easement across his property. Paradyne Corp. v. Fla. Dept. of Transp., 528 So. 2d 921, 926-27 (Fla. 1st DCA 1988). In the third case, a state appellate court in Illinois held that the denial of an application to expand a gas station was substantively invalid; therefore, the court's discussion of whether the dedication that the city would have attached to an issued permit was dicta. Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 391 (Ill. App. Ct. 1995) ("[T]he very issue in this case is whether [the city] has in fact enacted a *valid* special use permit."). And in the fourth, Salt Lake County had not only proposed an exaction but

and contradictory guidance on the complex questions surrounding whether such a novel claim presents a legitimate takings issue.

In one case, *William J. Jones Insurance Trust v. City of Fort Smith*,[84] the City of Fort Smith advised a developer seeking to build a convenience store that it could not authorize the proposed construction unless the developer granted the city an expanded right-of-way along the street frontage of his property for traffic and safety purposes.[85] In ruling for the developer, then-U.S. District Court Judge Morris Arnold (and current judge on the Eighth Circuit Court of Appeals) cited to what he termed "a brilliantly sustained and intellectually unrelenting elaboration of the relationship between the Fifth Amendment and taxes" by noted libertarian scholar Richard Epstein.[86]

Judge Arnold accepted that the development would result in an increase in traffic into and out of the relevant property.[87] However, drawing on Epstein's work, he likened the city's dedication proposition to a tax.[88] He held that the city did not prove that any overall traffic increase, as opposed to a mere redistribution of traffic, would result from the proposed development.[89] He declared that this governmental action thus amounted to an exaction taking under *Nollan*'s nexus standard.[90] Judge Arnold ordered the city "to issue the requested permit unconditionally."[91]

A second case, *Goss v. City of Little Rock*,[92] involved factual circumstances quite similar to *William J. Jones Insurance Trust*. The federal district court ruled that the city's denial of a rezoning request—in light of the applicant's refusal to dedicate a portion of his property for highway expansion as a condition thereto—amounted to an exaction taking in violation of the *Nollan* and *Dolan* threshold.[93] The U.S. Court of Appeals for the Eighth Circuit affirmed.[94]

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issued a conditional permit. *See* B.A.M. Dev. L.L.C. v. Salt Lake Cnty., 128 P.3d 1161, 1164 (Utah 2006).

84. 731 F. Supp. 912 (W.D. Ark. 1990).

85. *Id.* at 913.

86. *Id.* at 914 n.2.

87. *Id.* at 914.

88. *Id. See also* Nancy E. Stroud & Susan L. Trevarthen, *Defensible Exactions After* Nollan v. California Coastal Commission *and* Dolan v. City of Tigard, 25 STETSON L. REV. 719, 764-65 (1996) (remarking that, although Judge Arnold admitted that the increased carloads on the applicant's property could increase congestion, he suggested that a reasonable fact finder could conclude that the development would not create the congestion but only relocate it). Takings scholar Steven Eagle has described Judge Arnold's opinion on this point as "well-reasoned" and "prescient" in advance of the U.S. Supreme Court's decision in *Dolan*, which came four years after *William J. Jones Ins. Trust*. EAGLE, *supra* note 55, at § 7-10(a)(1).

89. *See William J. Jones Ins. Trust*, 731 F. Supp. at 914.

90. *Id.*

91. *Id.*

92. 151 F.3d 861 (8th Cir. 1998).

93. *Id.* at 863.

But *Goss* is a peculiar holding, for the court stated, "Little Rock has a legitimate interest in declining to rezone Goss's property, and the city may pursue that interest by denying Goss's rezoning application outright, as opposed to denying it because of Goss's refusal to agree to an unconstitutional condition . . . ."[95] Thus, the court said that a taking occurred, but no remedy—compensation or otherwise—was due.[96] In light of the Eighth Circuit's decision on the remedy in *Goss* eight years after *William J. Jones Insurance Trust*, as well as recent U.S. Supreme Court case law indicating that equitable relief is not appropriate in takings cases,[97] the continuing precedential value of Judge Arnold's decision in *William J. Jones Insurance Trust* is in some doubt.

At issue in a third case, *Lambert v. City and County of San Francisco*,[98] were two measures taken by the City of San Francisco to counter the diminishing supply of affordable housing and the corrosion of the character of mixed-use neighborhoods that were resulting from tourism generation.[99] First, the City amended its Planning Code and Master Plan to prohibit the employ of residential units for commercial uses except upon approval of a conditional use permit application.[100] Second, it adopted the Residential Hotel Unit Conversion and Demolition Ordinance ("HUCDO"). Independent of the restrictions in the Planning Code and the Master Plan, the HUCDO requires conditioning the conversion of residential units to tourism units on the provision of either a one-to-one

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94. *Id.*

95. *Id.* at 864.

96. *Id.* at 866. *See also* David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523, 570-71 n.309 (1999) ("[w]hile finding the highway dedication a taking, the court held the city could avoid *any* takings claims by simply refusing to rezone the subject property without the invalid dedication, pursuing its legitimate interest in declining to rezone property").

97. *See* Lingle v. Chevron, U.S.A., Inc., 544 U.S. 528, 543 (2005) (asserting that the validity of government action is a due process inquiry that necessarily is precedent to a takings analysis, for "[n]o amount of compensation can authorize such action."). *But see* Stop the Beach Renourishment v. Fla. Dept. of Envtl. Prot., 130 S. Ct. 2592, 2607 (2010) (plurality opinion) (asserting there is "no reason why [compensation] would be the exclusive remedy for a . . . taking."). The lone court to face the remedies question since *Stop the Beach Renourishment* rejected as dictum the recent proposition in the *Stop the Beach Renourishment* plurality opinion that remedies beyond compensation exist for some successful takings claims. Sagarin v. City of Bloomington, 932 N.E.2d 739, 744-45 n.2 (Ind. Ct. App. 2010).

98. 67 Cal. Rptr. 2d 562 (Cal. Ct. App. 1997).

99. *Id.* at 564-65. *See also* San Remo Hotel v. City & Cnty. of San Francisco, 145 F.3d 1095, 1098 (9th Cir. 1998) (discussing several "hotel conversion ordinances" enacted by the City of San Francisco to "stop the depletion of housing for the poor, elderly and disabled").

100. *Lambert*, 67 Cal Rptr. 2d at 564 (discussing amendment of S.F. PLAN. CODE, § 178(a)(2) & (c) (1981)).

replacement for those lost units or compensation to the city to mitigate a portion of the replacement costs.[101]

The City Planning Commission administers the Planning Code and the Master Plan, while the Department of Building Inspection administers the HUCDO.[102] In acquiring two independent appraisals and narrowly following the generally-applicable mitigation formula mandated by the HUCDO, the City's Department of Building Inspection determined that Lambert's proposed replacement of twenty-four of his residential units warranted a payment of $600,000 in replacement costs.[103] Lambert offered only $100,000.[104] Meanwhile, the City Planning Commission exercised its discretionary authority by denying Lambert's application to convert these twenty-four residential units into tourism units.[105] The Planning Commission's stated reasons for denying the application included non-compliance with the Planning Code and the Master Plan provisions regarding the preservation of an affordable housing supply[106] and neighborhood character,[107] as well as those aimed at preventing traffic congestion.[108]

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101. *Id.* at 564-65 (discussing S.F. ADMIN. CODE, § 41.13(a) (1990)).

102. *See* Opposition to Petition for Writ of Certiorari at 2-3 *Lambert*, 67 Cal. Rptr. 562 (No. 99-967), 1999 WL 33632464.

103. *See Lambert*, 67 Cal. Rptr. at 570 (Strankman, J., dissenting) (citing government replacement cost appraisals of $488,584 and $612,887). Some commentators question whether such a fee structure actually could offset the lost affordable housing in light of the extraordinary real estate escalation of the day in San Francisco. *See, e.g.*, E-mail from Brian Weeks, Deputy Public Advocate, State of N.J., to Timothy M. Mulvaney, Assoc. Professor of Law, Tex. Wesleyan Univ. Sch. of Law (June 29, 2009) (on file with author). Mr. Weeks authored a brief on behalf of the States of New Jersey, Colorado, Delaware, Hawaii, Maryland, Missouri, Montana, Oklahoma, and West Virginia as amici curiae in support of the respondents, the City and County of San Francisco, in San Remo Hotel, L.P. v. City & County of San Francisco. *See* Brief of the States of New Jersey, Colorado, Delaware, Hawaii, Maryland, Missouri, Montana, Oklahoma and West Virginia as Amici Curiae in Support of the Respondents San Remo Hotel, L.P. v. City & County of San Francisco, 543 U.S. 1032 (2005) (No. 04-340), 2005 WL 508086.

104. *Lambert*, 67 Cal. Rptr. 2d at 570 (Strankman, J., dissenting). While the Board of Permit Appeals, in its review of the determination that the HUCDO applied to Lambert's units, invited Lambert to acquire his own appraisal, he apparently did not. *Id.* at 571 (Strankman, J., dissenting). Since the City arrived at the $600,000 figure by inserting its appraisal figures into a legislatively-mandated mitigation formula, Lambert's "offer" of $100,000 could be considered irrelevant because there was no competing appraisal—or other variable—for the parties to negotiate.

105. *Id.* at 563-64. Lambert argued that "[i]t is clearly of no significance to property owners which department or officer of the City demands an extortionary payment in exchange for a discretionary permit . . . and which one denies the permit when the demand is not paid . . . ." Petitioners' Reply to Brief in Opposition at 3, *Lambert*, 67 Cal. Rptr. 562 (No. 99-697) 1999 WL 33632465.

106. *Lambert*, 67 Cal. Rptr. at 566.

107. *Id.* at 567.

108. *Id.* Unlike the City of Little Rock's denial at issue in *Goss*, the permit denial at issue in *Lambert* did not cite the applicant's refusal to comply with a proposed exaction as a reason for the denial. *Id.* Lambert suggested that the reasons stated in the Planning Commission's permit denial amounted to "subterfuge," "pretense," and an "interagency shell game." Petitioners' Reply to Brief in Opposition, at 3-4. The parties also disagreed on

Lambert filed suit, alleging that the Planning Commission denied the permit application because Lambert would not agree to what he believed amounted to an extortionate demand in violation of *Nollan* and *Dolan*.[109] The appellate court refrained from conducting a substantive review of any pre-permit-decision negotiations between any City agency and Lambert under the heightened exaction takings scrutiny of *Nollan* and *Dolan*.[110] The court made this decision based on the fact that the Planning Commission took neither the $600,000 nor a permitted use from him.[111] Instead, the court conducted a rational basis review, ultimately concluding that the reasons offered by the Planning Commission for denying the permit application were reasonable.[112]

The U.S. Supreme Court rejected Lambert's petition for certiorari.[113] However, joined by Justices Kennedy and Thomas, Justice Scalia wrote, in dissenting from the denial of certiorari, that "[t]here is no apparent reason why the phrasing of an extortionate

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whether the Planning Commission determined that a mitigation fee of $600,000 would be appropriate, or whether the Planning Commission or any other City agency bargained with the Lambert's over the amount of any mitigation fee. These factual disputes, however, do not detract from the discussion of *Lambert* for purposes of this Article's distinguishing between proposed-versus-imposed exactions, for the Planning Commission also contended that, even assuming that it had unsuccessfully attempted to impose the $600,000 replacement fee, the heightened scrutiny of *Nollan* and *Dolan* is inapplicable. *See* Respondent's Opposition to Petitioner's Petition for Writ of Certiorari at 2, *Lambert*, 67 Cal. Rptr. 562 (No. 99-697) 1999 WL 33632464.

109. *See Lambert*, 67 Cal. Rptr. at 566-67.

110. *Id.* at 568-69.

111. *Id.* at 569. In dissent, Judge Strankman posited that the exaction must meet the heightened scrutiny of the *Nollan* "essential nexus" test and the *Dolan* "rough proportionality" test, as a "legitimate state interest[]" is not enough to "support unrelated permit exactions." *Id.* at 571-72 (Strankman, J., dissenting) (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 & n.5 (1987)) (suggesting that such heightened scrutiny is required to prevent "improper leveraging of the state's police power"). While disparate views on the proportionality of an exacted fee to the impacts posed by Lambert's development under the *Dolan* standard are conceivable, it is difficult to understand how a fee contributing to replacing the housing stock lost via conversion would not bear an essential nexus to the purposes of a regulation seeking to preserve the housing stock. Even if one agrees that the access way parallel to the water in *Nollan* did not bear an "essential nexus" to the scenic access way perpendicular to the water that the development restriction sought to protect, the exaction of a housing supply mitigation fee, if conditioned upon a permit issued to Lambert, seems the epitome of a proper exaction under the *Nollan* "essential nexus" standard. Of course, in other situations, there may be a clear proportionality between the proferred condition and the anticipated impact under *Dolan*, though *Nollan* could instill taking liability fears in the regulating entity. Fenster, *Constitutional Shadow*, *supra* note 4, at 747.

112. *Lambert*, 67 Cal. Rptr. 2d at 568. In other words, the California Court of Appeals held that the Lamberts had no constitutional right to a permit for the land use change for which they applied.

113. *See* Lambert v. City & Cnty. of San Francisco, 120 S. Ct. 1549 (2000) (denying certiorari). The California Supreme Court originally granted certiorari in *Lambert*, but later dismissed review as improvidently granted. *See* Schwartz, *supra* note 55, at 6. However, as one commentator notes, the California Supreme Court did not authorize republication of the Court of Appeal's opinion, whereby there is "no published precedent in California to prevent developers from seeking relief under this [proposed exaction] principle in the future." *Id.*

demand as a condition precedent rather than as a condition subsequent should make a difference."[114]

Justice Scalia's dissent from the denial of certiorari is puzzling for at least two reasons. First, despite the divergence between the then-recent decision of the Eighth Circuit in *Goss* and the California appellate court's decision in *Lambert*, Justice Scalia found this case an exception to the Supreme Court's ordinary practice against reviewing cases where there is no "conflict of authority on the precise point[.]"[115] Second, Justice Scalia invoked the rationale from the Supreme Court's 1980 opinion in *Agins v. Tiburon* by contending that an "unjustified denial can constitute a taking[.]"[116] That Justice Scalia later signed on to the unanimous 2005 opinion in *Lingle v. Chevron* holding that the *Agins* test is inappropriate in takings analyses suggests that Justice Scalia may have reconsidered the position he espoused five years earlier in his dissent from the denial of certiorari in *Lambert*.[117]

Justice Scalia's dissent from the denial of certiorari—which, of course, is not based upon full consideration of the merits and is not binding on any court—also is far from unequivocal. He suggests that "the subject of any proposed taking in the present case is far from clear[,]"[118] that there may be a "plausible" basis for distinguishing completed takings from proposed conditions that are never actually imposed,[119] and that this temporal proposed-versus-imposed distinction "raises a question that will doubtless be presented in many cases."[120] However, the dissent from the denial of certiorari does make one point abundantly clear. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[121] the Court just one year prior to *Lambert* had unanimously stated that *Dolan*'s rough proportionality test "was not designed to address . . . questions arising where . . . the landowner's challenge is based not on excessive ex-

114. *Lambert*, 120 S. Ct. at 1551 (Scalia, J., Kennedy, J., & Thomas, J., dissenting from the denial of certiorari).

115. *Id.* at 1552 (Scalia, J., Kennedy, J., & Thomas, J., dissenting from the denial of certiorari).

116. *Id.* at 1551 (Scalia, J., Kennedy, J., & Thomas, J., dissenting from the denial of certiorari).

117. *See* Lingle v. Chevron U.S.A, Inc., 544 U.S. 528, 548 (2005).

118. *See Lambert*, 120 S. Ct. at 1551 (Scalia, J., Kennedy, J., & Thomas, J., dissenting from the denial of certiorari).

119. *Id.* at 1551-52 (Scalia, J., Kennedy, J., & Thomas, J., dissenting from the denial of certiorari). Indeed, to present a prima facie exaction takings claim, a claimant must identify an exaction, and this exaction must amount to a taking of property that, if imposed in isolation, would require compensation. Seen in this light, the *Nollan* and *Dolan* decisions are in some ways quite narrow: even conditions that, if imposed in isolation, would amount to a taking, are not considered takings if they are directly connected to, and roughly proportionate with, the external concerns raised by the development application.

120. *Id.* at 1552 (Scalia, J., Kennedy, J., & Thomas, J., dissenting from the denial of certiorari).

121. 526 U.S. 687 (1999).

actions but on denial of development."[122] The dissent from the denial of certiorari in *Lambert* makes evident that Justice Scalia and two of his brethren that remain on the current Court agree that this quoted language from *Del Monte Dunes* does not resolve the proposed-versus-imposed exaction takings issue.[123]

In addressing the *Koontz* case, the three-member appellate panel in Florida had only these very limited judicial annotations in *William J. Jones Insurance Trust, Goss*, and *Lambert* to inform their decision. Two of these three judges recently sided with the conclusions of *William J. Jones Insurance Trust* and *Goss*, as well as the pronouncements made by Justice Scalia in *Lambert*, in holding that the *Nollan* and *Dolan* tests are applicable not only to conditions that actually are imposed, but also to conditions that merely are proposed.[124] Applying the nexus and proportionality standards, the panel affirmed a trial court's deduction that the conservation restriction self-proposed by Koontz was "enough" mitigation for the wetlands destruction associated with Koontz's development proposal.[125] Therefore, the additional offsets suggested by the District at the pre-decisional stage amounted to an unconstitutional exaction taking.[126] The Florida court, however, departed from the holdings in both *William J. Jones Insurance Trust* and *Goss* with respect to the remedy. The *Koontz* panel awarded the prevailing claimant compensation for the lost rent of his entire underlying parcel *and* the permit that the District had originally denied.[127]

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122. *Id.* at 703

123. However, the *Koontz* court asserted that the *Dolan* majority "implicitly rejected" the argument that non-imposed conditions are not subject to the heightened "rough proportionality" standard because Justice Stevens addressed the argument (and, in actuality, misstated the underlying facts) in his *Dolan* dissent. *Koontz IV*, 5 So. 3d 8, 11 (Fla. 5th DCA 2009). The *Koontz* court's assertion conflicts with traditional notions of judicial review for many reasons. For instance, as a dissenting Judge explained, the court's interpretation of *Dolan* would mean that Justice Scalia would have had no reason to dissent from the denial of certiorari in *Lambert*. *See id.* at 20 (Griffin, J., dissenting). Furthermore, were dissenting opinions afforded the authority to set binding precedent by raising an innumerable amount of issues unaddressed in the majority opinion, the opposite of which the majority must have implicitly agreed, it stands to reason that members of the judiciary would clamor to be in the dissent rather than the majority in nearly every case.

124. *See Koontz IV*, 5 So. 3d at 12 n.4.

125. *Id.* at 12 n.5.

126. *See id.* Even if *Nollan* and *Dolan* are applicable to proposed conditions, under the factual circumstances of *Koontz* it is difficult to imagine how replacing, improving, or preserving wetlands does not bear an "essential nexus" to the impact of the development—the loss of wetlands—that the regulation at issue sought to prevent. Nonetheless, without explanation, the Florida trial court made that finding. *Id.* at 10.

127. *Id.* at 17 (Griffin, J., dissenting). "[R]emoval of the unconstitutional condition cannot mean the applicant acquires the right to be free of *any* condition. Such a judicially-invented notion might not do much harm on fourteen acres in the middle of rural central Florida but in a thousand other contexts, it could be disastrous." *Id.* at 21 (Griffin, J., dissenting).

B. Competing Interests in the Proposed-Versus-Imposed Exaction Debate

William J. Jones Insurance Trust, Goss, Lambert, and *Koontz* offer a brief glimpse into the contentious considerations in interpreting the temporal question of when the content of the theoretical, the spatial, and the stringency dimensions attach in the exaction takings context. However, the conclusory and, at times, contradictory nature of these cases provide little by way of a substantive analysis of the competing interests at stake. The remainder of this Part aims to fill this foundational gap.

1. Applying the *Nollan* and *Dolan* Construct to Proposed Exactions

At first glance, applying the same tests to all conceivable exactions, whether they are proposed prior to an outright permit denial or imposed in a final development approval, makes intuitive sense; otherwise, the propensity for regulators to follow their worst rent-seeking tendencies may be too great. This argument suggests that property owners would be beholden to the government's extortionate exaction propositions, lest they side with the empty alternative of an absolute development prohibition.[128] In the abstract, it may sound illogical to require a property owner to accede to extortionate demands before bringing suit to challenge those demands as unconstitutional takings.[129] Should the applicability

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128. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (citing J.E.D. Assocs., Inc. v. Town of Atkinson, 121 N.H. 581, 584) (equating an exaction that lacks the requisite nexus to governmental extortion); Town of Flower Mound v. Stafford Estates L.P., 71 S.W.3d 18, 30 n.8 (Tex. Ct. App. 2002) (quoting Alan Romero, *Two Constitutional Theories for Invalidating Extortionate Exactions*, 78 NEB. L. REV. 348, 349 (1999)) ("'exactions may be considered extortionate because the government uses the threat of denial to extract some property interest from the owner, rather than simply trying to mitigate the negative public effects from the proposed land use'"); J.E.D. Assocs., Inc. v. Town of Atkinson, 432 A.2d 12, 14 (N.H. 1981) (concluding that, absent proof by the Town of the need for the exaction, an imposed condition was nothing short of "an out-and-out plan of extortion"). *But see* Fenster, *Takings Formalism*, *supra* note 1, at 651 ("In situations in which jurisdictions compete for development and property owners may exit with relative ease or successfully engage in political lobbying, the . . . story of powerful, unchecked local governments is inaccurate and unpersuasive."). One scholar has suggested that *Nollan* and *Dolan* are not concerned at all with the right that is infringed; rather, they are focused solely on the behavior of governmental entities. *See* Hanoch Dagan, Remarks at Georgetown Univ. Law Ctr., Association for Law, Property, and Society (Mar. 2011). However, the U.S. Supreme Court has held that the validity of government action is a due process inquiry that necessarily is precedent to a takings analysis. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

129. *See, e.g.*, Eagle, *supra* note 53, at 10104. A concurrence in *Koontz* suggests that the government retains the right to consider pre-decisional offset proposals *from applicants* free of the *Nollan* and *Dolan* strictures. *See Koontz IV*, 5 So. 3d at 15 (Orfinger, J., concurring). Nonetheless, apparently at least one property owner did assert a *Dolan* challenge to a road dedication that he himself had offered. *See* KMST, L.L.C. v. Cnty. of Ada, 67 P.3d 56, 62 (Idaho 2003).

of *Nollan* and *Dolan* rest solely on how a given landowner reacts to a proposed exaction?[130]

It may seem discomforting that an applicant who stands his ground and refuses an inappropriate exaction would be penalized—in that he could not avail himself of the nexus and proportionality threshold that is more demanding of the government than the alternative *Penn Central* balancing test applicable to ordinary permit denials[131]—but an applicant who succumbs to the exaction demand *could* rely on the *Nollan* and *Dolan* tests. There is an instinctive appeal to the argument that the denial of an application based on refusal to comply with an exaction demanded by the government is indistinct from a permit conditioned on that exaction. The government, this theory suggests, would be in a position to threaten every applicant with an outright denial—which are rarely challenged as successful takings under *Penn Central*—unless the applicant consented to a particular exaction. And it is possible that the applicant would be consenting to proceed with a project that is economically infeasible or unmarketable with that exaction attached. This arguably lends some support to the contention that *Nollan* and *Dolan*'s underlying premise is to protect against these types of extortionate measures, whether they are presented as the basis of a conditional permit or result in a permit denial.

2. Limiting Application of the *Nollan* and *Dolan* Construct to Imposed Exactions

There are at least three reasons to suggest that the approach offered in the preceding section may amount to an oversimplification of, and an ultimately unsound resolution to, what is in fact a complicated theoretical problem. First, where a proposed exaction is refused or withdrawn, nothing actually has been taken from the applicant. Second, judicial speculation on hypothetical exactions and their hypothetical economic impacts poses a wholly unmanageable system that could require courts to review countless cases that do not present actual controversies. Third, and arguably most importantly as a matter of legal policy, burdening governmental entities with possible takings liability for

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130. *See Koontz IV*, 5 So. 3d at 12 n.4. One amici of Koontz, in its brief to the Florida Supreme Court, contends that the principles of *Nollan* and *Dolan* should apply with even *greater* force where an applicant's refusal to accede to an unconstitutional condition results in a denial. *See* Brief of Fla. Home Builders Ass'n & Nat'l Ass'n of Home Builders as Amici Curiae Supporting Respondent at 9-10, *Koontz IV*, 5 So. 3d 8 (SC09-713) 2010 WL 262547 ("Using the classic gun-to-the-head metaphor for extortion, fatally pulling the trigger upon refusal of the threatened party is more repugnant than a mere threat that succeeds in coercing the victim.").

131. *See infra* notes 80-81 and accompanying text.

statements made during negotiation sessions will place a chilling effect on regulator-landowner coordination. Each of these reasons is taken up below.

First, once the government exercises its discretion to deny a permit application, the applicant has the same development rights that he had before he began the permitting process. Thus, he has forfeited nothing that could be considered "taken."[132] To pursue a takings challenge, it seems elementary that some identifiable property interest must be "taken" by a valid government action before a court is able to determine if that government action violates the tests set forth in its "takings" jurisprudence. Then, only if that governmental action violates the appropriate test, is just compensation due.[133] And if just compensation is due for the taking of property, the public seemingly is entitled to obtain that property for public use.[134] If compensation were paid for a hypothetical exaction, there would be nothing for the public to obtain.

This is not to suggest that, if a governmental entity or official performs an impermissible act, that entity or official is not subject to a damages or equity suit on some legal theory for injuries sustained.[135] However, the remedy for a taking is neither damages

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132. *See, e.g., Koontz IV*, 5 So. 3d 8, 20 (Fla. 5th DCA 2009) (Griffin, J., dissenting) ("[I]n what parallel legal universe or deep chamber of Wonderland's rabbit hole could there be a right to just compensation for the taking of property under the Fifth Amendment when no property of any kind was ever taken by the government and none ever given up by the owner?"). Property owners in the position of Mr. Koontz are not without recourse. They have the ability to raise takings challenges to permit conditions, if they so choose, by obtaining the permit with the government's proposed condition attached and then seeking compensation under a traditional exaction claim in the trial court. In Florida, this procedure is codified at FLA. STAT. § 373.617(2) (2010). Still, it seems that the takings challenge would pertain only to property allegedly taken, which in Koontz's case would presumably be the money that the mitigating measures cost upon implementation. Property owners retain the ability to challenge the substantive merit of a permit denial or the conditional grant of a permit. In Florida, this substantive review can take place in an adjudicative proceeding under FLA. STAT. § 120.57 (2010), or in the appellate division under FLA. STAT. § 120.68 (2010). *See also* Albrecht v. Florida, 444 So. 2d 8, 11 (Fla. 1984). However, in *Koontz*, the property owner conceded that he had no entitlement to his proposed commercial development. *Koontz IV*, 5 So. 3d at 15-16 (Griffin, J., dissenting).

133. *See, e.g.*, Covington v. Jefferson Cnty., 53 P.3d 828, 831 (Idaho 2002) (citing Snyder v. Idaho, 438 P.2d 920, 924 (1968)) ("An inverse condemnation action cannot be maintained unless an actual taking of private property is established.").

134. *See* Echeverria, *Takings and Errors*, *supra* note 51, at 1084-85 (noting the "bilateral character" of the Takings Clause, in that property owners are entitled to just compensation if their property is taken and "the public is entitled to the benefit of the property it has purchased . . .").

135. The most probable constitutional basis for such a challenge is the Due Process Clause. *See, e.g.*, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (asserting that a due process violation supports a claim for economic damages against federal officials). A tort suit also could serve as the basis for monetary relief, while a claim for equitable relief might arise under federal or state administrative rules. And, of course, if the government is indeed willing to issue the conditional permit, the applicant always has the ability, as stated *supra* note 132, to accept that approval and file suit seeking just compensation based on a takings theory.

nor equity, so that legal theory cannot be based on the Takings Clause. The only takings remedy is just compensation, which is required by the Fifth Amendment only "for payment of an obligation *lawfully incurred*."[136]

Second, there are multiple reasons why a governmental entity might deny a discretionary development permit. One preeminent takings scholar suggests that it would be "foolish[ ]" for a governmental entity to explicitly record that its denial is based upon a proposed exaction that the applicant refused.[137] However, so long as the government notes the external effects of the proposed development, it may not be material for takings purposes even if it did state that its denial is based upon the applicant's refusal of a proposed exaction.[138] That the proposed exaction was actually recorded in the denial seems inconsequential where the government al-

136. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 747 (1999) (Souter, J., dissenting) (emphasis added). *See also* Echeverria, *Takings and Errors*, *supra* note 51, at 1067 ("If a government action serves a public use if the legislature has authorized it, it logically follows that an action which is not authorized by the legislature, or which is contrary to legislative direction, cannot serve a public use" as required for a taking). The U.S. Supreme Court unanimously supported the view expressed in Justice Souter's dissenting opinion in *Del Monte Dunes* (and long espoused by Professor Echeverria) in deciding Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005). In *Lingle*, the Court held that the validity of government action is a due process inquiry that necessarily is precedent to a takings analysis, for "[n]o amount of compensation can authorize such action." *Lingle*, 544 U.S. at 543. While some might suggest that a claimant could waive a challenge to the validity of the governmental act in order to proceed with a takings claim, Echeverria poignantly has noted that such a theory is belied by the possibility of a third party challenging the validity of that same act in a separate proceeding. *See* Echeverria, *Takings and Errors*, supra note 51, at 1083-84.

137. Fenster, *Takings Formalism*, *supra* note 1, at 640. *See also* Steven Eagle, Remarks at Georgetown Univ. Law Ctr., Association for Law, Property, and Society (March 2011) (suggesting that there may be a difficult evidentiary burden for plaintiffs challenging an exaction that the government proposed where the government did not state that proffer in writing when it ultimately denied the application).

138. *But see* Lambert v. City & Cnty. of San Francisco, 120 S. Ct 1549, 1550-51 (2000) (denying certiorari) (Scalia, J., Kennedy, J., Thomas, J., dissenting from the denial of certiorari) (suggesting that it would be relevant for the government's position if the government ignored petitioners' refusal to satisfy the government's proposed exaction in ultimately denying development approval). Justice Scalia chastised the lower court in *Lambert* for "asserting that 'San Francisco did not demand anything' from petitioners, [but] in the next breath [finding] it 'somewhat disturbing that San Francisco's concerns about congestion, parking and preservation of a neighborhood might have been overcome by payment of [a] significant sum of money.'" *Id.* at 1550 (emphasis omitted) (quoting *Lambert* v. City & Cnty. of S.F., 67 Cal. Rptr. 2d 562, 569 (Cal. Ct. App. 1997)). Justice Scalia's assertion seems to implicitly raise a *Nollan* question: if San Francisco's sole concern is, say, parking, then a fee imposition for housing supply bears no nexus to that concern. However, in ultimately denying Lambert's application to convert residential units to tourist units, San Francisco voiced its concerns on the availability of housing stock. *Id.* at 1550 (Scalia, J., Kennedy, J., Thomas, J., dissenting from the denial of certiorari). Where there are multiple concerns associated with a development application (e.g., parking, housing stock, traffic congestion, etc.), an important issue is whether exactions should address *each one* of those concerns for which the application would be denied. Taken to its logical end, Justice Scalia's assertion counsels regulators to demand more exactions, not less. *See, e.g., supra* note 65 (suggesting that only one of the concerns raised by the development application in *Koontz* would be offset by the government's proposed exactions).

ways maintained the authority to deny the permit[139] and the identified proposed exaction was never imposed.[140]

Assuming the government did have the authority to deny the permit application outright, is a court to review all of the listed government-proposed exactions and declare that, say, the self-proposed offer by the applicant (for example, in *Koontz*, the self-proposed conservation restriction,[141] or, in *Lambert*, the self-proposed $100,000 impact fee[142]) was "enough" and the others are invalid?[143] This would mark an unprecedented and ceaseless judicial intrusion into what are traditionally considered substantive local land use control issues.[144]

Ordinarily, the validity of the governmental action is a precondition to any successful regulatory takings claim.[145] Moreover, successful takings claims ordinarily arise only where the economic impact of that valid regulatory act is significant. Yet *Nollan* and *Dolan* admittedly—and rather peculiarly—authorize courts to assess the validity of an exaction and to find takings in instances where the economic impact of the exaction is quite modest.[146] But

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139. In other words, the approval was "not part of [the applicant's] title to begin with." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) (footnote omitted).

140. If there were no such concern of an external impact, then the substantive validity of any government action prohibiting development could be called into question as erroneous and violative of the applicant's due process rights. *See Lingle*, 544 U.S. at 542. If there were a concern of an external impact but the government chose *not* to consider an exaction to offset it, current exaction takings law seemingly places no limits on such governmental inaction, despite the ill-effects suffered by the neighbors and nearby residents of the development site. *See* Timothy M. Mulvaney, Address at Gonzaga Univ. Sch. of Law, Faculty Seminar, Where the Wild Things Aren't: Transposing Exaction Takings (Sept. 30, 2010).

141. *Koontz IV*, 5 So. 3d 8, 10 (Fla. 5th DCA 2009).

142. Lambert v. City & Cnty. of San Francisco, 67 Cal. Rptr. 2d 562, 570 (Cal. Ct. App. 1997) (Strankman, J., dissenting).

143. *See Koontz IV*, 5 So. 3d at 12 and n.5 (affirming a trial court conclusion that a conservation restriction self-proposed by the applicant was "enough" mitigation for the wetlands destruction associated with the applicant's development proposal, such that the exactions proposed by the government necessarily amounted to an exaction taking).

144. *See* Schwartz, *supra* note 55, at 7 (suggesting that judicial acceptance of a theory of proposed exaction takings "could serve as a potent weapon for developers" by requiring courts to "subject all manner of permit denials to heightened scrutiny").

145. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 592-94 (1962). *See also* Schwartz, *supra* note 55, at 1 ("Like other forms of social and economic regulation, land use regulation has traditionally enjoyed a presumption of validity.").

146. It is true that tension continues to exist in delineating due process and takings analyses in the exactions context. In Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, a unanimous 2005 opinion, the U.S. Supreme Court rejected a previously espoused takings test that probed into the validity of the government action, suggesting that such tests instead sound in due process. *Id.* at 540-43. The *Lingle* Court confirmed that regulatory takings inquiries center on the economic impact that a governmental action has upon an individual's property value. *Id.* at 538-40. The exaction takings tests of *Nollan* and *Dolan* seemingly required application of the very substantive analysis rejected in *Lingle* because exactions that result in takings are invalid in the sense that they violate the means-ends nexus and proportionality threshold. Nevertheless, *Lingle* perplexingly preserved *Nollan* and *Dolan*'s tests in the "special context" of exactions. *Id.* at 538, 548.

even with the peculiar inquiry into the substantive validity of exactions required by *Nollan* and *Dolan*, it is a far stretch to suggest from this peculiarity that courts are to engage in mass speculation in cases where *no* exaction is imposed and there is therefore *no* economic impact that can be examined.

The *Koontz* facts are illustrative of this point. If the theoretical, spatial, and stringency features of property attached at the mere proposal of an exaction, a thorough judicial analysis in a case like *Koontz* would include determining the validity of (1) the proposed offsite mitigation on all of the potential offsite mitigation sites, (2) all equivalent hypothetical mitigating measures that the applicant conceivably otherwise could have offered, and (3) the reduction in the development footprint, to determine whether any of these possibilities—if they ever were actually imposed—would have crossed the *Nollan* and *Dolan* threshold.[147] Such a multi-layered exercise in speculation seems far outside the bounds of the judicial branch's role.

Requiring courts to predict the exactions a permitting agency might have chosen had it issued a conditional permit, and to assess the hypothetical economic impact that those hypothetical exactions might have amounted to, blurs the very distinction between the courts and the political branches. As the U.S. Supreme Court has noted, "[a] court cannot determine whether a regulation has gone 'too far' [so as to require the payment of just compensation] unless it knows how far the regulation goes."[148] And even if such a speculative review were proper and a court determined that all of the reviewed exactions violate *Nollan* and *Dolan*, it seems appropriate that the regulating entity should have the ability to choose among the assuredly many other conditions that would be "enough" to offset the development's external effects.[149]

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147. While the *Koontz* trial court apparently focused exclusively on the government's offsite mitigation proposition (which could occur on a number of sites), the government agency had also presented the property owner with the options of proposing any equivalent mitigating measure within the Basin or reducing the size of his development, which would not have required any mitigation. *Koontz IV*, 5 So. 3d at 16 (Griffin, J., dissenting). The *Koontz* appellate court apparently did not take issue with the trial court's failure to undertake an analysis of each possibility. *See id.* at 12 n.5 (stating that "the trial court decided as fact that the conservation easement offered by Mr. Koontz *was enough* and that any more would exceed the rough proportionality threshold, whether in the form of off-site mitigation or a greater easement dedication for conservation") (emphasis added).

148. *See* MacDonald, Sommer & Frates v. Yolo Cnty., 477 U.S. 340, 348 (1986) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

149. In both *William J. Jones Ins. Trust* and *Koontz*, the court not only mandated the issuance of a permit in light of a takings finding, but also determined the terms of that permit. *See supra* notes 91 & 127 and accompanying text. *But see Koontz IV*, 5 So. 3d at 21 (Griffin, J., dissenting) ("Surely, even the most extreme view that conditions imposed on the issuance of a permit constitute an 'out and out plan of extortion' would, nevertheless, recognize that removal of the unconstitutional condition cannot mean the applicant acquires the right to be free of *any* condition."). The lack of any definitive, discretionary agency

Third, while it may be the case that the government is required in some circumstances to pay temporary takings compensation for the period of time during which an unconstitutional exaction constrains a landowner's economic use of her property,[150] proposed conditions in instances where the government could have denied the development permit outright rarely if ever constrain a landowner's justified expectations regarding the property's economic uses. Establishing a rule requiring temporary takings liability for proposed conditions would place a momentous chilling effect on cooperative negotiation between regulators and landowners to advance collective land use objectives. (These objectives include, for example, promoting traffic safety and accommodation as in *William J. Jones Insurance Trust*[151] and *Goss*,[152] assuring an adequate housing supply as in *Lambert*,[153] and protecting vulnerable wetlands as in *Koontz*.[154])

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decision on which condition(s) might or might not have been imposed can be analogized to the longstanding tenet that a takings claim is not reviewable unless it is ripe. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 620-21 (2001) ("Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion . . . ."). However, in an earlier opinion in the *Koontz* litigation, a Floridian appellate panel overturned the trial court's dismissal of Koontz's takings claim by rejecting the government's ripeness defense, holding that Koontz need not continue negotiating with the government until it approves an offer before filing a takings claim. *See Koontz III*, 720 So. 2d 560, 562 (Fla. 5th DCA 1998).

150. *See* First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 321 (1987) (establishing landowner's right to "compensation for the period during which the taking was effective.").

151. William J. Jones Ins. Trust v. City of Fort Smith, 731 F. Supp. 912, 914 (W.D. Ark. 1990).

152. Goss v. City of Little Rock, 151 F.3d 861, 863 (8th Cir. 1998).

153. Lambert v. City & Cnty. of San Francisco, 67 Cal. Rptr. 2d 562, 566 (Cal. Ct. App. 1997).

154. *See Koontz IV*, 5 So. 3d at 10. Dissenting in *Koontz*, one judge stated that "[i]t will be too risky for a governmental agency to make offers for conditional permit approvals or to offer a trade of benefits out of fear that the offer might be rejected and the condition later found to have lacked adequate nexus or proportionality." *Id.* at 21 (Griffin, J., dissenting). In light of the risk identified by this dissenting judge, property owners ultimately may suffer. Regulators might choose the risk-averse option of simply denying more permit applications, whereby they would face only the more deferential, ad hoc balancing test of *Penn Central* in any takings challenge. *See* Dana, *supra* note 4, at 1298; Mulvaney, *Remnants of Exaction Takings*, *supra* note 4, at 214-16. In some jurisdictions, pre-construction acquiescence to a development condition apparently does not always foreclose the possibility of the developer—even after construction has commenced—challenging that condition as unconstitutional. *See, e.g.*, Sarasota Cnty. v. Taylor Woodrow Homes Ltd., 652 So. 2d 1247, 1252 (Fla. 2d DCA 1995) (holding that the property owner is entitled to apply current (1995) constitutional law to an alleged taking which occurred in 1974 after a contractual concession was acceded without protest); Trimen Dev. Co. v. King Cnty., 877 P.2d 187, 195 (Wash. 1994) (dismissing post-construction challenge to development impact fee on statute of limitations grounds). *But see, e.g.*, Wolverton Assocs. v. Official Creditors' Comm., 909 F.2d 1286, 1297 n.7 (9th Cir. 1990) (citing Cnty. of Imperial v. McDougal, 564 P.2d 14 (1977)) (holding that "enjoyment of the benefits of a conditional use permit bars a landowner or his successor in interest from challenging any conditions that the permit requires");

Yet if all permit application denials that followed some level of failed negotiations were subject to the Supreme Court's exaction takings framework based on even one exaction mentioned by the government during those negotiations, governmental officials would be forced into uncommunicative rejections or unconditioned approvals of development applications when a more amenable compromise may have been available.[155] The potential mutual advantages of growth development and resource protection emanating from the ordinarily fluid negotiating process between applicants and governmental staff persons would be compromised, as the next Part discusses in more detail.[156]

IV. THE IMPACT OF SUBJECTING PROPOSED EXACTIONS TO THE EXACTION TAKINGS CONSTRUCT AT THE WATER'S EDGE

This Part considers the limitations that subjecting proposed exactions to a *Nollan* and *Dolan* analysis could have at the water's edge in light of the regulatory focus of this journal volume: the phenomenon of sea level rise. While denying all discretionary development applications in the coastal zone may be the most prudent response to pending sea level rise, this is unlikely a financially and politically practical choice in many jurisdictions.[157] The competing interests of growth development on one hand and the protection of public health and environmental resources on the other necessarily demand that regulatory bodies engage in a balancing analysis. Therefore, though development may be strictly prohibited in identified retreat areas in certain jurisdictions, this Part assumes that some development will continue in

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Rossco Holdings, Inc. v. State, 212 Cal. App. 3d 642, 660-61 (Cal. Ct. App. 1989) (landowner corporation forfeited its inverse condemnation claim by complying with permit conditions).

155. For literature suggesting that, even where applied to imposed exactions, *Nollan* and *Dolan* encourage such results, see, for example, Fenster, *Takings Formalism*, *supra* note 1, at 652-65; Mulvaney, *Remnants of Exaction Takings*, *supra* note 4, at 214-15.

156. *See, e.g.*, Fenster, *Constitutional Shadow*, *supra* note 4, at 741 (contending that exactions "play a crucial regulatory and ideological role in bringing flexibility to an otherwise inflexible process, ameliorating the negative consequences of controversial new development proposals while persuading political opposition to accept them").

157. *See, e.g.*, CSA INT'L, INC., SEA LEVEL RISE RESPONSE STRATEGY WORCESTER COUNTY, MARYLAND 1-3, 2-7, 3-14 & 3-28 (2008), *available at* http://landuse.law.pace.edu/landuse/documents/laws/reg3/WorcesterCntyMDPlanning08.pdf (noting that in Worcester County, Maryland, only 5% of the residential parcels projected to be inundated by 2100 under the "worst case scenario" of a 1.47 meter sea level rise are in areas designated for conservation, while the remainder is available for possible development, and suggesting that adopting retreat "as the only response strategy . . . would be improbable" in light of short term costs, including the "massive cut in property tax revenues," and the "extremely politically unfavorable" nature of making the "drastic decision[]" to restrict public investment.).

areas of accommodation that nonetheless are vulnerable to the effects of sea level rise.[158]

A. Discouraging Pre-Decisional Interaction Between Landowners and Regulators

Pre-decisional meetings between regulators and applicants are quite common in the course of the balancing analysis in areas where at least some development will be accommodated. Indeed, it is difficult to conceive of a realistic development application that would *not* trigger pre-decision discussions between the regulator and the applicant. Yet subjecting an exaction to a takings challenge under *Nollan* and *Dolan* at the moment it is proposed in a negotiating session could foreclose, for all intents and purposes, the possibility of such a session ever taking place.

A permitting official's fear of encumbering his or her agency with an exaction taking at the pre-decisional stage could expose the "landowner to the treadmill effect of repeated denials without any indication from governmental agencies of changes in [the landowner's] proposal that would permit an economically beneficial use of his property."[159] Conversely, these fears could result in the equally socially detrimental result of the government's conferring unconditional approvals—i.e., waiving its regulatory responsibility—for projects with negative community impacts.[160] Ironically, the very exaction system that was created to bring about an

158. Within these accommodation areas, this Part focuses on exactions that are attached to development approvals on an ad hoc basis, as opposed to exactions mandated by generally applicable legislation. However, to the extent legislation creates a formula or schedule for the imposition of exactions that retains some discretionary role for regulators in individual cases, this Part is also relevant. For a discussion of the distinction between adjudicative and legislative exactions for takings purposes, *see supra* notes 50-53 and accompanying text.

159. Estuary Props., Inc. v. Askew, 381 So. 2d 1126, 1137 (Fla. 1st DCA 1979) *rev'd on other grounds sub. nom.* Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981). *See also* UNDERKUFFLER, *supra* note 12, at 156; Jonathan M. Davidson et al., *"Where's* Dolan*?": Exactions Law in 1998,* 30 URB. LAW. 683, 697 (1998) (suggesting *Nollan* and *Dolan* create a "chilling effect" on local governments' use of exactions); Fenster, *Takings Formalism*, *supra* note 1, at 665 (suggesting that, in risk-averse jurisdictions with the political will to deny development permits outright, "the property owner is significantly worse off than if she could bargain freely with the local government over conditions that might win an approval").

160. These waivers predictably would confer an unfair windfall on particular property owners at the public's expense. Third-party suits to challenge such waivers have faced mixed results. *Compare* Dudek v. Umatilla Cnty., 69 P.3d 751, 758 (Or. Ct. App. 2003) (rejecting neighbor challenge to county's waiver of road widening and improvement requirements for fear that imposing the requirement might violate *Dolan's* proportionality threshold), *with* McAllister v. Cal. Coastal Comm'n, 87 Cal. Rptr. 3d 365, 384 (Cal. Ct. App. 2009) (concluding that the record did not support the Coastal Commission's defense of its issuance of a permit allowing erection of a house in an environmentally sensitive area on the ground that failure to issue the permit would have been a compensable taking).

outcome serving the interests of all parties would often have precisely the opposite effect. From a normative perspective, it is unlikely that such absolutism—making final decisions on discretionary permits without attempting to find a negotiated solution amenable to all parties—is what a large contingency of society demands of its government officials.[161]

B. Lost Benefits on the Coast

The lost benefits of regulator-landowner negotiations could be particularly acute for the nation's coastlines, where municipalities are in the midst of a complex effort to respond to sea level rise. This acuteness can be attributed in part to the fact that the potential impacts associated with coastal land use intensification in the face of rising sea levels are particularly wide-ranging. These impacts include, but certainly are not limited to, erosion of beaches, heightened coastal flooding, increased public health and safety risks, and damaged public infrastructure.[162] But even more significant for exaction takings purposes than the diversity of the impacts, this acuteness can also be attributed to the fact that the magnitude of these impacts is quite difficult to forecast with any precision.

The rapid and continuing development of advanced scientific tools to predict and measure these threats makes fashioning responsive measures an exceptionally fluid exercise in coastal areas. Exactions that have been employed in the past in an effort to respond to such impacts include both retreat measures—such as setback provisions, conservation easements, rolling easements, and development elevation—and defensive measures—such as shoreline enhancement requirements, armoring (e.g., bulkheads, seawalls, retaining structures, revetments, dikes, tide gates, storm surge barriers, etc.), and land surface elevation. Yet both regulators and landowners are continually exploring new, creative solu-

161. *See* Fennell, *supra* note 4, at 5 (contending that both *Nollan* and *Dolan* block what could be mutually beneficial dealings between local governments and developers); Fenster, *Takings Formalism*, *supra* note 1, at 675-78 (same).

162. *See, e.g.*, Patricia E. Salkin, *Can You Hear Me Up There? Giving Voice to Local Communities Imperative for Achieving Sustainability*, 4 ENVTL. & ENERGY L. & POL'Y J. 256, 289 (2009); Meg Caldwell & Craig Holt Segall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 ECOLOGY L.Q. 533, 534 (2007); David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*,155 U. PA. L. REV.1741, 1763 (2007); Marc R. Poirier, *A Very Clear Blue Line: Behavioral Economics, Public Choice, Public Art and Sea Level Rise*, 16 S.E. ENVTL. L.J. 83, 85-93 (2007); James G. Titus, *Does the U.S. Government Realize that the Sea is Rising? How to Restructure Federal Programs so that Wetlands and Beaches Survive*, 30 GOLDEN GATE U.L. REV. 717, 725-33 (2000); Nicholas A. Robinson, *Legal Systems, Decisionmaking, and the Science of Earth's Systems: Procedural Missing Links*, 27 ECOLOGY L.Q. 1077, 1088-89 (2001).

tions to a natural phenomenon that they still do not fully understand. It would seem quite prudent for each party to at least consider and discuss any innovative remediative or restorative proposals offered by the other party, in light of the often varied sets of experiences and perspectives on both sides. The dynamism of the boundary between land and water, and the unique nature of any particular parcel at or near that boundary, calls for a flexible, evolutionary, and, where possible, collaborative approach.[163]

A system that encourages regulators and applicant landowners to convene at the pre-decisional stage offers the possibility of developing what Mark Fenster refers to as "site- and dispute-specific terms of compromise[,]" which have advantages for both the landowner and the community members (and resources) that regulators are charged with protecting.[164] Exactions can enable responsible growth and enlarge local economies,[165] while simultaneously promoting the efficient use of infrastructure and protection of the environment by assuring that developers and their customers contribute their cost-share of the infrastructural or environmental resources they are anticipated to utilize or impair.[166]

Fenster does not doubt that, at times, these attempts at coordination can be "quite messy."[167] However, he argues persuasively that the very legitimacy and effectiveness of the local government model demands such debate within the political system.[168] This potential for delegitimization stems from at least two sources. First, the manifestation of pre-decisional exaction takings fears squanders the expertise of the engineers and environmental scientists employed to assess development projects' impacts and to identify alternative or provisional ways in which such a project could proceed. Second, and more broadly, the loss of attempts at a collective resolution can damage confidence in the social processes that are essential to the very functionality of local governance.[169]

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163. *See, e.g.*, Laurie Reynolds, *Local Subdivision Regulation: Formulaic Constraints in an Age of Discretion*, 24 GA. L. REV. 525, 563-66 (1990).

164. *See* Fenster, *Takings Formalism*, *supra* note 1, at 617.

165. *See* Been, *supra* note 4, at 483 (citing Elizabeth A. Deakin, *The Politics of Exactions*, 10 N.Y. AFF. 96, 98-100 (1988)).

166. *See, e.g.*, Arthur C. Nelson, *Development Impact Fees*, 54 J. AM. PLAN. ASS'N 3, 4 (1988); Mark P. Barnebey et al., *Paying for Growth: Community Approaches to Development Impact Fees*, 54 J. AM. PLAN. ASS'N 18, 23-24 (1988).

167. *See* Fenster, *Takings Formalism*, *supra* note 1, at 617.

168. *Id.* at 668-78.

169. *See, e.g.*, Poirier, *Virtue of Vagueness*, *supra* note 36, at 190-91 (discussing the essential nature of collective processes); Fenster, *Takings Formalism*, *supra* note 1, at 673; Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 110 (2000) (suggesting that negotiated solutions legitimize environmental policy choices).

V. CONCLUSION

In *Nollan* and *Dolan* and their exaction takings progeny, the judiciary has presented multiple and conflicting theories of property rights; has only alluded to the spatial characteristics of the property interest subject to those theories; and has addressed how stringently those interests will be protected by establishing the elusive "nexus" and "proportionality" tests. Yet despite this overall lack of absolute clarity on the relevant property interest's theoretical, spatial, and stringency features, it is property's temporal characteristics that appear to be the most perplexing and unsettled within exaction takings law. In focusing on the temporal features of the property interest at stake, this Article explores whether the takings construct ordinarily applied when an exaction is *imposed* is also applicable at the point in time when an exaction is merely *proposed*.

The piece offers three reasons to suggest that only upon the imposition of an exaction should the existing exaction takings construct attach as to any particular claimant. First, where a proposed exaction is refused or withdrawn, no property has been taken. Second, judicial speculation on the substantive worth of hypothetical exactions suggests such matters are not suitable for review. Third, burdening governmental entities with possible takings liability for statements made during negotiation sessions places a chilling effect on regulator-landowner coordination. The last of these three is likely the most significant from a legal policy perspective, particularly on the nation's coastlines, where such coordination can be especially useful in light of the uncertainties surrounding the extent of and impacts associated with sea level rise.

The lack of reasoned judicial guidance on issues of temporality in exaction takings law is hindering the ultimate employment of an important regulatory tool for local governments. Until the proposed-versus-imposed question is appropriately resolved, the discretionary governmental power to condition development approvals—particularly as a tool to adapt to a complex, developing phenomenon such as sea level rise—will continue to raise indeterminate and unnecessary takings liability risks.