Life After *Koontz*?

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This paper seeks to provide practical advice to government litigators, and to government attorneys advising government regulators, about how to deal with the Supreme Court’s far-reaching decision in Koontz v. St. Johns Water Management District.¹ It is possible to spin out a variety of theories about what Koontz means or might mean. But the true meaning of Koontz will be largely determined by the outcomes of upcoming cases interpreting Koontz. Government attorneys will have a major effect on the outcomes of these cases based on the arguments they present (or fail to present) to the courts.

The premise of this paper is that both of the major rulings in Koontz are incoherent in light of pre-existing and apparently still authoritative Supreme Court precedent. These two rulings are: (1) the so-called Nollan/Dolan standards apply to a government denial of a land use permit based on an applicant’s refusal to accede to a government demand for an exaction that, if it had been imposed, would have triggered review under Nollan/Dolan, and (2) the Nollan/Dolan standards apply to “monetary exactions.” Neither of these rulings can be reconciled with the reasoning of the Court in Nollan v. California Coastal Commission,² or Dolan v. City of Tigard,³ nor with other pertinent Supreme Court precedent. Thus, Koontz, in my view, is an exceedingly unstable precedent, far more unstable than other major takings decisions of recent decades. It is not beyond the realm of possibility, following a change of heart by one of the nine justices currently on the Court, or following an unexpected new appointment to the Court, that the Court will fundamentally modify one or both of these rulings. In addition, in doctrinal terms, Koontz appears to put the law of takings, which prior to Koontz had achieved (to some) a welcome kind of stasis, in new kind of limbo. In the future, the Court could pull back from Koontz and refuse to follow the apparent implications of its reasoning. Or the Court could embrace these implications and eventually adopt a new theory of regulatory takings that is more expansive than any other in the

¹ 133 S.Ct. 2586 (2013).


Court’s history. In any event, \textit{Koontz} seems like the beginning of a process rather than the end of one.

This assessment of the character of the \textit{Koontz} precedent has important implications for how government attorneys should approach the challenge of litigating questions about how to interpret and apply the Court’s rulings. In particular, responsible legal advocacy dictates that government attorneys assert and preserve arguments challenging the basic correctness of \textit{Koontz}’s two central rulings. These arguments not only might prevail on the merits, at some unpredictable time in the future, but asserting them will help educate the courts about the fragility of \textit{Koontz}’s logical underpinnings, encouraging judicial efforts to read \textit{Koontz} narrowly and/or eventually overturn its rulings. In addition, assuming \textit{Koontz} remains the law of the land for the time being, the Court’s opinion presents a number of additional choices for the lower courts about how to interpret the Court’s opinion. Even the resolution of these less sweeping issues will have important implications for the future of land use and environmental regulations.

\textit{The Incoherence of Koontz}

Before addressing how to argue \textit{Koontz}, it is necessary to describe how badly the Court stumbled in \textit{Koontz} and how badly scrambled the law of takings has become as a result of this decision. I have already criticized the \textit{Koontz} decision in print,\textsuperscript{4} as have other academics.\textsuperscript{5} Property rights advocates have generally cheered the outcome of the case, but without, so far as I know, attempting to offer a truly robust defense of the Court’s reasoning.

I recently had the opportunity to debate the meaning of the \textit{Koontz} decision with my friend JB Ruhl, a professor at Vanderbilt Law School. On the issue of whether \textit{Koontz} was correctly decided, Professor Ruhl, self-consciously borrowing


the famous line uttered by Justice Antonin Scalia in response to a critic of the Court’s decision in Bush v. Gore, summed up his argument by saying I should just “get over it.” As I said in response at the time, “I am not over it. I am not even at the beginning of getting over it.”

First, the Court’s ruling that a permit condition requiring the payment or expenditure of money is subject to challenge under the Nollan/Dolan standards is incoherent, at least judged by the basic principles of takings doctrine previously laid down by the Supreme Court. In Nollan and Dolan, the Court set out a new, heightened standard of review for certain types of conditions attached to land use permits. Specifically, the Court said that certain permit conditions can be upheld against a takings challenge only if there is an “essential nexus” between the purpose served by the condition and the purpose of the regulatory program, and if the burden imposed on the owner by the condition is “roughly proportional” to the harms threatened by the owner’s proposed development. The Court justified this demanding standard in part on the ground that the conditions at issue in each of these cases would have resulted in takings if they had been imposed unilaterally, outside of the permitting process. Thus, in Nollan, the Court posited that it would have been a taking for the California Coastal Commission to unilaterally demand an easement in front of the Nollans’ beachfront property, and in Dolan it would have been a taking to demand a right of way for a public bike path from Mrs. Dolan. Given this understanding of the nature of these requirements viewed in isolation, the Court reasoned, this type of requirement cannot be imposed as a condition of a discretionary land use permit unless it meets the relatively stringent essential nexus and rough proportionality tests. At the same time, it was implicit in the reasoning of Nollan and Dolan that, where a requirement imposed unilaterally would not result in a taking, Nollan/Dolan’s heightened standard would not apply to a permit condition imposing such a requirement. In sum, after Nollan and Dolan, both the justification for -- and the limits of -- the Court’s exactions theory rested on the fact that conditions within the scope of Nollan/Dolan, viewed independently, are themselves takings.


7 Citation to summer 2014 debate
The centrality of the independent-taking requirement to the holdings in *Nollan* and *Dolan* was underscored by the Supreme Court’s subsequent unanimous opinion in *Lingle v. Chevron USA, Inc.* The Court stated in that case that in both *Nollan* and *Dolan* “the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking.” Thus, the Court said, the issue presented by each case “was whether the government could, without paying the compensation that would otherwise be required upon effecting *such a taking*, demand the easement as a condition for granting a development permit the government was entitled to deny.” The Court also returned to the independent-taking requirement at a later point in its analysis, stating that “*Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed to be physical takings.” The Court’s unanimous decision in *Lingle* unquestionably reflects the understanding that the scope and limits of *Nollan* and *Dolan* rest on the understanding that the condition attached to a permit, viewed independently, would constitute a taking.

The embarrassment for the Court in extending *Koontz* to so-called “monetary exactions” arises from the fact that the Court previously committed itself, and apparently remains committed, to the notion that unilateral mandates by government to citizens to spend or pay over money are not takings. Indeed, according to the settled understanding, not only are such requirements not *per se* (or automatic) takings (like the indefinite physical occupations at issue in *Nollan* and *Dolan*), they are not within the scope of the Takings Clause at all. Five justices (albeit in separate opinions) adopted this position in *Eastern Enterprises v Apfel*, and lower federal and state courts have generally treated this five-justice

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9 *Id.* at 546.

10 *Id.* at 546-47 (emphasis added).

11 *Id.* at 546

conclusion (even though expressed in separate opinions) as a binding Supreme Court holding. More importantly for present purposes, in *Koontz*, Justice Alito, speaking for the Court, accepted the conclusion of the five justices in *Eastern Enterprises* that a government action must affect an “identified property interest” in order to trigger review under the Takings Clause, and that the government’s imposition of monetary liability in that case did not implicate the Takings Clause. Following the logic of *Nollan* and *Dolan*, given the understanding that *Eastern Enterprises* established that a requirement to pay out money is not a taking, the Court should have ruled in *Koontz* that monetary exactions are not governed by *Nollan/Dolan*.

Nonetheless, the Court ruled in *Koontz* that the *Nollan/Dolan* standards do apply to monetary exactions, at least in some circumstances. To justify this conclusion the Court relied on the fact that the permit to which the St Johns Water Management District attached its payment requirement involved real property. Here, the Court said, the demand for money did “operate upon ... an identified property interest” in the terminology of *Eastern Enterprises*, “by directing the owner of a particular piece of property to make a monetary payment.” This connection the Court asserted, not only supported the conclusion that a monetary condition can constitute a taking, but that such a condition should be treated as the equivalent of a *per se* taking. After the Court reached this conclusion, it necessarily followed that monetary exactions should be subject to *Nollan/Dolan* on the same basis as conditions involving requirements that, considered independently, actually are *per se* takings.

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13 See, e.g., *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001) (en banc).
14 133 S. Ct. at 2599 (observing that Justice Kennedy joined four other Justices in dissent in arguing that the Takings Clause does not apply to government-imposed financial obligations that “d[o] not operate upon or alter an identified property interest”).
15 133 S. Ct. at 2599.
16 *Id.* at 2600.
There are two fundamental problems with this analysis. First, it makes a hash of the reasoning that was central to the innovation in takings doctrine accomplished by the *Nollan* and *Dolan* decisions. As discussed, those decisions justified applying new, strict tests on the ground that the requirements, considered independently, would have constituted *per se* takings. *Koontz*, by contrast, suggests that the mere fact that a requirement is attached to a land use permit is sufficient to trigger these demanding tests, regardless of whether the condition, considered independently, would have constituted a taking. These two lines of reasoning are self-evidently inconsistent and indeed mutually exclusive. If a connection to real estate were all that is required to trigger heightened scrutiny of a permit condition, then *Nollan* and *Dolan*’s independent-taking requirement was completely superfluous. At least in terms of legal reasoning, *Nollan, Dolan* and *Koontz* are irreconcilable and cannot all stand.

The second problem with the Court’s analysis is that it suggests that the Nollan/Dolan standards apply to any condition attached to a permit relating to real property. Once the limiting principle that the requirement, considered independently, must be a *per se* taking is eliminated, and the limiting principle becomes a mere connection to real property, then it appears to follow that any term or condition included in a land use permit will trigger Nollan/Dolan. Under this logic, Nollan and Dolan would apply to all manner of garden variety land use conditions, including set back requirements, height limitations landscaping requirements, inclusionary housing requirements, and so on. After all, a setback requirement, for example, is “direct[ed][ at] the owner of a particular piece of property,” in exactly the same sense as a monetary exaction.

It is very doubtful that the entire majority in *Koontz* intended to go so far as to apply *Nollan* and *Dolan* to any and all conditions included in permits relating to the use of land. Justice Alito emphasizes what he perceives as the similarity and apparent interchangeability of permit conditions requiring the public dedication of an interest in land, on the one hand, and permit conditions requiring the expenditure of money, on the other.\(^\text{17}\) He viewed them as comparable exercises of

\(^{17}\) *Id.* at 2599 (observing that “so-called “in lieu of” fees are utterly commonplace . . . , and they are functionally equivalent to other types of land use exactions”)

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power in the sense that they can potentially impose similar economic burdens on land owners and can both serve to mitigate the otherwise harmful impacts of development. Yet if the test following Koontz is simply whether a requirement is attached to a land use permit, it is impossible, in straightforward doctrinal terms, to see how to limit the scope of Nollan/Dolan following Koontz to monetary exactions.

A recent California Court of Appeals decision illustrates the challenge presented to the lower courts by Koontz’s ruling on monetary exactions. The plaintiff relied on Koontz to challenge the constitutionality of a permit condition that was neither a monetary exaction nor a per se taking under a physical occupation theory. The Court declined to read Koontz as abrogating the independent-taking requirement of Nollan, Dolan and Lingle. But, in the face of the explicit holding in Koontz, the Court of Appeals felt compelled to recognize an exception to this requirement in the case of monetary exactions. Thus, the Court said the Nollan/Dolan standards apply (1) whenever an exaction involves a requirement that, considered independently, would constitute a taking, and (2) when the exaction is a monetary exaction. While this statement of the law is technically compliant with Koontz, it makes obvious the lack of a principled theory underlying the new, post-Koontz version of exactions doctrine.

As discussed below, one plausible way of limiting the scope of the Koontz Court’s ruling on monetary exactions is to say that monetary requirements imposed through general legislation are not subject to Nollan/Dolan. This solution would limit the adverse consequences for government defendants of the Court’s illogical expansion of takings doctrine. But it would do nothing to resolve the doctrinal incoherence that remains in the wake of Koontz. It is also possible that Justice Alito at least intends to subject all facets of land use permitting to the exacting Nollan/Dolan standards. If that view were to prevail, Koontz would plant the seed for the most revolutionary transformation in the annals of U.S. takings jurisprudence.


19 Id. at 1439.
The Court’s second major ruling, that the Nolan/Dolan standards apply when an applicant is denied a permit because it refuses to accede to a government demand that it accept an exaction that would trigger Nolan/Dolan, is equally incoherent in light of prior precedent. As discussed, one of the premises of the Nolan and Dolan decisions is that the exaction involves a requirement that, imposed outside the permitting process, would result in a taking. A second basic premise underlying the cases is that the government, instead of issuing a permit with conditions, could simply have rejected the application based on a conclusion that the project impacts were unacceptable. The Court assumed in both cases that any takings claim based on a permit denial, which represents a straightforward restriction on use, would be analyzed under the traditional regulatory takings standards. Under the relatively forgiving regulatory takings standards, the Court further assumed, a denial of a permit in either Nolan or Dolan would not have constituted a taking. The Court’s conclusion that a requirement in a permit that would otherwise be a taking should not necessarily be treated as a taking when attached as condition to a permit squarely rested on the premise that the government could have denied the application outright without triggering takings liability. As Justice Scalia explained in Nolan, “The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking.”\footnote{20} His response was unequivocal: “We agree.”\footnote{21}

Given the logic of Nolan and Dolan, it is impossible to understand how the Court in Koontz reached the conclusion that, when the government actually exercises the option of denying a permit based on unacceptable project impacts, rather than granting it subject to conditions, a takings claim based on the government’s denial should be analyzed under Nolan and Dolan. Since Nolan and Dolan are built on the premise that the regulatory takings standard applies if the government chooses to deny the permit rather than grant it subject to

\footnote{20}{483 U.S. at 836.}
\footnote{21}{Id.}
conditions, the logic of those decisions should have led the Court in *Koontz* to apply a regulatory takings analysis to the permit denial at issue in that case.

The Court rejected this straightforward reasoning for two reasons, neither of which is convincing. First, the Court thought a permit grant subject to conditions was substantively indistinguishable from a permit denial based on a lack of agreement on a condition and, therefore, the two cases should be analyzed in the same fashion. As Justice Alito put it, the legal standard cannot vary based on whether the government expressed its decision in the form of a “condition subsequent or a condition precedent.”\(^{22}\) And, in truth, there is some superficial appeal to this argument, because a government determination that a development proposal can go forward only if project impacts are successfully mitigated can be expressed in either fashion. But this analysis overlooks a crucial point. Although the *reason* for the government’s action may be the same in both cases, the effects of the two types of government actions are quite different. When the government grants a permit subject to an exaction, the government has determined to impose a requirement which, outside of the permitting process, would be a *per se* taking, appropriately triggering an especially demanding standard of review. On the other hand, when the government denies a permit, regardless of the *motivation* for the decision, the *effect* of the decision is quite different from the effect of a permit grant subject to an exaction. When the government denies a permit, regardless of the thinking motivating the decision, the government is simply restricting the use of the property in the same fashion that the government restricts property in any other case giving rise to a regulatory takings claim. The Court was simply wrong to think that a permit denial and a permit grant subject to conditions should be treated in the same fashion.

Second, the Court invoked the “unconstitutional conditions” doctrine to support its conclusion that a permit denial should be analyzed using the *Nollan/Dolan* standards. The Court pointed to cases involving the First Amendment in which the Supreme Court ruled that a citizen can invoke the protection of the First Amendment not only when government restrains free speech rights directly but also when the government denies a citizen a benefit (such as a job) because the citizen insists on exercising these rights. Transferring the logic of

\(^{22}\) 133 S.Ct. at 2596.
these decisions to the land use field, Justice Alito suggested that Nollan and Dolan should apply not only when an exaction is imposed but also when the benefit of a land use permit is denied because the owner refuses to accept an exaction.

But this reasoning is, again, deeply flawed. In some general sense the Nollan/Dolan inquiry relates to the unconstitutional conditions doctrine, since it certainly addresses “conditions” as well as issues surrounding their “constitutionality.” But applications of the unconstitutional conditions doctrine in the First Amendment context cannot be mechanically transferred to the takings context, a point strongly hinted at by Justice Rehnquist’s statement in Dolan that Nollan/Dolan represents a “special” version of the unconstitutional conditions doctrine. What makes Nollan/Dolan special is crucial in this context. The Nollan and Dolan decisions articulate a distinctive version of the unconstitutional conditions doctrine in which a different test applies to denial of benefit, i.e., the permit (regulatory takings doctrine) than to a permit grant subject to conditions (Nollan/Dolan). Thus, the specific version of the unconstitutional conditions doctrine developed and applied in Nollan and Dolan contradicts rather than supports the idea that a taking claim based on a permit denial should be analyzed under the Nollan/Dolan standards. In the end, Justice Alito’s invocation of the abstract doctrine of unconstitutional conditions does nothing to explain or justify the result in Koontz.

**How Should Government Lawyers Litigate Koontz Claim?**

Building on the foregoing assessment of the incoherence and fragility of the holdings in Koontz, I offer the following advice on the arguments government litigators should present regarding the meaning and proper interpretation of Koontz.

1. Government litigators should respectfully but forcefully contest the validity of both holdings in Koontz on the ground that they are inconsistent with prior Supreme Court precedent and established principles of takings jurisprudence. State and lower federal courts obviously lack the authority to ignore or contradict square holdings of the Supreme Court, and litigators need to acknowledge that fact. But nothing precludes a party from noting its disagreement with (at least temporarily governing) Supreme Court precedent. Moreover, the “inferior courts”
can certainly comment on the ways in which the rulings in Koontz are problematic. A frontal assault on Koontz can help set the stage for eventual reversal of Koontz and, in the meantime, will support efforts to narrow the scope of Koontz. Importantly, state and lower federal courts will have little justification or incentive to acknowledge the incoherencies of Koontz unless parties (and also amici) bring these problems to their attention.

There is precedent for the Supreme Court eating its words in the takings arena. For over twenty five year, the Supreme Court maintained that the failure of a government measure to “substantially advance a legitimate state interest” constituted a valid basis for takings claim. 23 In 2005, in a unanimous ruling in Lingle v. Chevron USA, Inc., the Court repudiated this ostensible takings test. One of the greatest challenges in getting the Supreme Court to reverse itself on this important aspect of takings law was persuading government attorneys to assert and preserve the issue from the outset of their cases in the lower courts. Hopefully, it will not take twenty five years to get Koontz fixed.

The argument that both of the rulings in Koontz are mistaken should not be read to suggest that government actions of the kind at issue in Koontz should be immune from constitutional challenge. Even if Koontz is wrong on monetary exactions, they should be subject to challenge under the Due Process Clause; as the five-justice majority recognized in Eastern Enterprises, even though assessments of financial liability do not affect “property” within the meaning of the Takings Clause, they do affect “property” within the meaning of the Due Process Clause. Thus, monetary conditions can and should be subject to constitutional challenge, but under an appropriately deferential due process standard. As discussed below, permit denials following a disagreement over potential permit exactions should also be subject to challenge under either the Due Process Clause, or in a takings suit focused on the whether the permit denial resulted in taking of the property the owner sought to develop.

2. Even if one accepts for the present that monetary fees are subject to challenge under Nollan/Dolan, government attorneys should argue that monetary fees are not subject to Nollan/Dolan when they are imposed through a general

legislative mandate rather than in an *ad hoc* administrative proceeding. In *Koontz*, Justice Kagan in dissent raised the question whether fees imposed through legislation should be subject to *Nollan/Dolan*, but the majority was pointedly silent on the point, indicating that the justices in the majority were divided over the issue or at least unwilling to express themselves. Many federal and state courts have ruled that exactions imposed through general legislative mandates, especially those involving fees, are not subject to *Nollan* and *Dolan*. Thus, at least pending further rulings from the Supreme Court, many government defendants in exactions takings cases will be in a strong position to defeat takings claims based on monetary fees, so long as the fees have been imposed through general legislation.

As a matter of first principles, there are sound reasons for not extending the ruling in *Koontz*, which involved an *ad hoc* calculation of charges, to fees determined through a formula set by statute. The Supreme Court crafted the *Nollan* and *Dolan* standards out of concern that local governments might “coerce” property owners into giving up interests in land for purposes unrelated to the mitigation of project impacts. In general, legislatively determined fees raise less serious concerns about possible “coercion” than fees determined administratively. Legislation is typically adopted by more senior and more responsible government officials than the officials who handle administrative proceedings. The legislative process is generally more transparent and open to public scrutiny than individual administrative proceedings. Finally, because legislative measures, by their nature, affect citizens across the board, there is a lower risk that legislative measures will tend single out one or few individuals to bear burdens which in fairness and justice should be borne by the community as a whole. For all these reasons, the Supreme Court would be justified in not extending the *Nollan/Dolan* standards to legislative measures, especially given the collateral costs to the judiciary and other branches of intrusive judicial review of regulatory decisions. I believe there is a reasonable likelihood the current Supreme Court will adopt this position.

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24 133 S.Ct. at 2608 (“The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed *ad hoc*, and not to fees that are generally applicable.”)

25 *See, e.g.*, Rogers Mach., Inc. v. Washington Cnty., 45 P.3d 966 (Or. App. 2002); Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1995).
3. With respect to a *Koontz* claim based on a permit denial, government attorneys should argue that the permit denial is potentially open to challenge under the Due Process Clause (or perhaps under some other provision of the Constitution), but *not* under the Takings Clause. While the majority opinion in *Koontz* is confusing and opaque in several respects, the Court is quite clear in saying that *Koontz* could not assert that he suffered a “taking” as a result of the permit denial following an owner’s refusal to accede to a demand for an exaction. If an exaction is actually imposed, the landowner can assert that the exacted interest has been taken, triggering the Fifth Amendment mandate that just compensation be paid. But when no exaction has been imposed, it is equally clear there has been no taking of any exacted interest. Justice Alito made the point repeatedly in his opinion for the Court. For example, he stated, “Extortionate demands for property in the land-use permitting context run afoul of the takings clause, *not because they take private property*, but because they impermissibly burden the right not to have property taken without just compensation.”

In the same vein, he acknowledged that “[w]here the permit is denied and the condition is never imposed, *nothing has been taken.*” The dissenters agreed, stating that “when the government denies a permit because an owner has refused to accede to . . . [a] demand, nothing actually has been taken.”

The obvious question raised by these statements is what provision of the Constitution, if any, is violated by a permit denial resulting from an owner’s refusal to accede to a government demand that she accept an exaction. The Court cryptically described a claim under *Koontz* as involving “a *Nollan/Dolan* unconstitutional conditions violation.” But the Constitution does not create a constitutional right to protection against “unconstitutional conditions” in the abstract. If a challenge to a permit denial under *Koontz* raises a legitimate constitutional issue, it must be because the denial violates one of the enumerated

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26 133 S. Ct. at 2596 (emphasis added).

27 *Id.* at 2597 (emphasis added).

28 *Id.* at 2603 (Kagan J., dissenting).

29 *Id.* at 2596
provisions in the Bill of Rights. The most plausible answer, once the Takings Clause is off the table, is the Due Process Clause. If a permit is denied, the only property affected by the decision is the real property the owner is seeking to develop. Of course, the owner might claim that the denial of the permit results in a taking because it unduly restricts the use of the property. Such a claim would have to rely on the Penn Central multi-factor takings analysis, or possibly the Lucas per se takings test. But insofar as the claim is based on an allegation that the government denied the permit because the owner refused to accede to an exaction, the most plausible theory of a constitutional violation is that the permit denial was arbitrary or unreasonable in a due process sense. As the Supreme Court explained in County of Sacramento v. Lewis, the Due Process Clause serves to protect the individual against “the exercise of power without any reasonable justification in the service of a legitimate governmental objective.”

An argument that the government acted unreasonably by refusing to issue a permit because the property owner balked at the imposition of an allegedly excessively burdensome permit condition at least plausibly fits under the Due Process Clause. Certainly no other provision of the Bill of Rights springs to mind as the potential basis for such a claim. Unless Koontz is to be regarded as a complete constitutional outlaw, or some novel application of the penumbral theory of constitutional liberties, some constitutional foundation must be found for a Koontz permit denial claim. The Due Process Clause appears to be the only available option.

From the perspective of government defendants, there are several long-term strategic advantages to advancing the argument that a Koontz permit denial claim must be understood to rest on the Due Process Clause. First, several members of the Koontz majority have taken the position that the Due Process Clause only applies to certain fundamental rights, a category which does not, according to their view, include interests in the use of land for development. Thus, resting a


31 See City of Cuyahoga Falls v. Buckeye Community Hope Found., 538 U.S. 188, 200 (2003) (Scalia, J., concurring, joined by Thomas, J.) (arguing that the Due Process Clause does not provide substantive protection against “arbitrary deprivations of nonfundamental liberty interests,” and that the Takings Clause does not involve “a fundamental liberty interest”).
Koontz claim on due process theory will tend, justifiably, to undermine Koontz over the long term. Some of the other justices on the Court who dissented in Koontz take a broader view of substantive due process than some members of the Koontz majority, and therefore might theoretically help form a majority to support a due process-based rationale to support the Koontz permit-denial holding. But these dissenters, because of their relatively stronger support for regulatory measures in general, appear unlikely to come to the support of their conservative brethren in order to help salvage Koontz.

Second, in the alternative, framing a Koontz permit-denial claim as a due process claim will, at a minimum, support the argument that such a claim should be evaluated under a deferential standard. For many decades the Court has emphasized that, at least in the realm of economic regulation, judicial review of economic regulation under the Due Process Clause should be exceedingly deferential, far more so than the Dolan/Nollan inquiry. As the Court explained in Lingle v. Chevron USA, Inc., “we have long eschewed . . . heightened scrutiny when addressing substantive due process challenges to government regulation.”32 It is possible, assuming the Koontz majority could be persuaded to accept a due process justification for its permit denial holding (a heroic assumption), that the majority would also embrace a special, particularly demanding version of substantive due process analysis for this specific type of land use regulation. But such a conclusion is so seriously at odds with the established reading of the Due Process Clause in the economic realm that it seems unlikely. Certainly the dissenters in Koontz would be unlikely to embrace a novel, stringent standard for the review for a narrow category of land use decisions under the Due Process Clause.

For the time being, the Koontz decision is susceptible to the interpretation that a Koontz permit denial claim should be analyzed using the same deferential standard that applies in an ordinary due process case. In my view, government litigators should contend that a deferential standard should govern a Koontz permit-denial claim. It must be acknowledged, of course, that the Court in Koontz

explicitly ruled that the Nollan/Dolan framework governs a Koontz claim based on a permit denial. However, the Court did not specifically address the standard of review or the burden of proof that should apply in the application of the Nollan and Dolan standards in this context. Koontz does not foreclose the lower courts from reaching their own sensible conclusions about the standard of review and allocation of the burden of proof in this type of case.

The question of the constitutional basis for a Nollan/Dolan permit denial may soon be addressed, appropriately enough, in the Koontz case itself. Following the Supreme Court’s decision, the case was remanded to the Florida Supreme Court, which in turn remanded the case to the Florida Court of Appeals. On April 30, 2014, the Court of Appeals, in a 2 to 1 ruling, reaffirmed its 2009 decision affirming the trial court’s judgment in favor of Koontz on a takings theory. The majority observed that the Florida Supreme Court had overturned the Court of Appeals’ 2009 decision but the U.S. Supreme Court in turn overturned the Florida Supreme Court decision, and determined it was therefore appropriate to reinstate its earlier decision. The Court asserted that the U.S. Supreme Court “concluded that an exactions taking may occur even in the absence of a compelled dedication of land and even when the unconstitutional condition is refused and the permit is denied,” and that the Court’s 2009 decision “is entirely consistent with the decision of the United States Supreme Court.”

In dissent, Judge Jacqueline Griffin argued that the U.S. Supreme Court decision, which she said was “ground-breaking in many respects,” presented more complex issues than the majority perceived. The specific question presented on remand, in her view, was whether Koontz was entitled to recover damages

34 Id. * 1
35 Id.
36 Id.
37 Id. *6.
under section 373.617 of the Florida statues, which states that damages are available whenever a state agency action is an “unreasonable exercise of the state’s police power constituting a taking without just compensation.” In Griffin’s view, this provision only authorizes recovery of damages for constitutional takings, making it imperative for the court to determine whether, in light of the U.S. Supreme Court’s ruling, Koontz’s claim rested on the Takings Clause or had some other basis. Her reading of the U.S. Supreme Court decision, in accord with that laid out above, was that the Koontz decision did not squarely identify the substantive basis for a Koontz permit-denial claim, but that the Court had made crystal clear that the Takings Clause did not apply. Accordingly, since section 373.617 was the only basis for relief Koontz had asserted, Griffin concluded that Koontz should have been barred from recovering damages on remand.

The St. Johns Water Management District has filed a petition for review in the Florida Supreme Court, and the petition is still pending as of this date. If the Florida Supreme Court grants review, Judge Griffin’s more thoughtful and accurate reading of the U.S. Supreme Court decision appears likely to be persuasive to the Florida Supreme Court.

4. Finally, government lawyers also should contend that, regardless of doctrinal basis for a Koontz permit-denial claim, the Nollan/Dolan standards do not apply when government regulators deny an application based on unacceptable project impacts, even if some general discussion about possible permit conditions may have preceded the decision to reject the application. Instead, any takings takings claim based on a permit denial justified by negative project impacts should be analyzed under ordinary regulatory takings standards, applying either the Penn Central framework or the Lucas per se test.

As discussed, the Court was persuaded in Koontz that the Nollan/Dolan standards should apply when, as in the Koontz case itself, the government explicitly denies an application because the owner refused to accede to a demand for an exaction. Furthermore, the Court apparently regarded the substance of a regulator’s decision as being the same regardless of whether the government imposed an exaction or denied an application for lack of an exaction, and believed the applicable legal test should not vary depending on whether the decision is expressed in the form of a condition precedent or a condition subsequent. For the
reasons discussed above, however, this reasoning is deeply problematic. The logic underlying *Nollan/Dolan* should have led the Court to conclude that the *Nollan/Dolan* standards do not apply to a permit denial, even if the government’s decision was motivated by the applicant’s refusal to accede to an exaction that would trigger *Nollan/Dolan*.

Passing over this objection, however, it is appropriate, at a minimum, to limit *Koontz* to its facts and reaffirm the logic of *Nollan* and *Dolan* to the extent possible consistent with *Koontz*. This can be accomplished by recognizing that the *Nollan/Dolan* standards do not apply in the situation where government explicitly rejects a development application because the project impacts are unacceptable, rather than because the applicant refused to accept proposed exactions. As discussed, *Nollan* and *Dolan* make clear that government officials have the option, in lieu of imposing an exaction, of simply denying the application and that any takings claim based on such a denial would be analyzed as a potential regulatory taking. Nothing in *Koontz* necessarily changes this aspect of *Nollan* and *Dolan* – except in the scenario where the government has explicitly denied the application because the applicant has refused to accede to an exactions demand. To be sure, drawing the boundary between permit denials based on rejection of proposed exactions and permit denials based on unacceptable projects impacts may be difficult in some circumstances. This challenge is simply the unavoidable consequence of *Koontz*’s important but (hopefully) quite narrow innovation in the recognizing the new permit-denial claim.

**How Should Government Lawyers Advise their Clients After Lingle?**

Government lawyers should offer advice to their client regulators about *Koontz* as follows.

1. With respect to monetary fees, lawyers should advise their clients to impose fees only pursuant to general rules establishing a detailed fee schedule imposing the exact same fees on similar types of development across the community. Accordingly, lawyers should advise their local government and state agency clients to adopt legislation or agency regulations establishing such general fee schedules. The rules should be drafted so as to generate a specific dollar figure based on the parameters of a proposed project. If the rules are drafted to
grant case-by-case discretion to regulators, the adoption of the rules likely will not provide immunity from Nollan/Dolan claims.

Just because general rules are not subject to challenge under Nollan and Dolan does not mean that they may not be challenged in some other fashion under the Constitution, including possibly under the Due Process Clause, the Equal Protection Clause, or the Takings Clause. While the standard of review should be deferential, it should not be utterly toothless. Thus, general rules need to be based on careful study and analysis designed to ensure the fees imposed are fair and reasonable.

2. With respect to permitting actions, regulators generally should avoid making demands or even proposals for permit exactions that could provide the basis for a later Koontz claim. Otherwise, each proposal advanced during the process could potentially generate a claim that the government rejected the developer’s application because the applicant refused to accept a permit condition “demanded” by the government. The Court suggested that a government demand must be “concrete and specific” in order to trigger Nollan and Dolan, indicating that government officials might attempt to advance nonconcrete and nonspecific requests for exacted interests without triggering Nollan/Dolan. But the likelihood that government regulators could stay on the safe side of this line and at the same time communicate intelligibly with permit applicants about what they might do to obtain project approvals seems so slender that it is not worth the effort.

One possible solution is for regulators to decline to demand, propose or suggest any potential exactions and instead invite applicants to submit project applications with proposed mitigation measures. If and when the applicant presents a complete application that meets the community’s goals, the community can give the application a thumbs up. Otherwise, it can give the application a thumbs down. While this one-sided process may be frustrating and time-consuming for all concerned, it represents a safe course to avoid liability under Koontz and has some potential to yield project approvals with reasonable mitigation measures.

An alternative approach is for local officials to engage fully in the process of negotiating potential development conditions with a developer but pursuant to a
process that would allow regulators (and their counsel) to ensure that each proposal for a permit condition advanced by government officials passes muster under Nollan and Dolan. Under this approach, planners and regulators will need to engage in a thorough and deliberate process, which will need to be fully documented, to determine whether each condition advanced by government officials during the negotiation process meets the essential nexus and rough proportionality standards. Because individual development applications will trigger the need for these kinds of analyses following Koontz, it is likely in most jurisdictions that governments can shift the costs of paying for these analyses to the developers. Apart from the issue of cost, the process of performing a Nollan/Dolan analysis at each step in the negotiation process will inevitably make the development review process more formal, time-consuming and expensive. While developers generally cheered the outcome in Koontz there will be some collateral consequences from this decision that will be less to their liking.

3. Finally, if and when government officials determine to reject a development application, they should explain the decision solely on the basis of the projected adverse effects of the development. On the other hand, officials should avoid discussion of possible conditions and other measures that might have led, and still might lead, to project approval. In Koontz, the St. John’s Water Management District memorialized in detail its efforts to come to closure on a set of mitigation measures that would have allowed the District to approve the project. With 20-20 hindsight, this was clearly a mistake, because it provided a roadmap for Koontz’s claim that the District’s rejection of the application was unconstitutional because it was based on Koontz’s refusal to accede to the government’s demand for exactions. For better or for worse, much better now to simply say no, rather than to labor to explain how the parties can get to yes.

*     *     *   END    *    *    *