

## ON BARGAINING FOR DEVELOPMENT

*Timothy M. Mulvaney\**

In his recent article, *Bargaining for Development Post-Koontz*, Professor Sean Nolon builds off the pioneering work of Carol Rose, Tony Arnold, and select other property scholars to highlight the role of negotiation in land use law.<sup>1</sup> In so doing, he offers a fine contribution to the longstanding debate on regulatory takings law as it pertains to the often bargained-for conditions, or “exactions,” state entities attach to land-use permits. In theory, these conditional permits aim to counter proposed development projects’ external harms in lieu of denying those proposals outright. Professor Nolon concludes that the Supreme Court’s recent ill-defined expansion of the circumstances in which such conditions might give rise to takings liability in *Koontz v. St. John’s River Water Management District*<sup>2</sup> will chill the state’s willingness to communicate with permit applicants about mitigation measures.<sup>3</sup> He sets out five courses that government entities might take in this confusing and chilling post-*Koontz* world, each of which leaves something to be desired from the perspective of both developers and the public more generally.<sup>4</sup>

This responsive essay proceeds in two parts. First, it illuminates the chilling effect Professor Nolon perceives by explaining *Koontz*’s grounding in the retroactive takings compensation principle adopted by the Supreme Court nearly thirty years ago in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.<sup>5</sup> Second, it suggests that Professor Nolon’s list of potential government responses to *Koontz* can be expanded to include at least five additional (if admittedly more radical) courses, several of which may hold slightly more promise for the public than those advanced in Professor Nolon’s insightful critique.

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1. Sean F. Nolon, *Bargaining for Development Post-Koontz: How the Supreme Court Invaded Local Government*, 67 FLA. L. REV. 171, 192 (2014).

2. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

3. See Nolon, *supra* note 1, at 219. This reflects, as Mark Fenster describes it, a “consequential focus [that] is the source of [Nolon’s] article’s strength.” See Mark Fenster, *Regulating in the Post-Koontz World*, 67 FLA. L. REV. F. 26 (2015).

4. Nolon, *supra* note 1, at 211–19.

5. *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304 (1987).

## I. THE ROOTS OF *KOONTZ*'S CHILLING EFFECT

Until the 1980s, it was largely understood that the state need not pay compensation for property later found to be taken by a regulatory action if the state repealed that regulatory action immediately upon the takings finding.<sup>6</sup> Yet in its 1987 decision in *First English*, the Supreme Court concluded that “where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”<sup>7</sup>

There is broad agreement that *First English*’s holding requiring compensation in these instances has a chilling effect on government regulation.<sup>8</sup> Determining whether a regulation amounts to a compensable taking usually is dependent on a fact-sensitive analysis first discussed in the Supreme Court’s 1978 decision in *Penn Central Transportation Co. v. City of New York*,<sup>9</sup> which requires inquiries about the economic impact of the regulation, the claimant’s investment-backed expectations, and the character of the government action at issue. After *First English*, legislators and administrators alike are hesitant to adopt new regulatory programs in light of the possibility that, given the nature of a *Penn Central* analysis, they might inadvertently step over the indistinct *Penn Central* line and, even despite immediately withdrawing the now-deemed-unconstitutional measure, possibly be forced to pay a considerable amount of money for the period during which that measure was in place.<sup>10</sup> And, at least according to the recent state appellate court decision on remand from the U.S. Supreme Court, *Koontz* extends this retroactive temporary takings compensation principle to the realm of exactions.

*Koontz* comes in the wake of the Supreme Court’s companion cases

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6. The next two paragraphs draw in part from a previously published book chapter. See Timothy M. Mulvaney, *Temporary Takings, More or Less*, in *CLIMATE CHANGE IMPACTS ON OCEAN AND COASTAL LAW: U.S. AND INTERNATIONAL PERSPECTIVES* 463 (Randall S. Abate, ed., Oxford University Press) (2015).

7. *Id.* at 465.

8. See, e.g., Daniel L. Siegel, *The Impact of Tahoe-Sierra on Temporary Takings Law*, 23 *UCLA J. ENVTL. L.* 273, 274 (2005); Donald W. Large, *The Supreme Court and the Takings Clause: The Search for a Better Rule*, 18 *ENVTL. L.* 3, 42 (1987).

9. 438 U.S. 104, 124 (1978). There are two types of regulations outside the exactions context that are not subject to a deferential level of judicial scrutiny, for the Supreme Court has asserted that they amount to categorical takings: those regulations that result in a permanent physical invasion, as set out in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982), or a total economic wipeout, in accord with *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

10. See, e.g., Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 *WM. & MARY L. REV.* 823, 830 (1990).

of *Nollan v. California Coastal Commission*<sup>11</sup> and *Dolan v. City of Tigard*,<sup>12</sup> which together held that the state—as the defendant—shoulders the burden of proving that some unspecified class of permit conditions bear an “essential nexus” to and are in “rough proportionality” with the proposed development’s impacts to avoid having to pay takings compensation. When compared to *Penn Central*, these decisions have been described as imposing a form of heightened scrutiny in the sense that their tests place the burden of proof on the defendant government entity, authorize a searching review of the relationship between an exaction’s structure and the public objectives in imposing that exaction, and allow for takings liability findings in instances where the economic impact of the exaction is minimal.<sup>13</sup> In this sense, the chilling effect recognized after *First English* in the context of ordinary regulations may be all the more pronounced in the exactions context. An abridged review of *Koontz* illustrates the point.

Koontz bought a 15-acre lot consistently predominantly of wetlands for just under \$100,000 in 1972. The state condemned one acre of Koontz’s parcel in 1987, paying approximately \$400,000 in “just compensation” (including severance damages). Years later, Koontz sought permission from the state’s regional water district to build a shopping mall on the remaining 14 acres. After reviewing Koontz’s permit application, the water district originally proposed conditions that, in its view, would mitigate the mall’s wetland impacts.<sup>14</sup> Koontz scoffed at the proposed conditions. The water district then withdrew those conditions and denied the requested permit, after which Koontz promptly filed a takings suit. The water district ultimately reconsidered its decision—for reasons that are not altogether clear—and unconditionally granted the permit after the case had crawled along for several years in the face of disputed procedural issues. Yet, with permit in hand, Koontz continued to press his claim for takings compensation.<sup>15</sup> In the course of

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11. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

12. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

13. See, e.g., Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1607–08 (1988); Douglas Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1651 (1988); Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 868 (1995); Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2184–87 (2002); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 622; 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); Donald C. Guy & James E. Holloway, *The Direction of Regulatory Takings Analysis in the Post-Lochner Era*, 102 DICK. L. REV. 327, 346 (1998).

14. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2592–93 (2013).

15. See *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1224–25 (Fla. 2011).

this lengthy litigation, Koontz sold his 14 acres to a development company for \$1.2 million.

Roughly converting these figures to today's dollars, Koontz purchased the parcel for approximately \$550,000 and sold it for approximately \$2.25 million without ever having made any improvements. Recognizing as much, he appropriately conceded that he had no viable *Penn Central* claim. However, in 2009, a state appellate panel determined that Koontz was entitled to \$477,000 in takings compensation for the property's lost rental value over the period of time between the denial of his original development application and the issuance of the permit in light of the fact that the initially proposed conditions did not comport with *Nollan* and *Dolan*'s standards.<sup>16</sup>

In 2013, the U.S. Supreme Court confirmed that, where a governmental entity (i) proposes permit conditions but (ii) later withdraws those proposed conditions and (iii) makes a decision to approve or deny the requested permit, those temporarily proposed conditions are subject to the heightened scrutiny of *Nollan* and *Dolan*.<sup>17</sup> The decision describes *Koontz* as presenting a dispute that fits within *Nollan* and *Dolan*'s "special application" of the Court's unconstitutional conditions jurisprudence.<sup>18</sup> This description is peculiar for, among other reasons, the Court stated that nothing was ever actually taken from Koontz.<sup>19</sup> Further complicating matters, the Court did not discuss what remedy, if any, might be available to a claimant who successfully argues that a proposed condition does not pass *Nollan* and *Dolan* muster, stating that "[b]ecause [Koontz] brought his claim pursuant to a state law cause of action, the Court has no occasion to discuss what remedies might be available for a *Nollan/Dolan* unconstitutional conditions violation either here or in other cases."<sup>20</sup>

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16. See *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 17 (Fla. 5th DCA 2009), *decision quashed*, 77 So. 3d 1220 (Fla. 2011), *rev'd*, 133 S. Ct. 2586 (U.S. 2013).

17. *Koontz*, 133 S. Ct. at 2596.

18. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 547 (2005).

19. See *Koontz*, 133 S. Ct. at 2597 (concluding that "nothing has been taken"). See also John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, 22 NYU ENVTL. L. REV. 1, 27 (2014) ("Justice Alito has implicitly adopted the novel, indeed bizarre position that the unconstitutional conditions doctrine should apply even in the absence of government action that violates the Constitution.").

20. *Koontz*, 133 S. Ct. at 2597. The body of scholarship assessing the Supreme Court's decision in *Koontz* is rapidly expanding. For relatively favorable treatment, see, e.g., Shelley Ross Saxer, *To Bargain or Not to Bargain? A Response to Bargaining For Development Post-Koontz*, 67 FLA. L. REV. F. 5 (2015); Ilya Somin, *Two Steps Forward for the "Poor Relation" of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, CATO SUP. CT. REV. 215, 216 (2013); Richard Epstein, "*Koontz v. St. Johns River Water Management District: Of Issues Resolved—and Shoved under the Table*," <http://www.pointoflaw.com/archives/2013/06/koontz-v-st-johns-river-water-management-district-of-issues-resolved--and-shoved-under-the-table.php>. For more critical treatment, see, e.g.,

Yet on remand, the state appellate court recently concluded that its earlier decision was “entirely consistent” with the Supreme Court’s decision.<sup>21</sup> Therefore, it “reaffirm[ed]” its compensation award for lost rents over the period of time between the denial of Koontz’s original development application and the issuance of the permit.<sup>22</sup> One could thus interpret this appellate decision as working to expand *First English’s* retroactive takings compensation principle to at least some government communications made during pre-decisional negotiation sessions and subjecting such communications to the heightened scrutiny of *Nollan* and *Dolan*.

Though the point received scant attention in this recent appellate decision, it is not altogether evident which communications actually are subject to *Nollan* and *Dolan*. The Supreme Court had stated that it was declining to reach the state’s claim that the proposed conditions at issue in the case might be “too indefinite” or not “concrete and specific” enough to be considered a “demand” that “give[s] rise to liability under *Nollan* and *Dolan*.”<sup>23</sup> Moreover, while the Court declared *Nollan* and *Dolan* applicable to some subset of monetary conditions, it did little to explain the distinction, if any, between monetary exactions, fees, and taxes.<sup>24</sup> Further, the Court did not broach the longstanding debate over whether *Nollan* and *Dolan’s* heightened scrutiny, which is applicable to those exactions imposed administratively on a case-by-case basis, also should be applicable to those exactions resulting from broadly applicable legislation.<sup>25</sup>

With such uncertainties, the unsettling lesson permitting entities can deduce from the recent state court decision on remand in *Koontz* is twofold. First, where the state could deny a permit application under existing law but considers issuing the permit with conditions (be they monetary or otherwise) to counter the detrimental impacts of the project, those conditions *may* be subject to the heightened scrutiny of *Nollan* and *Dolan*. Second, where the landowner/permittee successfully challenges any proposed condition as violative of *Nollan* and *Dolan*, the state will

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Echeverria, *supra* note 19; John D. Echeverria, *The Costs of Koontz*, 39 VT. L. REV. 573 (2015); Christopher Serkin, *The Winners and Losers in Negotiating Exactions: A Response to Sean Nolon*, 67 FLA. L. REV. F. 9, 10 (2015); Mark Fenster, *Substantive Due Process by Another Name: Koontz, Exactions, and the Regulatory Takings Doctrine*, 30 Touro L. REV. 403, 404 (2014); Mulvaney, *supra* note 6, at 467.

21. St. Johns River Water Mgmt. Dist. v. Koontz, 2014 WL 1703942, at \*1 (Fla. 5th DCA 2014).

22. *Id.*

23. *Koontz*, 133 S. Ct. at 2598.

24. See, e.g., Justin R. Pidot, *Fees, Expenditures, and the Takings Clause*, 41 ECOLOGY L.Q. 131 (2014); Saxer, *supra* note 20.

25. See, e.g., Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, HARV. ENVTL. L. REV. (forthcoming 2016).

be required to pay the landowner/permittee compensation for the period of time during which that proposed condition was on the table, even if it withdrew that condition on or before the date of the judgment.

## II. THE STATE'S PLIGHT AFTER KOONTZ

Professor Nolon sets out five rather unappealing courses that government entities could take in this confusing and chilling post-*Koontz* world: (1) negotiate without making offers;<sup>26</sup> (2) insulate negotiation “through pre-approval processes and waiver;”<sup>27</sup> (3) negotiate despite the risks;<sup>28</sup> (4) hire a mediator who can facilitate negotiation among non-government stakeholders;<sup>29</sup> or (5) deny permit applications outright.<sup>30</sup> Building on Professor Nolon’s lucid analysis, the first section below outlines the drawbacks of these courses. The second section suggests that there are at least five additional courses—all of which admittedly come with their own shortcomings and risks—that might be important to consider in future discussions on governmental action in the face of *Koontz*.

### A. Professor Nolon’s Proposed Post-*Koontz* Options for Land Use Boards

The first two courses set out by Professor Nolon require clearness on the circumstances under which, in the Supreme Court’s words, a “demand” should be deemed sufficiently “concrete and specific,” and not “too indefinite.” In this regard, Professor Nolon asserts that “[a] demand is ‘definite’ when the board has made a commitment that if the landowner incorporates the condition into the application, the board will approve the application,” and “‘specific’ when the board describes the condition with sufficient detail to provide clarity from an engineering perspective.”<sup>31</sup> These important preliminary suggestions about the reach of *Koontz* open up new conversations about the meaning of “commitment,” “sufficient detail,” and “clarity” in this context. These are the very types of conversations that no doubt will continue in the courts and among academic commentators for some time. At this point, though, it is not apparent that the first two courses Professor Nolon proffers present any shelter from the heightened scrutiny of *Nollan* and *Dolan* and the associated retroactive compensation remedy. The same could be said of the third, negotiate-despite-the-risks course, for it amounts to maintaining the government’s pre-*Koontz* strategy.

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26. Nolon, *supra* note 1, at 215.

27. *Id.* at 211.

28. *Id.* at 216.

29. *Id.* at 212.

30. *Id.* at 211–12.

31. *Id.* at 208.

Professor Nolon acknowledges as much about the first three courses, and aptly notes that the fourth course also is problematic for it, among other reasons, removes from the discussion the very planning officials and technical staff who have the expertise (and the public charge) to study and evaluate threats to the community resulting from proposed development projects.<sup>32</sup>

To Professor Nolon, then, this leaves the state to the fifth course of issuing more outright permit denials without conversing with applicants about alternatives in an effort to avoid the risk of confronting heightened exaction takings scrutiny.<sup>33</sup> He specifically notes how this course could harm developers by reducing the amount of issued permits,<sup>34</sup> though it also could harm the public in the sense that it eschews all context-dependent administration of permit applications in favor of rigid application of formulaic land use restrictions.<sup>35</sup>

#### B. *Additional Post-Koontz Options for Land Use Boards*

It seems there are at least five additional courses not mentioned by Professor Nolon that the government could take in the chilling post-*Koontz* environment. They include: (6) issuing more unconditioned permits; (7) strategically proposing alongside other conditions a constitutionally acceptable condition that is unpalatable to the applicant; (8) fashioning land use restrictions not as exactions but rather as use limitations; (9) asserting that conditions deemed illegal under the unconstitutional conditions doctrine cannot be construed as legal acts that take property for a public use; and (10) renewing an unqualified challenge

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32. *Id.* at 214.

33. *Cf.* *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2610 (2013) (Kagan, J., dissenting) (“[O]bservers have wondered whether those decisions have inclined some local governments to deny permit applications outright, rather than negotiate agreements that could work to both sides’ advantage. But that danger would rise exponentially if something less than a clear condition—if each idea or proposal offered in the back-and-forth of reconciling diverse interests—triggered *Nollan-Dolan* scrutiny. At that point, no local government official with a decent lawyer would have a conversation with a developer.”) (internal citations omitted).

34. Even for those permits that the state does continue to issue, *Koontz* would impact the permit review process in at least two ways. First, the state likely would conduct additional time-consuming pre-decisional studies in light of the fact that it would bear the burden of proof on nexus and proportionality in any future takings case. Second, the state potentially could charge developers increased fees to cover the administrative costs of preparing such studies.

35. In a forthcoming paper, I contend that a pronounced shift in land use policy toward broad, unbending legislative measures could come with significant social implications, given that in many contexts only administrative processes afford crucially important attention to the affected parties’ human stories. *See* Mulvaney, *supra* note 25. Shelley Saxer approaches the problem from a different angle in asserting that “if land-use boards opt to deny projects instead of negotiate with developers to offset externalities by imposing conditions, such a behavioral change will detrimentally impact a community’s ability to gain the benefits of development, including improved services and revenue.” Saxer, *supra* note 20, at 6.

to *Nollan* and *Dolan*. While each of these additional courses could benefit from a far deeper assessment than space allows for here, they can be preliminarily summarized as follows.

a. Issuing More Unconditioned Permits

The easiest way for state entities to avoid the prospect of retroactive takings liability under the heightened scrutiny of *Nollan* and *Dolan* is to issue unconditioned permits. In this instance, the public will bear all of the external burdens of new development projects. While this course admittedly could produce some immediate benefits for developers, they, too, ultimately may suffer from an approach that effectively informs all landowners that they need not consider the effects of their land uses on others.

b. Strategic Proposal of Constitutional but Unpalatable Conditions

*Koontz* notes that, where the state proposes multiple permit conditions, only one of those conditions need satisfy the strictures of *Nollan* and *Dolan*. The Court stated “[w]e agree with respondent that, so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition.”<sup>36</sup> In certain cases, the state might use this holding to its advantage by assuring that it routinely proposes one outlandish condition that no rational developer would accept over the other proposed conditions but that nonetheless does not offend *Nollan* and *Dolan*’s requirements.

The *Nollan* facts allow for a well-known illustration of this technique. The *Nollan* Court concluded that the exaction attached to the permit—a public walking easement along the ocean—would not alleviate the government’s stated concern that the development would block the public’s view of the ocean.<sup>37</sup> However, the Court asserted that the state’s conditioning *Nollan*’s permit on his providing a public viewing platform on his upland property likely would meet the “essential nexus” test.<sup>38</sup> It is unlikely that, if most homeowners were forced to choose, they would prefer such a public platform on their upland property over the north-south transit easement along the oceanfront that the state actually

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36. *Koontz*, 133 S. Ct. at 2598.

37. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 838 (1987).

38. *Id.* at 836 (“[S]o long as the Commission could have exercised its police power . . . to forbid construction of the house altogether . . . [a] condition would be constitutional even if it consisted of the requirement that the *Nollans* provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere.”).

proposed.<sup>39</sup> Yet the holding in *Koontz* confirms that *Nollan*'s "nexus" test prohibited California from bestowing a discretionary development authorization in exchange for a non-"nexused" beach access way only because the state failed to present an option that was far less desirable to the applicant.

Whether on the *Nollan* facts a condition requiring a viewing platform would have been considered "roughly proportional," as *Dolan* came to require seven years after *Nollan*, is not clear. However, it is conceivable that some conditions that meet both *Nollan* and *Dolan* would be so objectionable to developers that they are pressed to choose the alternative conditions that do not technically comply with the "nexus" and "proportionality" tests but the permitting authority reasonably believes better serve the public interest.

### c. Fashioning Restrictions As Use Limitations, Not Exactions

The state might follow the successful path charted by the City of San Jose in a recent dispute by contending that the conditions at issue do not constitute exactions at all but rather merely place limitations on the way a landowner may use her property. In *CBLA v. City of San Jose*, the California Supreme Court declared that an ordinance requiring developers of twenty or more residential units to set aside at least fifteen percent of those units for affordable housing amounted to an ordinary regulatory restriction on the use of property, not an exaction, because the state's action did not technically require the payment of money or the physical dedication of property to public use.<sup>40</sup> The *CBLA* court even went one step further to assert that *Nollan* and *Dolan* do not apply in situations where the government action "makes clear that its purpose goes beyond mitigating the impacts attributable to the proposed developments that are subject to [it]."<sup>41</sup>

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39. See Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3, 48 (1991); Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 511, 522 n.42 (2012).

40. Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 988 (Cal. 2015) ("[T]here can be no valid unconstitutional-conditions takings claim without a government exaction of property, and the ordinance in the present case does not effect an exaction. Rather, the ordinance is an example of a municipality's permissible regulation of the use of land under its broad police power."); *id.* at 991 ("[L]ike many other land use regulations, this condition simply places a restriction on the way the developer may use its property by limiting the price for which the developer may offer some of its units for sale."). The claimants have filed a petition for certiorari with the U.S. Supreme Court.

41. *Id.* at 1000.

d. Challenging the Premise that an Illegal Act Can Give Rise to Takings Liability

The final two courses entail more broadly contesting *Nollan* and *Dolan*'s foundations, and they could be adopted in conjunction with most of those courses already presented. While challenging the very premise of the Court's now-entrenched exaction takings jurisprudence is a tall task, a governmental entity making such a claim could look to the silver lining of the otherwise confounding recent decision in *Starr International Company v. U.S.*<sup>42</sup> for support. In a complaint described by the news editor of the *National Review* as "shameless,"<sup>43</sup> AIG shareholders alleged that the Federal Reserve Bank had imposed overly demanding conditions on an \$85 billion, taxpayer-funded bailout loan that allowed the company to avoid bankruptcy.<sup>44</sup> To many observers' surprise, the federal district court found the federal government liable for an "illegal exaction" on the theory that the government had usurped its authority under the Federal Reserve Act by taking an equity share in a rescued company.<sup>45</sup> Yet the court simultaneously asserted that illegal exactions cannot give rise to Fifth Amendment takings liability.<sup>46</sup> By way of analogy, then, *Starr International* leaves government entities in land use exaction cases with the possible defense that conditions deemed illegal on the similar, unconstitutional conditions logic of *Koontz* cannot give rise to takings liability and its associated compensation remedy either.

Such an approach is far from a slam dunk; *Koontz* very well may be interpreted to preclude this line of reasoning in the future. But at the moment, given the vague and perplexing nature of the majority opinion in *Koontz*,<sup>47</sup> this position theoretically remains viable and, in the right circumstances, could find sympathetic ears in some courts.

e. Renewing an Unqualified Challenge to *Nollan* and *Dolan*

Taking the prior approach one step further, government entities might reinvigorate the long dormant and admittedly uphill battle to reverse *Nollan* and *Dolan* in their entirety.<sup>48</sup> *Nollan* and *Dolan* accept that the

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42. *Starr Int'l Co. v. United States*, 121 Fed. Cl. 428 (2015).

43. Tim Cavanaugh, *5 Reasons the Gov't Might Lose the AIG Lawsuit*, NAT'L REV. (Oct. 10, 2014), <http://www.nationalreview.com/article/389994/5-reasons-govt-might-lose-aig-lawsuit-tim-cavanaugh?target=author&tid=1107329>.

44. *Starr Int'l Co.*, 121 Fed. Cl. at 430–31.

45. *Id.* at 434.

46. *Id.* at 472.

47. On the confusing nature of *Koontz*, see, for example, Echeverria, *supra* note 19; Echeverria, *supra* note 20; Fenster, *supra* note 20; Nolon, *supra* note 1.

48. Laura Underkuffler offered some compelling, wide-ranging remarks in this regard in her keynote address at the Association for Law, Property and Society Annual Conference in May of 2015. Laura Underkuffler, Keynote Address at the 2015 ALPS Conference at the University of

government could deny the relevant permit application outright under the current state of the law “unless the denial would interfere so drastically with the [claimants’] use of their property”<sup>49</sup> under the traditional regulatory takings framework first discussed in *Penn Central*. Few, if any, would suggest that denials of the permit applications on the *Nollan* and *Dolan* facts would constitute such a drastic interference, for the claimants in those cases already were putting their respective parcels to significant use.<sup>50</sup> One might question, then, why the Court found it appropriate to apply heightened judicial scrutiny when reviewing (and to afford the possibility of a compensatory remedy for) government proposals that the applicant might prefer to the legal status quo.<sup>51</sup>

#### f. Summary

Each of the five additional approaches presented above surely comes with considerable uncertainty for the state, and this essay does not advocate for any of them on normative grounds. Rather, they are offered here simply to demonstrate that, in the post-*Koontz* world in which permitting entities must operate, the list of potential government moves is even more expansive than Professor Nolon’s article stakes out. It may be fodder for future empirical work to determine which of these approaches—and the assuredly many other approaches that are not discussed here—the myriad state and municipal entities adopt moving forward.

#### CONCLUSION

Seizing on an opening created by the Supreme Court’s vague opinion in *Koontz*, the recent state appellate decision on remand extends the retroactive takings compensation principle of *First English* into the realm of exactions. This decision serves to highlight the chilling effect emanating from *Koontz* about which Professor Nolon is rightly concerned. Professor Nolon explained how the list of potential government responses in the confusing and chilling post-*Koontz* world is extensive, and this essay adds even more possibilities. Unless and until the Supreme Court conducts a pragmatic reevaluation of its exaction

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Georgia: From Bailouts to Bogs—Shaking the Takings Money Tree (May 1, 2015) (written remarks on file with author).

49. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 836 (1987). *See also Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994).

50. *See* Timothy M. Mulvaney, *The Remnants of Exaction Takings*, 33 ENVIRONS 198, 226 (2010) (explaining that a successful takings claim “depends on the court’s determination of the whole unity of property at issue”).

51. *See, e.g., Starr Int’l Co. v. United States*, 121 Fed. Cl. 428, 444 (2015) (“[T]he AIG Board of Directors decided that accepting the loan was a better alternative than bankruptcy.”); Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 334–35; Underkuffler, *supra* note 48.

takings jurisprudence,<sup>52</sup> each potential response is in need of deep analytical and empirical assessment. Professor Nolon's article thoughtfully starts us on this path.

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52. The final chapter of the *Koontz* saga is yet to be written, as the state has filed a petition for certiorari with the Florida Supreme Court seeking review of the decision on remand.