# REGULATING IN THE POST-*KOONTZ* WORLD

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I begin these brief comments on Professor Sean F. Nolon's fine article[1] with the following stipulations:

1. *Koontz*[2] is a poorly reasoned decision in two especially frustrating ways: It failed to clarify the precise legal doctrine on which it rests, thereby further muddying the notorious swamp of exactions law, and potentially threatening the brokered peace over the regulatory takings doctrine that *Lingle*[3] seemed to indicate; and it made muck of the already confusing and confused facts of the case itself, remanding to the state courts to resolve basic factual, legal, and remedial issues.

2. Exactions are a second-best alternative to a world run by a beneficent, all-knowing emperor endowed both with the ability to consensually define "socially beneficial" and to impose her will on all land use.[4] In the absence of that hypothetical world, we're left with a series of bad choices that extend from the market and common law nuisance on one end to strict zoning on the other. Often, regulators and/or land owners distrust each other, bargain in only semi-good or bad faith in a hazy netherworld of regulations, imperfect information, anticipated impacts, and the political machinations caused by NIMBYism[5] and property rights fundamentalism.

Professor Nolon is more concerned with *Koontz*'s consequences to the environment and land use patterns than with the decision's effects on legal doctrine, and therefore it is stipulation #2 that is more relevant to my response. His consequential focus is the source of his article's strength, even though his predictive claims are difficult to assess because they are inherently speculative. The one thing we can know for sure is that neither the Court nor advocates on either side of the issue can predict with

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1. 67 FLA. L. REV. 171 (2015).
2. Koontz v. St. Johns River Water Management District, 133 S. Ct. 2586 (2013).
3. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).
4. *See* NEIL KOMESAR, *Housing, Zoning, and the Public Interest*, *in* PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 218, 220–21 (Burton A. Weisbrod ed., 1978). For an argument that exactions could, in the abstract, prove perfectly efficient, see Stewart E. Sterk, *Nollan, Henry George, and Exactions*, 88 COLUM. L. REV. 1731, 1732–36 (1988).
5. An acronym for "not in my back yard."

certainty what will happen—indeed, given the incredibly, wonderfully variable nature of local governments as sub-sub-national regulatory entities, we can only say with certainty that *Koontz*'s consequences will be complex, often unanticipated, and, literally, all over the map.

In this regard, Professor Nolon is right to note the diversity of responses to *Koontz* we might expect to see from local governments. For commentators like him who favor negotiated dispute resolution as the best means to develop and implement land use regulations, *Koontz* is a potential disaster. Except in certain circumstances—the right political environment, the right property owner, and the right regulatory scheme and practices—rational regulators will be wary of engaging in discussions with property owners when liability might attach to any misstep. Viewed from the regulator's perspective, the decision's expansion of *Nollan*[6] and *Dolan*'s[7] scrutiny makes one of the tools in the procedural tool-chest significantly less attractive. The risk-averse city and county attorney who reads *Koontz* carefully would be wise to advise planning staff: *Don't discuss the matter with the applicant in an informal manner. Give no indication of what mitigation might require for approval until you can demonstrate that it bears an essential nexus with the proposal and is roughly proportional to it.*

There are other institutions and individuals involved in this process that Professor Nolon's paper (understandably, since it is just one article) doesn't fully consider. The complexity of land use practice on the ground reflects not only the topographical variability of the nation, but also its economic, ideological, and institutional variability—variability that comes from the fact that land use decisions are deeply political and one of the most visible issues that drives local elections. It is therefore worth considering what role they might play in responding to *Koontz*. Any conclusions would not contradict Professor Nolon's predictions about the choices that agencies will make about how to implement regulations, but regulations and their implementation do not occur in a vacuum. The interesting question would not be whether conditions will attach to development approvals, for they surely will—there is too much at stake financially and politically for local governments to eschew conditions, and there is too much at stake financially for property owners to refuse all conditions because local governments continue to enjoy the police power authority to simply deny proposals. But how will these conditions attach and at what stage? Unfortunately, we do not have good empirical data to help us answer the question of how local governments derive and impose conditions, and so all we can do, as Professor Nolon does, is speculate.

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6. Nollan v. California Coastal Commission, 483 U.S. 825 (1987).
7. Dolan v. City of Tigard, 512 U.S. 374 (1994).

In previous work, I predicted that regulatory entities would voluntarily turn to regulatory formulas as a means to impose conditions rather than rely upon bespoke conditions that face higher judicial scrutiny,[8] a trend that I later found in an admittedly non-systematic study of the institutional context of exactions after *Nollan* and *Dolan*.[9] Many of the parties to land use regulation have reasons to prefer formulaic exactions: property developers who want cost-certainty and a streamlined regulatory process; state governments (perhaps channeling the developers' lobbying money) trying to constrain local government discretion; and even local governments themselves, who could reasonably believe that devising formulas in advance would not only limit takings liability, but also prove to be a fairer and more efficient approach to regulating land use. It is this abstract ideal—that formulas could constitute good planning—which helps explain the result, found almost ten years ago, that California planners considered *Nollan* and *Dolan*'s qualitative and quantitative standards to constitute good planning practice.[10] We need look no further for this trend than in Florida's statewide water management regulations and its regional implementation—the subject of the *Koontz* litigation. In 2002, Florida amended its wetland mitigation program by statute, adopting the Uniform Mitigation Assessment Method to set mitigation conditions that would offset expected impacts on wetlands and other surface water.[11] The legislature intended the statute to force regulators into a formulaic scheme that would establish both a "practicable" process for determining mitigation measures and a "consistent" one across a diverse and large state.[12]

Formulas that establish fees and other offset measures might not be the optimal procedure for devising mitigation, and they might not result in the most legitimate and democratically acceptable regulatory response to land development. More individualized exactions derived from a more inclusive, negotiated process may—in theory no doubt, and often in practice—result in better local governance and individualized, appropriate regulation. But we live and practice in the world that *Nollan*, *Dolan*, and *Koontz* created, alongside the contested politics of land use regulation (which themselves led to the judicial development of regulatory takings jurisprudence).

To return to my initial stipulations, I don't believe that the approach in

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8. Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609 (2004).

9. Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 759–60, 766–67 (2007).

10. Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 105 (2001).

11. FLA. STAT. § 373.414(18).

12. *Id.*

*Koontz* is justified textually or doctrinally, and I don't think that even the approach's authors on the Court's conservative side will like all its consequences. Short of a complete sea change in the Court's jurisprudence, exactions cannot and will not die. They are essential to planning and are politically essential to the planning process as it currently exists. But *Koontz* continues the property rights orientation of the Court's reaction to land use planning. For reasons Professor Nolon identifies, it will lead in some instances to inferior processes and policies and will frustrate different parties in different ways in different locations.