THE WINNERS AND LOSERS IN NEGOTIATING EXACTIONS: A RESPONSE TO SEAN NOLON

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Land use law suffers from something of a split personality. On the one hand, zoning and land use controls represent the product of a planning process aimed at improving municipal design. Urban planners set forth aspirational goals that zoning and land use controls seek to achieve. On the other, modern land use practices tend to treat zoning as a framework for bargaining between developers and municipal officials. Some municipalities set aside large swaths of land in holding zones so that any development will require negotiation. And even where practices are not so explicit, most development projects of any significant size will require discretionary approvals that provide an opportunity for bargaining between developers and municipal officials.

These separate roles of land use controls are quite familiar in the legal literature. Carol Rose, in her seminal article on the topic, labeled them "planning" and "dealing" respectively.[1] While both remain important, the dealing model has been ascendant. Budgetary pressures have caused local governments to look to developers to provide (or pay for) infrastructure improvements, new schools, public space, and the like. Simultaneously, increased modesty within the planning profession has replaced idealized end-state design planning with a more evolutionary approach that recognizes the inevitability of change.[2] Often, that change occurs through the process of negotiation because local governments do not have a monopoly on sound planning ideas. Developers, too, put forward plans for future growth that a municipality may well embrace, so long as additional costs or burdens are shared with the developer.

Many land use decisions today are the result of this "dealing " model. Practitioners and academics seem largely sanguine about this trend, but courts, and the Supreme Court in particular, have remained wary. Where municipal officials see mutually beneficial deals, the Supreme Court has seen the risk of extortion and the imposition of unconstitutional conditions. As a result, the Court for over two decades now has required that government demands be "related both in nature and extent to the impact of the proposed development."[3] The effect of these requirements, set forth in the twin cases *Nollan*[4] and *Dolan*,[5] has been somewhat perverse; deals that

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1. *See generally* Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837 (1983).

2. *See* Christopher Serkin & Gregg P. Macey, *Post-Zoning: Alternative Forms of Public Land Use Controls*, 78 BROOK. L. REV. 305, 307–08 (2013).

3. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

4. Nollan v. Calif. Coastal Comm'n, 483 U.S. 825 (1987).

5. 512 U.S. at 374.

both a developer and a municipality would find mutually beneficial are rendered unconstitutional.

Scholars have long recognized that this dynamic may impede bargains that would, in fact, make both parties better off.[6] While the developer's best-case scenario is being allowed to build without any exactions, the worst-case scenario is not being able to build at all. Removing certain kinds of exactions from permissible bargains can make the worst-case scenario more likely.

The Supreme Court recently exacerbated this problem in *Koontz v. St. John's Water Management District*,[7] and Sean Nolon has written an insightful article injecting himself squarely into the debate.[8] As Professor Nolon explains, *Koontz* both expands what counts as an exaction subject to the *Nollan/Dolan* test, including now monetary exactions as well as requirements for physical dedications.[9] Moreover, and more problematically, the analysis applies even to failed exactions. These are proposed exactions that a developer rejects, resulting in no deal. In *Koontz* itself, a negotiation between the developer and the government broke down, with the developer unwilling to pay what the government asked. The Supreme Court's ruling for the plaintiff, Koontz, means that a consummated deal is not necessary to trigger the *Nollan/Dolan* inquiry. This, in turn, raises the possibility that any time bargaining fails, a property owner may be able to bring an unconstitutional conditions claim focused on the government's final demand (or offer).[10] The question, as Professor Nolon rightly points out, is what counts as a "demand" for purposes of triggering *Nollan/Dolan*.[11]

As Professor Nolon details in his article, this uncertainty and the potential for liability if negotiations fail create a particularly troubling range of options for a municipal government seeking to negotiate with developers. It could simply avoid negotiation, which risks leaving beneficial deals on the table.[12] It could engage in some stilted form of negotiation in which the municipality avoids making offers, conveys its preferences through intermediaries, or relies on third parties.[13] But these devices are cumbersome and may, once again, impede bargaining outcomes that the parties would reach if dealing more directly with each

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6. *See, e.g.*, Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 28–33 (2000); *see also* Sean F. Nolon, *Bargaining for Development Post-*Koontz*: How the Supreme Court Invaded Local Government*, 67 FLA. L. REV. 171, 204 n. 248 (2015) (citing Fennell and other sources).

7. 133 S.Ct. 2586 (2013).

8. Nolon, *supra* note 6.

9. *Id.* at 175.

10. *Id.* at 207.

11. *Id.* at 175.

12. *Id.* at 211.

13. *Id.* at 212–16.

other. Alternatively, the municipality could simply engage in direct negotiations and assume the resulting litigation risk.[14] This is a troubling array of options. Given the benefits of bargaining—benefits that Professor Nolon describes in detail[15]— discouraging negotiation is costly indeed.

There is, however, an additional distributional problem lurking within this range of options that deserves some more attention. A municipality's willingness to engage in bargaining will vary depending on its relationship with the property owner. It will also vary with its own risk aversion. Consider these in order.

Ultimately, *Koontz* threatens to expose a municipality to liability if it even engages in the bargaining process. But that risk will not arise equally in all negotiations. In many municipalities, some particular developers are repeat players seeking regulatory approvals. Those developers have a strong incentive to protect their reputation with the municipality. After all, developers create value from their ability to navigate the land use process and secure regulatory benefits. In the paradigmatic case, a developer buys relatively low-valued property, assembles it, and secures an upzoning or variance that allows the property to be put to more productive use than was available to the original owners. Developers' ability to secure regulatory benefits in the future, however, depends on the municipality viewing them as trustworthy parties in the development process. And, more importantly, municipal officials know and understand this dynamic. As a result, municipal officials implicitly understand that they can generally trust repeat players not to sue if bargaining in one instance fails.

The result is easy to predict. Municipalities will be much more likely to negotiate with developers with whom they have a relationship. This, in turn, will favor insiders over outsiders and repeat players over newcomers. To the extent Professor Nolon is correct and land use bargaining is generally beneficial to both parties, the rule in *Koontz* is likely to favor incumbent developers and will serve primarily as a new barrier to entry.

Different municipalities are also likely to react differently to the risk of litigation. Smaller local governments with fewer residents and a less diverse tax base are likely to be more risk averse than larger local governments.[16] All else being equal, smaller governments will therefore be less likely than cities to engage in negotiations that might trigger litigation. Of course, all else is not equal and cities will generally have greater capacity to negotiate through intermediaries and to generally avoid the *Koontz* pitfalls. The result: more negotiation in cities than in towns and suburbs. Cities can therefore be expected to capture more of the benefit of urban development. Again, to the extent negotiations are mutually

14. *Id.* at 216.

15. *Id.* at 199–200.

16. Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause,* 81 N.Y.U. L. REV. 1624, 1666 (2006).

beneficial, *Koontz* will tend to favor larger municipalities over smaller ones.

It may well be, as a normative matter, that rules favoring cities in the development process are normatively desirable. Urban renewal is important for social and environmental reasons. But accomplishing these goals through the haphazard and indirect means of discouraging negotiation is poorly calibrated if not perverse. By highlighting the value of negotiation and the awkward workarounds available to local governments, Professor Nolon's article contains the seeds for this sobering prediction of the relative winners and losers under *Koontz*.