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## NEGOTIATIONS IN THE AFTERMATH OF *KOONTZ*

DANIEL P. SELMI\*

### I. INTRODUCTION: THE EXACTIONS REFORM PROJECT

A majority of the Supreme Court has been engaged in a long-running project intended to reform the use of exactions in land use permitting. The Court's seminal decisions in *Nollan v. California Coastal Commission*<sup>1</sup> and *Dolan v. City of Tigard*<sup>2</sup> reshaped the law under which public agencies can require dedications of real property as conditions of approving land use proposals. Like them or not, the decisions provided a more definite doctrinal framework for exactions of land.

The Court's 2013 decision in *Koontz v. St. Johns River Water Management District*,<sup>3</sup> however, falls into a different category. The decision went beyond *Nollan* and *Dolan*, inserting Takings Clause issues directly in the pre-decision negotiation process. The Court held that demands seeking to impose excessive conditions on land use projects could violate the doctrine of unconstitutional conditions.<sup>4</sup> The decision has led to an outpouring of largely critical academic commentary.<sup>5</sup>

Deterring "extortion[]," "coercion," "evasi[on]," and use of "leverage" by local governments plainly motivated the Court's decision.<sup>6</sup> The Court's five-Justice majority believes that land use agencies are acting improperly

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1. 483 U.S. 825, 837 (1987) (an "essential nexus" must exist between a condition placed on a project and an end that would have justified the denial of the project).

2. 512 U.S. 374, 391 (1994) (requiring dedication of land to be roughly proportional to the impact of a proposed development).

3. 133 S. Ct. 2586 (2013).

4. *Id.* at 2595 ("The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so.").

5. *See, e.g.*, John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1 (2014) (arguing that the *Koontz* Court failed to justify the expansion of takings law in light of the practical harms that will result); Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287 (2013) (arguing that the Court should ground its heightened scrutiny of land use in the Due Process Clause, rather than the Takings Clause, given the difficulty in developing coherent, administrable, and appealing exactions jurisprudence); Mark Fenster, *Substantive Due Process by Another Name: Koontz, Exactions, and the Regulatory Takings Doctrine*, 30 TOURO L. REV. 403 (2014) (suggesting that *Koontz* may not in fact signal a new direction in takings law, but rather, solidifies the Court's exactions jurisprudence as an exception to the *Penn Central* test for regulatory takings).

6. *Koontz*, 133 S. Ct. at 2594–95.

and that judicial intervention is needed in the pre-decision stage of the regulatory process to reform their practices.<sup>7</sup> The Court employed the extension of the takings doctrine in *Koontz* as a vehicle for this reform effort.

The question, then, is what effect *Koontz* will have on local governments' regulatory behavior and, in particular, on negotiations between local governments and developers.<sup>8</sup> As with the other Supreme Court takings decisions,<sup>9</sup> *Koontz* triggered a flurry of predictions about its effect. First in line was Justice Elena Kagan, whose dissent suggested that local governments might stop communicating with project applicants to avoid potential takings claims.<sup>10</sup> Professor Sean Nolon surveyed various potential responses, such as the possibility that municipalities may favor denying projects rather than negotiating with applicants.<sup>11</sup> Other articles suggested that in the future only developers (rather than municipalities) might make offers of exactions in negotiations,<sup>12</sup> that the size of the municipality will determine

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7. The Court's concern over governmental impropriety is evident from its choice of language repeatedly characterizing government violations of its constitutional standards as "extortion." See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) ("In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" (quoting *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 1–15 (N.H. 1981))); *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (same). The opinion in *Koontz* begins by declaring that *Nollan* and *Dolan* "provide important protection against the misuse of the power of land-use regulation." 133 S. Ct. at 2591. It later notes the "special vulnerability of land use permit applicants to extortionate demands for money." *Id.* at 2603. See generally Daniel P. Selmi, *Takings and Extortion*, FLA. L. REV. (2016) (forthcoming) (discussing how the Court has used the concept of extortion in its exactions cases and the implications of this use).

8. The Supreme Court's takings decisions apply to states and regional agencies, as well as to local governments. For convenience, in this Essay the discussion refers to "municipalities" and "local governments" but is intended to cover the wider group of governmental entities.

9. Indeed, suggesting alarming consequences is somewhat of a cottage industry with respect to the Court's takings decisions. See, e.g., *The Constitution's New Public Burden*, N.Y. TIMES (June 28, 1994), <http://www.nytimes.com/1994/06/28/opinion/the-constitution-s-new-public-burden.html> (terming the *Dolan* decision a "triumph of ideology over community needs to protect fragile environments and scarce resources").

10. *Koontz*, 133 S. Ct. at 2610 (Kagan, J., dissenting) ("If a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed, the government might desist altogether from communicating with applicants.").

11. Sean F. Nolon, *Bargaining for Development Post-Koontz: How the Supreme Court Invaded Local Government*, 67 FLA. L. REV. 171, 203 (2015) ("Will it cause municipalities to favor the absolutism of denials over the flexibility of deliberative negotiation?").

12. E.g., Peter A. Clodfelter & Edward J. Sullivan, *Substantive Due Process Through the Just Compensation Clause: Understanding Koontz's "Special Application" of the Doctrine of Unconstitutional Conditions by Tracing the Doctrine's History*, 46 URB. LAW. 569, 621 (2014) ("Perhaps the haziness of determining exactly when a good-faith negotiation turns into extortion will cause the city and developer's roles to switch and the developer will propose exactions to the local government.").

whether it continues proposing exactions after *Koontz*,<sup>13</sup> and that municipalities could issue more unconditioned permits.<sup>14</sup>

This Essay takes a different tack from many responses to *Koontz*, arguing that the actual impact of the decision is likely to be relatively small, for several reasons. First, it suggests that the complexity and diversity of the local land use process defeats the kind of uniformly broad prophylactic effect that the Court seeks. Second, the Essay contends that as agency discretion increases, it will be less likely that the agency's negotiations with a developer will result in a *Koontz* problem. Third, it argues that, to the extent municipalities and project applicants enter into development agreements, *Koontz* becomes irrelevant. Finally, the Essay points to the use of state legislation as a more effective instrument for addressing excessive government exactions.

## II. COMPLEXITY, DISCRETION, AND CONTRACT

### A. *The Multiple Variables in the Land Use World*

Supreme Court decisions under the Takings Clause bind all state agencies that regulate land use.<sup>15</sup> Because of this sweeping effect, there is a tendency to assume that those rulings impact all land use decisionmakers equally. Reinforcing this tendency is the basic structure for local land use regulation, which is similar nationwide despite the absence of any overarching federal law dictating uniformity.<sup>16</sup>

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13. Christopher Serkin, *The Winners and Losers in Negotiating Exactions: A Response to Sean Nolon*, 67 FLA. L. REV. F. 9, 11 (2015) ("All else being equal, smaller governments will therefore be less likely than cities to engage in negotiations that might trigger litigation."). Professor Serkin then suggests that "all else is not equal" and that "cities will generally have greater capacity to negotiate through intermediaries and to generally avoid the *Koontz* pitfalls." *Id.*

14. Timothy M. Mulvaney, *On Bargaining for Development*, 67 FLA. L. REV. F. 66 (2015). In addition to issuing more unconditioned permits, Professor Mulvaney suggests that public agencies might (1) strategically propose, alongside other conditions, a constitutionally acceptable condition that is unpalatable to the applicant; (2) fashion land use restrictions as use limitations rather than exactions; (3) assert that conditions deemed illegal under the unconstitutional conditions doctrine cannot be construed as legal acts that take property for a public use; or (4) renew an unqualified challenge to *Nollan* and *Dolan*. *Id.*; see also Mark Fenster, *Regulating in the Post-Koontz World*, 67 FLA. L. REV. F. 26, 28 (2015) ("[R]egulatory entities would voluntarily turn to regulatory formulas as a means to impose conditions rather than rely upon bespoke conditions that face higher judicial scrutiny . . ." (citing Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 689 (2004))); cf. Shelley Ross Saxer, *To Bargain or Not to Bargain? A Response to Bargaining for Development Post-Koontz*, 67 FLA. L. REV. F. 5, 8 (2015) (concluding that "the consequences of this decision are not as dire as predicted by Nolon and others").

15. See, e.g., *Fideicomiso de la Tierra del Cano Martin Pena v. Fortuno*, 604 F.3d 7, 12 (1st Cir. 2010) ("The Takings Clause of the Fifth Amendment applies to the states and to Puerto Rico through the Fourteenth Amendment.").

16. The uniformity is due to the widespread adoption by states of the model Standard State Zoning Enabling Act. NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, 1 AMERICAN LAND

But within this structure, land use regulation on the ground is quite complex,<sup>17</sup> and that complexity is easily underappreciated. The variables in the system are numerous. Single-purpose agencies wield permit power over quite narrow subject areas, while multi-purpose agencies address a much wider variety of land use concerns. Some public agencies exercise land use authority over small geographic areas; others have authority over large areas. Some affected areas are urban; others are rural. Moreover, the sophistication of the legal advice given to public agencies about the Supreme Court's takings doctrine can differ substantially.

Another variable is the size of development proposals. Some proposals require only one permit, while multi-year developments will require interlocking, sequential permits.<sup>18</sup> Appointed officials make some land use decisions; politically elected officials make others.<sup>19</sup> And there is a final important point: land developers are first and foremost business persons. They concentrate with laser-like focus on ensuring the financial success of their project, not on vindicating their Fifth Amendment rights.

Thus, while *Koontz* will govern in all jurisdictions, it will be applied in a wide variety of situations. In many cases the issues raised by *Koontz* will be far down the parties' lists of important concerns; their attention will be focused elsewhere. For example, the developer may be more concerned with securing a larger number of units in the project to increase the profit margin, while a municipality might focus on addressing the traffic flow from the project. Consequently, while the Supreme Court's purpose in *Koontz* was generally to deter local government overreaching, its actual effect will vary widely in this complex regulatory world. The variables of the land use regulatory process will defeat a uniform response to the decision.

### B. *The Spectrum of Discretion and Bargaining*

Perhaps the most important variable affecting exaction decisions is the breadth of discretion exercised by the decisionmaking agency. It may help to visualize agency levels of discretion as a spectrum. Located on the left

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PLANNING LAW: LAND USE AND THE POLICE POWER § 18.01 (1988) (noting that the Standard State Zoning Enabling Act was adopted at one point in all fifty states and is still in effect (with various modifications) in forty-seven states, and also noting the "remarkable phenomenon" that "all the states should have essentially the same enabling legislation").

17. See Fenster, *supra* note 14, at 27 ("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 . . .").

18. See, e.g., CK Dev., LLC v. Town of Nolensville, No. M2010-00633-COA-R3-CV, 2012 WL 38287, at \*1 (Tenn. Ct. App. Jan. 6, 2012) (phase 7 of multi-phase development).

19. City councils, for example, are elected officials. *City Councils*, NAT'L LEAGUE OF CITIES, <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-officials/city-councils> (last visited Oct. 2, 2015). By contrast, planning commissioners are appointed. *Commission Profiles*, AM. PLANNING ASSOC., <http://www.planning.org/commissioners/profiles/> (last visited Jan. 22, 2016).

of the spectrum are single-purpose agencies focused principally on one issue, perhaps wetlands or historic preservation. Their discretion will be narrow, and their negotiations tightly focused. As the spectrum proceeds to the right, the issues of concern to the public agencies broaden as does, concomitantly, the discretion that they exercise. These agencies will possess authority to address a variety of impacts from projects, and many of those responses will be subject to the constitutional constraints of *Nollan*, *Dolan*, and *Koontz*.

Finally, on the far right of the spectrum, local governments exercise very broad discretion. Here the projects are quite large and, perhaps, multi-staged. The local government possesses wide discretion in the design of the project, the scope of its infrastructure, and the sequence in which it is actually constructed.

As the amount of discretion on this spectrum widens, the impulse of the public agency and developer to bargain rises. Single-purpose agencies are narrowly focused; they impose conditions designed to achieve a specific goal.<sup>20</sup> While they might wish to bargain over those conditions, the scope of agency discretion means that any bargaining will occur within limited confines. Further, the agencies have little leverage over the developer in the bargaining process other than project approval. At the same time, however, their focus on a single goal could lead to overreaching as they concentrate narrowly on imposing conditions designed to achieve that one goal. These factors might well explain why, out of the *Nollan*, *Dolan*, and *Koontz* trilogy of exaction decisions, two involve narrow-purpose agencies: the California Coastal Commission<sup>21</sup> and the St. Johns River Water Management District.<sup>22</sup>

The *Koontz* decision is likely to have some effect on such narrow-purpose agencies. The limited scope of discretion exercised by these agencies can easily make bargaining positions appear to be demands. Indeed, that is precisely what happened in *Koontz*. The Supreme Court accepted the Florida Court of Appeal's characterization of the Water Management Dis-

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20. Orlando E. Delogu et al., *Some Model Amendments to Maine (and Other States') Land Use Control Legislation*, 56 ME. L. REV. 323, 363 n.6 (2004) (noting "the proliferation in recent decades of states' adoption, in piecemeal fashion, of a range of single-purpose state land use control measures, including power plant siting, wetlands preservation, coastal zone protection, and wild rivers preservation, among many others").

21. See CAL. COASTAL COMM.,N, <http://www.coastal.ca.gov/whoware.html> (last visited Oct. 2, 2015) ("The mission of the Coastal Commission is to protect, conserve, restore, and enhance environmental and human-based resources of the California coast and ocean for environmentally sustainable and prudent use by current and future generations.").

22. See ST. JOHNS RIVER WATER MGMT. DISTRICT, <http://floridaswater.com/overview.html> (last visited Jan. 22, 2015) (stating agency's mission is to "ensur[e] the sustainable use of Florida's water for the benefit of the people of the District and the state").

trict's negotiation as a demand even though the District took pains to state that it would consider other offers.<sup>23</sup>

Agencies with a variety of concerns and wider discretion will respond differently. An example might be a city considering a large subdivision. The city is unlikely to turn down the project because of a single impact. The city also will generally recognize the need for new housing and will wish to maximize the benefits that it will receive from the project. None of those benefits will accrue if the project is denied. On the other side of the permit process, the developer is largely concerned with minimizing costs across the various exactions that will address the project's impacts. At the same time, she would prefer a set of exaction conditions that maximize the development's benefits and thus add as much value to the development as possible.

The stage is thus set for some degree of bargaining between the parties. The decisions in *Nollan* and *Dolan* will constrain that bargaining, as the agency cannot approve a project that violates the "essential nexus"<sup>24</sup> and "rough proportionality"<sup>25</sup> tests. Moreover, the agency will now be subject to *Koontz's* new constraint under which bargaining positions can be viewed as demands that would violate the doctrine of unconstitutional conditions. Still, the wider scope of discretion leaves more room for the "give and take" of bargaining.

The negotiation pattern is thus likely to be more complex, featuring interconnected issues and multiple exchanges of viewpoints. The pattern will probably vary substantially from the much more straightforward negotiations in *Koontz*. As long as the negotiations proceed on a normal track, the parties are likely to reach an agreement. And if they do not, the odds are that the bargaining record will not contain the type of unequivocal, unilateral demand that would support a *Koontz* claim. Furthermore, municipalities can take affirmative steps to minimize the potential that negotiation po-

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23. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2598 (2013) (declining "to reach respondent's argument that its demands for property were too indefinite to give rise to liability under *Nollan* and *Dolan*," and noting that the Florida Supreme Court "relied instead on the Florida District Court of Appeals' characterization of respondent's behavior as a demand for *Nollan/Dolan* purposes").

24. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 838 (1987) (referring to the requirement that a condition further the end that would justify prohibiting a project as an "essential nexus").

25. *See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) ("We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

sitions look like demands. For example, they can structure positions to avoid language that makes them appear to be demands.<sup>26</sup>

In sum, two factors will tend to minimize the importance of *Koontz*. First, as the discretion available to an agency increases, the bargaining process is likely to focus on a wider variety of issues than just the narrow demands at issue in *Koontz*. Second, the negotiation process itself is likely to be more comprehensive and correspondingly less likely to result in the kind of explicit demands that the Court assumed were made in *Koontz*. Overall, the complexity of the land use process works against producing situations like the one in *Koontz*.

### C. Contractual Agreements

As a project gets even bigger, with its implementation perhaps occurring in phases and extending over a number of years, the agency's discretion grows much larger. As a result, the government and the developer may well decide that negotiating a development agreement would best address their mutual concerns.<sup>27</sup> In doing so, both negotiating parties will see the Supreme Court's exaction cases, including *Koontz*, as irrelevant.

The situations faced by the government and developer lead to that outcome. The limitations imposed by *Koontz* and its antecedents, *Nollan* and *Dolan*, favor developer interests, and all things being equal, developers would insist on honoring those constraints. But here other concerns intervene. The developer's primary focus is securing certainty; she has a large project with many facets that will build out over time. The developer may be concerned that a changing economy might make immediate construction unwise at present and so wish to ensure that the rights to build the project remain in effect for a longer period of time.<sup>28</sup>

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26. Selmi, *supra* note 7 (noting that municipalities can "take pains to structure the positions that they take in bargaining to prevent their use later in litigation").

27. See James S. Burling, *The 2013 Takings Triplets: From Exactions to Flooding to Raisin Seizures—Implications for Litigators*, 3 BRIGHAM-KANNER PROP. RIGHTS CONF. J. 163, 179 n.69 (2014) ("Development agreements have become a very common land use approval vehicle since *Nollan*." (citing David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 CASE W. RES. L. REV. 663 (2001), then citing John J. Delaney, *Development Agreements: The Road from Prohibition to "Let's Make a Deal!"*, 25 URB. LAW. 49 (1993), and then citing Daniel J. Curtin, Jr. & Scott A. Edelstein, *Development Agreement Practice in California and Other States*, 22 STETSON L. REV. 761 (1993))).

28. See *Howard Hughes Co., LLC v. Comm'r. Internal Revenue*, No. 10539-11, 2014 WL 10077466, at \*4 (U.S.T.C. June 2, 2014) ("Petitioners were parties to master development agreements with Las Vegas, Nevada, and Clark County, Nevada, that govern the planned development of Summerlin West and Summerlin South, respectively. These long-term, 30-year agreements assure petitioners that they will be able to develop the land in accordance with the agreements and remove any necessity to negotiate development agreements and entitlements village by village.").

Accordingly, in situations such as these the developer would like to obtain an agreement locking in the project for an extended period. While a state statute on vested rights<sup>29</sup> may confer a measure of protection for the entitlements over some time, that time period might not be enough. Furthermore, the developer is concerned that if the entitlements expire and she needs to return to the jurisdiction for a new approval, the political circumstances could have changed drastically. A potential nightmare for a developer is a city council whose composition changed and whose newly elected members attempt to alter the project during its development.<sup>30</sup>

The municipality, in contrast, is concerned about comprehensively addressing the impacts from the developer's large project. It sees the "essential nexus" and "rough proportionality" tests as barriers to attaining full mitigation of the project's impacts and to meeting the city's larger infrastructure needs. The municipality also views itself as entitled to some "quid pro quo" for the consideration that it is giving up in the contract, such as, for example, its agreement to "lock in" the development for a longer period.

Under these circumstances, both parties are highly attracted to a contract solution. They will see contract, with its focus on mutually beneficial provisions, as a better vehicle for reaching their goals than remaining solely within the public regulatory framework. And here, *Koontz* becomes irrelevant for several reasons.

First, the parties are negotiating a contract; they are not engaged in a regulatory proceeding initiated by an application for a land use approval. Any demands made by the municipality will not lead to a permit denial, as in *Koontz*. Instead, in the event of an impasse, the negotiations for the contract will simply stop.

Second, even if an argument could be fashioned that *Koontz* somehow applied to demands made in such negotiations, the interactions between the parties are different than in the normal land use process. Here, the parties really *are* negotiating rather than making demands—their purpose is to reach a meeting of the minds. The comprehensive nature of the negotiations over the development agreement would make it difficult to show that,

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29. N.C. GEN. STAT. § 160A-385.1 (2007) ("A vested right shall be deemed established with respect to any property upon the valid approval, or conditional approval, of a site specific development plan or a phased development plan, following notice and public hearing by the city with jurisdiction over the property. Such vested right shall confer upon the landowner the right to undertake and complete the development and use of said property under the terms and conditions of the site specific development plan or the phased development plan including any amendments thereto.").

30. Perhaps the classic case on this point is *Avco Community Developers, Inc. v. South Coast Regional Commission*, 553 P.2d 546, 557 (Cal. 1976) (finding that multi-stage development project for which infrastructure had been installed did not have a vested right to development and thus was subject to the new California Coastal Zone Conservation Act).

at any given point, a public agency had formulated a specific demand that would constitute a taking.

Third, if a contract proves impossible to negotiate, the developer may fall back on seeking the “normal” land use approvals without the benefit of the development agreement. Suing the agency at this point would not help achieve those approvals.

Last, and perhaps most importantly, parties to such negotiations do not believe that the regulatory restrictions found in the permit process apply to development agreements. The parties will assume that their entire agreement resides in the contract’s terms; they do not see *Nollan*, *Dolan*, and *Koontz* as applying to contract. Moreover, if an agreement is reached, the developer’s focus will be on implementing the agreement, not on vindicating any perceived constitutional deficiency in the balance of exactions negotiated in the contract. In short, the Supreme Court’s attempt in *Koontz* to deter local government “extortion” will be largely ineffectual under these circumstances.

### III. ADDRESSING MUNICIPAL OVERREACHING AFTER *KOONTZ*

#### A. *The Effectiveness of Koontz in Perspective*

The *Koontz* decision is explainable only by the Court’s concern over municipal overreaching in imposing exactions. This concern led the majority to decide the case even though it was not certain that the public agency had ever made a specific demand that formed the basis for its denial of the project,<sup>31</sup> and even though the existence of any remedy was highly uncertain.<sup>32</sup> Moreover, although the Takings Clause by its terms concerns compensation for property *taken*, the Court applied the unconstitutional conditions doctrine to a situation where it recognized that no actual taking had occurred.<sup>33</sup>

So what will *Koontz* accomplish? The discussion above leads to the conclusion that it will not be highly effective for several reasons. First, the widely varied nature of land use proposals and the interactions between municipalities and developers mean that the concerns over *Koontz* are likely to play a subordinate role. Second, as the municipality’s discretion grows,

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31. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2598 (2013) (“we decline to reach respondent’s argument that its demands for property were too indefinite to give rise to liability under *Nollan* and *Dolan*”).

32. *Id.* at 2597 (“Because petitioner 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.”).

33. Michael T. Kamprath, *A Look at Koontz v. St. Johns River Water Management District*, 45 URB. LAW. 953, 969–70 (2013) (“The *Koontz* case is remarkable because the Court majority holds that monetary exactions can form the basis for a *Nollan/Dolan* claim even after finding that nothing was, in fact, taken.”).

the negotiations grow increasingly complex, and demands of the type the Court assumed in *Koontz* are less likely. Third, a significant subset of development proposals will result in development agreements in which the parties assume that the constitutional constraints of *Nollan*, *Dolan*, and *Koontz* do not apply.

Indeed, the *Koontz* decision might even incentivize parties to negotiate contracts that exceed the constitutional limits imposed by *Nollan* and *Dolan*. In the non-contractual situation, *Koontz* allows negotiating positions to be read as demands that constitute takings for purposes of the doctrine of unconstitutional conditions.<sup>34</sup> If the parties negotiate within the land use regulatory framework, that outcome is always a possibility—albeit a remote one in many instances, as the parties’ other concerns during the negotiations are more likely to take precedence. However, if a municipality is concerned about *Koontz*, it would be better off negotiating a development agreement. The parties believe that *Koontz*’s exactions limitations are irrelevant to such a contract,<sup>35</sup> and their energy can thus be spent on the “give and take” of real bargaining, not on the types of intransigent demands that could lead to trouble under *Koontz*.

### B. Examining the Waiver Theory

Given the growing importance of contract in land use, it is worth considering the contracting parties’ assumption about the constitutional protections established by *Nollan* and *Dolan*. Are they correct in assuming that these limits are irrelevant in the context of land use contracts? Can constitutional constraints imposed on local governments be avoided so easily?

The conclusion that the exactions limitations do not apply to contract rests on the theory that a developer voluntarily waives those limitations by entering into the contract.<sup>36</sup> The waiver theory has not been tested in court or fully explored in the literature on development agreements. The near universal opinion, however, has been that developers waive constitutional

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34. See *supra* note 4.

35. See *infra* Part III.B.

36. See David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 CASE W. RES. L. REV. 663, 692 (2001) (“The question is whether the local government may go further since the development or annexation agreement is indeed a voluntary agreement which neither government nor landowner is compelled to either negotiate or execute. So long as the agreement is indeed voluntary, the answer is almost certainly yes.”); Daniel J. Curtin, Jr., & Sanford M. Skaggs, *Legal Issues and Considerations*, in DEVELOPMENT AGREEMENTS: PRACTICE, POLICY, AND PROSPECTS 121, 130–31 (Douglas R. Porter & Lindell L. Marsh eds., 1989) (“On occasion, city officials will attempt to obtain greater exactions by suggesting or declaring that they will refuse to negotiate an agreement if the developer does not comply, on the basis that a city need not enter into one in the first place.”).

protections by contractually agreeing to exactions that would not comply with *Nollan* and *Dolan*.<sup>37</sup>

Two principal arguments support the constitutional waiver theory. First, the idea of waiver here relates logically to other waivers of constitutional rights.<sup>38</sup> For example, the courts have long held that parties can waive their constitutional protections in criminal cases, and those waivers have expanded in recent years.<sup>39</sup> As long as parties understand their rights and freely release them, a wide variety of waivers are possible in criminal cases. Courts then treat issues that arise under the waivers as questions of contractual interpretation, not as matters of constitutional law.<sup>40</sup> Indeed, the prevalence of the waiver theory in recent decades not only testifies to its attractiveness, it may also indicate a sort of inevitable expansion of the use of contract in other areas, like land use, nominally governed by public law. We are, in short, increasingly comfortable with the idea of replacing public law with contract.

Second, at least some of the concerns over waiver in other areas of law are not present in the land use field. There is, for example, no real concern about developers understanding the rights that they are waiving.<sup>41</sup> Given the size and scope of the land use projects that now are the subject of development agreements, developers are almost certainly cognizant of their rights.

Still, the waiver theory has some troubling aspects. To begin with, while one can certainly debate whether *Nollan*, *Dolan*, and *Koontz* establish the proper boundaries to prevent overreaching, few individuals reject the premise that land use agencies can overreach in demanding exactions. Some boundaries are needed. The use of contract, however, simply makes

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37. Interestingly, a large number of development agreements contain no express waiver of constitutional protections. The waiver is simply assumed.

38. Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913, 917 (2006) (“Some of the resistance to connecting constitutional rights to contract law is that we are accustomed to thinking of these rights as inalienable, if not sacred. But numerous contexts exist in which constitutional rights are surrendered with some government benefit serving as the consideration.”).

39. *Id.* (“[S]ome constitutional rights (especially those relating to criminal procedure) are, in practice, used almost entirely as bargaining chips; rarely are they retained and actually exercised by the holder of those rights.”); Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 74 (2015) (“Criminal matters are often resolved by plea rather than trial, and procedural protections are routinely waived as part of the bargain. Contract principles, rather than constitutional law, govern these agreements.”).

40. See, e.g., *United States v. Obey*, 790 F.3d 545, 547 (4th Cir. 2015) (“We apply contract law principles when we construe a plea agreement. Thus, ‘each party should receive the benefit of its bargain’ under the agreement.” (quoting *United States v. Dawson*, 587 F.3d 640, 645 (4th Cir. 2009))).

41. *McCamey v. Epps*, 658 F.3d 491, 500 (5th Cir. 2011) (“[T]he test for a valid waiver is a case-specific inquiry into ‘all of the relevant circumstances surrounding it.’” (quoting *Brady v. United States*, 397 U.S. 742, 749 (1970))).

those boundaries largely irrelevant. The constitutional constraints may establish a starting point for negotiations (or they may not), but nothing more.

Additionally, the Court has grounded its takings limitations in the doctrine of unconstitutional conditions. This doctrine holds that the government cannot condition certain benefits upon the waiver of constitutional rights.<sup>42</sup> Development agreements, however, allow the local governments to do exactly what this doctrine prohibits, to accomplish indirectly what they could not do directly.<sup>43</sup> The agreements in effect authorize the government to place conditions on development that would be unconstitutional if imposed through the public regulatory process. This sort of circumvention should give pause, for the doctrine of unconstitutional conditions is intended to prevent just this situation—the waiver of constitutional rights to secure a benefit from the government.

Furthermore, the set of exactions agreed to in such contracts substantially depends on negotiating power.<sup>44</sup> Where governments possess significant bargaining power in the negotiations, they are likely to receive exactions far exceeding the constitutional limitations. This set of exactions will be greater than those secured by a local government with less bargaining power. In other words, the more bargaining power that the local government has, the more likely it is to actually overreach in negotiating the contract. Contract law thus rewards the very same overreaching that constitutional law seeks to deter and that animated the *Koontz* decision.

Finally, the bargaining outcome will not necessarily bear any logical relationship to the environmental or infrastructure effects that the project will cause. Instead, the outcome is more random, resulting from the factors that affect the flow of negotiations rather than from a rational planning analysis.

In short, the widespread use of development agreements assumes that they render superfluous *Nollan* and *Dolan*, and now *Koontz* as well. That outcome may be correct under contract law, but there are important questions about allowing contract law to so easily override the Fifth Amendment's constitutional protections.

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42. Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 473–74 (1991) (noting the doctrine's requirement that "even if the government is not constitutionally required to grant a particular privilege or benefit, once it offers that benefit, it may not condition the offer upon the recipient's surrender or waiver of a constitutional right").

43. Indeed, in *Koontz* the Court was concerned with similar tactics. It sought to prevent local governments from "evad[ing] the *Nollan/Dolan* limitations simply by phrasing its demands for property as conditions precedent to permit approval." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2589 (2013).

44. See Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 629 ("[V]ariables in the bargaining process render it likely that negotiated outcomes will differ on otherwise similar developments.").

### C. *The Alternative of State Legislation*

The discussion above argues that the Supreme Court's attempt to police land use negotiations in *Koontz* will have limited effect. Given the concern over local government overreaching in dealing with developers, are there any other potential checks on overreaching? The obvious check, of course, is state legislation.

Implicit in the Supreme Court's decisions is the premise that the Court's supervision is necessary to avoid unfair exactions imposed by municipalities.<sup>45</sup> But if municipal extortion was rampant, there is every reason to expect that state legislatures would respond to curb municipal discretion. Property developers are not a powerless group; they have the political influence to make their views known.<sup>46</sup> The absence of a large-scale state legislative response to municipal overreaching certainly raises questions about whether that overreaching is anywhere near as unfair or epidemic as the Court's language in *Koontz* assumes.<sup>47</sup>

Development agreements, however, raise different considerations with respect to state legislation. Both developers and municipalities see efficiency benefits in negotiating development agreements; thus, any push for state legislation that would address either municipal overreaching or the disparate outcomes in development agreements would be very unlikely. To date, the state legislation on development agreements confirms this conclusion. That legislation is largely procedural and quite general in nature. After authorizing such agreements, the laws address issues such as the length of development agreements and the process by which they might be adopted.<sup>48</sup> But they largely do not constrain local government discretion in seeking benefits over and above those allowable under *Nollan* and *Dolan*.

One case, however, suggests that at least under certain circumstances, those statutes might limit a municipality's bargaining discretion in a development agreement. In *Toll Bros., Inc. v. Board of Chosen Freeholders of the County of Burlington*,<sup>49</sup> a local jurisdiction insisted that a developer

45. *Koontz*, 133 S. Ct. at 2591 (“Our decisions in *Nollan* . . . and *Dolan* . . . provide important protection against the misuse of the power of land-use regulation.”).

46. See Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1, 5 (2003) (“As repeat players in the political process without significant coordination costs, developers generally have a leg up in the political arena.”); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 260 (2004) (“The enactment of property rights legislation, together with the imposition of statutory limits on development moratoria, suggest that the political power developers enjoy in state legislatures provides them with significant protection against potentially abusive practices by local governments. . . . Landowners will not always win in the state legislatures, but their interests will not be ignored.”).

47. Selmi, *supra* note 7.

48. See OR. REV. STAT. ANN. § 94.513(2) (West 2015) (“Approval of a development agreement requires compliance with local regulations and the approval of the city or county governing body after notice and hearing.”); ARIZ. REV. STAT. ANN. §9-500.05 (West 2014).

49. 944 A.2d 1 (N.J. 2008).

meet its obligations under a negotiated contract. These obligations required the developer to pay far more than a pro rata share of improvements even though the circumstances of the development had markedly changed since the contract was signed. The agreement, insisted the county, was a binding contract: a deal is a deal.<sup>50</sup>

Plainly bothered by the county's position, the New Jersey Supreme Court disagreed. It found that a development agreement is not an "independent contractual source of obligation."<sup>51</sup> If it was, the court explained, "the effect would be to approve public entities and developers entering into 'voluntary' agreements in violation of the specific provisions of the MLUL [Municipal Land Use Law]."<sup>52</sup> In short, the court simply found that the agreement was not a binding instrument because the agency had no authority to negotiate conditions that exceeded the boundaries of state law.

If applied in other jurisdictions, such a holding would bring to light the underlying issue of whether state law authorizes parties to waive constitutional rights through the use of contract. To date, that issue has largely been ignored. It also might stimulate state legislatures—the institutions best situated to balance concerns about government overreaching with the benefits that accrue through development agreements—to directly address this issue of whether state law *ought* to authorize such waivers and, if so, what limits should be placed on them.

#### IV. CONCLUSION

The Supreme Court's decision in *Koontz* fails in several ways. First, it is doctrinally questionable, as others have shown.<sup>53</sup> It is also based on an unsustainable premise:<sup>54</sup> that governmental agencies uniformly engage in "extortion" when imposing exactions.<sup>55</sup> But *Koontz* also fails on an instrumental basis in effecting the systematic reform that the majority sought. The complexity of land use factors and the variable nature of negotiations in light of municipal discretion mean that *Koontz* will not play a large role in negotiations over development approvals.

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50. *Id.* at 9–10.

51. *Id.* at 16.

52. *Id.* at 17.

53. *See supra* note 5.

54. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2608 (2013) (Kagan, J., dissenting) ("No one has presented evidence that in the many States declining to apply heightened scrutiny to permitting fees, local officials routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development's costs." (citing *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d, at 697, then citing *Home Builders Assn. of Central Arizona v. Scottsdale*, 187 Ariz. 479, 486, 930 P.2d 993, 1000 (1997), and then citing *McCarthy v. Leawood*, 257 Kan. 566, 579, 894 P.2d 836, 845 (1995))).

55. *See Selmi, supra* note 7.

Moreover, it will have no effect on an important set of land use tools: contracts negotiated between local governments and developers. Under those contracts, exactions can exceed the limits of *Nollan* and *Dolan*, and now *Koontz*. And the exceedances will vary from contract to contract, depending on the bargaining power of the parties. The contracting parties—both municipalities and developers—anticipate and accept just such a result.

Consequently, despite the Court's intent, the constitutional limitations of *Nollan*, *Dolan*, and *Koontz* apply unevenly to current land use regulation. Effective regulation of potential municipal overreaching will have to originate elsewhere, such as in state legislation.