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## The Post-Koontz Landscape: Koontz's Shortcomings and How to Move Forward

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## **THE POST-KOONTZ LANDSCAPE: KOONTZ'S SHORTCOMINGS AND HOW TO MOVE FORWARD**

### **ABSTRACT**

*This Comment analyzes the Supreme Court's opinion in Koontz v. St. Johns River Water Management District, and critiques the Court's language regarding environmental protection and local government regulation. In sum, the Koontz opinion reveals that the Court is unsympathetic to environmental protection at the local level, and is suspicious of local government's ability to make reasoned land-use decisions without extorting unfair value from property owners. The Court's doubtful attitude regarding the validity of wetlands protection and local government regulation are unsupported by the relevant scholarship.*

*Next, this Comment argues that applying the formulaic takings test prescribed in Koontz has the negative effect of reducing procedural flexibility for local land-use decision-makers. Acknowledging Koontz as the new reality for local governments, local officials will need to adapt to the changes imposed by expanding the Nollan-Dolan test to permit denials, and address the confusion caused by issues the Court left open in the opinion. This Comment recommends a new "negotiated permitting" procedure as a strategy to limit potentially expanded takings liability under Koontz. Under "negotiated permitting," a local government will always approve a permit subject to one acceptable condition, even if negotiations break down as they did in Koontz. Approving one condition reduces confusion about which mitigation options offered in negotiation will be subject to the "nexus" and "rough proportionality" requirements in the event that a permit applicant brings a takings claim against the permitting authority.*

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## INTRODUCTION

On June 25, 2013, the Supreme Court issued an opinion for a case titled *Koontz v. St. Johns River Water Management District*.<sup>1</sup> While the opinion received much less popular attention than other high-profile opinions issued that summer,<sup>2</sup> it has generated debate amongst property rights advocates, urban planners, state and local governments, and environmental advocates about the current reach of local government power and regulatory takings generally.<sup>3</sup>

It is important to note here that, while less glamorous than large federal environmental laws such as the Endangered Species Act,<sup>4</sup> local land-use regulation has perhaps the greatest impact of any environmental law or regulation on the daily lives of residents within a certain community. The majority of federal successes regulating pollution and environmental quality were achieved through “right to pollute” schemes monitoring “point sources” such as smoke stacks.<sup>5</sup> Achieving adequate regulation of “nonpoint source” pollution remains a major challenge in environmental law, and federal legislation has not been successful.<sup>6</sup> The reality is that land-use decisions, which generally fall within a local government’s police power, make up a substantial portion of environmental law, including managing urban sprawl, protecting wetlands, and preventing pollution hotspots, even though they may not trigger popular understanding as such.<sup>7</sup> Therefore, *Koontz* is relevant not

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<sup>1</sup> 133 S. Ct. 2586 (2013).

<sup>2</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675 (2013) (striking down the definition of marriage in the Defense of Marriage Act); *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (striking down a section of the Voting Rights Act).

<sup>3</sup> See John D. Echeverria, Op-Ed., *A Legal Blow to Sustainable Development*, N.Y. TIMES, June 26, 2013, <http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html>; William Fulton, *U.S. Supremes Tighten Screws on Exactions—Is Ehrlich Dead?*, CAL. PLAN. & DEV. REP. BLOG (June 25, 2013, 12:46 PM), <http://www.cp-dr.com/node/3381>; Brian T. Hodges, *Koontz—A Banner Day for Property Rights*, PAC. LEGAL FOUND. LIBERTY BLOG (June 25, 2013), <http://blog.pacificlegal.org/2013/koontz-a-banner-day-for-property-rights/>; *Supreme Court Expands Takings Test*, AM. PLAN. ASS’N (June 25, 2013), <http://www.planning.org/newsreleases/2013/jun25.htm>.

<sup>4</sup> 16 U.S.C. §§ 1531–1544 (2012).

<sup>5</sup> See, e.g., 33 U.S.C.A. § 1342(a)(1) (West, Westlaw through Pub. L. No. 113-121); 42 U.S.C. § 7411(b) (2012); *id.* § 7412(d)(1); see also John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 366–67 (2002) (describing the federal government’s struggle to successfully regulate nonpoint pollution sources).

<sup>6</sup> Nolon, *supra* note 5, at 365.

<sup>7</sup> See Michelle Bryan Mudd, *A “Constant and Difficult Task”: Making Local Land Use Decisions in States With a Constitutional Right to a Healthful Environment*, 38 ECOLOGY L.Q. 1, 3 (2011) (“[L]ocal governments stand on the front lines of environmental regulation. . . . Thus, a local government’s role in assessing the environmental impacts of land development can be profound. A silent community puts the health

just as an exactions decision, but as an important indication of the Court's attitude toward local government as an environmental regulator and protector.

*Koontz* expanded a previous legal test to determine whether a government has effectuated a regulatory taking via an excessive exaction.<sup>8</sup> “Exactions” are a regulatory tool used by local governments in land-use planning.<sup>9</sup> Generally, a local government will require that a property owner meet a certain condition in order to grant a permit or other entitlement allowing “the intensified use of real property.”<sup>10</sup> Exactions have traditionally been considered a valuable tool for local governments in promoting economic development in a community while requiring builders to internalize some of the external costs.<sup>11</sup> This point is key to the rest of this Comment, which asserts that the *Koontz* opinion restricts local governments' flexibility in land-use decision-making, thus negatively impacting a very significant environmental protection tool.

Over the past several decades, courts have begun to view the exaction as an inherently suspect way for local governments to extort unfair benefits from landowners.<sup>12</sup> While exactions must certainly meet a threshold of constitutionality,<sup>13</sup> this Comment argues that the Court mischaracterized several aspects of the *Koontz* scenario, resulting in the unwieldy extension of the “nexus” and “rough proportionality” test to conditions suggested by state and local governments to land developers prior to permit denials. However, flexibility is not necessarily precluded by the *Koontz* holding. Recognizing *Koontz* as the new legal reality for local governments, this Comment argues in favor of regulatory flexibility regarding exactions, and prescribes a record-generating “negotiated permitting” scheme as a way for local governments to limit confusion regarding their potentially expanded liability under *Koontz* and effectively return to a pre-*Koontz* regulatory world.

Part I of this Comment provides a history of the exactions cases leading up to *Koontz*. Part II describes how *Koontz* arose, and what was at stake. It also provides an overview of the majority and dissenting opinions, and discusses

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of its environment at risk.”); Joseph L. Sax, *Using Property Rights to Attack Environmental Protection*, 19 PACE ENVTL. L. REV. 715, 715–16 (2002).

<sup>8</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013).

<sup>9</sup> Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 613 (2004).

<sup>10</sup> *Id.*

<sup>11</sup> *Koontz*, 133 S. Ct. at 2595 (“Our precedents . . . enable permitting authorities to insist that applicants bear the full costs of their proposals . . .”).

<sup>12</sup> See *infra* Part III.

<sup>13</sup> U.S. CONST. amend. V.

public reaction to the outcome. The first section of Part III includes general background information about wetlands protection to facilitate understanding of the policy issues in *Koontz*, and the second section identifies several of the Court's mischaracterizations of environmental protection policy and local government function in the opinion. Part IV discusses the benefits of regulatory flexibility in exactions decisions, elaborating on why local governments should adapt to maximize flexibility in spite of *Koontz*. Part IV then assesses possible ways that local governments could react to the *Koontz* opinion, and proposes, by analogy to federal negotiated rulemaking, that local governments implement "negotiated permitting" procedures to limit uncertainty about increased takings challenges under *Koontz*.

## I. THE HISTORY OF EXACTIONS LAW

The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation."<sup>14</sup> This prohibition applies both to federal and state government takings, but still allows local governments to restrict land in certain ways via regulation such as permitting and zoning schemes.<sup>15</sup> The Supreme Court has addressed several times whether requiring something from a landowner "as a condition for issuing a land-use permit" violates the landowner's constitutional rights, and "ha[s] long recognized that land-use regulation does not effect a taking if it 'substantially advances legitimate state interests' and does not 'deny an over economically viable use of his land.'"<sup>16</sup>

Historically, the Court has assessed Fifth Amendment takings claims against regulatory restrictions on private property under a more flexible legal standard than claims concerning physical occupations or seizures of land.<sup>17</sup> For example, in *Penn Central Transportation Co. v. New York City*, the Court considered whether a city effectuated a taking by restricting the development

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834–36 (1987); *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 239 (1897) ("[S]ince the adoption of the Fourteenth Amendment[,] compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution.").

<sup>16</sup> *Nollan*, 483 U.S. at 834 (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

<sup>17</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–24 (1978) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . ."); see also John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?* 4–5 (Vt. Law Sch., Faculty Working Paper No. 28-13, 2013), available at <http://ssrn.com/abstract=2316406>.

of Grand Central Terminal.<sup>18</sup> The Court discussed the nationwide movement to preserve historic landmarks, noting several aspects of public policy that have parallels to environmental conservation concerns.<sup>19</sup> First, the Court noted that many historic landmarks have been lost in the years leading up to the case “without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways.”<sup>20</sup> Second, the Court acknowledged the “widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all.”<sup>21</sup> The Court’s favorable presentation of these public policy considerations is in stark contrast to language used in *Koontz v. St. Johns River Water Management District* regarding local government decision-making and environmental protection, as discussed in Part III.

Ultimately, the Court in *Penn Central* concluded that it was “unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require” that the government pay compensation for “economic injuries caused by public action.”<sup>22</sup> Therefore, the Court concluded that evaluation of such claims was necessarily on an “ad hoc, factual” basis.<sup>23</sup> Factors to consider include: (1) “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations” and (2) “the character of the governmental action.”<sup>24</sup>

In 1987, the Court had the opportunity to refine its approach to regulatory restrictions on private land-use in *Nollan v. California Coastal Commission*.<sup>25</sup> There, the Nollan family wanted to exercise their option to purchase a shorefront piece of land that they had leased for years.<sup>26</sup> In order to exercise their option to purchase the property, they had to tear down the existing bungalow structure and replace it.<sup>27</sup> Such a project required the approval of the

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<sup>18</sup> 438 U.S. at 107.

<sup>19</sup> *Id.* at 107–08.

<sup>20</sup> *Id.* at 108.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 124.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> 483 U.S. 825 (1987).

<sup>26</sup> *Id.* at 827.

<sup>27</sup> *Id.* at 828.

California Coastal Commission (Coastal Commission).<sup>28</sup> Upon consideration of the Nollans' application, the Coastal Commission "granted the permit subject to their recordation of a deed restriction" allowing a public pathway along the ocean line of the property.<sup>29</sup>

The Nollans contested this outcome, and eventually the case landed in front of the Supreme Court.<sup>30</sup> While acknowledging that the Court had previously recognized "a broad range of governmental purposes and regulations" that qualified as "legitimate state interests" and thus did not constitute a taking, Justice Scalia reasoned that the "constitutional propriety" of the Coastal Commission's action depended on the existence of an "essential nexus" between the proposed project and the condition of the permit.<sup>31</sup> The Court found no "essential nexus" between the Nollans' construction project and the Coastal Commission's easement requirement, and therefore held that the Coastal Commission's permit condition could not "be treated as an exercise of its land-use power."<sup>32</sup>

The Court elaborated on the "nexus" requirement in 1994 in *Dolan v. City of Tigard*.<sup>33</sup> The case concerned Dolan's proposed redevelopment project on land including a 100-year floodplain subject to restrictions under a local government's comprehensive zoning scheme.<sup>34</sup> Dolan applied to the City Planning Commission (Tigard Commission) for the necessary permits to expand her plumbing and electric store located on the site.<sup>35</sup> Consistent with the existing zoning scheme, the Tigard Commission approved the permit subject to Dolan improving a storm drainage system within the 100-year floodplain and dedicating a portion of it to the city greenway, and dedicating an adjacent strip of land for a pedestrian and bicycle pathway.<sup>36</sup>

When the Tigard Commission denied her variance requests, Dolan appealed to the local Land Use Board, the Oregon Court of Appeals, and the Oregon Supreme Court, all of which affirmed the decision of the Tigard

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *See id.* at 828–31 (reciting procedural history).

<sup>31</sup> *Id.* at 834–37.

<sup>32</sup> *Id.* at 838–42.

<sup>33</sup> 512 U.S. 374, 386 (1994).

<sup>34</sup> *Id.* at 377–81. The state statute required "all Oregon cities and counties to adopt new comprehensive land use plans that were consistent with the statewide planning goals." *Id.* at 377.

<sup>35</sup> *Id.* at 379.

<sup>36</sup> *Id.* at 381–82.

Commission.<sup>37</sup> But when the United States Supreme Court granted certiorari to settle “an alleged conflict between the Oregon Supreme Court’s decision and [its] decision in *Nollan*,” it ultimately reversed.<sup>38</sup> Unlike in *Nollan*, the Court found that the floodplain and pedestrian/bicycle pathway requirements had an adequate nexus to the “legitimate public purpose” claimed by the Tigard Commission (flood prevention and traffic reduction).<sup>39</sup> Therefore, the Court moved on to the second part of the analysis that it did not reach in *Nollan*: “whether the degree of the exactions demanded by the city’s permit conditions bears the required relationship to the projected impact of petitioner’s proposed development.”<sup>40</sup>

The Court approached this inquiry by assessing whether the evidentiary findings of the Tigard Commission were sufficient to support the conditions to the building permit.<sup>41</sup> The Court considered three tests and settled on the intermediate “reasonable relationship” test that had already been adopted by “many other jurisdictions,” renaming it the “rough proportionality test.”<sup>42</sup> Under this test, “[n]o 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.”<sup>43</sup> The Court found that the Tigard Commission had not presented evidence to show why the floodplain area had to be dedicated to the public greenway and not privately conserved.<sup>44</sup> Furthermore, the Tigard Commission had not shown sufficient support for the pedestrian/bicycle pathway because the findings showed that the pathway “could” reduce traffic demand, instead of a stronger finding.<sup>45</sup>

In *Lingle v. Chevron U.S.A. Inc.*, the Court attempted to summarize its collection of regulatory takings cases.<sup>46</sup> While admitting that its body of regulatory takings jurisprudence “[could not] be characterized as unified,” the Court noted that the cases “share a common touchstone.”<sup>47</sup> According to

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<sup>37</sup> *Id.* at 382–83.

<sup>38</sup> *Id.* at 383, 396.

<sup>39</sup> *Id.* at 387–88.

<sup>40</sup> *Id.* at 388.

<sup>41</sup> *Id.* at 389.

<sup>42</sup> *See id.* at 389–91 (renaming the test in order to avoid confusion with the “rational basis” level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment).

<sup>43</sup> *Id.* at 391.

<sup>44</sup> *Id.* at 392–95.

<sup>45</sup> *Id.* at 395–96.

<sup>46</sup> 544 U.S. 528, 537–40 (2005).

<sup>47</sup> *Id.* at 539.

Justice O'Connor, "[e]ach aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights."<sup>48</sup>

Justice O'Connor, writing for the majority, named two situations that would generally be deemed per se takings requiring just compensation: (1) where government has forced a landowner "to suffer a permanent physical invasion,"<sup>49</sup> and (2) where government has "deprive[d] an owner of 'all economically beneficial use' of her property."<sup>50</sup> Outside of these two "narrow categories . . . regulatory takings challenges are governed by the standards set forth in *Penn Central*."<sup>51</sup>

The Court also discussed the *Nollan* and *Dolan* decisions, clarifying that the "nexus" and "rough proportionality" test applies only with regulatory exactions where the question is: "[Can the government], without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny[?]"<sup>52</sup>

Many scholars celebrated this summary in *Lingle* as bringing clarity and a sense of judicial restraint to the Court's regulatory takings jurisprudence, including an explanation of *Nollan* and *Dolan* in the broader framework.<sup>53</sup> Furthermore, the fact that the Court issued the opinion unanimously provided hope for a more coherent takings framework moving forward.<sup>54</sup> However, according to Professor John Echeverria, a professor at the Vermont Law School, these "hopes have been dashed by *Koontz*."<sup>55</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

<sup>50</sup> *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 546–48.

<sup>53</sup> Robert G. Dreher, *Lingle's Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371, 372 (2006) ("*Lingle* brings a remarkable coherence to the Court's confused regulatory takings doctrine. The paradigm of a regulatory taking that emerges . . . is relatively clear, and quite narrow."); Echeverria, *supra* note 17, at 12; Winfield B. Martin, Comment, *Order for the Courts: Reforming the Nollan/Dolan Threshold Inquiry for Exactions*, 35 SEATTLE U. L. REV. 1499, 1501 (2012) ("In reconsidering and streamlining its takings jurisprudence, the Court whittled decisively away at the very underpinnings of [the *Nollan* and *Dolan*] body of law. . .").

<sup>54</sup> Echeverria, *supra* note 17, at 12.

<sup>55</sup> *Id.*

## II. UNDERSTANDING THE *KOONTZ* CASE IN CONTEXT

This Part provides background information about the *Koontz* case, describing the facts and procedural history. This Part then discusses what was at stake in the resolution of *Koontz*, and describes the majority and dissenting opinions. Finally, commentary from environmentalists, city planners, and property rights advocates illustrates the divided public reaction to the opinion.

### A. *Koontz's Facts and Procedural History*

In 1972, Coy Koontz, Sr.<sup>56</sup> purchased 14.9 acres of undeveloped land near a highway east of Orlando.<sup>57</sup> The state of Florida had classified a large portion of the land as wetlands, and Koontz was therefore required to obtain a development permit from the St. Johns Water Management District (District) under Florida's Warren S. Henderson Wetlands Protection Act (Henderson Act), which had jurisdiction over his property.<sup>58</sup> Under the Henderson Act, the state requires that landowners "provide 'reasonable assurance' that proposed construction on wetlands is 'not contrary to the public interest.'"<sup>59</sup> Furthermore, the landowner must select a form of mitigation that "offset[s] the adverse effects" of the development.<sup>60</sup>

Koontz applied for a development permit in 1994.<sup>61</sup> To offset the adverse effects of his proposed development plan, Koontz offered to place eleven acres of his land in a conservation easement.<sup>62</sup> The District found his proposal inadequate and suggested alternatives, such as increasing the size of the conservation easement while decreasing the size of the development or proceeding with the development plan and paying to restore wetlands on District-owned land.<sup>63</sup> The District also stated that they would "favorably

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<sup>56</sup> Coy Koontz, Sr. passed away while the case was working its way through the courts, and his estate was represented by Coy Koontz, Jr. here. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (2013). This Comment uses "Koontz" interchangeably for both men throughout to indicate the petitioner before the U.S. Supreme Court.

<sup>57</sup> *Id.* at 2591–92.

<sup>58</sup> *Id.* at 2592; see also *Koontz v. St. Johns River Water Mgmt. Dist.*, 720 So. 2d 560, 561 (Fla. Dist. Ct. App. 1998) ("The property is located on a tributary of the Econlockhatchee River in an area now designated by the . . . District . . . as a part of a designated hydrologic basin and largely within the Riparian Habitat Protection Zone.") (upholding the District's jurisdiction over the hydrologic basin under state statute).

<sup>59</sup> *Koontz*, 133 S. Ct. at 2592. (quoting FLA. STAT. § 373.414(1) (2013)).

<sup>60</sup> FLA. STAT. § 373.414(1)(b) (2014); see also *Koontz*, 133 S. Ct. at 2592.

<sup>61</sup> *Koontz*, 133 S. Ct. at 2592.

<sup>62</sup> *Id.* at 2592–93.

<sup>63</sup> *Id.* at 2593.

consider” alternatives suggested by Koontz.<sup>64</sup> Dissatisfied with the options before him, Koontz refused to negotiate and the District denied his application.<sup>65</sup>

Koontz filed suit in state court, claiming he was entitled to “monetary damages” due to the District’s “unreasonable exercise of . . . police power constituting a taking without just compensation.”<sup>66</sup> The Florida Circuit Court found that Koontz had not exhausted all of his administrative remedies and granted the District’s motion to dismiss.<sup>67</sup> The Florida District Court of Appeal for the Fifth Circuit reversed, and, on remand, the Florida Circuit Court found the District’s actions constituted a taking under the *Nollan-Dolan* test.<sup>68</sup> Thereafter, the Florida District Court affirmed, but the Florida Supreme Court reversed, distinguishing *Nollan* and *Dolan*.<sup>69</sup> The Florida Supreme Court distinguished *Nollan* and *Dolan* from the Koontz’s case because in their case, the District denied the permit, rather than granting it subject to a condition.<sup>70</sup> In addition, the court addressed whether a demand for money, rather than real property, could constitute a taking under the *Nollan-Dolan* test, and concluded that it could not.<sup>71</sup> The U.S. Supreme Court, acknowledging a divide amongst the lower courts with respect to these issues, granted certiorari to resolve the conflict.<sup>72</sup>

### B. *What Was at Stake in Koontz?*

At stake in *Koontz* was the resolution of two questions regarding exactions: (1) whether a permit denial was subject to the *Nollan-Dolan* test, and (2) whether a demand for money could constitute a taking requiring just compensation.<sup>73</sup> Advocating for Koontz, the Association of Florida Community Developers submitted an amicus curiae brief expressing concern

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 2591.

<sup>66</sup> *Id.* at 2593 (citing FLA. STAT. § 373.617(2) (2013)).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* In finding that the District’s actions constituted a taking, the Florida District Court of Appeals ordered the District to issue the permit and awarded \$376,154 in damages. *Koontz v. St. Johns River Water Mgmt. Dist.*, 5 So. 3d 8, 17 (Fla. Dist. Ct. App. 2009); *see also* Lyle Denniston, *Argument preview: When is a Civic Task a “Taking”?*, SCOTUSBLOG (Jan. 14, 2013, 10:46 PM), <http://www.scotusblog.com/2013/01/argument-preview-when-is-a-civic-task-a-taking/>.

<sup>69</sup> *Koontz*, 133 S. Ct. at 2593.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2594.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 2595, 2598.

about maintaining the integrity of the land-use decision-making process.<sup>74</sup> While acknowledging that “‘the centrality of negotiation’ is sacrosanct” in Florida with respect to state and local agencies’ ability to balance private and public interests, the organization argued that the *Nollan-Dolan* test should apply to permit denials and demands for money to “curb the abuses that currently occur,” and “reduce the need for after-the-fact litigation.”<sup>75</sup> Similarly, small business owners argued for the extension of the *Nolan-Dollan* test to assuage a fear that “their property rights w[ould] be held hostage to extortionate *quid pro quo* demands.”<sup>76</sup> Similar amicus briefs articulated a need to keep government in check with a ruling in favor of *Koontz*.<sup>77</sup>

Others filed amicus briefs in support of the District. Local governments worried that expanding the *Nollan-Dolan* test to permit denials would be “illogical, unworkable, and unnecessary.”<sup>78</sup> Urban planners feared that applying the test to permit denials would reduce the ability of local governments to negotiate with applicants, therefore reducing the quality of development decision-making.<sup>79</sup> Furthermore, wetland scientists and academics observed that in order to offset the negative effect of development on wetlands, governments have to require exactions that eliminate or offset wetland *function*.<sup>80</sup> Wetland destruction has “adverse environmental, public safety, and economic impacts” that may not be apparent to a permit applicant, and “[o]ne acre of wetland is not necessarily equivalent to another acre of wetland.”<sup>81</sup> Therefore, adequate mitigation frequently requires efforts and costs beyond a one-to-one ratio of land developed to land preserved.<sup>82</sup>

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<sup>74</sup> Brief of Amici Curiae Association of Florida Community Developers et al. in Support of the Petitioner at 1–2, *Koontz*, 133 S. Ct. 2586 (No. 11-1447), 2012 WL 6054086.

<sup>75</sup> *Id.* at 3–5 (quoting Gen. Dev. Corp. v. Div. of State Planning, Dep’t of Admin., 353 So. 2d 1199, 1206 (Fla. Dist. Ct. App. 1977)).

<sup>76</sup> Brief of Amicus Curiae of The National Federation of Independent Business Small Business Legal Center at 2, *Koontz*, 133 S. Ct. 2586 (No. 11-1447), 2012 WL 5982591.

<sup>77</sup> Brief Amicus Curiae of for Hillcrest Property, LLP in Support of Petitioner at 16, *Koontz*, 133 S. Ct. 2586 (No. 11-1447), 2012 WL 6042216; Brief Amici Curiae Supporting Petitioner, by National Association of Home Builders et al. at 16, *Koontz*, 133 S. Ct. 2586 (No. 11-1447); Brief Amicus Curiae of Owners’ Counsel of America in Support of the Petitioner at 4, *Koontz*, 133 S. Ct. 2586 (No. 11-1447).

<sup>78</sup> Amici Curiae Brief of the National Governors Association et al. in Support of Respondent at 1, *Koontz*, 133 S. Ct. 2586 (No. 11-1447), 2012 WL 6755147.

<sup>79</sup> Brief of the American Planning Association et al. as Amici Curiae in Support of Respondent at 6, *Koontz*, 133 S. Ct. 2586 (No. 11-1447), 2012 WL 6759407.

<sup>80</sup> See Brief of Former Members of the National Research Council Committee on Mitigating Wetland Losses as Amici Curiae in Support of Respondent at 3, *Koontz*, 133 S. Ct. 2586 (No. 11-1447), 2012 WL 6762583.

<sup>81</sup> *Id.* at 3.

<sup>82</sup> *Id.* at 4.

Most notably, the United States Solicitor General's Office (Solicitor General) elected to file an amicus curiae brief in support of the District.<sup>83</sup> Although the Solicitor General is generally regarded as "in a class by itself" in terms of amicus influence,<sup>84</sup> here the Court ultimately deviated from both conclusions advocated in the Solicitor General's amicus brief.<sup>85</sup>

The United States' interest in the outcome of the case stemmed from the power of the federal government to regulate wetland protection under the Clean Water Act, viewing this power as parallel to the power of the state of Florida to regulate wetlands and land-use under state statutes.<sup>86</sup> The Solicitor General indicated that "[t]he United States has a substantial interest in the sound development of the relevant constitutional analysis in cases that may affect its ability to implement the Clean Water Act, consistent with constitutional protections."<sup>87</sup> Accordingly, the Solicitor General argued that a permit denial could be the basis for a takings claim according to the factors articulated in *Penn Central*, but not under the *Nollan-Dolan* exactions theory, and furthermore that applying the *Nollan-Dolan* test to analyze a permit conditioned on paying money was inappropriate.<sup>88</sup>

### C. Koontz Majority Opinion

Justice Alito penned the majority opinion, joined by Justices Roberts, Scalia, Kennedy, and Thomas.<sup>89</sup> First, the Court addressed whether a permit denial could be subject to the *Nollan-Dolan* "nexus" and "rough

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<sup>83</sup> Brief for the United States as Amicus Curiae Supporting Respondent, *Koontz*, 133 S. Ct. 2586 (No. 11-1447), 2012 WL 6755146 [hereinafter Brief for U.S.]; see also Kristen A. Norman-Major, *The Solicitor General: Executive Policy Agendas and the Court*, 57 ALB. L. REV. 1081, 1095 (1994) (explaining that the Solicitor General's ability to file amicus briefs is discretionary and therefore indicates which cases the executive thinks are important).

<sup>84</sup> Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 761 (2000) (observing that citations to amicus briefs from the Solicitor General's Office have increased during the past fifty years).

<sup>85</sup> *Compare Koontz*, 133 S. Ct. at 2591 (concluding "that *Nollan* and *Dolan* cannot be evaded" even though "[t]he District did not approve his application on the condition that he surrender an interest in his land"), with Brief for U.S., *supra* note 83, at 15, 17 ("The government's denial of a development permit can be the basis for a Fifth Amendment claim for compensation under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), but not under an exaction-takings theory.").

<sup>86</sup> See Brief for U.S., *supra* note 83, at 5 (citing various provisions of the Clean Water Act, including 33 U.S.C. §§ 1311(a), 1344(a), 1362(6)–(7) (2012)).

<sup>87</sup> Brief for U.S., *supra* note 83, at 2.

<sup>88</sup> *Id.* at 15.

<sup>89</sup> *Koontz*, 133 S. Ct. at 2591.

proportionality” test.<sup>90</sup> The Court grounded its reasoning in the unconstitutional conditions doctrine, citing previous decisions holding that “the government may not deny a benefit to a person because he exercises a constitutional right.”<sup>91</sup> Applied to land-use permitting, the Court noted that “*Nollan* and *Dolan* ‘involve a special application’ of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits.”<sup>92</sup> The Court further explained that “[e]xtortionate demands” from local governments “frustrate” landowners’ rights under the Fifth Amendment, and are therefore prohibited by the unconstitutional conditions doctrine.<sup>93</sup> On this point, the Court was particularly concerned about local governments attempting to “evade” the *Nollan-Dolan* test via a language formality, reasoning that granting a permit with a condition attached is no different than withholding a permit until a certain condition is met.<sup>94</sup> Therefore, the Court held that the *Nollan-Dolan* “nexus” and “rough proportionality” test does apply in the context of permit denials, and that “[a] contrary rule would be . . . untenable.”<sup>95</sup>

Second, the Court addressed the issue of whether a demand for money could constitute a taking that requires just compensation.<sup>96</sup> The Court distinguished *Eastern Enterprises v. Apfel*,<sup>97</sup> where a plurality of four justices found that a retroactive statutory imposition of financial liability was “so arbitrary that it violated the Takings Clause,” but Justice Kennedy (in his controlling opinion) joined the four dissenting justices in finding “that the Takings Clause does not apply to government-imposed financial obligations that ‘do not operate upon or alter an identified property interest.’”<sup>98</sup> While the District argued that requiring Koontz to spend money to improve public land could not “operate upon or alter an identified property interest,” and therefore could not give rise to a taking, the Court disagreed.<sup>99</sup> In the Court’s opinion, the demand for money did “operate upon . . . an identified property interest” because it required that the property owner make the payment.<sup>100</sup> The Court

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<sup>90</sup> *Id.* at 2594–98.

<sup>91</sup> *Id.* at 2594 (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983)).

<sup>92</sup> *Id.* (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005)).

<sup>93</sup> *Id.* at 2595.

<sup>94</sup> *Id.* at 2595–96.

<sup>95</sup> *Id.* at 2595.

<sup>96</sup> *Id.* at 2598.

<sup>97</sup> 524 U.S. 498 (1998).

<sup>98</sup> *Koontz*, 133 S. Ct. at 2599 (quoting *E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring in judgment)).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

found it appropriate to apply the *Nollan-Dolan* test to a demand for money that links to a “specific parcel of real property” due to the “risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue.”<sup>101</sup> Answering Justice Kagan’s dissent, discussed in the next section, the Court also declined to elaborate on the theoretical distinctions between a tax and a taking because it “had little trouble distinguishing between the two” in the facts of the case.<sup>102</sup>

#### D. Koontz Dissenting Opinion

In Justice Kagan’s dissenting opinion, joined by Justices Ginsburg, Breyer, and Sotomayor, Justice Kagan agreed with the majority as to the first question of whether *Nollan-Dolan* applied to permit denials, with two caveats.<sup>103</sup> First, and most importantly, she agreed that the *Nollan-Dolan* test would apply if a local government actually made a demand, but she and the dissenting justices failed to see how the District had made a demand given the facts of *Koontz*, noting that the District “never demanded *anything* (including money) in exchange for a permit.”<sup>104</sup> Second, while the majority indicated that Koontz may be entitled to recover monetary damages under state law, Kagan disagreed, arguing no taking had actually occurred.<sup>105</sup>

Kagan dedicated the remainder of the dissent to disagreeing with the majority opinion about whether a demand for money can constitute a taking (assuming there is such a demand, which she did not concede was present in *Koontz*).<sup>106</sup> Kagan would hold that it does not.<sup>107</sup> In Kagan’s view, the *Nollan-Dolan* test applies when the government seeks something it would otherwise have to pay for, were it not operating within a land-use permit setting.<sup>108</sup> Therefore, she found that a demand for money could only be a taking if the requirement to pay would constitute a taking outside of the permit

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<sup>101</sup> *Id.* at 2600.

<sup>102</sup> *Id.* at 2601–02.

<sup>103</sup> *Id.* at 2603–04 (Kagan, J., dissenting).

<sup>104</sup> *Id.* (“The *Nollan-Dolan* standard applies not only when the government approves a development permit conditioned on the owner’s conveyance of a property interest (i.e., imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (i.e., imposes a condition precedent).”).

<sup>105</sup> *Id.* at 2604.

<sup>106</sup> *Id.* at 2605.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

setting, and interpreted *Eastern Enterprises* to mean that the answer is no.<sup>109</sup> Kagan cited to Kennedy's controlling opinion, where he stated that if a law "[d]oes not 'operate upon or alter' a 'specific and identified property or property right,'" there is no taking.<sup>110</sup> Synthesized with Justice Breyer's four-justice dissent, which found "that the Takings Clause applies only when the government appropriates a 'specific interest in physical or intellectual property' or 'a specific, separately identifiable fund of money[,]"<sup>111</sup> Kagan concluded that "a requirement that a person pay money to repair public wetlands is not a taking."<sup>112</sup>

Kagan worried that expanding the Takings Clause to include demands for money would harm local governments, where prevalent use of permitting fees as a regulatory tool facilitates mitigation of adverse development impacts.<sup>113</sup> Furthermore, while the majority was quick to say that there is no problem distinguishing takings from taxes,<sup>114</sup> Kagan asserted, to the contrary, that state and local governments often "struggle to draw a coherent boundary."<sup>115</sup>

#### *E. Public Reaction to the Koontz Outcome*

The *Koontz* decision generated mixed reviews. Commentators made statements ranging from, "*Koontz* . . . is one of the worst—if not the worst—decision in the pantheon of the Supreme Court takings decisions,"<sup>116</sup> to "reading . . . *Koontz* . . . is like being a kid . . . in a candy store" for property rights advocates.<sup>117</sup> Still others claimed that the opinion would have little effect, stating that "[w]hile there has been much wringing of hands . . . *Koontz* did not change the law."<sup>118</sup>

John Echeverria quickly expressed his disappointment in a *New York Times* Op-Ed published the day after the Court released the decision.<sup>119</sup> He

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* (quoting *E. Enters. v. Apfel*, 524 U.S. 498, 540–41 (1998) (Kennedy, J., concurring in judgment)).

<sup>111</sup> *Id.* (quoting *E. Enters.*, 524 U.S. at 554–55 (Breyer, J., dissenting)).

<sup>112</sup> *Id.* at 2606.

<sup>113</sup> *Id.* at 2607 ("[T]he flexibility of state and local governments to take the most routine actions to enhance their communities will diminish . . .").

<sup>114</sup> *Id.* at 2601–02 (majority opinion).

<sup>115</sup> *Id.* at 2608 (Kagan, J., dissenting).

<sup>116</sup> Echeverria, *supra* note 17, at 1.

<sup>117</sup> Hodges, *supra* note 3.

<sup>118</sup> David L. Callies, *Koontz Redux: Where We Are and What's Left*, PLAN. & ENVT. L., Oct. 2013, at 7, 7 (2013).

<sup>119</sup> Echeverria, *supra* note 3.

characterized the decision as a “Blow to Sustainable Development” because “the ruling creates a perverse incentive for municipal governments to reject applications from developers rather than attempt to negotiate project designs that might advance both public and private goals.”<sup>120</sup> The American Planning Association (APA) expressed similar concern and disappointment, worrying that the decision “create[d] a terrible precedent allowing landowners to determine what they feel are sufficient mitigation efforts.”<sup>121</sup> Patricia Salkin, the chair of the APA’s Amicus Curiae Committee, stated that the conversations between applicants and permitting authorities “will now occur less often given today’s ruling.”<sup>122</sup> In addition, state and local government officials and interested parties read the decision and wondered what the implications would be for state laws.<sup>123</sup>

Echeverria followed his criticism in the *New York Times* with a working paper, sarcastically questioning: *Koontz: The Very Worst Takings Decision Ever?*<sup>124</sup> He protested that the opinion “conflicts with established doctrine in several respects and even misrepresents pertinent precedent.”<sup>125</sup> In addition, he argued that “the majority does not explain whether or how it thinks established doctrine should or could be reformulated to accommodate its novel conclusions.”<sup>126</sup> Echeverria also noted that *Koontz* has created tension with the unanimous Supreme Court decision in *Lingle v. Chevron U.S.A. Inc.*,<sup>127</sup> which “provided . . . reason to hope that the Court had settled on a more coherent and

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<sup>120</sup> *Id.*

<sup>121</sup> *Supreme Court Expands Takings Test*, *supra* note 3.

<sup>122</sup> *Id.*

<sup>123</sup> Fulton, *supra* note 3; *Koontz Decision Extends Property Owners’ Constitutional Protections*, LATHAM & WATKINS CLIENT ALERT COMMENT., 3 (July 17, 2013), <http://www.lw.com/thoughtLeadership/LW-koontz-decision-property-protection.pdf> (“It is not apparent . . . that the Court will accept the distinction drawn by the California Supreme Court in *Ehrlich*, and it could apply the *Koontz* protections broadly.”).

<sup>124</sup> Echeverria, *supra* note 17, at 1.

<sup>125</sup> *Id.*; see also John Echeverria, *Horne v. Department of Agriculture: An Invitation to Reexamine “Ripeness” Doctrine in Takings Litigation*, 43 ENVTL. L. REP. 10735, 10748 (2013) (“*Koontz*[] reflect[s] a willingness to twist or abandon established doctrine in order to achieve desired outcomes and/or suggest new avenues for using the Takings Clause to challenge government action.”) (footnote omitted).

<sup>126</sup> Echeverria, *supra* note 17, at 1. Echeverria argued that applying the *Nollan-Dolan* test to permit denials is problematic because it shifts the burden to governments to show that they have satisfied the requirements. *Id.* at 7. Echeverria also criticized the Court’s failure to cite at all to *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 544 U.S. 528 (2005), which was essential to the decision of the Florida Supreme Court, and for citing to *Lingle v. Chevron U.S.A. Inc.*, 526 U.S. 687 (1999) only once, which he argued was a particularly important decision “because it created a new, unifying coherence for takings law as a whole.” *Id.* at 12, 19.

<sup>127</sup> 526 U.S. 687.

predictable law of takings.”<sup>128</sup> Echeverria commented that “[s]adly, those hopes have been dashed by *Koontz*.”<sup>129</sup>

On the other side, private property rights advocates celebrated. The Pacific Legal Foundation (PLF), which represented Koontz in the case, dubbed the day the decision was handed down *A Banner Day for Property Rights*.<sup>130</sup> The author of the blog post accompanying this proclamation enthusiastically claimed “There is just so much good stuff in the opinion—I almost feel guilty. Mind you, *I don’t*.”<sup>131</sup> Several days later, the site posted a graphic depicting Coy Koontz, Jr. with overlaid text declaring “In *Koontz*, one family’s battle with a government agency became a huge win for the Constitution.”<sup>132</sup> PLF’s enthusiasm was echoed by many private firms, watchdog organizations, and academic blogs whose members were excited by the perceived strengthening of private property rights against the threat of extortion at the hands of the government.<sup>133</sup>

Still another set of commentators hypothesized that *Koontz* will have no practical effect on local governments,<sup>134</sup> although the true effect remains to be seen as new local government decisions make their way through the appeals process.

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<sup>128</sup> Echeverria, *supra* note 17, at 12. *Contra* Robert H. Thomas, *Surprise! Environmental Lawprof Dislikes Koontz*, INVERSECONDEMNATION.COM (June 27, 2013), <http://www.inversecondemnation.com/inversecondemnation/2013/06/surprise-environmental-lawprof-dislikes-koontz.html> (opining that Echeverria “has never met a taking he’s liked” and that “[t]he post-opinion commentary that *Koontz* will unduly bind the hands of land regulators . . . isn’t a serious concern”).

<sup>129</sup> Echeverria, *supra* note 17, at 12.

<sup>130</sup> Hodges, *supra* note 3.

<sup>131</sup> *Id.*

<sup>132</sup> Koontz, a “*Supreme*” *Victory for Property Rights*, PAC. LEGAL FOUND. LIBERTY BLOG (July 1, 2013), <http://blog.pacificlegal.org/2013/koontz-a-supreme-victory-for-property-rights/>.

<sup>133</sup> See Michael M. Berger, *Supreme Court Limits Land Development Permit Conditions*, MANATT (June 26, 2013), [http://www.manatt.com/Real\\_Estate\\_and\\_Land\\_Use/Supreme\\_Court\\_Limits\\_Conditions.aspx](http://www.manatt.com/Real_Estate_and_Land_Use/Supreme_Court_Limits_Conditions.aspx) (“[*Koontz*] sets forth some useful clarity regarding the ability of local government to engage in ‘extortionate’ . . . actions toward permit applicants.”); Larry Salzman, *Koontz Decision: Victory for Property Rights*, NAT’L REV. ONLINE (June 25, 2013, 5:45 PM), <http://www.nationalreview.com/corner/352016/koontz-decision-victory-property-rights-larry-salzman> (“Today the Supreme Court said, no: It is unconstitutional to use the permit process as a tool of extortion . . . .”); Ilya Somin, *Thoughts on the Koontz Takings Clause Case*, VOLOKH CONSPIRACY (June 25, 2013, 1:07 PM), <http://www.volokh.com/2013/06/25/thoughts-on-the-koontz-takings-clause-case/> (“Overall, *Koontz* is the most important victory for property rights in the Supreme Court for a long time.”).

<sup>134</sup> Amy Brigham Boulris, *Substance Prevails Over Form in Property Rights Case*, DAILY BUS. REV., July 15, 2013, <http://www.dailybusinessreview.com/PubArticleDBR.jsp?id=1202610781240> (“*Koontz* did not change the law so much as protect against nonsensical loopholes.”).

### III. MISCHARACTERIZATIONS OF ENVIRONMENTAL SCIENCE AND LOCAL GOVERNMENT IN THE *KOONTZ* OPINION

This Part analyzes and critiques the *Koontz* opinion. The first section provides a discussion of wetlands science and policy to facilitate understanding about why wetlands protection is a good idea. The second section compares the principles of wetlands protection and environmental protection generally with the language of the *Koontz* opinion. In addition, it argues that the Court makes incorrect and unsupported assertions about environmental policy, and argues against the Court's description of local governments as extortionate over-regulators.

#### A. *Basic Wetlands Protection Science and Policy*

This section briefly explains that federal and state governments protect wetlands because of the valuable ecosystem services they provide, further illustrating issues raised by the *Koontz* opinion.

In 1979, the U.S. Department of the Interior Fish and Wildlife Service (FWS) issued a report on the classification of wetlands that defined wetlands as “lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water.”<sup>135</sup> This definition was cited with approval by the FWS in a 2011 report on the updated status of national wetlands, and is similar to definitions used by other federal administrative agencies.<sup>136</sup>

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<sup>135</sup> L. M. COWARDIN ET AL., U.S. DEPT. OF THE INTERIOR, FISH AND WILDLIFE SERVICE, CLASSIFICATION OF WETLANDS AND DEEPWATER HABITATS OF THE UNITED STATES 3 (1979), available at <http://www.npwr.usgs.gov/resource/1998/classwet/classwet.htm>. “For purposes of this classification wetlands must have one or more of the following three attributes: (1) at least periodically, the land supports predominantly hydrophytes; (2) the substrate is predominantly undrained hydric soil; and (3) the substrate is nonsoil and is saturated with water or covered by shallow water at some time during the growing season of each year.” *Id.* (footnotes omitted).

<sup>136</sup> T. E. DAHL, U.S. DEPT. OF THE INTERIOR, FISH AND WILDLIFE SERVICE, STATUS AND TRENDS OF WETLANDS IN THE CONTERMINOUS UNITED STATES 2004 TO 2009 20 (2011), available at <http://www.fws.gov/wetlands/Documents/Status-and-Trends-of-Wetlands-in-the-Conterminous-United-States-2004-to-2009.pdf>; see also 40 C.F.R. § 230.3(t) (2013) (defining wetlands as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions” for the purpose of setting guidelines applicable to the specification of disposal sites for discharges of dredged or fill materials in waters of the United States); U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER, PUB. NO. EPA 843-F-04-011a, WETLANDS OVERVIEW (2004), available at <http://water.epa.gov/type/wetlands/outreach/upload/overview-pr.pdf> [hereinafter WETLANDS OVERVIEW] (“Wetlands are the link between the land and the water. They are transition zones where the flow of water, the cycling of nutrients, and the energy of the sun meet to produce a unique ecosystem characterized by hydrology, soils, and vegetation . . .”).

Wetlands provide ecosystem services<sup>137</sup> such as providing habitat for plants and animals, controlling floods, absorbing pollutants before they reach the water supply, and providing recreation opportunities.<sup>138</sup> These services “combine with manufactured and human capital services to produce human welfare.”<sup>139</sup>

One of the most important of these functions is flood control.<sup>140</sup> According to an EPA fact sheet, “[a] one-acre wetland can typically store about three-acre feet of water, or one million gallons.”<sup>141</sup> In addition, “[t]rees and other wetland vegetation help slow the speed of flood waters.”<sup>142</sup> These unique wetland characteristics “can actually lower flood heights and reduce the water’s destructive potential.”<sup>143</sup>

Wetlands can also treat wastewater at a cost comparable to building a new wastewater treatment plant.<sup>144</sup> For example, an EPA case study found that a constructed wetland wastewater treatment system in South Carolina could “significantly lower the cost of wastewater treatment because the systems rely on plant and animal growth instead of the addition of power or chemicals.”<sup>145</sup> Using constructed wetlands for wastewater treatment has the added feature of maintaining hundreds of acres of land in “a natural ecological condition,” allowing the community to enjoy additional recreation and environmental education benefits.<sup>146</sup>

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<sup>137</sup> See Robert Costanza et al., *The Value of the World’s Ecosystem Services and Natural Capital*, 387 NATURE 253, 253 (1997) (defining ecosystem services as “the benefits human populations derive, directly or indirectly, from ecosystem functions”).

<sup>138</sup> WETLANDS OVERVIEW, *supra* note 136 (“Often called ‘nurseries of life,’ wetlands provide habitat for thousands of species of aquatic and terrestrial plants and animals.”).

<sup>139</sup> Costanza et al., *supra* note 137, at 254.

<sup>140</sup> U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER, PUB. NO. EPA 843-F-06-001, WETLANDS: PROTECTING LIFE AND PROPERTY FROM FLOODING (2006), available at <http://water.epa.gov/type/wetlands/outreach/upload/Flooding.pdf> (discussing six case studies in which wetlands reduced the negative effects of flooding).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> U.S. ENVTL. PROT. AGENCY, PUB. NO. EPA832-R-93-005, CONSTRUCTED WETLANDS FOR WASTEWATER TREATMENT AND WILDLIFE HABITAT (1993), available at <http://purl.access.gpo.gov/GPO/LPS42176> (“[Constructed wetland] systems offer an effective means of integrating wastewater treatment and resource enhancement, often at a cost that is competitive with conventional wastewater treatment alternatives.”).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

Although difficult to quantify, studies confirm that wetlands have significant economic benefits when the services discussed above are translated into monetary equivalents.<sup>147</sup> Quantifying ecosystem services is controversial, but according to many ecological economists, “[t]o say that we should not do valuation of ecosystems is to simply deny the reality that we already do, always have and cannot avoid doing so in the future.”<sup>148</sup> “Failure to quantify ecosystem values in commensurate terms with opportunity costs often results in an implicit value of zero being placed on ecosystem services. In most cases, ecosystem services have values larger than zero.”<sup>149</sup>

The need to protect wetlands and other environmental resources whose value is not readily identifiable in monetary terms is the impetus for the “no overall net loss” policy implemented by federal and state governments with respect to wetlands.<sup>150</sup> Per this policy, agencies seek to achieve ““no net loss” of wetland acreage and function” when issuing certain land-use permits.<sup>151</sup> While simple in theory, a “no net loss” policy is difficult to implement because a “one-to-one acreage replacement may not adequately compensate for the aquatic resource functions and services lost,” and the value of ecosystem services can be subjective.<sup>152</sup> In addition, ecosystem services have many characteristics of public goods, making them difficult to privatize and exchange on the free market.<sup>153</sup> Because of these challenges, wetland regulation and development is often contested, particularly by private wetland owners who want to develop lands restricted by wetland development permitting schemes.

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<sup>147</sup> U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER, PUB. NO. EPA843-F-06-004, ECONOMIC BENEFITS OF WETLANDS (2006), available at <http://water.epa.gov/type/wetlands/outreach/upload/EconomicBenefits.pdf>.

<sup>148</sup> Robert Costanza et al., *The Value of Ecosystem Services: Putting the Issues in Perspective*, 25 *ECOLOGICAL ECON.* 67, 68 (1998).

<sup>149</sup> John Loomis et al., *Measuring the Total Economic Value of Restoring Ecosystem Services in an Impaired River Basin: Results from a Contingent Valuation Survey*, 33 *ECOLOGICAL ECON.* 103, 104 (2000) (citation omitted).

<sup>150</sup> 40 C.F.R. § 230.93(a)(1) (2013) (“The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by DA permits.”); *Compensatory Mitigation for Losses of Aquatic Resources*, 73 Fed. Reg. 19,594, 19,604 (Apr. 10, 2008) (to be codified at 40 C.F.R. pt. 230) (supplemental information).

<sup>151</sup> *Compensatory Mitigation for Losses of Aquatic Resources*, 73 Fed. Reg. at 19,594 (supplemental information).

<sup>152</sup> See *id.* at 19,604; James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 *STAN. L. REV.* 607, 611–12 (2000).

<sup>153</sup> Loomis et al., *supra* note 149, at 105.

*B. The Koontz Opinion Conflicts with the Policy Realities of Environmental Protection and Local Government*

This section critiques the Court's unsympathetic attitude towards environmental protection in the first subsection, and the Court's distrust of local government in the second subsection.

*1. Environmental Protection*

Despite the ecological and economic importance of wetlands,<sup>154</sup> recent Supreme Court cases tightened the ability of the federal government and local governments to ensure the stability of wetlands, and exhibited a hostility towards environmental protection generally, while strengthening private property rights.<sup>155</sup> For example, in *Lujan v. Defenders of Wildlife*, Justice Scalia, writing for the Court, denied standing to plaintiffs who alleged an injury arising from a rule that reduced protections for species under the Endangered Species Act (ESA).<sup>156</sup> He reasoned that the plaintiffs lacked a "factual showing of perceptible harm," despite the expansive language of the citizen suit provision of the ESA.<sup>157</sup> In *Rapanos v. United States*, Justice Scalia, writing for a plurality of the Court, asserted that "waters of the United States"<sup>158</sup> did not include "transitory puddles or ephemeral flows of water" under the Clean Water Act, belittling the importance of such waters that did not fit within his "commonsense understanding of the term."<sup>159</sup> Such assertions are unsupported by science, despite the Court's best efforts to categorize areas as "water" or "land" for the purpose of a neat legal test.<sup>160</sup>

Given the Court's growing hostility to environmental claims in one strain of cases over the past two decades, the Court's tone regarding the

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<sup>154</sup> See *supra* Part III.A.

<sup>155</sup> See, e.g., *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>156</sup> *Lujan*, 504 U.S. at 556–78.

<sup>157</sup> 16 U.S.C. § 1540(g)(1)(A) (1988) (current version at 16 U.S.C. § 1540(g)(1)(A) (2012)) (granting a cause of action to "any person" in order "to enjoin any person, including the United States . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof"); *Lujan*, 504 U.S. at 566–67.

<sup>158</sup> 33 U.S.C. § 1362(7) (2000) (current version at 33 U.S.C. § 1326(7) (2012)).

<sup>159</sup> *Rapanos*, 547 U.S. at 732–34.

<sup>160</sup> See FED. GEOGRAPHIC DATA COMM. & U.S. FISH & WILDLIFE SERV., WETLANDS SUBCOMM., PUB NO. FGDC-STD-004-2013, CLASSIFICATION OF WETLANDS AND DEEPWATER HABITATS OF THE UNITED STATES, 5–6 (2d ed. 2013), available at <https://www.fgdc.gov/standards/projects/FGDC-standards-projects/wetlands/nvcs-2013> [hereinafter DEEPWATER HABITATS].

environmental findings of the District in *Koontz* is unsurprising.<sup>161</sup> As in previous cases, the Court made unfounded assertions about the legitimacy of the science used to define wetlands in the local Florida permitting scheme.<sup>162</sup> For example, Justice Alito incredulously described Koontz's land by stating that "[a]lthough largely classified as wetlands by the State, the northern section drains well; the most significant standing water forms in ruts in an unpaved road used to access the power lines."<sup>163</sup> As discussed above,<sup>164</sup> one of the defining features of a wetland is that it represents a continuum between wet and dry.<sup>165</sup> Therefore, the fact that the area does not always hold standing water, but rather "drains well," does not mean that the area is not a scientifically legitimate wetland, as the Court implied.<sup>166</sup>

Furthermore, the Court noted that "[t]he property is located less than 1,000 feet from . . . one of Orlando's major thoroughfares," and that power lines bisect the property.<sup>167</sup> This description of the land emphasizes the urban, developed character of the surrounding area and deemphasizes the value of natural wetland services.<sup>168</sup> By contrast, "[e]ven small wetlands in urban areas provide important pollution control services to the local population, and clusters of small isolated wetlands provide important functions as an ecological complex."<sup>169</sup> The Court's dismissive attitude towards the value of urban wetlands is symptomatic of a broader trend in wetland banking of relocating

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<sup>161</sup> See *Summers v. Earth Island Inst.*, 555 U.S. 488, 494–96 (2009); *Rapanos*, 547 U.S. at 739; *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65–67 (2004); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106–09 (1998); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031–32 (1992); *Lujan*, 504 U.S. at 562–71; see also William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL L. & POL'Y F. 247, 273–79 (2001) (noting tension between Justice Scalia's typical approach to statutory interpretation and his opinions regarding environmental citizen suit provisions); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1440–41 (1993) (arguing that the Court intended its "seemingly odd" ruling in *Lucas* to "isolate the ecological regulations which Justice Scalia seeks to illegitimate").

<sup>162</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2592 (2013).

<sup>163</sup> *Id.*

<sup>164</sup> *Supra* Part III.A.

<sup>165</sup> DEEPWATER HABITATS, *supra* note 160 ("There is no single, correct, indisputable, ecologically sound definition for wetlands, primarily because of the diversity of wetlands and because the demarcation between dry and wet environments lies along a continuum or gradient.").

<sup>166</sup> *Koontz*, 133 S. Ct. at 2592; DEEPWATER HABITATS, *supra* note 160.

<sup>167</sup> *Koontz*, 133 S. Ct. at 2592.

<sup>168</sup> See *id.* at 2591–92.

<sup>169</sup> J. B. Ruhl & James Salzman, *The Effects of Wetland Mitigation Banking on People*, NAT'L WETLANDS NEWSL. (Envtl. Law Inst., Washington, D.C.), Mar.–Apr. 2006, at 1, 8, available at <http://wetlandsnewsletter.org/pdf/28.02/Ruhl.pdf>.

wetlands from high-value urban areas to rural areas with low land costs, resulting in an imbalanced reallocation of wetland ecosystem services.<sup>170</sup>

The Court also discussed the wildlife found on the property, and characterized the animals as of the type “that often frequent developed areas,” indicating that further development would not have a negative impact on the animals, or that the wildlife is not of the type worth protecting.<sup>171</sup> This assertion directly conflicts with the Florida statute requiring administrative agencies, such as the District, to consider the conservation of wildlife and habitat (not just endangered or threatened species) when issuing permits for activities concerning the alteration of wetlands.<sup>172</sup>

## 2. Local Government

An additional aspect of the *Koontz* opinion is the Court’s deeply distrustful attitude toward local government decision-making.<sup>173</sup> If *Penn Central* represents a high point for the Court’s flexibility regarding local government decisions, *Koontz* may be evidence of a new low.<sup>174</sup> For example, Justice Alito strongly declared in the first paragraph of the opinion that the District “believe[d] that it circumvented *Nollan* and *Dolan* because of the way in which it structured its handling of [Koontz’s] permit application.”<sup>175</sup> This assertion does not comport with the District’s Wetland Resource Management Technical Staff Report, which recommended denial of Koontz’s application because the project as proposed failed to meet the regulatory requirements, and Koontz “was unwilling to consider any additional mitigation options other than what was originally proposed.”<sup>176</sup> Therefore, the District based its denial on the unacceptability of the proposed project and Koontz’s refusal to negotiate with

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<sup>170</sup> *Id.* at 10.

<sup>171</sup> *Koontz*, 133 S. Ct. at 2592.

<sup>172</sup> FLA. STAT. § 373.414(1)(a)(2) (2013) (“[T]he department *shall* consider and balance . . . [w]hether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats[.]”) (emphasis added). The language in the statute is the same today as when *Koontz* was decided. *See* FLA. STAT. § 373.414(1)(a)(2) (2014).

<sup>173</sup> *See Koontz*, 133 S. Ct. at 2591, 2594–95 (describing local government action as “coercing people into giving [Constitutional rights] up,” making “[e]xtortionate demands,” and attempting to evade *Nollan* and *Dolan*).

<sup>174</sup> *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–24 (1978) (explaining that the Court has not been able to establish a “set formula” for what constitutes a regulatory taking).

<sup>175</sup> *Koontz*, 133 S. Ct. at 2591.

<sup>176</sup> Joint Appendix Exhibits, *Koontz*, 133 S. Ct. 2586 (No. 11-1447), 2012 WL 7687919, at \*90, \*92 (containing excerpts from the report, originally marked for identification as Defendant’s Exhibit 28).

it, not an intentional and coercive attempt by the District to evade the *Nollan-Dolan* requirements.<sup>177</sup>

The Court supported its extension of *Nollan-Dolan* by advancing the theory that overbearing local governments must be restrained from engaging in complex schemes to evade answering to the controlling precedent.<sup>178</sup> At first blush, the Court's assertion seems logical: approving a permit subject to a condition, which was already subject to *Nollan-Dolan*, is no different from denying a permit until a certain condition is met.<sup>179</sup> The Court failed to acknowledge, however, that in *Koontz* the District never officially made a specific demand. In fact, the District remained open to other suggestions, and *Koontz* was the party that ended the negotiations.<sup>180</sup> While the opinion includes much discussion about local government extortion, evasion, and coercion, it does not address Justice Kagan's point in the dissent that "[the District] never demanded *anything* (including money) in exchange for a permit; the *Nollan-Dolan* standard therefore does not come into play."<sup>181</sup>

Despite declining to rule on "how concrete and specific a demand must be to give rise to liability under *Nollan* and *Dolan*," the Court further confused the outcome for local governments by conflating the options the District presented.<sup>182</sup> While the Court agreed with the District that it only needed to present one mitigation option with an appropriate nexus and rough proportionality to *Koontz*'s project to avoid liability for a taking, it combined the mitigation options presented for the purpose of the *Nollan-Dolan* analysis.<sup>183</sup> The District argued that the Court should consider the off-site mitigation and the reduced footprint options separately, and that if one satisfied *Nollan-Dolan* then further analysis was unnecessary.<sup>184</sup> The Court declined to consider the options as separate ways to satisfy the test, however, because the same 2.7 acres of *Koontz*'s land was at stake—whether he reduced his

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<sup>177</sup> *Koontz*, 133 S. Ct. at 2591 ("*Nollan* and *Dolan* cannot be evaded in this way . . ."); Joint Appendix Exhibits, *supra* note 176, at \*89–92 (listing four mitigation proposals that would meet the District's criteria, expressing a willingness to consider other options, and reiterating *Koontz*'s refusal to consider other mitigation plans).

<sup>178</sup> *Koontz*, 133 S. Ct. at 2591, 2595.

<sup>179</sup> *Id.* at 2595.

<sup>180</sup> *Id.* at 2593 ("[The District's] policy is never to require any particular offsite project, and it did not do so here.").

<sup>181</sup> *Id.* at 2604 (Kagan, J., dissenting).

<sup>182</sup> *Id.* at 2598 (majority opinion).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*; Brief for Respondent at 41, *Koontz*, 133 S. Ct. 2586 (No. 11-1447), 2012 WL 6694053.

development from 3.7 acres to one, or completed off-site mitigation to develop the entire 3.7.<sup>185</sup>

It appears that the Court came to this conclusion because the math on the number of acres affected happened to be the same for both options, rather than considering the possibility that the District offered both to Koontz as independent ways to satisfy the permitting requirements based on the scientific classifications of the land areas.<sup>186</sup> Furthermore, the Court did not address the fact that the reduced footprint option was not yet finalized pending a decision about the size of the final approved project, as indicated by the Management and Storage of Surface Water Technical Staff Report (Surface Water Staff Report). The Surface Water Staff Report stated that “the applicant’s on-site mitigation proposal would be sufficient to mitigate for a commercial development of smaller size on this site (*assuming the relevant water quality and quantity were met*).”<sup>187</sup> After *Koontz*, a local government must defend each option presented to an applicant during negotiation as a possible way to satisfy *Nollan-Dolan* in the event of a takings claim, but cannot be certain of which options the Court will consider separately.<sup>188</sup>

Furthermore, the Court’s position that state and local governments are “especially” likely to engage in “the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take” conflicts with studies that show that state and local governments are actually lax regulators, particularly with respect to environmental regulation.<sup>189</sup> In fact, economic studies have shown that federal regulation of environmental pollution may be most desirable due to the very real threat of a “race to laxity”

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<sup>185</sup> *Koontz*, 133 S. Ct. at 2598.

<sup>186</sup> *Id.* (“Petitioner claims that he was wrongfully denied a permit to build on those 2.7 acres. For that reason, respondent’s offer to approve a less ambitious building project does not obviate the need to determine whether the demand for off-site mitigation satisfied *Nollan* and *Dolan*.”); Joint Appendix Exhibits, *supra* note 176, at \*134–35.

<sup>187</sup> Joint Appendix Exhibits, *supra* note 176, at \*134 (emphasis added).

<sup>188</sup> *Koontz*, 133 S. Ct. at 2598.

<sup>189</sup> *Id.* at 2594; NATURAL RES. DEF. COUNCIL, INC., LAND USE CONTROLS IN THE UNITED STATES: A HANDBOOK ON THE LEGAL RIGHTS OF CITIZENS 317 (Elaine Moss ed., 1977) (“[L]ocal governments have failed to adopt needed controls or to enforce them effectively.”); Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 824–25 (1990) (noting that “many [states] have been reluctant to expand their roles in natural resources management”, and that “[s]tate action . . . conflicts frequently with scientific knowledge and understanding”); Patrick J. Skelley II, Comment, *Finding the Pearl in the Oyster: Strategies for a More Effective Implementation of Virginia’s Chesapeake Bay Preservation Act*, 31 U. RICH. L. REV. 417, 431–32 (1997).

among the states if left to their own devices.<sup>190</sup> Possible reasons for this phenomenon include the inability to fund large-scale environmental programs, the misconception that action by merely one state will have no effect, or that states lack the expertise and technology.<sup>191</sup> In addition, local governments can be hesitant to implement and enforce state environmental plans due to heightened visibility at the local level, reelection concerns, the fact that demands from state level can appear overly bureaucratic, and the attractiveness of a “race of laxity” to attract economic opportunities.<sup>192</sup> While the Court is concerned about coercive overregulation at the state and local level, the relevant scholarship points in the opposite direction.

One counterargument to the position that local governments are actually lax is that local governments are tyrannical overregulators when communities are overly homogeneous, disenfranchise vulnerable groups, or are captured by narrow interests.<sup>193</sup> This logic is flawed, however, in that homogeneity or local government capture do not necessarily lead to overbearance, as the Court fears in *Koontz*.<sup>194</sup> Corrupt local governments can also choose laxity or strictness as

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<sup>190</sup> Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL’Y REV. 67, 98–105 (1996). Compare Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 544–45 (1991) (“A community then can quite justifiably seek a ‘second best’ solution: a benefit that substitutes or makes up for the harm for which there is no feasible or cost-effective solution.”), Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “to the Bottom”?*, 48 HASTINGS L.J. 271, 278 (1997) (“[T]here is little reason to believe that state environmental standards established in the absence of a federal framework will be optimal.”), Joshua D. Sarnoff, *The Continuing Imperative (but Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL’Y F. 225, 278–85 (1997) (“[A] reason for federal environmental regulation is to prevent states and localities from engaging in a welfare reducing ‘race-to-the-bottom.’”), and Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211–12 (1977) (“[A]ny individual state or community may rationally decline unilaterally to adopt high environmental standards that entail substantial costs for industry and obstacles to economic development for fear that the resulting environmental gains will be more than offset by movement of capital to other areas with lower standards.”), with Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race to the Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1242 (1992) (“The conclusions that emerge from this review of the theoretical literature point strongly against race-to-the-bottom claims.”).

<sup>191</sup> Butler, *supra* note 189, at 823–26.

<sup>192</sup> Skelley II, *supra* note 189, at 432–33.

<sup>193</sup> See, e.g., Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 32–40 (1992).

<sup>194</sup> See *Koontz*, 133 S. Ct. at 2594; see also Mandelker & Tarlock, *supra* note 193, at 34–35 (indicating that the problems with pluralistic local government decisions stem from: (1) not all major land use interests being represented, and (2) that community land use interests may not represent the interests of the larger region, neither of which clearly result in under- or overregulation).

a way to perpetuate their power and subordinate vulnerable groups, depending on which suits their needs at the time.<sup>195</sup>

#### IV. RECOMMENDATIONS TO LOCAL GOVERNMENTS FOR ACHIEVING FLEXIBILITY AND REDUCING CONFUSION WITHIN THE *KOONTZ* FRAMEWORK

Although Part III critiqued several shortcomings of the *Koontz* opinion, *Koontz* represents a continuing trend towards strengthening private property rights in the courts. Despite scholarship showing that land-use planning is “intensely local” and not easily contained by legal tests, *Koontz* is the current state of the law, and local governments will have to adapt their processes relative to its holdings.<sup>196</sup> Specifically, this Part discusses how local governments may respond to address the lower takings threshold and confusion about which mitigation options presented during permitting negotiation may now be potential liabilities in a takings claim, as discussed above.<sup>197</sup> First, section A establishes why procedural flexibility is important for quality land-use decision-making, indicating that local governments will want to find out how to maximize flexibility under *Koontz*. Section B considers and rejects several popular suggestions of ways that local governments could react to *Koontz*. Section C concludes this Part by recommending a new model for permitting, described as a “negotiated permitting process.”

##### A. *Flexibility Leads to Better Land-Use Decision-Making*

This section argues that procedural flexibility for local governments leads to better land-use outcomes based on the history of local government land-use decisions, the unique characteristics of local governments, empirical data about the negative impacts of increased rigidity, and the inherently flexible nature of exactions. This analysis seeks to establish that regulatory flexibility is a positive and necessary element of local land-use decision-making; therefore,

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<sup>195</sup> Mandelker & Tarlock, *supra* note 193, at 32, 37.

<sup>196</sup> See *Koontz*, 133 S. Ct. at 2594; *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834–37 (1987); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problems of Local Legitimacy*, 71 CAL. L. REV. 837, 839 (1983) (noting in 1983 that “during the last two decades, judges and legal scholars have shown increasing doubt that local governments make land development decisions fairly and rationally—that is, with a reasonable distribution of burdens among individuals, and with the care and deliberation commensurate with the long-term implications of land development”). Cases and legal scholarship indicate a trend toward increasing limitations on local government discretion regarding exactions from the 1960s through today. See, e.g., *id.*

<sup>197</sup> Butler, *supra* note 189, at 830; *supra* Part III.B.2.

local governments should work to recapture some of this flexibility following *Koontz*.

First, a history of deference toward local land-use decisions indicates that regulatory flexibility for local land-use decisions is preferable. Prominent property law scholar Professor Carol Rose observed in her classic article, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, that local governments have always used a flexible, “piecemeal” approach to local land-use planning, even when using more rigid legislative zoning measures.<sup>198</sup> This is partially because modern American local governments evolved from colonial settlements during a time when “factors such as geomorphology, climate, religion, and economic organization yielded contrasting forms of local governments.”<sup>199</sup> Although much has changed from colonial times, the need to adapt to unique local circumstances remains.<sup>200</sup>

For example, when comprehensive zoning became popular in the 1950s due to government subsidies, local governments began to publish comprehensive zoning measures for less intense use than actually anticipated, and later rezoned for more intense uses on a case-by-case basis.<sup>201</sup> Over the past several decades, however, courts have grown suspicious of local governments’ ability to administer such flexible programs due to fear of local corruption, based in part on the Federalist theory that local jurisdictions tend more towards homogeneity and factions.<sup>202</sup> This lack of faith in local governments’ ability to make reasoned land-use decisions on a case-by-case basis without coercing property owners into conferring unwarranted benefits slowly led to increasingly strict judicial review, but it was not always so.<sup>203</sup> The Oregon Supreme Court expressed this shift in Rose’s illustrative case *Fasano v. Board of County Commissioners*, and the sentiment can be found in the *Nollan*, *Dolan*, and now *Koontz* opinions.<sup>204</sup>

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<sup>198</sup> Rose, *supra* note 196, at 853.

<sup>199</sup> RUTHERFORD H. PLATT, *LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY* 236–37 (rev. ed. 2004).

<sup>200</sup> *Id.*

<sup>201</sup> Rose, *supra* note 196, at 849.

<sup>202</sup> *Id.* at 851, 855.

<sup>203</sup> See *NATURAL RES. DEF. COUNCIL, INC.*, *supra* note 189, at 317 (“In the past virtually all land use decisions involving private land were made at the local level of government. Today, as the states are redefining their responsibilities regarding land use problems and federal legislation increasingly affects such concerns, land use is no longer a strictly local matter . . .”).

<sup>204</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (“[L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than

Second, because local government bodies are distinct from larger state and federal legislative bodies, courts should set standards that reflect those differences and facilitate improved local government decision-making. While acknowledging that “local bodies making piecemeal land decisions may be unreliable as legislatures in a Madisonian sense,” Rose proposed that these differences are indicative of “some solution outside the traditional separation of powers,” rather than a fatal shortcoming.<sup>205</sup> If a local government is unlike a larger legislative body, regulatory checks should reflect the distinction by focusing on the mechanisms that make a local government work well: “citizen[] participation,” or voice, and “possible departure,” or “exit.”<sup>206</sup> Therefore, acknowledging that local governments are unlike large legislatures, judicial review should emphasize flexible standards that promote political participation backed by a real threat of departure, rather than formulaic tests that do not reflect the varied reality of local government decisions.

Third, interviews with local officials and judicial outcomes of challenges to land-use actions have revealed that increased rigidity is detrimental to the local regulatory process. In 1990, Professor Lynda Butler conducted a study of state regulatory failure using Virginia as a model state.<sup>207</sup> Butler conducted interviews to ascertain the “perceptions and views of state and local officials responsible for environmental and land-use regulation.”<sup>208</sup> Butler ultimately concluded that the administrative process was burdened significantly by the then-current takings case law.<sup>209</sup> In the article, Butler analyzed the *Nollan* decision and observed that local officials in particular expected *Nollan* and similar opinions to result in an “increase in litigation and . . . a chilling effect

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property it would like to take.”); *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994) (“The city’s goals . . . are laudable, but . . . [a] strong public desire to improve the public condition will not warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922))); *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. Town of Atkinson*, 432 A.2d 12, 14 (N.H. 1981))); *Fasano v. Bd. of Cnty. Comm’rs*, 507 P.2d 23, 30 (Or. 1973) (“[H]aving weighed the dangers of making desirable change more difficult against the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government, we believe that the latter dangers are more to be feared.”).

<sup>205</sup> Rose, *supra* note 196, at 887; *see also* Mandelker & Tarlock, *supra* note 193, at 1–2 (“Despite courts’ almost ritualistic invocation of the presumption of constitutionality, the reality is that the presumption does not immunize land-use decisions from intense judicial review to the same degree that the presumption immunizes acts of Congress and state legislatures from Supreme Court review.”).

<sup>206</sup> Rose, *supra* note 196, at 882–83, 887, 910.

<sup>207</sup> Butler, *supra* note 189, at 826–27.

<sup>208</sup> *Id.* at 827–28.

<sup>209</sup> *Id.* at 830.

on government regulation of land use.”<sup>210</sup> The officials reported experiencing less flexibility in decision-making for fear of getting the law wrong.<sup>211</sup> Butler confirmed these fears, finding that challenges to new land-use measures resulted in unpredictable outcomes in various state courts.<sup>212</sup> Per Butler’s reasoning, adding another case reaffirming and expanding the formulaic *Nollan-Dolan* test increases confusion and reduces flexibility, intensifying burdens on state and local officials.<sup>213</sup>

Finally, flexibility towards regulatory exactions is justified because exactions are an inherently flexible tool. Exactions and other similar measures, such as floodplain and wetland regulations and public nuisance laws, are designed to aid regulators in adapting to intensely local and individualized circumstances that are not adequately addressed with the blunt tool of Euclidean comprehensive zoning.<sup>214</sup>

### B. Possible Local Government Reactions to Koontz

Despite the reasons supporting flexibility for land-use decisions discussed above,<sup>215</sup> the expanded *Nollan-Dolan* test is the new reality for local governments.<sup>216</sup> It is important to understand that while *Koontz* has created new confusion about which mitigation options will be subject to the *Nollan-Dolan* test during takings litigation,<sup>217</sup> the opinion did not expressly preempt flexible negotiation. *Koontz* holds that *Nollan-Dolan* applies to

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*; see also PLATT, *supra* note 199, at 304 (explaining that even a mere perception of broadening property rights “may become a self-fulfilling expectation if political bodies, administrative agencies, and lower courts are persuaded that the pendulum is swinging in the direction of private rather than public interests”).

<sup>212</sup> See Butler, *supra* note 189, at 832–34 (“Recent challenges to innovative land use measures adopted in Virginia and other states demonstrate the low predictive value of takings case law.”).

<sup>213</sup> *Id.* at 837–38. At the time, Butler pondered whether the case’s impact would be limited to cases of physical invasion of property or where there was an actual conveyance of property. See *id.* In *Koontz*, the Court clarified that *Nollan* is not so limited, but rather applies broadly, including to requests for easements and money. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013).

<sup>214</sup> PLATT, *supra* note 199, at 305 (noting that Euclidean zoning was poorly suited to address physical land variations); Sean F. Nolon, *Bargaining for Development Post-Koontz: How the Supreme Court Invaded Local Government* 30 (Vt. Law Sch., Faculty Working Paper No. 1-14, 2014), available at <http://ssrn.com/abstract=2400689> (“Judicial decisions restricting [local governments’] ability to bargain reduce th[e] opportunity to create value.”); see *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 379–85 (1926) (landmark decision finding an aesthetic comprehensive zoning scheme constitutional).

<sup>215</sup> *Supra* Part IV.A.

<sup>216</sup> See Nolon, *supra* note 214, at 22 (“I agree with Kagan’s concern and hope that future courts move quickly to clarify when a pre-decision proposal becomes a demand triggering *Nollan-Dolan* scrutiny. Until that time, land use boards must live in the world as it is and exercise appropriate caution.”).

<sup>217</sup> *Supra* Part III.B.2.

conditions attached to permit denials as well as permit approvals, which limits flexibility due to fear of an increased risk of takings claims, but does not explicitly prevent local governments from negotiating with permit applicants.<sup>218</sup> Empirical data shows that local officials have demonstrated high familiarity with the *Nollan* and *Dolan* decisions, and the attention that the APA dedicated to *Koontz* indicates that officials will modify behavior in response to the new addition.<sup>219</sup> Exactly how officials may adapt exactions procedures in response to increased potential liability for regulatory takings remains an open question.<sup>220</sup> This section explores some possible local government responses and discusses why local governments should avoid them.

One option is for state and local governments to move away from now-riskier permitting and implement intensely detailed comprehensive zoning schemes.<sup>221</sup> Legislative limits on land use that apply to a vast number of people are less suspect than individual burdens, answering the Court's concern in *Koontz* that one individual would bear an unfair burden at the hands of an extortionate government.<sup>222</sup> Such actions are more democratically accountable, and the best recourse for dissatisfied parties is through the political process.<sup>223</sup> However, exactions developed to allow local governments to adapt to changing circumstances.<sup>224</sup> It is not clear that a move away from exactions would fix the

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<sup>218</sup> *Koontz*, 133 S. Ct. at 2595.

<sup>219</sup> Ann E. Carlson & Daniel Pollack, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 116 (2001) (finding that "California planners have a high awareness of the cases, particularly of *Nollan* and *Dolan*," and that "no county planners and fewer than 10% of city planners report[ed] no familiarity with [*Nollan*]"); *Supreme Court Expands Takings Test*, *supra* note 3; *106th National Planning Conference April 26–30, 2014: Final Program*, AM. PLAN. ASS'N, 40, 53, 81, 84, <https://www.planning.org/conference/program/pdf/final.pdf> (showing various panels discussing *Koontz*—including a panel titled "*Koontz*—Clarity or Calamity?"—scheduled for the APA's 2014 National Planning Conference).

<sup>220</sup> See, e.g., Chuck Cohen, Op-Ed., *Supreme Court Decision in Koontz Case May Complicate Development in California*, PAC. COAST BUS. TIMES, July 19, 2013, <http://www.pacbiztimes.com/2013/07/19/oped-supreme-court-decision-in-koontz-case-may-complicate-development-in-california/>; Adam Lovelady, *The Koontz Decision and Implications for Development Exactions*, COATES' CANONS BLOG (July 1, 2013), <http://canons.sog.unc.edu/?p=7191>; *Potential Impacts of Koontz Decision on Local Land Use Decisions*, CHI. METROPOLITAN AGENCY FOR PLAN. (Aug. 5, 2013), [http://www.emap.illinois.gov/about/updates/-/asset\\_publisher/UIMfSLnFfMB6/content/potential-impacts-of-koontz-decision-on-local-land-use-decisions](http://www.emap.illinois.gov/about/updates/-/asset_publisher/UIMfSLnFfMB6/content/potential-impacts-of-koontz-decision-on-local-land-use-decisions).

<sup>221</sup> See Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 511, 533–37 (2012).

<sup>222</sup> See *Koontz*, 133 S. Ct. at 2594; Mulvaney, *supra* note 221, at 536–37.

<sup>223</sup> See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395–97 (1926); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445–46 (1915).

<sup>224</sup> Fenster, *supra* note 9, at 622–23; see *supra* Part IV.A (discussing the origins of comprehensive zoning and the benefits of flexibility in land use planning).

problem as such a scheme would have to be burdensomely intricate and would likely still require the use of variances over time.<sup>225</sup>

Another option, as predicted by Justice Kagan's dissent in *Koontz*, is for local governments to deny subpar permit applications outright, without any negotiation. While Kagan agreed that approving a permit with a certain condition was the same as denying a permit pending a certain condition, the *Koontz* opinion leaves open the issue of when the government makes a demand.<sup>226</sup> Kagan observed that "[i]f 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."<sup>227</sup> Despite Kagan's point, the majority opinion did not define when a demand has been made, but repeatedly referred to the District's conditions as such.<sup>228</sup> Furthermore, the Court declined to consider the District's off-site mitigation proposal and reduced-footprint mitigation proposal as alternative options. This expands the potential for liability, making it more likely that a local government will prefer to merely deny permits outright because it is difficult to predict which suggestions a court will consider as distinct alternatives.<sup>229</sup>

Conversely, officials' unwillingness to discuss mitigation options could lead to under-regulation due to permits granted on either insufficient exactions or extra-regulatory, possibly illegal, bargains between local officials and developers.<sup>230</sup> Both outcomes undesirably limit economic growth and other positive benefits accompanying new development "to the detriment of both communities and property owners."<sup>231</sup>

A final possibility is states and local governments may adopt alternative negotiation and mediation measures to facilitate and improve land-use decision-making. This option is appealing because it has the potential to allow

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<sup>225</sup> See *supra* Part IV.A (discussing the necessary benefits of flexibility in local land use decision-making).

<sup>226</sup> *Koontz*, 133 S. Ct. at 2609–10 (Kagan, J., dissenting).

<sup>227</sup> *Id.* at 2010.

<sup>228</sup> *Id.* at 2593, 2598 (majority opinion) (characterizing the petitioner's belief that "the District's *demands* for mitigation [were] excessive," and noting that "respondent's offer . . . does not obviate the need to determine whether the *demand* . . . satisfied *Nollan* and *Dolan*") (emphasis added).

<sup>229</sup> *Id.* at 2598; *supra* Part III.B.2.

<sup>230</sup> Fenster, *supra* note 9, at 654–57, 665.

<sup>231</sup> *Koontz*, 133 S. Ct. at 2610 (Kagan, J., dissenting).

for greater flexibility,<sup>232</sup> providing an avenue where both parties can reach an agreeable compromise that is possibly preferable to a solution that would have been reached in a traditional adversarial setting (such as a quasi-adjudicatory permitting process). Proposals for alternative regulatory procedures have been popular with environmental and land-use scholars for decades.<sup>233</sup> Proponents argue that mediations are cost-effective, issue-focused, and superior for addressing technical and scientific concepts.<sup>234</sup>

While the above points are valid, site-specific exaction disputes between private landowners and local governments are not well-suited to the mediation process.<sup>235</sup> First, mediation involves the aid of a neutral mediator, but land-use decisions require the professional opinions of subject-matter experts, such as government-employed engineers, urban planners, and environmental scientists, in order to determine whether an application meets certain legal standards.<sup>236</sup> For example, in *Koontz*, the reason that the District did not accept Koontz's original proposal was because it did not meet the legal requirements set forth in Florida law.<sup>237</sup> Therefore, it does not make sense (if it is even procedurally possible) to place the dispute between an applicant and the permitting authority (or intervening advocacy group) in front of a separate mediator who has no expertise in the matter when, ultimately, the permitting authority is constrained by science-based legal standards.

Second, both parties must agree to enter mediation, and a permitting authority cannot force a private applicant outside of the application process established by state laws.<sup>238</sup> This would introduce another layer of uncertainty and confusion into a process administered by local governments with limited time and resources.<sup>239</sup> Finally, the point of mediation is to reach one final compromise, still leaving open the question of what would happen in a

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<sup>232</sup> See *supra* Part IV.A (arguing that greater flexibility for local officials is preferable in land use decision-making).

<sup>233</sup> See Rose, *supra* note 196, at 887 (arguing that land use decisions are better analyzed as mediation-inspired rather than quasi-adjudicative); John L. Watson & Luke J. Danielson, *Environmental Mediation*, 15 NAT. RESOURCES LAW. 687, 689 (1983); Lawrence Susskind & Alan Weinstein, *Towards a Theory of Environmental Dispute Resolution*, 9 B.C. ENVTL. AFF. L. REV. 311, 336–37 (1980).

<sup>234</sup> Watson & Danielson, *supra* note 233, at 689–90.

<sup>235</sup> *Id.* at 690–91; Fenster, *supra* note 9, at 677 (“Certain communities at certain moments . . . may lack the willingness, ability, and information to negotiate fairly and inclusively.”).

<sup>236</sup> Susskind & Weinstein, *supra* note 233, at 314.

<sup>237</sup> Joint Appendix Exhibits, *supra* note 176, at \*90, \*92.

<sup>238</sup> See Susskind & Weinstein, *supra* note 233, at 314.

<sup>239</sup> Butler, *supra* note 189, at 825–26.

scenario where the applicant walks out of negotiations, like in *Koontz*.<sup>240</sup> In sum, local governments are not likely to adopt standard mediation as a method for increasing flexibility in dealing with the *Koontz* decision, but mediation has many positive qualities that can be incorporated into a recommendation for local governments in adapting to *Koontz*.

*C. A “Negotiated Permitting” Procedure Will Allow Local Governments to Reclaim Flexibility in Exactions Settings*

Although Carol Rose proposed that courts should review exactions proceedings as mediations rather than quasi-adjudications, the fact remains that they are not actually true mediations.<sup>241</sup> Building on this idea of exactions proceedings as functionally mediation inspired, this section analogizes to federal negotiated rulemaking to propose a “negotiated permitting” model as a way for local governments to reclaim flexibility following *Koontz*. The negotiated permitting framework will minimize a local government’s increased exposure to takings claims after *Koontz* by capturing the collaborative spirit of negotiated rulemaking, and ultimately producing one mitigation option.

Negotiated rulemaking is a consensus-based process originally devised as a way to improve rulemaking outcomes in federal administrative agencies.<sup>242</sup> The procedures, endorsed by Congress in the Negotiated Rulemaking Act of 1990,<sup>243</sup> supplement procedures in the Administrative Procedure Act by allowing an agency to assemble a committee that meets publicly to negotiate a proposed rule.<sup>244</sup> If the group reaches an agreement, the agency may adopt the rule according to Administrative Procedure Act procedures.<sup>245</sup> The consensus is not binding on the agency, but is rather intended to reduce the likelihood of later challenges to the rule, assuming that the representation and negotiation process has resulted in a compromise agreeable to most.<sup>246</sup> Despite continued debate over whether true negotiated rulemaking actually works (or is even a good idea) these concerns are outside the scope of this Comment, which declines to weigh in on the efficacy of negotiated rulemaking at the federal

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<sup>240</sup> See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2593 (2013).

<sup>241</sup> Rose, *supra* note 196, at 887.

<sup>242</sup> Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 13–14 (1982).

<sup>243</sup> Pub L. No. 101-648, 104 Stat. 4969 (codified as amended at 5 U.S.C. §§ 561–570a (2012)).

<sup>244</sup> Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1257 (1997).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

level.<sup>247</sup> Here, the example of negotiated rulemaking is taken only as a procedural analogy because there are many aspects of this process that are applicable to local land-use decision-making.

An adapted negotiated permitting process modeled on negotiated rulemaking is feasible in the land-use permitting setting because many of the factors that lead to effective negotiated rulemaking (or the absence of which arguably lead to poor negotiated rulemaking) are present in a local permitting setting. The factors applicable to exaction decisions are: (1) “countervailing power” between the applicant, the permitting authority, and third-party interests; (2) “limited number of parties;” (3) “mature issues;” (4) “inevitability of decision;” (5) “opportunity for gain,” both for the applicant and the permitting authority; (6) openness to tradeoffs; and (7) high likelihood of “agreement implementation.”<sup>248</sup>

Applying the factors above to the facts of *Koontz* as a case study, both the District and Koontz had countervailing power: the District had the power to grant the permit, and Koontz had the power to walk away and sue.<sup>249</sup> There were only two parties, and the issue did not require any further development.<sup>250</sup> The District’s own procedures inevitably required it to make a decision.<sup>251</sup> Both parties had something to gain: Koontz wanted a development permit, and the District wanted wetlands mitigation.<sup>252</sup> Both were willing (to an extent) to make tradeoffs.<sup>253</sup> Finally, implementation of a mutual decision, had one been reached, was nearly certain.<sup>254</sup>

Therefore, this Comment proposes a model for land-use decision-making that is similar to negotiated rulemaking, although the final outcome will be a case-by-case determination about a permit application, rather than a broad rule. In addition, one should note that the analogy is not perfect because in negotiated rulemaking, the administrative agency must start § 553

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<sup>247</sup> *Id.* at 1258 (“[T]he instrumental value of negotiated rulemaking has more often been asserted than demonstrated.”).

<sup>248</sup> See Harter, *supra* note 242, at 45–52.

<sup>249</sup> See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2592–93 (2013); Harter, *supra* note 242, at 45–46.

<sup>250</sup> See *Koontz*, 133 S. Ct. at 2591.

<sup>251</sup> See 1 ST. JOHNS RIVER WATER MANAGEMENT DISTRICT ET AL., ENVIRONMENTAL RESOURCE PERMIT APPLICANT’S HANDBOOK § 5 (2013), available at, [http://floridaswater.com/handbooks/pdfs/ERPhandbook\\_voll.pdf](http://floridaswater.com/handbooks/pdfs/ERPhandbook_voll.pdf) [hereinafter PERMIT HANDBOOK] (including information about required timing for permit processing).

<sup>252</sup> *Koontz*, 133 S. Ct. at 2592–93.

<sup>253</sup> *Id.*

<sup>254</sup> See PERMIT HANDBOOK, *supra* note 251, § 5.

rulemaking<sup>255</sup> after the negotiation process has been completed, and the negotiations do not become part of the record, nor are they subject to judicial review.<sup>256</sup> With negotiated permitting, the negotiations would be part of the record in the event that the ultimate decision was challenged in court. The idea, however, is that negotiated permitting will capture the spirit of negotiated rulemaking's consensus-based process, and at the end the authority will only open itself to liability for the one condition it approves, similar to the way that a federal agency is only liable for the one rule it ultimately promulgates.

Per the negotiated permitting model, the permitting authority will consider a permit application in a collaborative way, inviting various interested parties to participate.<sup>257</sup> The permitting authority can explain the legal requirements for granting the permit and suggest alternatives, while weighing the concerns of the applicant and third parties.<sup>258</sup> Parties will work together, aided by subject matter experts and a facilitator if necessary, to reach an agreeable solution.<sup>259</sup> One advantage of this model is that it gives local governments the opportunity to explain the scientific basis for the permit requirements, and to perform "data mediation" if there is a conflict between an applicant's presentation of the facts and the permitting authority's determinations.<sup>260</sup> For example, such a data conflict actually occurred in *Koontz*, where the District found the wetlands to be "high quality," while Koontz's hired environmental consulting firm found the wetlands to be "of minimal (or no) regional significance."<sup>261</sup> Other advantages of the model include the decreased likelihood of judicial challenges once a negotiated decision has been reached and the possibility of establishing an ongoing relationship of communication and compromise between developers and permitting authorities.<sup>262</sup>

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<sup>255</sup> See 5 U.S.C. § 553 (2012).

<sup>256</sup> *Id.*

<sup>257</sup> Harter, *supra* note 242, at 52–53 (arguing that "any interest that would be substantially or materially affected by the regulation should be represented" in a negotiated rulemaking, as determined on an ad hoc basis by the relevant agency); Nolon, *supra* note 214, at 31 ("[T]he presence of multiple parties in most significant development decisions . . . creates room for value creation.").

<sup>258</sup> Harter, *supra* note 242, at 59 (promoting agency participation in rulemaking as a way to "tap the expertise and resources in the private sector" and "reduce the need for development of vast factual material").

<sup>259</sup> *Id.* at 77–79.

<sup>260</sup> *Id.* at 89–91.

<sup>261</sup> Indeed, there was a clear conflict between the District's and Koontz's findings regarding the land at issue. Compare Joint Appendix Exhibits, *supra* note 176, at \*89–90 (District's exhibit), with *id.* at \*14 (Koontz's exhibit).

<sup>262</sup> Harter, *supra* note 242, at 102, 110.

Continuing the case study example, suppose that Koontz and the District had framed the permitting process as a negotiated permitting. The engineers, scientists, and urban planners employed by the District would have investigated the area based on Koontz's application. If their scientific findings conflicted with the assessments of Koontz's privately hired environmental consulting firm, both parties could have compared the results to discover why. The District could have made mitigation suggestions freely, without fear of increasing potential takings liability with each option. An attorney for the District could have explained the permit requirements under Florida law, and Koontz could have contributed his own suggestions within that framework. Third parties, such as environmental protection advocates, homeowner associations, or nearby business owners could have added information for consideration. In the end, the parties could have reached a mutually agreeable solution in accordance with Florida law.

The key to the negotiated permitting model is that at the end of negotiations the permitting authority will approve the permit subject to one condition. This is true whether the negotiations end in a mutually agreeable outcome or the applicant walks away dissatisfied with the choice. Per this model, the District would have issued a permit approval subject to only one condition in *Koontz*, despite the other conditions discussed during negotiations. As with negotiated rulemaking, none of the options suggested by the District during the negotiation process would be subject to judicial review, only the one condition attached to the final approval.<sup>263</sup> While the one final condition would still be subject to *Nollan-Dolan* if Koontz sued, the District could carefully decide what the one condition should be, considering the "nexus" and "rough proportionality" requirements and building a record to support the decision.<sup>264</sup> This would eliminate confusion about whether officials had made a "demand," and would allow officials to carefully consider the legal basis of the condition should the issue land in court.<sup>265</sup>

Note that these procedures are substantially similar ones that local governments already follow. For example, in *Koontz*, District officials offered several mitigation options to Koontz, but concluded that his project as proposed failed the regulatory requirements.<sup>266</sup> The District indicated the

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<sup>263</sup> See *id.* at 82.

<sup>264</sup> See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (2013).

<sup>265</sup> See *id.* at 2598 ("This Court therefore has no occasion to consider how concrete and specific a demand must be to give rise to liability under *Nollan* and *Dolan*.").

<sup>266</sup> *Id.*

collaborative nature of the permitting process by listing four potentially sufficient mitigation options, and inviting Koontz to choose his preferred combination of the options.<sup>267</sup> The District's handbook also illustrates the inherently flexible nature of the permitting process by stating that "[i]nnovative mitigation proposals which deviate from the standards described in this handbook will be considered on a case-by-case basis."<sup>268</sup> The novel aspect of the negotiated permitting model is that it advises the permitting authority to approve one option when a disgruntled applicant walks away from the negotiations, as opposed to leaving several amorphous options on the table, each potentially exposing the permitting authority to takings liability. Like with negotiated regulation, where the agency can still perform § 553 rulemaking<sup>269</sup> regardless of whether the parties produce a mutually agreeable rule during negotiations, permitting authorities can approve a permit subject to a condition even if the applicant doesn't like the condition.

Some may argue that this model is procedurally burdensome, or that a permitting authority will not be able to come to a reasoned decision with so many competing interests.<sup>270</sup> The benefits of this model outweigh the burdens, however, largely because it is substantially similar to negotiation procedures already employed by local governments.<sup>271</sup> The model reduces uncertainty following *Koontz* by restoring negotiating flexibility and effectively returning local governments to a pre-*Koontz* universe by eliminating judicial review of remediation suggestions issued prior to a permit denial.<sup>272</sup>

## CONCLUSION

While it is true that exactions must meet a threshold of constitutionality,<sup>273</sup> this Comment has argued that the risk of overregulation at the hands of local government, as the Court feared in *Koontz*, is less compelling than the need for flexible land-use decision-making. In the *Koontz* opinion, the Court mischaracterized aspects of environmental and local government policy, and extended the *Nollan-Dolan* test to demands imposed prior to permit denials

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<sup>267</sup> Joint Appendix Exhibits, *supra* note 176, at \*90–92.

<sup>268</sup> *Id.* at \*152.

<sup>269</sup> 5 U.S.C. § 553 (2012).

<sup>270</sup> See Harter, *supra* note 242, at 110–12.

<sup>271</sup> See Rose, *supra* note 196, at 887–93 (arguing that “piecemeal changes” in land use planning are “more realistically perceived as mediative than quasi-judicial”).

<sup>272</sup> See *supra* notes 241–47 and accompanying text.

<sup>273</sup> U.S. CONST. amend. V.

without clarifying when a local government has made such a demand. The *Koontz* decision created uncertainty for local governments regarding their exposure to takings liability and, as a result, has negatively reduced regulatory flexibility. Finally, this Comment acknowledged *Koontz* as the new reality for local governments, and suggested that they seek flexibility within the *Koontz* framework. As such, it recommended a novel “negotiated permitting” scheme as a procedural solution for limiting expanded potential for liability under *Koontz*.

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