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# When Local Government Misbehaves

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# WHEN LOCAL GOVERNMENT MISBEHAVES

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*Abstract*

*This Article addresses one of the lingering questions following the Supreme Court's decision in* Koontz v. St. Johns River Water Management District. *In that land use case, the Court held that proposed local government monetary exactions from property owners to permit land development were subject to the same heightened scrutiny test as imposed physical exactions. The Court left unanswered the question of how broadly this heightened scrutiny should be applied to other monetary obligations imposed by the government. The Article argues that "in-lieu" exactions that are individually assessed as part of the permitting process should be treated differently than the impact fees that are developed through the legislative process and are applied equally to all developers without regard to a specific project. Accordingly,* Koontz*'s application should be limited to "the special context of land-use exactions" during a permitting process rather than be extended to all regulatory monetary obligations.*

*The Article begins by identifying the various levels of scrutiny applied to land use decisions and shows how these levels are designed to prevent the abuse of power, particularly when actions are exercised at the individualized level. It concludes by suggesting that exactions that result in a permanent physical occupation of real property should be subject to heightened scrutiny. However, only administrative, individualized, monetary exactions, designed to replace a physical exaction, such as the kind involved in* Koontz*, should be subject to heightened scrutiny to control the potential for abuse. Legislatively determined monetary conditions such as impact fees, but not taxes, should be subject to review under state statutory or judicial standards, which range from a rational basis test to more stringent tests, such as the dual rational nexus test or* the Nollan/Dolan *test. In the absence of a state standard of review, legislatively enacted impact fees challenged in federal court should be analyzed under the deferential rational basis test for land use regulation.*

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## I. INTRODUCTION

Local officials may abuse their power over land-use regulation, particularly when they are involved in individualized decision-making over discrete landowners and parcels. A city council's legislative actions are subject to public hearings and are generally directed to resolving issues affecting the community as a whole. But when individual decision making is involved, there is considerable concern about self-dealing, special interests, and the potential for abuse of power.[1] The jurisprudence of land-use regulation addresses this concern by applying differing levels of judicial scrutiny to government actions. In challenges to land-use regulation, courts more closely scrutinize those situations where government abuse is most likely to appear.

The threat of abuse is most acute when the government requires from property owners an exaction, which is a burden—either physical, such as a public easement, or monetary—placed on a project as a condition of development approval.[2] The U.S. Supreme Court "has usually been deferential to state courts and local decisionmaking on land use" except in exaction cases,[3] most notably *Nollan v. California Coastal Commission*[4] and *Dolan v. City of Tigard*.[5] These two decisions established a heightened scrutiny test for physical exactions demanded by government officials to offset the perceived negative impacts from landowners seeking development permits in an adjudicatory process.[6] The test requires that there be an essential nexus and proportionality between the exaction and the negative impact caused by the proposed development.[7]

In *Koontz v. St. Johns River Water Management District*,[8] the Court unanimously held that the *Nollan/Dolan* test, which had been developed in the context of *imposed* exactions, also applies to *proposed* exactions.[9] A majority of Justices then ruled that *Nollan/Dolan* heightened scrutiny that applies to physical

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[1] WILLIAM A. FISCHEL, *From* Nectow *to* Koontz*: The Supreme Court's Supervision of Land-Use Regulation*, *in* THE NEW ECONOMICS OF ZONING LAWS 22 (July 25, 2014) (discussing one theory for closer judicial scrutiny of administrative decisions that "parties who lose from an administrative decision have fewer political roads to correct them than they do in legislative matters").

[2] *Id.* at 19.

[3] *Id.* at 1 (noting that this deference is "appropriate given the Court's lack of access to local knowledge").

[4] 483 U.S. 825 (1987).

[5] 512 U.S. 374 (1994).

[6] In *Nollan*, the exaction at issue was a lateral public easement along the landowner's beachfront lot, whereas the city planning commission in *Dolan* required an easement dedicated for a public greenway. In both cases the Court applied heightened scrutiny to such "physical" exactions. *See supra* note 4, at 825 and note 5, at 379–80.

[7] *Dolan*, 512 U.S. at 391 ("[T]he 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.").

[8] 133 S. Ct. 2586 (2013).

[9] *Id.* at 2599.

exactions should also be applied to monetary exactions that are demanded in lieu of physical property.[10] Justice Alito began the majority's opinion by stating that the Court's decisions in *Nollan* and *Dolan* "provide important protection against the misuse of the power of land-use regulation."[11]

The Court could have identified alternative constitutional bases for challenges to monetary conditions. One would be a substantive due process claim based on unfairness and governed by the deferential rational basis standard. Another would be a takings challenge to a severe and disproportionate monetary imposition, evaluated under the *Penn Central Transportation Co. v. City of New York*[12] standard. This standard requires courts to balance three factors, including the severity of the impact of the monetary demand, the interference with investment-backed expectations of the landowner, and the character of the government action.[13] For example, in an earlier challenge to a monetary imposition, a plurality of the Court applied the *Penn Central* factors in *Eastern Enterprises v. Apfel*[14] to find that the Coal Act's imposition of severe and disproportionate retroactive liability constituted a taking.[15] However, instead of applying either a substantive due process analysis or the *Penn Central* factors to the monetary exaction challenged in *Koontz*, the Court determined that the *Nollan/Dolan* test provided the appropriate scrutiny.[16] *Nollan* and *Dolan* were deemed to be the applicable decisions because the "direct link between the government's demand and a specific parcel of real property" required scrutiny to address "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."[17]

This Article will address the *Koontz* majority's holding—subjecting in-lieu monetary exactions to the heightened scrutiny test of *Nollan/Dolan*[18]—and argue

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[10] *Id.* at 2602 (noting that "respondent has maintained throughout this litigation that it considered petitioner's money to be a substitute for his deeding to the public a conservation easement on a larger parcel of undeveloped land").

[11] *Id.* at 2591.

[12] 438 U.S. 104 (1978).

[13] *Id.* at 124.

[14] 524 U.S. 498 (1998).

[15] *Id.* at 529–37. It should be noted that Justice Kennedy, who concurred with the judgment for *Eastern Enterprises*, dissented from the takings holding, noting that for regulatory takings challenges there must be "a specific property right or interest . . . at stake." *Id.* at 541 (Kennedy, J., concurring in part and dissenting in part) (concurring with the plurality that the Coal Act's application to Eastern violates due process because of the retroactive imposition of financial liability, but dissenting from plurality's conclusion that the statute violated the Takings Clause).

[16] *Koontz*, 133 S. Ct. at 2600.

[17] *Id.*

[18] *See* Scott Woodward, *The Remedy for a "*Nollan/Dolan *Unconstitutional Conditions Violation,"* 38 VT. L. REV. 701, 701 (2014) (discussing the unconstitutional conditions violation and remedy).

that this approach fits within the existing state and federal judicial framework used to prevent land-use regulatory abuse. However, this Article will also argue that legislatively determined impact fees are not monetary exactions and should not be subject to *Nollan/Dolan* heightened scrutiny. Instead, impact fees should be evaluated under existing state standards, which range from rational basis scrutiny to more exacting review.

Much debate and scholarship has followed the *Koontz* decision.[19] Some have predicted that the consequences will be dire for local governments if the Court's holding is applied to any monetary fee demanded of developers and possibly to environmental regulation as well.[20] Justice Kagan's dissent, which disagreed with the majority's extension of *Nollan* and *Dolan* to the payment or expenditure of money in government permitting, expressed this concern by avowing that the uncertainty of this rule "threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny."[21] Others assert varying views including that 1) the *Koontz* decision is a "big yawn" that will have little effect, particularly on environmental regulation, which is already governed by environmental impact review;[22] 2) the *Koontz* majority was wrong to extend the *Nollan/Dolan* inquiry to monetary exactions and instead should have recognized that the claim ultimately rests on substantive due process that should be governed by the deferential rational basis standard;[23] 3) similar to the impact of *Nollan/Dolan,* after *Koontz,* planners and local officials will do a better job of "justifying and documenting the rationale for exacting money or land from developers";[24] 4) *Koontz* created a per se taking when a government attaches a monetary obligation to property that cannot be classified as a tax;[25] 5) the Court's *Nollan/Dolan* limitations on land-use negotiations "run counter

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[19] *See, e.g.*, *id.* at 702 ("The *Koontz* decision leaves no doubt that the unconstitutional conditions doctrine will remain an integral part of takings law for the foreseeable future. But, *Koontz* resurrects old questions and creates new ones.").

[20] *See* Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287.

[21] *Koontz*, 133 S. Ct. at 2604 (Kagan, J., dissenting).

[22] *See* J.B. Ruhl, Koontz*: A Big Yawn for Environmental Law?*, YOUTUBE (June 24, 2014), http://youtu.be/YbVxU-leFLo [http://perma.cc/K6PY-CJLJ]; *see also* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth With Impact Fees*, 59 SMU L. REV. 177, 191, 262 (2006) (observing that the features of environmental impact analysis have been applied to development exactions during the last two decades and that "[t]he impact of the *Nollan/Dolan* case line appears to have been confined to an extremely narrow set of circumstances—adjudicated or individually-negotiated impact fees—and these cases do not commonly occur").

[23] *See* John D. Echeverria, *The Costs of* Koontz, 39 VT. L. REV. 573, 585 (2015); *see also* Fennell & Peñalver, *supra* note 20, at 352–55; Mark Fenster, *Substantive Due Process by Another Name:* Koontz*, Exactions, and the Regulatory Takings Doctrine*, 30 TOURO L. REV. 403, 403 (2014).

[24] Steven J. Eagle, Koontz *in the Mansion and the Gatehouse*, 46 URB. LAW. 1, 22–23 (2014) (quoting Professors Ann E. Carlson and Daniel Pollak).

[25] Michael Castle Miller, *The New Per Se Takings Rule:* Koontz*'s Implicit Revolution of the Regulatory State*, 63 AM. U. L. REV. 919, 923 (2014).

to the economic idea that takings jurisprudence makes governments face a higher cost for regulation";[26] and 6) the courts should differentiate between fees and expenditures such that heightened scrutiny should apply to fees only where the permit applicant is required to directly transfer money to the government, but not to expenditures that "require a permit applicant to spend money to carry out mitigation activities."[27] This Article, with the support of others,[28] proposes that in-lieu exactions that are individually assessed as part of the permitting process should be treated differently than the impact fees that are developed through the legislative process and applied equally to all developers without regard to the specific project.

The purpose in advocating this approach is not to arrive at a particular result, either pro-government or pro-developer, but to determine what level of judicial scrutiny should be applied to monetary impact fees consistent with the traditional land-use regulation framework, based on both state law and U.S. Supreme Court precedent. This Article does not propose a different approach to evaluating property owners' claims of excessive regulation. Instead, it works within the established structure developed by the states and the Court up through the *Koontz* and *Horne v. Department of Agriculture*[29] decisions. While some from both sides of the property rights issue have criticized the Court's jurisprudence in land-use law, this Article suggests that the general development of takings law has resulted in a well-reasoned approach with one exception, which the Court has now corrected.[30] This framework

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[26] FISCHEL, *supra* note 1, at 45.

[27] Justin R. Pidot, *Fees, Expenditures, and the Takings Clause*, 41 ECOLOGY L.Q. 131, 131 (2014); *see also* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2605–06 (2013) (Kagan, J., dissenting) (noting that the majority in *E. Enters. v. Apfel*, 524 U.S. 498 (1998) distinguished "between the appropriation of a specific property interest and the imposition of an order to pay money" and found that a statute requiring a company to pay money for employee health benefits was not a taking, therefore "a requirement that a person pay money to repair public wetlands is not a taking"). *But see* Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 635 (Tex. 2004) (requiring "a developer [to] improve an abutting street at its own expense is in no sense a use restriction" and should be analyzed the same as an exaction in determining whether a taking has occurred).

[28] Rosenberg, *supra* note 22, at 259 (concluding that "[a]djudicative or discretionarily imposed fees will be subjected to the full rigor of *Nollan/Dolan* analysis while legislative or non-discretionary fees will undergo state constitutional review usually under a form of rational nexus evaluation"); *see also* Echeverria, *supra* note 23, at 611 (noting that "there are sound reasons for not extending the ruling in *Koontz*, which involved an ad hoc calculation of charges, to fees determined through a formula set by statute"); Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 10 HARV. ENVTL. L. REV. (forthcoming 2016), http://papers.ssrn.com/so13/papers.cfm?abstract_id=2700954 [https://perma.cc/F6X-N7QY] (finding the arguments for the legislative/adjudicative distinction persuasive, but discussing the potential for the secondary effects that "actually impede the goals of progressive property theory").

[29] Horne v. Dep't of Agric., 135 S. Ct. 2419, 2427–28 (2015) (noting that direct appropriations of real property and personal property must be treated alike under the Fifth Amendment).

[30] *See infra* notes 70–80 and accompanying text. The first prong of the takings test expressed in *Agins* was later repudiated by the Court in *Lingle* and held to be a substantive due process challenge. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 541–45 (2005).

was adeptly presented by Justice O'Connor in *Lingle v. Chevron U.S.A. Inc.*[31] and is described in flow chart form in Appendix A, which also includes some thoughts as to how the analysis of land use takings challenges should be approached. This Article maintains that the Court should continue to operate within this framework and limit the application of *Koontz* to "the special context of land-use exactions"[32] rather than extend it to all government regulation as Justice Kagan's dissent portends. In addition, the development of takings law for personal property can follow the land-use framework so long as it does not mistakenly use concepts developed specifically for real property takings without taking into account the context under which these concepts arose.[33]

The Article begins by identifying the various levels of scrutiny applied to land-use decisions and shows how these levels are designed to prevent the abuse of power, particularly when actions are exercised at the individualized level. This consistent framework supports treating ad hoc in-lieu exactions that require discretionary permits differently than uniform monetary fees imposed legislatively. Part II compares the scrutiny levels applied to land use actions such as: legislative versus administrative actions; spot zoning challenges; consistency with the general plan; impermissible delegation of legislative authority; initiative and referendum authority; eminent domain challenges; and constitutional challenges, both facial and as applied, to corroborate the theme that abuse of power is controlled through increased judicial scrutiny when appropriate. Part III discusses the *Koontz* case and explores existing state and federal laws that treat exactions differently than monetary impact fees. Part IV briefly reviews expanded regulatory applications of impact fees, such as affordable housing techniques, climate change fees, and efforts to address environmental resilience and sustainability.

The Article concludes by suggesting that any physical or monetary in-lieu exaction proposed as part of a land-use adjudicative permitting process constitutes a permanent physical occupation (or an attempt to evade such an occupation through payment of money) under *Loretto v. Teleprompter Manhattan CATV Corp.*[34] and is, therefore, a per se taking, unless it passes *Nollan/Dolan* heightened scrutiny.[35] The decision in *Nollan*, expanded by *Dolan* and *Koontz*, was based on making an exception to the *Loretto* per se taking rule in situations involving land-use permitting. *Loretto* involved a New York state law that required landlords to permit the installation of television cable on their property.[36] The Court held that this legislative action requiring a permanent physical occupation of private property constituted a taking.[37] The government action in *Loretto* did not involve a permitting process, whereby permission could be refused, and the government alternatively

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[31] 544 U.S. at 545–48.
[32] *Id.* at 538.
[33] *See infra* notes 82–89 and accompanying text.
[34] 458 U.S. 419 (1982).
[35] Nollan v. Cal. Coastal Com., 483 U.S. 825, 834 (1987).
[36] *Loretto*, 458 U.S. at 421.
[37] *Id.* at 438.

could condition the grant of the permit on the developer's willingness to offset negative externalities caused by the proposed development. Instead, the legislation requiring a permanent physical occupation of a cable was a confiscation of real property, albeit a minor one, because it "chop[ped] through the bundle [of property rights], taking a slice of every strand."[38]

Legislation or any other government action resulting in the confiscation of real property, other than an exaction, would not be subject to *Nollan/Dolan* scrutiny and would instead constitute a per se taking if it caused a permanent physical occupation of the property. Similarly, confiscations of personal property should constitute a per se Fifth Amendment taking requiring just compensation, provided that the government essentially possesses or occupies (and not merely regulates) the property.[39] Regulations placed on personal property that are excessive can be challenged as a taking and evaluated using the *Penn Central* factors.[40]

Exactions that result in a permanent physical occupation of real property should be subject to *Nollan/Dolan*. However, only administrative,[41] individualized, monetary exactions, designed to replace a physical exaction, such as the kind involved in *Koontz*, should be subject to *Nollan/Dolan* scrutiny to control the potential for abuse.[42] Legislatively determined monetary obligations such as impact fees, which are charges imposed on a development to offset the increased service

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[38] *Id.* at 435.

[39] *See* Horne v. Dep't of Agric., 135 S. Ct. 2419, 2427–28 (2015) (noting that direct appropriations of real property and personal property must be treated alike under the Fifth Amendment); Nixon v. United States, 978 F.2d 1269, 1284–87 (D.C. Cir. 1992) (holding that the Presidential Records and Materials Preservation Act of 1974 (PRMPA), which allowed the government to take possession and control of the Nixon papers constituted a per se taking of Mr. Nixon's personal property and required just compensation).

[40] *See* E. Enters. v. Apfel, 524 U.S. 498, 537 (1998) (holding that requiring Eastern to pay "the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised" was a taking).

[41] Judicial review of administrative decisions is stricter than review of decisions that are legislative in nature. *See* Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 468 (7th Cir. 1988).

[42] *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2600 (2013) (citing Brown v. Legal Found., 538 U.S. 216, 235 (2003) (stating that "when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a 'per se [takings] approach' is the proper mode of analysis")). For a very similar approach, *see* Colorado's Regulatory Impairment of Property Rights Act, COLO. REV. STAT. §§ 29-20-201 to 29-20-205 (2008), which is described and interpreted in Wolf Ranch, LLC v. City of Colo. Springs, 207 P.3d 875, 878–79 (Colo. App. 2008) (explaining that the Act was enacted to codify federal and state constitutional protections against regulatory takings like those in *Nollan* and *Dolan* and is triggered only if 1) the action imposes conditions upon the grant of land use approval and 2) either requires the landowner to dedicate real property "or pay money or provide services to a public entity in an amount that is determined on an individual and discretionary basis").

requirement,[43] but not taxes, should be subject to review under state law standards, which range from a reasonableness test to more stringent tests under statutory or judicial determinations. A majority of states apply the dual rational nexus test to impact fees. This test was developed by the Wisconsin Supreme Court in *Jordan v. Village of Menomonee Falls*,[44] and has been described as two steps: 1) there must be a rational nexus "'between the need for additional capital facilities and the growth in population generated by the subdivision,'" and 2) a rational nexus "'between the expenditures of the funds collected and the benefits accruing to the subdivision.'"[45] While this test may be similar to the *Nollan/Dolan* test, which requires that there be an essential nexus and proportionality between the exaction requested and the impact caused by the development sought, the dual rational nexus test requires that the impact fee does not exceed the cost of the infrastructure required by the development and that the development receives a benefit from the infrastructure.[46]

The dual rational nexus test is aimed at preventing the government from using legislative fees instead of taxes, which it may not have the power to impose, to support the community infrastructure by burdening only the newcomers without an associated benefit to those being burdened. This test for impact fees seeks to ensure that the money collected through legislative fees is actually spent to address the impact on infrastructure allegedly caused by the development, instead of being placed in a general revenue account. The *Nollan/Dolan* test was developed to prevent the government from individually exacting physical or monetary concessions from a developer during the permitting process and aims to prevent the government from essentially extorting property from developers that is not related to the development's actual impact. While the difference between these tests may not yield a different result, states should have the freedom to maintain the dual rational nexus test or any other level of scrutiny they deem appropriate for reviewing challenges to legislative action.

In the absence of a state standard of review, legislatively enacted impact fees challenged in federal court should be analyzed under the traditional rational basis test for land-use regulation.[47] Even assuming that a legislatively enacted impact fee can pass a deferential rational basis test or the dual rational nexus test, landowners can still challenge these fees as legislation that has gone too far and assert a takings challenge for evaluation under the *Penn Central* factors, which examine the severity

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[43] *See, e.g.*, Utah Code Ann. § 11-36a-102 (West 2012) ("'Impact fee' means a payment of money imposed upon new development activity as a condition of development approval to mitigate the impact of the new development on public infrastructure.").

[44] 137 N.W.2d 442 (Wis. 1965).

[45] Rosenberg, *supra* note 22, at 225–26 (quoting Hollywood, Inc. v. Broward Cnty., 431 So. 2d 606, 611–12 (Fla. Dist. Ct. App. 1983) (noting that the second prong of the test will not be satisfied unless "the ordinance . . . specifically earmark[s] the funds collected for use in acquiring capital facilities to benefit the new residents")).

[46] Rosenberg, *supra* note 22, at 260.

[47] FISCHEL, *supra* note 1, at 37 (observing the resistance of federal courts to get involved in litigating land use regulations because "the reasonableness of each party's claims is difficult to assess without local knowledge that is difficult to transmit to higher courts").

of the impact on the property owner, the interference with the owner's investment-backed expectations, and the character of the government action.[48] Economically, the regulatory impact on the property owner is the same, regardless of whether it is a legislative or adjudicative action, and is subject to challenge as a regulatory taking. However, applying heightened scrutiny to these actions, instead of a rational basis review, is justified when there is a potential for government to misbehave. Accepting the Supreme Court's "attempt to supervise bargaining between regulators and landowners in *Nollan*, *Dolan*, and *Koontz*,"[49] the decision by the *Koontz* majority to subject monetary exactions to greater scrutiny under *Nollan/Dolan* is consistent with the state courts' historic struggle to police the exercise of discretion in the land-use field.[50] This Article distinguishes the level of judicial scrutiny required for this type of individualized, monetary exaction from that of legislatively enacted impact fees.

## II. LEVELS OF SCRUTINY CONTROLLING ABUSE OF POWER

The starting premise for judicial review of local government land-use regulation is that the use of police power is presumed to be constitutionally valid.[51] This traditional judicial deference may be modified, as it was in the *Dolan* decision, in order to monitor adjudicative decisions.[52] Certain government land-use actions may go astray from the rule of law because they are adjudicated or negotiated through individualized, case-by-case decision-making.[53] Professors Fennell and Peñalver examine these deviations in the exactions context and determine that because of the concern about arbitrariness, favoritism, and corruption, "the Court might be understood [in its exaction decisions] as attempting to structure bargaining between governments and developers in ways that increase the conformity of that

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[48] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[49] *See* FISCHEL, *supra* note 1, at 46 (concluding that this supervision "does not appear to be a helpful way to rationalize the web of local regulation").

[50] *See id.* at 4 (noting that "[z]oning is the product of state law" and common-law adjudication has promoted "[c]ross-state similarities" that has "generated a national framework for zoning"); *see also* Robert C. Ellickson, *Federalism and* Kelo*: A Question for Richard Epstein*, 44 TULSA L. REV. 751, 762 (2009) ("[S]tate courts, not federal courts, should be centrally responsible for limiting eminent domain abuses by state and local agencies.").

[51] Rosenberg, *supra* note 22, at 241 (citing Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926)).

[52] *Id.* (citing Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994) (stating that because the decision to condition the building permit was adjudicative in nature, the burden rests on the city to prove validity)).

[53] Fennell & Peñalver, *supra* note 20, at 312 (referencing Lon Fuller's "eight ways that state action may deviate from the rule of law. Those are: (1) a failure to generate generally applicable rules ('generality'), 'so that every issue must be decided on an ad hoc basis;' (2) a failure to publicize the law; (3) excessive use of retroactive legislation; (4) the use of rules that are not intelligible; (5) the enactment of rules that contradict one another; (6) use of rules that are beyond the power of the regulated party to follow; (7) changing rules too frequently; and (8) permitting 'a failure of congruence between the rules as announced and their actual administration'").

bargaining to the formal requirements of the rule of law."[54] Concerns about excessive government discretion and the potential for abuse may justify heightened scrutiny of exactions, but these concerns also support state-law standards of increased scrutiny over administrative decisions, spot zoning, contract zoning, piecemeal rezoning, variances and conditional uses, and in some states, the standard of review for due process claims.[55]

In *Exactions Creep*, Fennell and Peñalver focus on exactions and only lightly touch upon the state-law standards.[56] They offer several alternatives for a path toward addressing the "confused and unsustainable state" of exactions and takings jurisprudence resulting from the Court's decision in *Koontz*.[57] These alternatives include 1) relying on the legislative/adjudicative distinction to determine heightened scrutiny; 2) applying heightened scrutiny to everything except taxes and fees; 3) applying other approaches to determine whether heightened scrutiny will be triggered, such as looking at the nature of the burden itself, distinguishing between payments to the government and expenditures to your own property, and reviewing the multiple options presented by the government; 4) applying heightened scrutiny to all land-use regulations; or 5) removing exactions from the takings analysis and instead analyzing them under substantive due process or based upon state-law doctrines.[58]

This Article advocates for a hybrid approach that employs several of the alternatives presented by Fennell and Peñalver. It uses the legislative/adjudicative distinction and relies upon state land-use doctrines to fill the interstices between current federal takings and exaction law and questions unanswered by *Koontz*.[59] In support of this approach, Part II discusses in detail the various state law doctrines and some federal law standards that are applied to land-use actions to determine whether judicial scrutiny of government action should be deferential or require heightened scrutiny. This Part also addresses the rudiments of land-use law, including: (A) legislative versus administrative actions; (B) spot zoning challenges and conformity to the general plan; (C) the impermissible delegation of legislative power; (D) neighborhood zoning and consent requirements, initiative and referendum authority, and how the people can also "behave badly" through ballot-box zoning; (E) eminent domain challenges; and (F) facial versus applied challenges, and the challenges to regulatory land-use actions that impact First Amendment rights, including religious exercise. The established and underlying framework of land-use law has, at its roots, the desire to prevent unfair dealing and

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[54] *Id.* at 24.
[55] *Id.* at 59–60.
[56] *Id.*
[57] *See id.* at 46–60.
[58] *Id.*
[59] *See* Rosenberg, *supra* note 22, at 242–43 (noting that state law adequately limits development exactions and "remains as the main source of policy and legal guidance for impact fee practices[,]" allowing states to control their own policies).

abuse that may result when government officials have too much discretion and stray from the rule of law.

### *A. The Legislative vs. Administrative Distinction*

Legislative action in local government has traditionally received strong deference when subjected to judicial challenge. The challenger has the burden of showing that the government entity did not have a rational basis for exercising its police power to promote the health, safety, morals, and general welfare of the community.[60] This deference is given because legislative action generally affects larger areas of the community without regard to who owns the property interests being regulated. In addition, legislative actors are subject to the electorate voicing support or criticism.[61]

Administrative, also called adjudicative or quasi-judicial, actions tend to affect individual landowners and are, therefore, considered susceptible to government favoritism or discrimination.[62] While the government entity is still held to providing a rational basis for its decision, it has the burden of showing that substantial evidence supported its decision.[63] When defending legislative actions, the government need only supply a rational basis for its action, even if the rationale is presented for the first time at trial.[64] Conversely, when defending administrative actions, the government must show substantial evidence of a rationale at the time the action was originally taken.[65]

Zoning regulation is a legislative process and receives deferential treatment by the courts.[66] Rezoning is typically considered legislative in nature, but there are some states that require closer scrutiny and treat it as administrative if it involves a

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[60] *Euclid*, 272 U.S. at 395–96.

[61] Rosenberg, *supra* note 22, at 219.

[62] While this Article groups administrative and quasi-judicial decisions together for purposes of distinguishing these actions from legislative action, it should be noted that administrative decisions may be considered ministerial or nondiscretionary action that may not require a hearing, but that quasi-judicial actions do require discretion and thus will require a hearing. *See* DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 161 (6th ed. 2012) (noting that other consequences such as government immunity may follow the determination of whether a decision is administrative or quasi-judicial).

[63] The requirement that administrative decisions be "supported by substantial evidence" is also asserted in federal administrative law cases. T-Mobile S., LLC v. City of Roswell, Ga., 135 S. Ct. 808, 818–19 (2015) (holding that federal administrative law doctrines apply to state and local governments in and under the Federal Communications Act, and local governments have power over siting and zoning of cell towers, but must meet certain federal limitations, including the requirement to support its denial of wireless infrastructure requests in a writing supported by substantial evidence).

[64] F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

[65] United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963).

[66] Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565, 571 (1980).

single landowner, or small number of landowners.[67] Rezoning that individually affects landowners, either positively or negatively, can also be challenged as "spot zoning," discussed below, and may require increased scrutiny.[68]

The grant or denial of a conditional-use permit or a variance request will be treated as administrative and requires substantial evidence in the file to support the decision made by the government.[69] In many municipalities, there will be different governmental bodies making either the legislative or the administrative decisions. City councils will serve as the legislative bodies, and boards of adjustment or planning commissions may serve as the administrative entities. Courts sometimes look to the body making the decision to determine whether it was legislative or administrative in nature, but in some regions the same governmental body, most likely the city council, will make all of the decisions. Thus, courts must look to both the nature of the government body making the decision and to the nature of the decision itself and whether it impacts an individual landowner or landowners in general.[70]

While many courts have recognized the distinction between legislative and administrative actions, some courts and scholars have challenged this distinction and have supported increasing the scrutiny of government decision-making regardless of the classification.[71] Nevertheless, the Supreme Court in both *Dolan* and *Lingle*

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[67] *Id.*

[68] *See infra* Section II.B.

[69] *Arnel*, 620 P.2d at 569.

[70] *See* 75 Acres, LLC v. Miami-Dade Cty., Fla., 338 F.3d 1288, 1296 (11th Cir. 2003) (contrasting the Second and Seventh Circuit tests for determining whether an action is legislative or adjudicatory).

[71] *See* Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 640–41 (Tex. 2004) (noting that despite the justification given by the California Supreme Court in San Remo Hotel v. City & Cty. of S.F., 41 P.3d 87 (Cal. 2002), for applying the *Dolan* standard to adjudicative decisions only, the Texas Supreme Court is "not convinced" that a "workable distinction can always be drawn between actions denominated adjudicative and legislative"); James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397, 410 (2009) (noting difference between legislative and administrative actions is negligible); Steven J. Eagle, Del Monte Dunes, *Good Faith, and Land Use Regulation*, 30 ENVTL. L. REP. 10100, 10104 (2000) (stating that there is difficultly in distinguishing legislative from administrative actions); Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487, 488–89 (2006) (noting that no constitutional difference exists between legislative and administrative takings); Gideon Kanner, *Tennis Anyone? How California Judges Made Land Ransom and Art Censorship Legal*, 25 REAL EST. L.J. 214, 230 (1997) (discussing the *Ehrlich* decision and criticizing the view that *Nollan* and *Dolan* should not apply if the exaction is imposed by ordinance, rather than by an individualized decision, reasoning that "the constitutionality of an exaction would depend not on its legitimacy or its impact, but only on the identity of the municipal body demanding it"); Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 511, 537–39 (2012) (noting the difficulty of "drawing a line between 'legislative' and 'adjudicative' exactions" and that the *Nollan* and *Dolan* facts involve legislative, not adjudicative decisions); Timothy M. Mulvaney, *Proposed Exactions*, 26 J. LAND USE & ENVTL. L. 279, 288–89 (2011) (stating that the nexus and proportionality of legislative and administrative tests is subject to debate); *see also* Parking Ass'n of Ga., Inc. v. City of

has endorsed this distinction between legislative and adjudicative land-use regulations.[72] The Court in *Dolan* distinguished the land-use regulations it had upheld in its earlier decisions in *Village of Euclid, Ohio v. Ambler Realty Co.*,[73] *Pennsylvania Coal Co. v. Mahon*,[74] and *Agins v. City of Tiburon*,[75] from the unconstitutional conditions imposed on the landowners in *Nollan* and *Dolan* based on the fact that its earlier decisions "involved essentially legislative determinations classifying entire areas of the city, whereas here [*Dolan*] the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel."[76] The Court in *Lingle* found this distinction relevant when it described its exactions jurisprudence from "*Nollan* and *Dolan* as involving 'adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit.'"[77]

A landowner who complains of being treated unfairly by local land-use officials will typically frame a judicial challenge as a violation of substantive due process.[78] Federal courts are generally unfriendly to such challenges, as expressed by Judge Posner in the Seventh Circuit case *Coniston Corp. v. Village of Hoffman Estates*.[79]

> This case presents a garden-variety zoning dispute dressed up in the trappings of constitutional law—a sure sign of masquerade being that the plaintiffs do not challenge the constitutionality of the zoning ordinances of the Village of Hoffman Estates but argue rather than [sic] the Board of Trustees had no authority under those ordinances to reject their site plan once the Village Plan Commission had approved it. If the plaintiffs can get us to review the merits of the Board of Trustees' decision under state law, we cannot imagine what zoning dispute could not be shoehorned into federal court in this way, there to displace or postpone consideration of some worthier object of federal judicial solicitude. Something more is necessary than dissatisfaction with the rejection of a site plan to turn a

Atlanta, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting) ("The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.").

[72] *See* Mulvaney, *Exactions for the Future*, *supra* note 71, at 533–34.

[73] 272 U.S. 365 (1926).

[74] 260 U.S. 393 (1922).

[75] 447 U.S. 255 (1980).

[76] Dolan v. City of Tigard, 512 U.S. 374, 385 (1994); *see also* Mulvaney, *Exactions for the Future*, *supra* note 71, at 533–34 (noting that "the Court strongly implied—if not expressly declared—that the strictures of *Dolan* (and by implication *Nollan*) are inapplicable to exactions that are part of a community plan and broadly applicable").

[77] Mulvaney, *Exactions for the Future*, *supra* note 71, at 534 (quoting Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 546–47 (2005)).

[78] *See* FISCHEL, *supra* note 1, at 21 (discussing the highly deferential view of substantive due process challenges with the test being "whether the regulation has a rational basis or a reasonable relation to the traditional police-power purposes of zoning, promotion of the health, safety, and general welfare of the community").

[79] 844 F.2d 461 (7th Cir. 1988).

> zoning case into a federal case; and it should go without saying that the something more cannot be merely a violation of state (or local) law. A violation of state law is not a denial of due process of law.[80]

Judge Posner also discussed the legislative/administrative distinction and noted that this "difference is critical" because judicial review of legislative decisions is much broader than the review of zoning decisions that are adjudicative in nature.[81] In addition to the Seventh Circuit approach to land-use substantive due process claims, other federal courts have given great deference to zoning decisions, requiring the plaintiff to show that the decision was outrageously arbitrary or so unfair that it "shock[s] the conscience of the court."[82]

In *Lingle v. Chevron USA Inc.*,[83] the Court corrected its earlier confusion between takings claims and substantive due process challenges,[84] so that the government need only show that it has acted rationally to defeat a due process challenge. Litigants who believe that unfair or arbitrary regulation has devalued their property will seek just compensation as a taking rather than invalidation under due process.[85] Such a takings challenge to legislative action will be analyzed using the *Penn Central* factors (severity of the impact, interference with investment-backed expectations, and character of the government action),[86] unless the property owner

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[80] *Id.* at 467 (citations omitted).

[81] *Id.* at 468; *see also* FISCHEL, *supra* note 1, at 22 (noting that administrative decisions are scrutinized "more carefully because, goes one theory, parties who lose from an administrative decision have fewer political roads to correct them than they do in legislative matters").

[82] *See* Cenergy-Glenmore Wind Farm #1, LLC v. Town of Glenmore, 769 F.3d 485, 488 (7th Cir. 2014) ("On the issue of arbitrariness, we have said that a land-use decision must 'shock the conscience' to run afoul of the Constitution. *Bettendorf v. St. Croix County*, 631 F.3d 421, 426 (7th Cir. 2011). We also have suggested that the action must have been 'arbitrary and capricious,' *Centres*, 148 F.3d at 704, or 'random and irrational,' *General Auto Service Station*, 526 F.3d at 1000. In yet another formulation, the Supreme Court has explained that a land-use decision must be arbitrary to the point of being 'egregious' to implicate substantive due process. *Cuyahoga Falls*, 538 U.S. at 198, 123 S. Ct. 1389. These standards should not be viewed as distinct, at least in the land-use context. In *Cuyahoga Falls*, the Supreme Court relied upon *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L.Ed.2d 1043 (1998), for the proposition that 'only the most egregious official conduct can be said to be arbitrary in the constitutional sense' (internal quotation marks omitted), and *Lewis itself*, *see* 523 U.S. at 855, 118 S. Ct. 1708, applied the 'shock the conscience' standard."); DANIEL K. MANDELKER, LAND USE LAW §§ 2.39, 2.46 (5th ed. 2003 & Supp. 2005) (citing, e.g., Natale v. Town of Ridgefield, 170 F.3d 258, 259 (2d Cir. 1999) (holding it is "outrageously arbitrary as to constitute a gross abuse of governmental authority"); Eichenlaub v. Twp. of Ind., 385 F.3d 274, 286 (3d Cir. 2004) (stating harassment, delays, and improper application of subdivision regulations does not shock the conscience).

[83] 544 U.S. 528 (2005).

[84] *Id.* at 548.

[85] *See* FISCHEL, *supra* note 1, at 25 (noting that "[t]he case that is now regarded as the lodestar of regulatory takings, Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922), was originally discussed in the legal literature as a due process case").

[86] Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978).

can show that a per se taking has occurred under either *Loretto v. Teleprompter Manhattan CATV Corp.*,[87] which requires a permanent physical invasion of real property, or *Lucas v. South Carolina Coast Council*,[88] which addresses regulation that deprives owners of all economically beneficial use of their real property. In *Lingle*, the Court addressed a takings challenge to a statutory rent cap on leases of gasoline service stations and determined that one of the two prongs of a takings test developed by the Court in *Agins v. City of Tiburon*[89] was not an appropriate test for a taking.[90] Whereas in *Agins*, the Court declared that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not *substantially advance* legitimate state interests . . . or *denies an owner economically viable use* of his land,"[91] the *Lingle* Court reclassified the "substantially advances" prong from a takings test to a substantive due process claim. However, the Court retained the *Nollan/Dolan* takings test for exactions even though it was originally developed from the *Agins* "substantially advances" takings test.[92] This remaining incongruity gives fodder to those who argue that *Nollan*, *Dolan*, and *Koontz* should be treated as substantive due process, not takings, challenges.[93]

The *Koontz* decision held that individualized monetary exactions would be subject to *Nollan/Dolan*, but did not resolve the question of whether legislatively enacted monetary fees would also be scrutinized under this higher standard.[94] The controversy over the legislative/administrative distinction remains,[95] even though it has been observed that:

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[87] 458 U.S. 419 (1982).

[88] 505 U.S. 1003, 1015 (1992).

[89] 447 U.S. 255 (1980).

[90] 544 U.S. 528, 548 (2005).

[91] 447 U.S. at 260 (emphases added).

[92] 544 U.S. at 547–48.

[93] Mulvaney, *Exactions for the Future*, *supra* note 71, at 543–48 (discussing the relationship between due process and takings review). *See generally* Fennell & Peñalver, *supra* note 20, at 291 (distinguishing takings challenges and due process challenges).

[94] 133 S. Ct. 2586, 2603 (2013).

[95] *See* Eagle, *supra* note 24, at 6 (observing that the major issue "left unanswered after *Koontz* is whether the doctrine applies not only to adjudicative decisions by administrators but also to legislative determinations"); Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 754–55 (2007) (noting the need for heightened scrutiny because there is a greater risk of unfair bargaining with individualized exactions than with legislative assessments); John Martinez, *What Color Is the Number Seven? Category Mistake Analysis and the "Legislative/Non-Legislative" Distinction*, 29 BYU J. PUB. L. 1, 11–20 (2014) (discussing the difficulty in appropriately distinguishing between quasi-judicial and quasi-legislative situations and examining the theory of category mistake in using the legislative/nonlegislative distinction in the exactions setting); Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 266 (2000) (observing that perhaps lower courts have been confused in interpreting *Dolan* because of the difficulty of distinguishing legislative from adjudicative decisions).

> With near uniformity, lower courts applying *Dolan* to monetary exactions have done so *only* when the exaction has been imposed through an adjudicatory process; they have expressly declined to use *Dolan*'s heightened scrutiny in testing development or impact fees imposed on broad classes of property pursuant to legislatively adopted fee schemes.[96]

As previously noted, not everyone has accepted the relevance of the distinction between legislative and individualized government actions in all situations.[97] For example, in *Horne v. Department of Agriculture*,[98] the Ninth Circuit applied the *Nollan/Dolan* test to a raisin marketing restriction that was legislatively enacted and directed to all who sent raisins into the stream of commerce.[99] The court noted that "[i]ndividualized review makes sense in the land-use context because the development of each parcel is considered on a case-by-case basis[,]" but it applied the *Nollan/Dolan* test to the legislative action in the raisin case, partly because "raisins are fungible (as opposed to land, which is unique)."[100] In an earlier footnote, the court explained that:

> We do not mean to suggest that all use restrictions concerning personal property must comport with *Nollan* and *Dolan*. Rather, we hold *Nollan* and *Dolan* provide an appropriate framework to decide *this* case given the

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[96] Rogers Mach., Inc. v. Wash. Cty., 45 P.3d 966, 977 (Or. Ct. App. 2002) (emphasis in original); *see also* McClung v. City of Sumner, 548 F.3d 1219, 1227–28 (9th Cir. 2008) (holding alternatively that if it did constitute a monetary exaction it would not be subject to *Nollan/Dolan*, subjecting a storm pipe requirement to *Penn Central* review rather than *Nollan/Dolan* test because regulation does not create a monetary exaction, but instead "provides an across-the-board requirement for all new developments"); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696 (Colo. 2001) (noting that "[o]ne critical difference between a legislatively based fee and a specific, discretionary adjudicative determination is that the risk of leveraging or extortion on the part of the government is virtually nonexistent in a fee system"); Wolf Ranch, LLC v. City of Colo. Springs, 207 P.3d 875, 879–80 (Colo. App. 2008), *aff'd*, 220 P.3d 559 (Colo. 2009) (discussing that drainage requirements imposed on landowners were legislatively determined so that the Regulatory Impairment of Property Rights Act requiring *Nollan/Dolan* scrutiny was not applicable because the monetary fee was not "determined on an individual and discretionary basis").

[97] *See* Parking Ass'n of Ga., Inc. v. City of Atlanta, Ga., 515 U.S. 1116, 1116–18 (1995) (Thomas, J., dissenting) (noting that "lower courts are in conflict over whether *Dolan*'s test for property regulation should be applied in cases where the alleged taking occurs through an Act of the legislature" and eschewing the "distinction between sweeping legislative takings and particularized administrative takings"); B.A.M. Development, L.L.C. v. Salt Lake Cty., 128 P.3d 1161, 1168–69, 1171 (Utah 2006) (noting that although recent legislation provides that all exactions, whether legislative or adjudicative, must be subject to the rough proportionality test derived from *Nollan/Dolan*, Utah Code Ann. § 17-27a-507 (Supp. 2005) could not be applied retroactively and "we are hard pressed to find a reason to assume that the legislative view of the proper scope of the rough proportionality test would have been different before section 17-27a-507 went into effect").

[98] 750 F.3d 1128 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

[99] *Id.* at 1144.

[100] *Id.*

> significant but not total loss of the Hornes' possessory and dispositional control over their reserved raisins.[101]

The court determined that requiring all raisin producers to reserve a certain percentage of their crop in order to regulate prices, was not a seizure of their crops, but was instead a *condition* on the use of their crops, subject to *Nollan/Dolan*.[102]

The U.S. Supreme Court reversed the Ninth Circuit decision in *Horne* and held that the government's duty to pay just compensation for a physical per se taking applies to personal property as well as to real property, and that the Raisin Marketing Order at issue was a per se taking under *Loretto*.[103] The Court's decision in *Horne* makes it clear that there is no distinction between real and personal property for determining if the private property is subject to a per se taking. The more appropriate distinction should be between what is considered a confiscation of real or personal property and what is considered a regulation of real or personal property.

The legislation at issue in *Loretto* was challenged as a regulatory taking, but because of the nature of the action in requiring a permanent and physical occupation of the property, the Court held it to be a per se taking, a *confiscation*, not subject to the *Penn Central* balancing factors.[104] A similar distinction between confiscation and regulation of personal property was evident in the D.C. Circuit's decision in *Nixon v. United States*,[105] which held that the Presidential Recordings and Materials Preservation Act ("PRMPA") was a per se taking of President Nixon's personal property because the government took complete possession and control of Nixon's papers.[106] The court noted that "[a]lthough a great public interest may justify a taking, it does not convert the taking into mere regulation."[107] The court distinguished between a regulation that might affect Nixon's property rights and the application of the PRMPA statute, which took away his right to exclude, and left Nixon with only a few rights in the materials that were "so fractured that his original property interest has been destroyed."[108]

In the context of land-use permitting, the distinction between confiscation and regulation of real property is less clear. In *Nollan,* the Court determined that the easement sought by the California Coastal Commission to cross the Nollans' beachfront property was a "'permanent physical occupation'" under the *Loretto* rule of per se taking because the public is given "a permanent and continuous right to

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[101] *Id.* at 1141 n.18.

[102] *Id.* at 1144.

[103] Horne v. Dep't of Agric., 135 S. Ct. 2419, 2427–28 (2015) (noting that direct appropriations of real property and personal property must be treated alike under the Fifth Amendment).

[104] Loretto v. Teleprompter CATV Corp., 458 U.S. 419, 438–40 (1982).

[105] 978 F.2d 1269 (D.C. Cir. 1992).

[106] *Id.* at 1284.

[107] *Id.*

[108] *Id.*

pass to and fro."[109] Requiring the Nollans to give the state an easement would be a confiscation of property requiring just compensation.[110] However, in the context of the permit process, the Court addressed the question of whether requiring the easement as a condition for granting a land-use permit would still result in a taking.[111] Because the Coastal Commission could refuse to issue the permit if the development would interfere with the public's right to use the beach, the Court agreed with the Commission that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."[112] The *Nollan/Dolan* framework was based on the concept that a physical exaction is a per se taking under *Loretto*, but because the exaction is part of a permitting process whereby the government could refuse to grant the permit, the government can instead place conditions on the permit in order to offset the externalities created by the development.

The *Nollan/Dolan* test was developed to increase the scrutiny for physical exactions because of the unconstitutional conditions doctrine and the concern about individual permitting and the potential for governmental abuse of power.[113] *Koontz* extended *Nollan/Dolan* scrutiny to monetary exactions, which seems appropriate because even though it is not a physical invasion of real property, money is being sought in lieu of the physical exaction. The *Koontz* Court expressed concerns about the ease by which land-use permitting officials could "evade the limitations of *Nollan* and *Dolan*" if review is not applied to in-lieu exactions.[114]

The Ninth Circuit should not have applied the *Nollan/Dolan* analysis in *Horne* based on the reasoning of *Koontz*, but instead should have determined whether the Raisin Marketing Order was a confiscation of raisins or a regulation of raisin handlers. Based on the framework that has been established for land-use regulation, applying the *Nollan/Dolan* test to a personal property takings challenge would be appropriate only if there were an administrative permitting process whereby the government could refuse approval to allow a use of personal property (without such refusal constituting a taking), but instead condition its approval on the property owner's willingness to turn over personal property in exchange for the permit. *Horne*, on the other hand, did not involve an exaction—either physical or

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[109] Nollan v. California Coastal Comm'n, 483 U.S. 825, 831–32 (1987).

[110] *Id.* at 841–42.

[111] *Id.* at 834.

[112] *Id.* at 835–36.

[113] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005) (quoting Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (noting that *Nollan* and *Dolan* "involve a special application of the 'doctrine of unconstitutional conditions,' which provides that 'the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property'")).

[114] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2599 (2013).

monetary—and it is unrelated to land-use regulation with the accompanying concerns about abuse of the government's discretion in granting permits.[115] Instead, as held by the Supreme Court, the Raisin Marketing Order constituted a confiscation of the product and resulted in a per se taking under *Loretto*.[116] If the Order had been determined to be a regulation of personal property, the takings challenge would have been analyzed using the *Penn Central* factors examining the severity of the impact, the interference with investment-backed expectations, and the character of the government action, and not *Nollan/Dolan* because the raisins were not being regulated as part of a permitting process.

The Ninth Circuit's approach in *Horne* of treating a legislatively enacted restriction on personal property as a monetary exaction subject to the *Nollan/Dolan* test was also applied to an affordable housing regulation in *Levin v. City and County of San Francisco*.[117] In *Levin*, the federal district court held that an ordinance requiring property owners to pay a lump sum amount to displaced tenants before they are permitted to withdraw rent-controlled property from the rental market was facially unconstitutional as a taking of property because it failed to meet the *Nollan/Dolan* standard for monetary exactions.[118] The court was not persuaded by the City's argument that *Nollan/Dolan* analysis does not apply to a facial takings claim nor does it apply to legislatively imposed exactions.[119] Instead, the *Levin* court referenced the Ninth Circuit's *Horne* decision as "reinforc[ing] the applicability of the *Nollan/Dolan* framework to facial reviews of legislative exactions."[120] In contrast, the California Supreme Court in *San Remo Hotel, L.P. v. City and County of San Francisco*[121] (another case involving affordable housing in San Francisco) noted:

> While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special

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[115] Horne v. Dep't of Agric., 135 S. Ct. 2419, 2430–31 (distinguishing *Ruckelshaus v. Monsanto Co.*, *467 U.S. 986 (1984)* on the basis that Monsanto received a "valuable Government benefit" to sell hazardous chemicals in exchange for turning over safety information, including trade secret property interests; whereas in *Horne*, as in *Nollan*, the takings at issue were not part of a voluntary exchange, but were instead "basic and familiar uses of property"—the right to "[s]ell[] produce in interstate commerce" and "the right to build on one's own property").

[116] *Horne*, 135 S. Ct. at 2430.

[117] 71 F. Supp. 3d 1072, 1083 (N.D. Cal. 2014).

[118] *Id.* at 1084 (finding that the "Ordinance on its face fails both the essential nexus and rough proportionality tests").

[119] *Id.* at 1083 n.4.

[120] *Id.* at 1083–84 n.4.

[121] 41 P.3d 87 (Cal. 2002).

> judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.[122]

San Francisco may have overreached in its affordable-housing legislation challenged in *Levin*, but the takings challenge should have been analyzed using *Loretto*, if the required payment to displaced tenants constituted a confiscation,[123] or using the *Penn Central* factors if the housing ordinance is considered to be regulation.

The *Levin* court also dismissed the "City's reliance on *McClung v. City of Sumner*,[124] . . . for the argument that *Nollan/Dolan* does not apply to legislative conditions," by noting *Koontz*'s abrogation of "*McClung*'s holding that *Nollan/Dolan* does not apply to monetary exactions." [125] In *McClung*, the landowners needed a permit to develop a Subway sandwich shop and parking lot, but the existing storm drain was not sufficient.[126] The City ordinance required all landowners to install a twelve-inch storm drain, but the City offered the McClungs a reduction of permitting fees if they would install a twenty-four-inch storm drain instead.[127] The Ninth Circuit considered the ordinance requiring all landowners to install a twelve-inch storm drain to be a legislative act, subject to the *Penn Central* test for any takings claim analysis, because it was a generally applicable development requirement to address flooding.[128] The court held that the McClungs impliedly contracted to install the twenty-four-inch drain, so it was unnecessary to decide whether this individualized request would be subject to *Nollan/Dolan* scrutiny.[129] It also disagreed with the landowners' characterization of the twelve-inch drain requirement as a monetary exaction, but stated that even if it could be so characterized, monetary exactions are not subject to the *Nollan/Dolan* test.[130]

Unfortunately, it is not clear from the *Koontz* decision whether *McClung* was abrogated because of its statement that monetary exactions are not subject to *Nollan/Dolan* or because it distinguished between legislative and administrative actions in order to determine the review standard.[131] The *Levin* court rejected the

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[122] *Id.* at 105.

[123] *See* Horne v. Dep't of Agric., 135 S. Ct. 2419, 2430. *But see Levin*, 71 F. Supp. 3d at 1080–81 (noting that *Loretto* is not applicable because "the government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land").

[124] 548 F.3d 1219 (9th Cir. 2008).

[125] 71 F. Supp. 3d at 1084 n.4.

[126] 548 F.3d at 1222.

[127] *Id.* at 1222–23.

[128] *Id.* at 1227.

[129] *Id.* at 1228.

[130] *Id.*

[131] *See Koontz*, 133 S. Ct. at 2594 ("[A] division of authority over whether a demand for money can give rise to a claim under *Nollan* and *Dolan*, and sided with those courts that have said it cannot." (comparing, e.g., *McClung*, 548 F.3d at 1228, with Ehrlich v. City of

significance of the legislative distinction based on *Koontz*'s abrogation of *McClung*'s holding that *Nollan/Dolan* does not apply to monetary exactions.[132] However, the *Koontz* decision itself points out the division of authority over monetary exactions and compares *McClung* to the *Ehrlich v. City of Culver City*[133] decision.[134] In *Ehrlich*, the City required the developer to provide funds to mitigate the loss of public recreation in exchange for permitting the conversion of a private tennis club and recreational facility to a condominium development.[135] The California Supreme Court determined that monetary exactions must be scrutinized under the *Nollan/Dolan* standard and remanded to the City the question of whether the monetary exaction was justified.[136] However, it did uphold an impact fee for art in public places as a regulatory fee not subject to *Nollan/Dolan* review.[137]

In contrast to *McClung*, the *Ehrlich* court did subject monetary exactions to the *Nollan/Dolan* test, but *Ehrlich* also used the legislative/administrative distinction to differentiate between the legislative fees for art that were not subject to *Nollan/Dolan* scrutiny,[138] and the administrative request for a monetary exaction for recreation that was subject to *Nollan/Dolan* scrutiny.[139] If this issue is presented to the Ninth Circuit at some point in the future, further clarity—or confusion—may be introduced into this controversy.[140] Not only will the Ninth Circuit need to reexamine its application of *Nollan/Dolan* to legislation involving personal property after the U.S. Supreme Court's decision in *Horne*, but it will also need to take into consideration the California Supreme Court's holding in *California Building*

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Culver City, 911 P.2d 429, 444 (Cal. 1996) (citing Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 640–641 (Tex. 2004)).

[132] 71 F. Supp. 3d at 1084 n.4.

[133] 911 P.2d 429 (Cal. 1996).

[134] *See Koontz*, 133 S. Ct. at 2594.

[135] *Erhlich*, 911 P.2d at 434–35 (holding that this monetary exaction was imposed after the City determined it could not afford to purchase the parcel outright for public recreation).

[136] *Id.* at 449–50.

[137] *Id.* at 450.

[138] *See id.* at 450 (agreeing with the city "that the art in public places fee is not a development exaction of the kind subject to the *Nollan–Dolan* takings analysis" and finding it "more akin to traditional land use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping requirements, and other *design* conditions such as color schemes, building materials and architectural amenities").

[139] *Id.* at 447 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. at 124) ("[I]t is not at all clear that the rationale (and the heightened standard of scrutiny) of *Nollan* and *Dolan* applies to cases in which the exaction takes the form of a *generally* applicable development fee or assessment—cases in which the courts have deferred to legislative and political processes to formulate 'public program[s] adjusting the benefits and burdens of economic life to promote the common good . . . .' But when a local government imposes special, discretionary permit conditions on development by individual property owners—as in the case of the recreational fee at issue in this case—*Nollan* and *Dolan* require that such conditions, whether they consist of possessory dedications or monetary exactions, be scrutinized under the heightened standard.").

[140] *Koontz and San Francisco Rent Control*, TAKINGSLITIGATION.COM (Oct. 26, 2014), http://takingslitigation.com/2014/10/26/koontz-and-san-francisco-rent-control/ [http://perma.cc/W7CN-7DXE].

*Industry Ass'n v. City of San Jose*,[141] which distinguished affordable housing ordinances that address specific adverse impacts caused by the developers, from legislative regulation of land use based on the broader public interest.[142] Finally, the Ninth Circuit may need to address its earlier opinion in *Commercial Builders of Northern California v. City of Sacramento*,[143] which applied *Nollan* to city legislation requiring the payment of a fee for nonresidential building permits to expand low-income housing in order to offset the burdens of low-income workers coming to the city to fill the jobs created.[144] This case was decided before the *Dolan* decision and the court found a nexus under *Nollan* between the development and fee provision.[145] The court affirmed the district court decision that the low-income housing fee was not an unconstitutional taking because there was a nexus between the fee and the impact from commercial development.[146]

The better interpretation of *Koontz*'s abrogation of *McClung* is that it was based on *McClung*'s suggestion that *Nollan/Dolan* does not apply to monetary exactions, rather than because *McClung* distinguished between legislative and administrative actions and subjected legislative actions to *Penn Central*. Indeed, the Supreme Court in *Eastern Enterprises v. Apfel*[147] observed that "economic regulation such as the Coal Act may . . . effect a taking,"[148] but should nonetheless be evaluated under the three *Penn Central* factors because the retroactive liability of the company for retired miners is not a permanent physical occupation of the company's property and does not constitute a per se taking under *Loretto v. Teleprompter Manhattan CATV Corp*.[149] As briefly discussed earlier in the Introduction, the plurality in *Eastern Enterprises v. Apfel* applied the three-factor test developed in *Penn Central* to analyze the constitutionality of the retroactive liability.[150] Noting that the *Penn Central* test was also applied to multiemployer pension plan liability in *Connolly v. Pension Benefit Guaranty Corp*.,[151] the plurality in *Eastern Enterprises* concluded "that the Coal Act's application to Eastern effects an unconstitutional taking."[152]

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[141] Cal. Bldg. Indus. Ass'n v. City of San Jose, 61 Cal. 4th 435 (Cal. 2015), *cert. denied*, 2016 WL 763863 (2016) (Thomas, J., concurring in the denial of certiorari) (noting that while "this case does not present an opportunity to resolve the conflict[]" as to "whether cities can legislatively impose exactions that would not pass muster if done administratively[,]" the Court should decide "what legal standard governs legislative ordinances" in order to resolve this uncertainty for local governments).

[142] *See* extended discussion in Part III, *infra* notes 399–411.

[143] Comm'l Builders of No. Cal. v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991).

[144] *Id.* at 873.

[145] *Id.* at 874 (noting that *Nollan* did not materially change the requirement that the legislation be "reasonably related to legitimate public purposes").

[146] *Id.* at 875–76.

[147] 524 U.S. 498 (1998).

[148] *Id.* at 523.

[149] *Id.* at 529–30.

[150] *Id.* at 529–37.

[151] 475 U.S. 211 (1986).

[152] 524 U.S. at 537.

However, Justice Kennedy, who concurred with the judgment for Eastern Enterprises based on a due process violation, dissented from the taking holding, asserting that for regulatory takings challenges there must be "a specific property right or interest . . . at stake."[153] Thus, legislatively developed economic regulation can constitute a taking, but should be analyzed under the *Loretto* standard, the three-factor *Penn Central* framework, or even as a *Lucas* per se taking if the facts justify, rather than under the *Nollan/Dolan* standard.

Recognizing the distinction between generalized legislative regulation and adjudicative administrative government action may be the key to limiting the scope of heightened judicial scrutiny over monetary fees following the *Koontz* decision. The controversy over the relevance of this distinction has existed for years before the Court's decision in *Koontz* to treat monetary exactions the same as physical exactions.[154] These conflicting views as to whether the nexus and proportionality test will apply not only to physical exactions, but to legislatively imposed fees, such as conservation restrictions and impact fees, remain following the *Koontz* decision to subject "monetary exactions" to *Nollan/Dolan* scrutiny.[155] The *Nollan/Dolan* test was developed as an exception to *Loretto* based on the bargaining nature of permitting, which would allow the government to deny the permit, so long as it does not constitute a taking under *Penn Central*, or condition the grant of the permit so long as the condition passes *Nollan/Dolan* scrutiny. The *Nollan/Dolan* test should not be applied outside the context of either physical or monetary exaction conditions imposed during the land-use permitting process.

### *B. Spot Zoning and Conformity to the General Plan*

Legislative zoning or rezoning may be challenged as "spot zoning" when the action affects a small parcel or small number of landowners in either a positive or negative way. The challenge is based on the concern that the government is targeting a particular landowner or group of landowners for either favorable or adverse treatment, unrelated to the general welfare of the community as a whole.[156] This

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[153] *Id.* at 539–44 (Kennedy, J., concurring in part and dissenting in part) (concurring with the plurality that the Coal Act's application to Eastern violates due process because of the retroactive imposition of financial liability, but dissenting from plurality's conclusion that the statute violated the Takings Clause).

[154] *See* Adam J. McLeod, *Identifying Values in Land Use Regulation*, 101 KY. L.J. 55, 70–75 (2012) (discussing judicial scrutiny over individualized assessments).

[155] Mulvaney, *Proposed Exactions*, *supra* note 71, at 287–89; *see, e.g.*, Kanner, *supra* note 71, at 230 (discussing the *Ehrlich* decision and criticizing the view that *Nollan* and *Dolan* should not apply if the exaction is imposed by ordinance, rather than by an individualized decision, reasoning that "the constitutionality of an exaction would depend not on its legitimacy or its impact, but only on the identity of the municipal body demanding it").

[156] *See, e.g.*, Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 132 (1978) (discussing the spot zoning challenge to landmark laws, which apply only to selected parcels, but finding that "landmark laws are not like discriminatory, or 'reverse spot,' zoning: that is,

distinction between legislative and administrative action is difficult to apply to zoning because there is not always a strict separation of the legislative and administrative branches. A municipality's city council may legislatively change a zoning law, but if it is tailored to specific parcels, it appears to be more administrative since such spot zoning looks more like the administratively granted zoning variance.[157]

Requiring the local government to show that its zoning actions conform to, or are consistent with, the municipality's general plan is another mechanism for controlling abuse. In takings litigation, the judiciary tends to defer to government planning efforts. Restrictions that are part of a comprehensive plan will generally not be found to be a regulatory taking.[158] Professor Timothy Mulvaney points out that this tendency to favor planning reflects that "when the political branches act comprehensively, rather than in a targeted way toward a particular individual, it is far more likely that the 'decision reflects a thoughtful, carefully considered assessment of all relevant costs and benefits.'"[159] Planning typically takes place at a community level such that catering to individual interests may be reduced by developing area-wide goals that are based on the municipality as a whole. Because of the presumed neutrality of the planning process, the government can defend against an allegation of spot zoning by showing that the action taken conforms to the general plan, which is intended to benefit the community. A spot zoning challenge can also be framed as a substantive due process violation, alleging that the government has no rational basis under its police power authority to affect individual landowners, or as an equal protection violation, arguing that the government is not treating similarly situated individuals equally.

States have adapted different approaches to resolving spot zoning challenges. For example, in California, rezoning is considered to be a quasi-legislative act, such that the government action is scrutinized under an "arbitrary or capricious or totally lacking in evidentiary support" standard of review,[160] rather than requiring the substantial evidence necessary to support an adjudicative decision. In 2014, the California appellate court in *Foothill Communities Coalition v. County of Orange*,[161] stated that "[a] spot zone results when a small parcel of land is subject to more *or less* restrictive zoning than surrounding properties"[162] and held that "the creation of an island of property with less restrictive zoning in the middle of properties with

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a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones").

[157] FISCHEL, *supra* note 1, at 22.

[158] Mulvaney, *Exactions for the Future*, *supra* note 71, at 530.

[159] *Id.* (quoting John D. Echeverria, *The Triumph of Justice Stevens and the Principle of Generality*, 7 VT. J. ENVTL. L. 22, 24 (2006)).

[160] *See* Foothill Cmtys. Coal. v. Cty. of Orange, 166 Cal. Rptr. 3d 627, 633 (Cal. Ct. App. 2014) (citing Avenida San Juan P'ship v. City of San Clemente, 135 Cal. Rptr. 3d 570, 579 (Cal. Ct. App. 2011)).

[161] *Id.*

[162] *Id.* at 635 (citation omitted) (internal quotation marks omitted).

more restrictive zoning is spot zoning."[163] The court first determined that the County Board of Supervisors' ("the Board") action to create new zoning for senior citizen housing on a single parcel of property owned by a local Diocese was spot zoning.[164] The court then concluded that this spot zoning was "in the public interest and . . . not arbitrary or capricious,"[165] and that "the Board's findings of consistency with the general plan and the North Tustin Specific Plan are supported by substantial evidence."[166]

A somewhat similar approach is taken in Arkansas, which considers rezoning to be a legislative act, subject to the arbitrary or capricious standard of judicial review. In *PH, LLC v. City of Conway*,[167] a land developer was denied a rezoning request and the Arkansas Supreme Court held that the denial did not require de novo review because rezoning was a legislative action and only administrative and quasi-judicial actions were entitled to de novo review under state statutory law.[168] The court affirmed the lower court's application of the standard for review of legislative acts that "[t]he court should affirm the city council's decision unless it was arbitrary, capricious, or unreasonable[,]" and affirmed the lower court findings, which included the finding that there was no reverse spot zoning or contract zoning at issue.[169] Addressing the developer's claim that the property was entitled to rezoning because it was "surrounded by parcels with different zoning designations," the court found that there was no reverse spot zoning because the city's decision was supported by legitimate traffic and safety concerns.[170] In addition, the court declined to determine whether contract zoning is permitted in Arkansas because even if it was not allowed, there was no support for finding improper contract zoning in this situation "where a city council considered a different, more suitable, zone designation in determining whether to approve a petition to rezone."[171] Thus, in Arkansas, rezoning will typically be considered legislative and subject to deference by the courts. This view appears to be even more deferential than California's quasi-legislative classification.

Likewise, spot zoning challenges in Pennsylvania require courts to "presume the zoning ordinance is valid and constitutional; the burden of proving otherwise is on the challenging party, who must show that the provisions are arbitrary and unreasonable, and have no relation to the public health, safety, morals, and general welfare."[172] When analyzing a spot zoning challenge, the Pennsylvania courts have

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[163] *Id.* at 637.
[164] *Id.*
[165] *Id.* at 641.
[166] *Id.*
[167] 344 S.W.3d 660 (Ark. 2009).
[168] *Id.* at 663, 666.
[169] *Id.* at 667.
[170] *Id.* at 669 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 132 (1978) (noting that "[r]everse spot zoning is 'a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones'")).
[171] *Id.* at 669–70.
[172] Penn St., L.P. v. E. Lampeter Twp. Zoning Hearing Bd., 84 A.3d 1114, 1121 (Pa. Commw. Ct. 2014) (internal quotation marks omitted).

determined that the most important factor "is whether the parcel in question is being treated unjustifiably different from similar surrounding land, thus creating an 'island' having no relevant differences from its neighbors."[173] This seems to be similar to the approach generally used for equal protection and substantive due process claims against a challenged land-use decision, which gives a high level of deference to the government action.

While states such as Arkansas, California, and Pennsylvania may subject spot zoning to a deferential standard of review as a legislative or quasi-legislative action, in many jurisdictions, a claim of spot zoning subjects the government action to increased judicial scrutiny, and courts generally look to balance the benefit to the community against the individualized impact on a landowner, either advantageous or detrimental. The size of the parcel, the number of landowners affected, and conformity with the general plan are important factors in determining whether judicial scrutiny is necessary to prevent the abuse of local power. For example, in New Jersey, a combination of factors may indicate that a land-use decision is either spot zoning or inverse spot zoning and constitutes an invalid arbitrary and capricious action.[174] These factors can include the rezoning of a parcel that makes it more difficult for a landowner to develop; the rezoning was done at the insistence of neighboring landowners; the rezoning was originally designated for a different area and is not in compliance with the comprehensive plan; and the rezoning was done without hearing from expert planners of consultants.[175] Examining these factors requires heightened scrutiny, and while New Jersey recognizes that "the role of courts in evaluating . . . [the adoption or amendment of a zoning ordinance] is 'circumscribed,'" it also appreciates that the legislative power to zone cannot be exercised arbitrarily.[176]

Some states have applied an established standard to review actions by local authorities that are challenged as illegal spot zoning. In North Carolina, for example, the fact finder must first determine if the zoning activity constitutes spot zoning.[177] Spot zoning is defined "as a zoning ordinance or amendment that 'singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to . . . relieve the small tract from restrictions to which the rest of the area is subjected.'"[178] If the zoning does constitute spot zoning, the court must decide whether "the zoning authority ma[de] a clear showing of a reasonable basis for the zoning."[179] To determine whether there

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[173] *Id.*

[174] Riya Finnegan LLC v. Twp. Council of S. Brunswick, 962 A.2d 484, 492 (N.J. 2008).

[175] *Id.*

[176] *Id.* at 489 (quoting Pheasant Bridge Corp. v. Twp. of Warren, 777 A.2d 334, 338 (2001)).

[177] *See* Etheridge v. Cty. of Currituck, 762 S.E.2d 289, 292 (N.C. Ct. App. 2014) (quoting Good Neighbors of S. Davidson v. Town of Denton, 559 S.E.2d 768, 771 (N.C. 2002)).

[178] *Id.* (internal quotation marks omitted).

[179] *Id.* (internal quotation marks omitted).

was a reasonable basis for the government's decision, the North Carolina courts consider the following factors (*aka Chrismon* factors):

> (1) "the size of the tract in question"; (2) "the compatibility of the disputed zoning action with an existing comprehensive zoning plan"; (3) "the benefits and detriments resulting from the zoning action for the owner of the newly zoned property, his neighbors, and the surrounding community"; and (4) "the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts." *Chrismon* [*v. Guilford Cty.*] . . . 370 S.E.2d [579,] 589 [(N.C. 1988)]. With these factors in mind, "the criteria are flexible, and the specific analysis used depends on the facts and circumstances of a particular case."[180]

This searching inquiry by North Carolina courts is far less deferential than that applied to local land-use decisions by California, Arkansas, and Pennsylvania courts and requires the government to "make a clear showing pursuant to any of the *Chrismon* factors that the rezoning was a reasonable spot zoning."[181]

Similar to North Carolina, South Carolina and Iowa courts evaluate spot zoning challenges by breaking the analysis into two parts.[182] First, the court determines whether the action is spot zoning, and if it is, the court must decide whether the spot zoning is valid. In South Carolina, spot zoning is defined as "the 'process of singling out a small parcel of land for use classification totally different from that of the surrounding area, for the benefit of owners of such property and to [the] detriment of other owners.'"[183] In Iowa, the courts "consider the size of the spot zoned, the uses of the surrounding property, the changing conditions of the area, the use to which the subject property has been put and its suitability and adaptability for various uses," but the most important factor is "whether the rezoned tract has a peculiar adaptability to the new classification as compared to the surrounding property."[184] For the second step, the courts in South Carolina inquire as to whether the "ordinance changes the zoning of a small area to a classification not consistent with the area," which is invalid spot zoning, or whether the zoning ordinance merely expands an existing zoning classification, consistent with the city's comprehensive

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[180] *Id.* at 292–93 (quoting Childress v. Yadkin Cty., 650 S.E.2d 55, 61 (N.C. Ct. App. 2007)).

[181] *Id.* at 295 (concluding that the spot zoning of 1.1 acres of agriculturally zoned land to heavy industrial zoning in order to accommodate a proposed recycling center was not a reasonable spot zoning).

[182] Historic Charleston Found. v. City of Charleston, 734 S.E.2d 306, 307 (S.C. 2012); Little v. Winborn, 518 N.W.2d 384, 387–88 (Iowa 1994).

[183] *Historic Charleston Found.*, 734 S.E.2d at 311 (Hearn, J., dissenting) (quoting Knowles v. City of Aiken, 407 S.E.2d 639, 641 (S.C. 1991)).

[184] *Little*, 518 N.W.2d at 387–88; Kane v. City Council of Cedar Rapids, 537 N.W.2d 718, 723 (Iowa 1995) (finding that the council's approval of a revised development plan was not illegal spot zoning).

plan.[185] Iowa courts, on the other hand, have a three-part test for deciding whether the spot zoning is invalid.[186] The courts must consider "(1) whether the new zoning is germane to an object within the police power, (2) whether there is a reasonable basis for making a distinction between the spot-zoned land and the surrounding property, and (3) whether the rezoning is consistent with the comprehensive plan."[187]

State differences in the standards used for judicial review of local government decision making are appropriate given that land-use regulation is local in nature, and that state views regarding the importance of municipality autonomy vary. For example, Maine courts also apply a heightened scrutiny test to determine whether spot zoning is illegal based upon whether the ordinance affects a single parcel for the benefit of a particular landowner and is inconsistent with the comprehensive plan or the character and zoning of the neighborhood in regards to the public health, safety, and welfare.[188] Montana applies a three-part test to evaluate "whether: (1) 'the requested use is significantly different from the prevailing use in the area,' (2) 'the area in which the requested use is to apply is rather small,' and (3) 'the requested change is more in the nature of special legislation.'"[189] In Alaska, courts apply a similar three-part inquiry and consider "(1) the consistency of the amendment with the comprehensive plan; (2) the benefits and detriments of the amendment to the owners, adjacent landowners, and community; and (3) the size of the area 'rezoned.'"[190]

Nebraska courts evaluate claims of spot zoning based on the facts and circumstances of each case, but will generally find that a zoning change is arbitrary and capricious and illegal spot zoning if "a small parcel of land is singled out for special and privileged treatment, the singling out is not in the public interest but serves only the interests of the landowner, and the action is not in accord with a comprehensive plan."[191] In Mississippi, the courts do not invalidate rezoning actions as spot zoning so long as the zoning is in harmony with the comprehensive plan.[192]

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[185] *Historic Charleston Found.*, 734 S.E.2d 306, 313 (Hearn, J., dissenting) (arguing that the majority should hold the City to "its own duly adopted plan").

[186] *Little*, 518 N.W.2d at 388.

[187] *Id.* (concluding that the rezoning ordinance at issue was invalid spot zoning).

[188] *See* City of Old Town v. Dimoulas, 803 A.2d 1018, 1024 (Me. 2002) (finding that the zoning ordinance adopted by voter referendum was not illegal spot zoning because the City was not able to show that the ordinance was inconsistent with the comprehensive plan).

[189] Helena Sand & Gravel, Inc. v. Lewis & Clark Cty. Planning & Zoning Comm'n, 290 P.3d 691, 699 (Mont. 2012) (citing Little v. Bd. of Cty. Comm'rs, 631 P.2d 1282, 1289 (Mont. 1981)) (finding there was no illegal spot zoning or reverse spot zoning because the zoning at issue was in compliance with the comprehensive plan and thus is not significantly different than the prevailing use in the area and is not in the nature of special legislation).

[190] Griswold v. City of Homer, 925 P.2d 1015, 1020, 1025 (Alaska 1996) (concluding that rezoning did not constitute spot zoning).

[191] Smith v. City of Papillion, 705 N.W.2d 584, 599 (Neb. 2005) (finding that "the Homeowners did not prove that this case involves illegal spot zoning"); *see also* Giger v. City of Omaha, 442 N.W.2d 182, 197 (Neb. 1989) (noting factors for invalid spot zoning and finding that developer did not "prove by clear and convincing evidence that the rezoning ordinance was illegal spot zoning").

[192] Hall v. City of Ridgeland, 37 So. 3d 25, 42 (Miss. 2010).

States applying heightened scrutiny to spot zoning challenges appear to do so because of the individualized nature of these actions. Giving deference to the government does not seem appropriate when the concern is that an individual landowner is singled out for either beneficial treatment or adverse discrimination through spot zoning or inverse spot zoning. Conformity or consistency with a comprehensive plan is an additional check on the government to make sure that land-use decisions are being made for the good of the community and not for the benefit or detriment of an individual landowner.

### *C. Impermissible Delegation of Legislative Power*

Individualized government decisions may be more closely scrutinized when the legislature delegates decision-making powers to discrete local bodies such as a board of adjustment or historic preservation commission. If the standards for deciding whether an individual landowner is granted a right to develop are vague and subject to manipulation by administrative discretion, a court may deem the delegation of legislative power to be impermissible. This is a particular problem when aesthetic and cultural standards are administered by nonlegislative bodies against individual landowners.

Again, because of the individualized nature of the decision-making, the danger of abuse exists when vaguely written guidelines leave room for discriminatory interpretation outside of the standard legislative process. This is yet another example where land-use principles guard against individualized decisions that are not applied generally to a larger group of landowners. Judicial scrutiny is increased when the legislative process allows for discretionary interpretations of regulatory standards that impact individual landowners.

An example of this concern over inappropriate delegation of legislative power is found in *A-S-P Associates v. City of Raleigh*,[193] where the North Carolina Supreme Court reviewed the state's delegation of legislative power to municipalities for the purpose of establishing historic district regulation.[194] The court observed that the "statutory authorization of historic district ordinances is . . . a mixture of delegated legislative and administrative power" because it requires a historic district commission to approve or disapprove applications for Certificates of Appropriateness before exterior changes can be made to historic architectural features.[195] This individualized determination has the potential for abuse of discretion by the Historic District Commission.[196] However, the *A-S-P* court held that the combination of "architectural guidelines and design standards" and the ordinance's limit on the commission's discretion "to prevent[] only those of certain specified activities, 'which would be incongruous with the historic aspects of the

[193] 258 S.E.2d 444 (N.C. 1979).
[194] *Id.* at 451–52.
[195] *Id.* at 452–53.
[196] *Id.* at 455 (noting that "procedural safeguards provided will serve as an additional check on potential abuse of the Historic District Commission's discretion").

district'" was sufficient to defeat a delegation challenge.[197] More recently, a North Carolina appellate court in *Meares v. Town of Beaufort*[198] held that a design guideline used by the town's historic preservation commission was more restrictive than the guideline allowed by state statute and was, therefore, unlawful as outside the authority delegated by the state.[199]

Similar concerns about improper delegation of legislative power for historic preservation were voiced by the plaintiff in *Lykes Bros., Inc. v. Architectural Review Commission* ("ARC").[200] Plaintiff alleged that the city's ordinance "'d[id] not provide sufficiently definite standards to guide action by the ARC or City Counsel to ensure that property owners subject to the decision-making process [were] protected from whimsical, capricious and otherwise arbitrary and discriminatory decisions . . . .'"[201] The federal district court in *Lykes Bros., Inc.*, rejected the facial challenge on the grounds of unlawful delegation of powers finding that the city's ordinance governing historic and cultural preservation contained "sufficiently detailed standards to guide the exercise of administrative discretion."[202]

The allegation that a government body has improperly delegated legislative power is a call to more closely monitor situations where the decision-making power is shifted from a legislative body making general and uniform laws to another body that is making individualized decisions where the potential for discretionary abuse is intensified.[203] Given that historic regulation, landmark preservation, and architectural and aesthetic regulations may necessarily involve subjective decision-making, courts have generally upheld such delegation when the deciding body is made up of individuals with expertise and the standards governing decision-making are not impermissibly vague or ambiguous.[204]

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[197] *Id.* at 453.

[198] 667 S.E.2d 239 (N.C. Ct. App. 2008).

[199] *Id.* at 242–43 (citing A-S-P Assocs. v. Raleigh, 258 S.E.2d 444, 451 (N.C. 1979) for the principle that "delegation with regard to historic district preservation commissions is not unlimited").

[200] No. 93-264-CIV-T-24(C), 1994 WL 16198098, at *14 (M.D. Fla. Aug. 3, 1994).

[201] *Id.*

[202] *Id.* at *20.

[203] *See, e.g.*, Conner v. City of Seattle, 223 P.3d 1201, 1210 (Wash. Ct. App. 2009) (contending that "the absence of definite building standards in the LPO [Landmarks Preservation Ordinance] condemns him to submitting application after application until, finally, one meets the Board's subjective standards").

[204] *See, e.g.*, A-S-P Assocs. v. City of Raleigh, 258 S.E.2d 444, 454–55 (N.C. 1979) (noting that historic district commission must have a majority of members with "demonstrated special interest, experience, or education in history or architecture" and upholding superior court's ruling that the city ordinance did not "impermissibly delegate legislative power" to the commission). *See also Conner*, 223 P.3d at 1211 (finding that "LPO contains both contextual standards *and a* process for clarification and guidance as to individual sites") (emphasis in original).

### *D. Initiative and Referendum ("The People" Misbehaving?)*

Courts have at times prevented municipalities from establishing neighborhood zoning and consent requirements by holding that delegating zoning power to neighborhoods is unconstitutional.[205] One of the early zoning ordinances enacted in Chicago to deal with the adverse impacts of livery stables in residential neighborhoods prohibited new stables unless nearby property owners gave written permission.[206] This 1887 ordinance was upheld by the Illinois Supreme Court, which reasoned that it was better to resolve these matters locally with those directly affected rather than with a central body.[207] However, later U.S. Supreme Court cases cast doubt on this reasoning by 1) striking down, as an unconstitutional delegation of power, a zoning ordinance permitting property owners bordering a street to establish the building setback line;[208] 2) upholding a zoning ordinance prohibiting billboards unless a majority of local property owners consented; [209] and 3) invalidating a zoning ordinance prohibiting group homes unless a majority of homeowners near the location consented.[210]

The major concern expressed by the Court in this line of cases is that giving individual landowners control over their neighbors' land use promotes self-interested behavior and may constitute an improper delegation of legislative authority that is subject to arbitrary and abusive land regulation.[211] While these decisions are difficult to reconcile,[212] they illustrate the judicial skepticism toward exercising land-use power on an individualized basis, which tends to place self-interest over the public good. The more localized the power, the more likely it is to be abused.[213] This concern about the abuse of localized power is also evident in

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[205] Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939, 939 (2013).

[206] City of Chicago v. Stratton, 44 N.E. 853, 853 (Ill. 1896).

[207] *Id.* at 855.

[208] Eubank v. City of Richmond, 226 U.S. 137, 141, 144 (1912).

[209] Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 527, 531 (1917) (distinguishing *Eubank* by noting that the zoning ordinance there allowed neighbors to impose regulation while the Chicago ordinance allowed neighbors to agree to waive an existing restriction).

[210] State of Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 117–18, 122–23 (1928) (distinguishing *Cusack* by noting that billboards are per se nuisances whereas group homes are not).

[211] *See, e.g.*, *id.* at 121–22 (citing Yick Wo v. Hopkins, 118 U.S. 356, 366, 368 (1886) (striking down a system where landowners who were "not bound by any official duty, but [were] free to withhold consent for selfish reasons or arbitrarily and may subject the [applicant] trustee to their will or caprice")).

[212] *See* Stahl, *supra* note 205, at 960–62.

[213] *But see id.* at 945 (arguing that neighborhood zoning districts are less likely to be coercive as compared with special assessment districts, which have been given more judicial deference).

challenges to initiatives and referenda actions based on allowing "the people" to exercise legislative or adjudicative action directly through the ballot box.

An initiative is distinguished from a referendum based on the nature of the action. When "the people" are exercising their power to initiate regulation on a proactive basis, they are deemed to be acting in a legislative capacity. However, the referendum is reactive in nature and is typically used to affirm or rescind regulatory acts of a legislative body. A majority of states do not allow zoning by initiative, but states are about evenly split as to whether legislative zoning acts should be subject to the referendum process.

The initiative process generates procedural due process concerns because there is no notice or hearing other than the political process, but the referendum process presents less of a concern since it is preceded by legislative zoning action that provides due process through open hearings. Another concern with this direct democracy is that the voters may not be required to follow the comprehensive planning document for the municipality and using an initiative or referendum will result in "piecemeal" zoning that is not necessarily in the best interests of the entire community. Finally, the use of initiatives may avoid the environmental impact reviews that would otherwise be required of local legislatures.[214]

The Supreme Court sanctioned the use of the referendum process to approve or reject zoning by the city council in *City of Eastlake v. Forest City Enterprises, Inc.*.[215] The developer challenged the city's delegation of legislative power to the people, but the Court held that the Ohio constitution expressly reserved the legislative authority of the people and was, therefore, not subject to a charge of "standardless" delegation.[216] The Court distinguished its earlier decisions in *Eubank* and *Roberge* on the basis that neither of those cases involved a referendum by the people.[217] Instead, *Eubank* and *Roberge* involved "the standardless delegation of power to a limited group of property owners . . . not to be equated with decisionmaking by the people through the referendum process."[218] The dissent expressed concern about the possibility of spot zoning because the rezoning at issue involved a small lot and did not allow the landowner an opportunity to be heard by the voters.[219]

This concern about the potential for unfair individualized decision-making is the same administrative versus legislative distinction that the Court refused to recognize in *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*.[220] In *Cuyahoga Falls*, the Court upheld the voters' referendum to invalidate a specific site plan that had been approved for a low-income housing

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[214] Kellen Zale, *Changing the Plan: The Challenge of Applying Environmental Review to Land Use Initiatives*, 40 ECOLOGY L.Q. 833, 833 (2013).

[215] 426 U.S. 668 (1976).

[216] *Id.* at 675–78.

[217] *Id.* at 678.

[218] *Id.*

[219] *Id.* at 680 (Powell, J., dissenting).

[220] 538 U.S. 188 (2003).

project and affirmed its view that administrative land-use actions taken through the referendum process do not violate due process.[221] Harkening back to its earlier decision in *Eastlake*, the Court rejected the Ohio Supreme Court's distinction between legislative and administrative referendums in *Cuyahoga Falls* and affirmed that subjecting either type of ordinance to the referendum process is not an unlawful delegation of power, but is instead the people's retained power to govern.[222] It should be noted that voter actions, while not necessarily considered impermissible delegation, are still subject to other constitutional challenges such as substantive due process or equal protection violations.[223]

While the U.S. Constitution does not prohibit voters from acting on administrative land-use decisions, states continue to control the use of the initiative and referendum through constitutional and statutory provisions. States generally prohibit delegating administrative or adjudicative decisions to voters because of due process concerns, but may statutorily allow legislative actions to be exercised by voters through initiative or referendum. In California, for example, the state constitution provides that voters have the right to use the initiative and referendum powers, but that "a referendum may be used to review only legislative acts and not executive or administrative acts of a local government."[224] In *Worthington v. City Council of Rohnert Park,* a California court reviewed the city's action to establish a Memorandum of Understanding ("MOU") with a local Indian tribe addressing the potential impacts of a casino project and determined that it was an administrative action, not subject to referendum.[225] Although the city's action could be considered a policy decision, voters in California are limited to adopting or rejecting statutes, and the city's negotiation with an Indian tribe is a contract, not a law, therefore it is not legislation subject to referendum.[226] South Dakota also restricts the use of referenda on administrative actions. In *Schafer v. Deuel County Board of Commissioners*,[227] initiative petitions were filed to amend certain zoning ordinances so that the special exceptions provision requiring quasi-judicial review by administrative boards would be treated as legislative action such that the voters would have a right of referendum.[228] The South Dakota Supreme Court refused to allow the use of the initiative process to "define decisions that are quasi-judicial administrative as legislative and thereby subject to referendum."[229]

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[221] *Id.* at 199.

[222] *Id.*

[223] *Id.* at 194 (noting the equal protection and substantive due process claims were reviewed and rejected).

[224] Worthington v. City Council of Rohnert Park, 31 Cal. Rptr. 3d 59, 65 (Cal. Ct. App. 2005) (citing multiple California court decisions, including Wheelright v. County of Marin, 467 P.2d 537, 543 (Cal. 1970)).

[225] *Id.* at 67.

[226] *Id.*

[227] 725 N.W.2d 241 (S.D. 2006).

[228] *Id.* at 249.

[229] *Id.*

Most states, based on the Standard Zoning Enabling Act, state legislation, or judicial decision, require that zoning be either "in accordance with" or "consistent with" a comprehensive plan, if one exists.[230] In Hawaii, the Supreme Court has held that zoning, while legislative, is not permitted through the initiative process because it is inconsistent with the need for long-range planning.[231] Similarly, the Washington Supreme Court in *1000 Friends of Washington v. McFarland*[232] held that county ordinances enacted to implement the Growth Management Act ("GMA") were not subject to local referenda.[233] While recognizing "the vital importance of the rights of local citizens to participate in policy decisions affecting their communities,"[234] the court affirmed the state legislature's exercise of power to mandate that counties develop comprehensive land-use plans that are not subject to local referenda.[235]

Even if the state does not statutorily allow administrative or adjudicative types of decisions to be referred to the people, some state constitutions, as noted by the Court in *Cuyahoga Falls* may still reserve power in the people to exercise regulatory power in all instances.[236] For example, under a Utah statute, only legislative actions are subject to referendum, and "site-specific rezoning decisions are statutorily ineligible for referendum."[237] Thus, the distinction between legislative and administrative power is a decisive factor in determining whether voters in Utah can demand a vote on local laws. However, the Utah Supreme Court in *Krejci v. City of Saratoga Springs* held that "the people's power to legislate is not a creature of statute" and that the statutory provision did not override the authority of the people as reserved in Utah's Constitution.[238] The court then found that the site-specific rezoning at issue, which rezoned twelve acres of property owned by one landowner from a low density to a medium density residential zone, was a legislative action subject to referendum based on the state constitution.[239] While it appears that the state statute was attempting to exclude administrative type of actions, such as site-specific rezoning, from referendum authority, the court determined that "[t]he chief hallmarks of legislative action . . . the adoption of rules of general applicability and

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[230] MANDELKER, *supra* note 82, at §§ 3.13–18.

[231] Kaiser Haw. Kai Dev. Co. v. City & County of Honolulu, 777 P.2d 244, 248–50 (recognizing "that there are jurisdictions which have upheld zoning by initiative despite the existence of laws calling for comprehensive plans for land use development").

[232] 149 P.3d 616 (Wash. 2006).

[233] *Id.* at 628.

[234] *Id.*

[235] *Id.* (noting that "it is for the legislature, not the courts, to amend GMA procedures" to subject ordinances implementing the GMA to local referenda).

[236] City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found., 538 U.S. 188, 199 (2003).

[237] Krejci v. City of Saratoga Springs, 322 P.3d 662, 667 (Utah 2013).

[238] *Id.*

[239] *Id.* at 669 ("[W]e deem site-specific rezoning a legislative act—and thus subject to referendum.").

the 'weighing of broad, competing policy considerations'" had been met by site-specific zoning.[240]

State constitutions, statutes, and judicial decisions differ as to whether the police power delegated by the state to municipalities and counties can be shared by the people through the use of initiative and referendum. In some states, the power is considered to be reserved for the people even while it has also been delegated to local entities. The distinction between legislative action and administrative action is important in those states that limit the initiative and referendum process to legislative action only. Even in states that allow initiatives and referenda to be used for legislative action, the process may be restricted when necessary to conform or be consistent with comprehensive planning. These distinctions, controls, and restrictions expressed through this patchwork of state statutes and judicial decisions are intended to control abuse of the land-use planning process by limiting individualized actions of self-interested local citizens through piecemeal, ballot-box zoning.

### *E. Eminent Domain*

The government's use of the eminent domain power, which allows condemnation of property for public use so long as just compensation is paid, is inevitably an individualized land-use action because it involves the valuation and transfer of individual parcels of land. Nonetheless, judicial scrutiny of eminent domain actions has remained deferential, with courts asking only whether the government is taking the property for "public use" and whether the landowner is receiving "just compensation," according to Fifth Amendment constraints. One of the reasons supporting this deference is that government planning efforts have precipitated the use of eminent domain for economic redevelopment purposes.[241] In both *Berman v. Parker* [242] and *Kelo v. City of New London*, [243] economic redevelopment was found to constitute a "public use" that satisfied the requirement for the exercise of eminent domain.[244] Integrated planning for the redevelopment of swaths of blighted property played a significant role in both cases as the Court relied on the comprehensive planning process to find that use of eminent domain was constitutional.[245]

In the *Kelo* case, Suzette Kelo's property was taken by the local municipality for purposes of land assembly for redevelopment, even though a local Italian club

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[240] *Id.* at 668 (applying principles from *Carter v. Lehi City*, 269 P.3d 141 (Utah 2012)).

[241] Mulvaney, *Exactions for the Future*, *supra* note 71, at 531.

[242] 348 U.S. 26 (1954).

[243] 545 U.S. 469 (2005).

[244] Mulvaney, *Exactions for the Future*, *supra* note 71, at 531–33 (citing *Berman*, 348 U.S. at 34–35 (upholding an eminent domain action against a nonblighted department store because it was part of a comprehensive redevelopment plan for Washington, D.C.); *Kelo*, 545 U.S. at 483–87 (holding that the city's comprehensive planning process supported constitutional validity of eminent domain for redevelopment).

[245] *Id.*

was spared from condemnation, and a nonblighted neighborhood was demolished without ever being replaced by the originally proposed private development.[246] A group of law professors submitted an amicus brief in the *Kelo v. City of New London* case, arguing that the use of eminent domain should require a higher level of judicial scrutiny, similar to the scrutiny applied to land-use exactions under the *Nollan/Dolan* standard.[247] However, the Court in *Kelo* followed precedent from the *Berman* and *Midkiff* decisions to find that so long as the government had any rational basis for exercising its eminent domain power to achieve any conceivable public purpose, the means to obtain the ends would not be subject to judicial scrutiny.[248] While Justice Kennedy, in his concurring opinion, agreed that eminent domain did not require heightened scrutiny, he did "not foreclose the possibility that a more stringent standard of review . . . might be appropriate for a more narrowly drawn category of takings."[249]

Since *Kelo*, some state courts have relied upon the existence of a comprehensive planning process, or the lack thereof, to determine the level of judicial scrutiny applied to eminent domain action challenges.[250] A lack of planning may be considered "a constitutional red flag"[251] that compels courts to more closely scrutinize individualized condemnation actions. However, unlike other land-use regulation and decision-making that affects individual landowners, eminent domain actions do not generally trigger increased judicial scrutiny to prevent governmental abuse. The Court has chosen not to require heightened scrutiny in eminent domain actions, particularly if they are the result of comprehensive planning, even though it requires *Nollan/Dolan* scrutiny to be applied to land-use exactions.[252] Perhaps the level of judicial scrutiny should depend upon the presence of comprehensive planning, similar to the deference given to spot zoning when it is in conformance to a comprehensive plan. This would allow both state and federal courts to provide more stringent review of those eminent domain actions that appear to unfairly target individual landowners without the support of a community-wide plan that provides for shared burdens.[253]

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[246] *Kelo*, 545 U.S. at 495 (O'Connor, J., dissenting).

[247] Brief for Professors David L. Callies et al. as Amici Curiae Supporting Petitioners, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2803192.

[248] *Kelo*, 545 U.S. at 487–89.

[249] Eagle, *supra* note 24, at 30 (internal quotation marks omitted) (citing *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring)).

[250] *See, e.g.*, Mayor & City Council of Baltimore City v. Valsamaki, 916 A.2d 324, 356 (Md. 2007) (stating that a lack of evidence regarding a comprehensive redevelopment plan suggests that use of eminent domain is invalid); Middletown Twp. v. Lands of Stone, 939 A.2d 331, 338–39 (Pa. 2007) (holding that the government's lack of planning creates doubt as to validity of public purpose supporting condemnation of a farm).

[251] Nicole Stelle Garnett, *Planning as Public Use?*, 34 ECOLOGY L.Q. 443, 454 (2007).

[252] *See Kelo*, 545 U.S. at 487–88.

[253] *See, e.g.*, Reading Area Water Auth. v. Schuylkill River Greenway Ass'n, 100 A.3d 572, 581–83 (Pa. 2014) (holding as invalid water authority's use of eminent domain and

### *F. Constitutional Challenges to Land-Use Regulation*

The level of scrutiny applied to judicial review of constitutional challenges to land-use actions is also at times dependent upon whether the challenged action is legislative or administrative in nature. For example, "facial" challenges are typically asserted against legislation that is unconstitutional as applied to everyone, while "as applied" challenges are asserted to challenge legislative action as it affects an individual landowner. In the Ninth Circuit, facial challenges applying *Nollan* and *Dolan* are prohibited because the fact-specific inquiry into whether an exaction meets the test of having a nexus to the impact on the land and being roughly proportional to the impact requires that the court have some action upon which to base its analysis.[254] In *Koontz Coalition v. City of Seattle*, the district court reviewed a land-use challenge asserted by a group of downtown Seattle property owners against an ordinance implementing a "downtown bonus program."[255] The ordinance allowed a developer who wished to exceed the allowed building density to either provide affordable housing or pay a "fee in-lieu" of the housing.[256] This bonus incentive program did not require developers to provide affordable housing or pay the in-lieu fees unless they wanted to exceed the established zoning regulations.[257] The court held that the property owners' two *Nollan/Dolan* claims were not ready for adjudication because the facial challenge was prudentially unripe under Ninth Circuit jurisprudence and the future as-applied challenges were speculative and uncertain.[258]

Substantive due process and equal protection challenges do not usually distinguish between generalized legislation and individualized action as the claims involve an assertion by the landowner that they have been treated unfairly or differently than similarly situated landowners would be treated. State judicial scrutiny standards for these challenges vary between a searching review, which balances the hardships to the landowners against the benefits to the community,[259] and a deferential review, which supports a government action if it is fairly debatable that there is any basis for exercise of the police power.[260] Federal courts are

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distinguishing *Kelo* in several respects, including that "there is no evidence of an overall economic development or urban revitalization plan into which this taking fits").

[254] *See* Koontz Coal. v. City of Seattle, No. C14–0218JLR, 2014 WL 5384434, at *4 (W.D. Wash. Oct. 20, 2014) (citing San Remo Hotel, L.P. v. San Francisco City & Cnty., 364 F.3d 1088, 1098 (9th Cir. 2004)).

[255] *Id.* at *1.

[256] *Id.*

[257] *Id.*

[258] *Id.* at *5.

[259] *See, e.g.*, Twigg v. Cnty. of Will, 627 N.E.2d 742, 745 (Ill. App. Ct. 1994) (applying eight factors, including the existing uses and zoning of neighboring property, to determine the validity of a zoning ordinance against a charge of arbitrariness).

[260] *See, e.g.*, Cormier v. Cnty. of San Luis Obispo, 207 Cal. Rptr. 880, 884 (Cal. Ct. App. 1984) (applying a deferential standard to evaluate the validity of a zoning ordinance against a charge of arbitrariness and finding that the action of the County's Board of Supervisors was constitutional because the rezoning was "fairly debatable").

deferential to state and local government and apply a "shocks the conscience" standard before they will invalidate legislation or an action based on substantive due process and, perhaps, equal protection claims.[261] Procedural due process challenges are usually not applicable to legislative action, based on the public notice and hearing requirements for the legislative process. However, administrative actions require notice and hearing for the specific individual affected and procedural due process challenges can be raised.

Land-use regulations that burden a fundamental constitutional right may be subject to heightened scrutiny, not only because they burden property, but because they burden a protected constitutional right.[262] First Amendment challenges to land-use regulation are typically advanced by adult businesses and religious institutions.[263] Adult businesses claiming that regulating the operations of adult bookstores, movie theaters, and nude dancing has restricted free speech will receive strict judicial scrutiny when the restriction is content based rather than content neutral.[264] In order for the court to apply a "strict scrutiny" standard to the regulation, the adult business must show that its speech is being restricted because of its adult content. Although local legislation has targeted adult movie theaters because of the content of the films being shown, the U.S. Supreme Court has applied an "intermediate scrutiny" review standard to adult business challenges based on the concept of "secondary effects."[265] The Court has decided that if the adverse secondary effects of the adult business, such as increased crime, prostitution, and other public nuisances, are the target of such local action, not the content of the speech, judicial review will be based on the less-searching "content-neutral" standard, rather than the "strict scrutiny" standard.[266]

The Court's free speech framework for analyzing challenges against adult businesses was recently employed by the First Circuit in *Showtime Entertainment, LLC v. Town of Mendon*[267] to review zoning restrictions on adult entertainment businesses in Mendon, Massachusetts. The court found that the bylaws regulating the size and height of adult business facilities, as well as the operating hours, which were not applied to other similar businesses, "unconstitutionally infringe[d] on Showtime's right to engage in a protected expressive activity."[268] In deciding the appropriate level of judicial review to apply to these restrictions, the *Showtime* court

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[261] *See* Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 467–68 (7th Cir. 1988).

[262] *See* Adam J. MacLeod, *Identifying Values in Land Use Regulation*, 101 KY. L.J. 55, 80 (2014).

[263] *See, e.g.*, Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 53 (1976) (involving two adult theaters that challenged ordinance placing limits on concentration of adult theaters in limited zones).

[264] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46–48 (1986).

[265] *See Young*, 427 U.S. at 70–71, 71 n.34 ("It is the secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech.").

[266] *City of Renton*, 475 U.S. at 49.

[267] 769 F.3d 61 (1st Cir. 2014).

[268] *Id.* at 66.

discussed the content-based restriction, which requires the government to prove a compelling state interest using least restrictive means to achieve that interest, and the content-neutral restriction, which incidentally burdens speech and requires there to be a significant government interest that does not burden more speech than necessary and leaves open alternative channels of communication.[269] However, the court also recognized that the zoning regulation will be treated as content neutral "only if the differential treatment does not stem from a disapproval of the former business-type's expression."[270] The *Showtime* court found that Mendon's zoning bylaws were underinclusive because they were not applied to other commercial businesses with similar traffic safety and rural aesthetic secondary effects.[271] Therefore, Mendon did not prove that "it ha[d] a substantial interest in regulating the secondary effects of adult-entertainment businesses that [was] actually furthered by its bylaws."[272]

Government restrictions on religious exercise may occur in the land-use context when local officials impose regulations on religious institutions to address concerns such as traffic, parking, noise, congestion, and other impacts on residential neighborhoods. In order to evaluate the constitutionality of such government restrictions on religious exercise, both the legislative branch and judicial branch of the federal government have been involved in establishing the appropriate level of judicial scrutiny over such actions. In *Employment Division, Department of Human Resources of Oregon v. Smith*,[273] two workers were denied unemployment benefits when they were discharged from their jobs as drug counselors for smoking peyote as part of a religious ceremony.[274] The Supreme Court stated that it has "consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[275] Therefore, neutral laws of general application that happen to impact religious freedom should be analyzed under a rational basis test that is highly deferential to the government. The Court in *Smith* distinguished some of its earlier decisions, which had applied a higher level of judicial scrutiny to free exercise challenges, based on the *Sherbert* test, which "was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."[276] The *Smith* decision was subsequently revisited by statute,[277] but has

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[269] *Id.* at 71.
[270] *Id.* at 72.
[271] *Id.* at 73.
[272] *Id.* at 78.
[273] 494 U.S. 872 (1990).
[274] *Id.* at 874.
[275] *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).
[276] *Id.* at 884 (citing Sherbert v. Verner, 374 U.S. 398, 401–403 (1963) (holding that government actions that substantially burden religious exercise must be justified by a compelling governmental interest)).
[277] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 (2014).

been cited to support heightened scrutiny of individualized actions infringing religious freedom as opposed to generally applicable laws.[278] Thus, we see once more that individualized actions may be subject to increased scrutiny under the First Amendment, even though generally applicable legislation burdening religious exercise may be subject only to rational basis review in circumstances where the *Smith* decision is still applicable.[279]

The Court in *Burwell v. Hobby Lobby Stores, Inc.* applied the Religious Freedom Restoration Act of 1993 ("RFRA") to regulations imposing health-insurance coverage for contraceptive methods that violate the religious beliefs of owners of closely held corporations and held that the regulations violated RFRA.[280] The Court described the history of its pre-*Smith* decisions, the *Smith* decision, and the two federal statutes enacted following the *Smith* decision that have attempted to provide protection for religious liberty.[281] The *Hobby Lobby* Court explained that following the *Smith* decision, Congress enacted RFRA to "restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder*. . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."[282] RFRA was designed to overrule the *Smith* decision and restore the law as established by the pre-*Smith* decisions.[283] Originally applied to both the federal government and to the states, the Court in *City of Boerne v. Flores*,[284] held that RFRA was unconstitutional as applied to the states because Congress overstepped its Section 5 authority under the Fourteenth Amendment to enforce the First Amendment.[285] Congress responded by enacting the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), which "imposes the same general test as RFRA but on a more limited category of governmental actions."[286] The *Hobby Lobby* Court noted that, relevant for purposes of deciding this health care regulation case, RLUIPA amended RFRA's definition of "exercise of religion" to separate it from First Amendment case law and to mandate that the concept "be construed in favor of a broad protection of religious exercise."[287]

RLUIPA has been applied to land-use regulation at the state level, although the Court in *Cutter v. Wilkinson*[288] upheld its constitutionality only in regards to its

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[278] *See, e.g.*, Holt v. Hobbs, 135 S. Ct. 853, 859 (2015) (noting that *Smith* "held that *neutral, generally applicable laws* that incidentally burden the exercise of religions usually do not violate the Free Exercise Clause of the First Amendment") (emphasis added)).

[279] *See Burwell*, 134 S. Ct. at 2761 (noting that after its decision in *City of Boerne v. Flores*, 521 U.S. 507, 533–34 (1997), RFRA as applied to the states, was no longer valid).

[280] *Id.* at 2759.

[281] *Id.* at 2760–62.

[282] *Id.* at 2791 (internal quotation marks omitted) (quoting 42 U.S.C. § 2000bb(b)(1)).

[283] *Id.*

[284] 521 U.S. 507 (1997).

[285] *Id.* at 533–34 (holding that "[t]he stringent test RFRA demands . . . far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*").

[286] *Burwell*, 134 S. Ct. at 2761.

[287] *Id.* at 2761–62.

[288] 544 U.S. 709 (2005).

application to institutionalized persons.[289] Most lower courts reviewing constitutional challenges to the land-use portion of the Act have upheld RLUIPA's constitutionality as applied to land-use regulation and religious exercise.[290] The important thing about RLUIPA for purposes of this Article is that RLUIPA is not typically triggered by a neutral and generally applicable zoning law, but instead applies when the government is involved in making "individualized assessments of the proposed uses for the property involved."[291] The RLUIPA substantial burden provision provides that the government cannot impose a land-use regulation that substantially burdens religious exercise unless it shows that it furthers a compelling government interest by the least restrictive means.[292] Decisions applying this substantial burden provision have recognized that it addresses "'subtle forms of discrimination' by land use authorities that may occur when 'a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards.'"[293]

RLUIPA's focus on individualized actions that present the opportunity for arbitrary and discriminatory response by local officials was addressed by the Second Circuit in *Chabad Lubavitch of Litchfield County, Inc. v. Litchfield Historic District Commission*.[294] In *Chabad Lubavitch*, Chabad purchased property in a historic district for purposes of expanding the existing building to accommodate its religious mission.[295] Chabad applied to the Historic District Commission ("HDC") for permission to modify the property and was denied.[296] The court found that Connecticut's statutory scheme for historic properties regulation requires an individual assessment of any application to modify such properties and also "requires that local commissions implement that general rule by applying loosely defined and subjective standards to discrete applications."[297] The denial of Chabad's application to the HDC was determined to be an individualized assessment that triggered RLUIPA's substantial burden provision.[298] In remanding the claim to the district court, the Second Circuit instructed the court to consider:

> [W]hether the conditions attendant to the HDC's denial of the Chabad's application themselves imposed a substantial burden on the Chabad's religious exercise, whether feasible alternatives existed for the Chabad to exercise its faith, and whether the Chabad reasonably believed it would be

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[289] *Id.* at 713.
[290] *Id.* at 717–18.
[291] 42 U.S.C. § 2000cc(a)(2)(C) (2012).
[292] *Id.* at §§ 2000cc(a)(1)(A), (B).
[293] Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n, 768 F.3d 183, 193 (2d Cir. 2014) (quoting Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 900 (7th Cir. 2005)).
[294] *Chabad*, 768 F.3d at 195.
[295] *Id.* at 187.
[296] *Id.*
[297] *Id.* at 193–94.
[298] *Id.* at 194–95.

> permitted to undertake its proposed modifications when it purchased the property . . . .[299]

In addition to requiring heightened scrutiny of individualized actions interfering with religious exercise, RLUIPA also provides for equal terms claims, which address unequal, but not different treatment of land-use,[300] and discrimination claims, which require evidence of discriminatory intent.[301]

## III. ADDRESSING THE *KOONTZ* CONTROVERSY

This Part addresses the takings issue evoked by in-lieu monetary exactions. The Court in *Koontz v. St. Johns River Water Management District* submitted such fees to the heightened scrutiny of the *Nollan/Dolan* test. However, the holding left the unanswered question of how broadly this heightened scrutiny should be applied to other monetary obligations imposed by the government. Lower courts have applied varying levels of scrutiny to impact fees, and this Part addresses the multiplicity of views among the states.

### *A. Background*

In *Koontz v. St. Johns River Water Management District*,[302] a landowner seeking to develop a tract of land near Orlando, Florida, was denied permission to build when he refused to comply with the water district's mitigation demand to pay for improvements on land owned by the water district that was located several miles away in order to offset the environmental impact of his proposed development.[303] The water district required this in-lieu exaction, in addition to the physical exaction requiring the landowner to deed an eleven-acre conservation easement to mitigate construction on wetlands.[304] The landowner sued the water district for monetary damages, claiming that the excessive mitigation demands constituted a taking without just compensation.[305]

The Florida Supreme Court reversed the trial court decision that was in favor of the landowner, holding that the *Nollan/Dolan* exactions test should not be applied to the offsite mitigation proposed by the water district, which did not require Koontz to dedicate real property and that "because St. Johns did not issue permits, Mr. Koontz never expended any funds towards the performance of offsite mitigation, and *nothing was ever taken from Mr. Koontz*."[306] The U.S. Supreme Court reversed,

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[299] *Id.* at 196.
[300] *Id.* at 196–97.
[301] *Id.* at 198.
[302] 133 S. Ct. 2586 (2013).
[303] *Id.* at 2593.
[304] *Id.*
[305] *Id.*
[306] St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1231 (Fla. 2011), *rev'd*, 133 S. Ct. 2586 (2013) (emphasis in original).

finding that under the "unconstitutional conditions" doctrine governmental demands that lack an essential nexus and rough proportionality to the impacts of a proposed development are subject to a takings claim for just compensation regardless of whether the permit is approved on the condition that the landowner meets the demands or whether the permit is denied because the landowner refuses.[307] In addition, the Court held that monetary exactions "must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*."[308] One of the questions that remains after the *Koontz* decision is how far does this scrutiny of land-use determinations extend?[309]

Justice Alito, in delivering the opinion of the Court, which held that monetary exactions are subject to *Nollan/Dolan* scrutiny, noted that its decisions in these cases "reflect two realities of the permitting process."[310] The first reality is that the government "has broad discretion to deny a permit" and coerce a land-use applicant into giving up property in response to an extortionate demand so long as "the building permit is more valuable than any just compensation the owner could hope to receive."[311] Such abuse is prohibited by the unconstitutional conditions doctrine.[312] The second reality is that new development may impose costs on the public that should be internalized by landowners, but the government "may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts."[313] Applying *Nollan* and *Dolan* to these two permitting realities allows the government "to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in 'out-and-out . . . extortion.'"[314] Extending this precedent to monetary exactions, which serve the same function as physical exactions, will preclude the government from evading the *Nollan* and *Dolan* restrictions by giving the landowner "a choice of either surrendering an easement or making a payment equal to the easement's value."[315]

The *Koontz* majority rejected the government's argument that based on the concurrence and dissent in *Eastern Enterprises v. Apfel*[316] a demand that the landowner spend money to improve public land does not constitute a taking so long as the financial obligation does not "'operate upon or alter an identified property

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[307] *Koontz*, 133 S. Ct. at 2595.

[308] *Id.* at 2599.

[309] *See generally* Fennell & Peñalver, *supra* note 20, at 289–90 (considering how far the scrutiny of land-use determination extends after *Koontz* as well as alternatives that would attempt to "reconcile the Court's twin interests in restraining governmental power over property owners and in keeping the gears of ordinary land use regulation running in ways that protect the property interests of those owners").

[310] *Koontz*, 133 S. Ct. at 2594.

[311] *Id.* at 2594–95.

[312] *Id.* at 2595.

[313] *Id.*

[314] *Id.*

[315] *Id.* at 2599.

[316] 524 U.S. 498 (1998).

interest.'"[317] This appears to be the major stumbling block for reconciling Justice Alito's opinion with Justice Kagan's dissent, which maintained that "requiring a person to pay money to the government, or spend money on its behalf" was not a taking based on the Court's decision in *Eastern Enterprises* because requiring someone to pay money to repair public wetlands "does not affect a 'specific and identified propert[y] or property right[]'; it simply 'imposes an obligation to perform an act' (the improvement of wetlands) that costs money."[318] Justice Alito asserted that the "fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property,"[319] while Justice Kagan equated the government's requirement that Koontz pay money to restore public wetlands in exchange for a permit to "'an ordinary liability to pay money,'" which would not be a taking according to the majority of Justices in *Eastern Enterprises*.[320] The two opinions could be reconciled by applying the *Koontz* majority opinion to monetary exactions that are imposed as part of a permitting process, with the associated concerns about broad government discretion and extortion, and applying the dissent's reasoning to financial obligations that are legislatively established in the form of impact fee schedules and, therefore, unrelated to a specific identified property interest.

On remand, the Florida District Court of Appeal addressed the case for the fifth time in *St. Johns River Water Management District v. Koontz*,[321] and found that its decision in *Koontz IV* "is entirely consistent with the decision of the United States Supreme Court" and reaffirmed its earlier decision in its entirety without allowing the briefing to be reopened.[322] The dissent objected to the majority's decision to affirm the judgment without further review, noting that the Supreme Court in *Koontz* held that "the District did not commit a 'taking without just compensation,'"[323] and thus the Florida court's affirmation of *Koontz IV* on the basis of a takings claim is incorrect because the remand was for the purposes of determining whether Koontz has a damages remedy (other than a takings remedy) under Florida law.[324]

### *B. In-Lieu Exactions and* Nollan/Dolan

Turning now to the *Koontz* Court's holding that monetary in-lieu exactions are subject to the *Nollan/Dolan* test, this Article agrees with the Court's holding, but submits that impact fees imposed based on legislatively determined fee schedules do not constitute monetary exactions. The differing level of scrutiny for legislative

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[317] *Koontz*, 133 S. Ct. at 2599.

[318] *Id.* at 2605–06 (quoting *E. Enter.'s*, 524 U.S. at 540–41 (Kennedy, J., concurring in part and dissenting in part)).

[319] *Id.* at 2600.

[320] *Id.* at 2605 (citing *E. Enter.'s*, 524 U.S. at 554–55 (Breyer, J., dissenting)).

[321] No. 5D06–1116, 2014 WL 1703942 (Fla. Dist. Ct. App. Apr. 30, 2014) *cert. denied*, 2016 WL 688824 (2016).

[322] *Id.* at *1.

[323] *Id.* at *6.

[324] *Id.* at *2–6 (Griffin, J., dissenting).

actions (rational basis with no record needed to support reasoning) as opposed to administrative actions (substantial evidence required) is just one illustration of the land-use framework that requires individualized governmental decision making to be subjected to more exacting judicial scrutiny. Justice Arabian's opinion in the *Ehrlich v. City of Culver City*[325] decision is helpful in this regard. In *Ehrlich*, the landowner challenged both a monetary exaction to mitigate the loss of commercial recreational use and an "art in public places" impact fee.[326] The court distinguished between a monetary exaction (held in *Ehrlich* to be subject to *Nollan/Dolan*) and an impact fee.[327]

> Nevertheless, we agree with the city that the art in public places fee is not a development exaction of the kind subject to the *Nollan-Dolan* takings analysis. As both the trial court and the Court of Appeal concluded, the requirement to provide either art or a cash equivalent thereof is more akin to traditional land use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping requirements, and other *design* conditions such as color schemes, building materials and architectural amenities. Such aesthetic conditions have long been held to be valid exercises of the city's traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property. (See, e.g., Metromedia Inc. v. San Diego, 453 U.S. 490, 508 fn.13, 101 S.Ct 2882, 2892 fn. 13, 69 L.Ed.2d 800 [approving prohibition against outdoor advertising]; Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646 [upholding municipal power to preserve landmark structures]; Agins v. City of Tiburon, [] 447 U.S. 255, 100 S.Ct. 2138 [upholding condition to preserve scenic views].) The requirement of providing art in an area of the project reasonably accessible to the public is, like other design and landscaping requirements, a kind of aesthetic control well within the authority of the city to impose.[328]

Exactions, either physical or monetary in lieu, should be subjected to *Nollan/Dolan* if they are government conditions targeted to a specific property as part of the permitting process.[329] This could potentially include legislative impact fees, but only if it can be shown that a specific property or landowner was targeted by the legislative action. In such a case, this Article proposes that courts reviewing

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[325] 911 P.2d 429 (Cal. 1996).

[326] *Id.* at 434–35.

[327] *Id.*; *but see* Kanner, *supra* note 71, at 232 (criticizing California Supreme Court's affirmance of the public art fee on the basis that it was not even rationally related to "traditional land-use regulations" and violated the developer's First Amendment speech rights).

[328] *Ehrlich*, 911 P.2d at 450 (alterations in original).

[329] *See* FISCHEL, *supra* note 1, at 40 (noting that the Supreme Court is generally reluctant to review local regulation, but in the exaction cases it "has gotten down and dirty with site-specific activity").

a landowner's challenge to a legislatively targeted impact fee use the same concepts applied in spot zoning cases to ferret out government abuse. Spot zoning challenges seek a higher level of judicial scrutiny for the legislative act of zoning, as discussed in Part II.B. above. Factors such as the size of the parcel, the number of landowners affected, and conformity with the general plan are considered in deciding whether the zoning is an abuse of power. If examining these same factors in challenges to impact fees indicates the potential for abuse, *Nollan/Dolan* judicial scrutiny of a legislative impact fee would be warranted to prevent the abuse of local power. If instead the fee has been legislatively determined and appears to be based upon an analysis of general development impacts, then the concern about either favoritism or unfairness should not be as strong. The remainder of this Article assumes that legislative impact fees are not targeted to individual landowners and should not be subject to *Nollan/Dolan* scrutiny unless they appear to be abusive, similar to a charge of illegal spot zoning.

Individualized government mitigation conditions with the potential to unfairly affect a specific landowner should be analyzed under *Nollan/Dolan*, whether they are physical or monetary, whereas impact fees that are applied to all similarly situated landowners, based upon previous legislative determinations, should be subject to a dual rational nexus test or other state review standards, depending on the state's law.[330] Many state courts, including those in Florida, do apply more than deferential scrutiny to legislative fees using the dual rational nexus test to make sure they are related to the impact of a particular type of development and are not being used in lieu of assessing a tax.[331] Impact fees that fail a dual rational nexus test (or some other state-determined scrutiny) may be considered an invalid tax. Since local governments may not have the authority to impose taxes under certain circumstances, impact fees that are not rationally related to the adverse impact caused by the development may be viewed as revenue raising and presumed to be a tax. Given that an overarching concern in land use is that local government power must be constrained because it is subject to abuse, a majority of states have appropriately distinguished individualized exactions from legislatively imposed impact fees.[332]

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[330] *See* FISCHEL, *supra* note 1, at 40 (observing that negotiations between developers and municipalities provide mutually beneficial gains from such trades).

[331] *See* Koontz v. St. Johns Water Mgmt. Dist., 133 S. Ct. 2586, 2602 (2013) (noting that "state law normally provides an independent check on excessive land use permitting fees").

[332] *See Koontz*, 133 S. Ct. at 2602–03 (rejecting the contention that *Nollan* and *Dolan* are not needed to protect land-use permit applicants and finding that other constitutional doctrines are not sufficient because of "the special vulnerability of land use permit applicants to extortionate demands for money").

### *C. Impact Fees and the Dual Rational Nexus Test*

Local governments have used exactions in some form for more than a century, beginning with physical exactions that were demanded within a proposed land development project.[333] After World War II, municipalities began asking for "in lieu of" cash payments instead of land dedication.[334] These monetary exactions were the precursor to impact fees, which are now used to finance community infrastructure improvements that are required to support the growth generated by land development. In holding that in-lieu exactions are subject to *Nollan/Dolan* scrutiny, the *Koontz* majority pointed out that land-use officials should not be allowed to avoid scrutiny by giving the landowner "a choice of either surrendering an easement or making a payment equal to the easement's value."[335] Justice Alito noted that "[s]uch so-called 'in lieu of' fees are utterly commonplace . . . and they are functionally equivalent to other types of land use exactions."[336] Justice Alito cited a law review article as support for this information, but did not discuss the article's analysis of the difference between impact fees, exactions, and how states have applied *Nollan/Dolan* to exactions, but have applied state standards to impact fees.[337] Professor Rosenberg's comprehensive article, *The Changing Culture of American Land Use*: *Paying for Growth with Impact Fees*, notes that "the Nollan/Dolan principles did not override and dominate a well-developed body of state statutory and constitutional law, and federal litigation did not become the crucible for determining the legality of impact fee practices."[338]

A majority of states have historically applied some version of a dual rational nexus test to evaluate impact fees and verify their validity.[339] This test was developed by the Wisconsin Supreme Court in *Jordan v. Village of Menomonee Falls*,[340] which challenged the validity of an ordinance imposing a set fee per developed lot, in lieu of dedicating land.[341] The test was later adopted by other

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[333] Rosenberg, *supra* note 22, at 183.

[334] *Id.* at 201–02.

[335] *Koontz*, 133 S. Ct. at 2599.

[336] *Id.* (citing Rosenberg, *supra* note 22, at 202–03).

[337] Rosenberg, *supra* note 22, at 262 ("In summary, the state courts have become comfortable with the application of their own impact fee enabling statutes and state constitutional provisions to render decisions in challenges to land development fees . . . . The impact of the Nollan/Dolan case line appears to have been confined to an extremely narrow set of circumstances—adjudicated or individually-negotiated impact fees—and these cases do not commonly occur.").

[338] *Id.* at 243.

[339] *Id.* at 226; *see, e.g.*, St. Johns Cnty. v. Ne. Fla. Builders Ass'n, Inc., 583 So. 2d 635, 637 (Fla. 1991) (providing details for the approval of the "imposition of impact fees that meet the requirements of the dual rational nexus test adopted by other courts in evaluating impact fees").

[340] 137 N.W.2d at 450.

[341] Rosenberg, *supra* note 22, at 225.

jurisdictions and has been described with two steps: 1) there must be a rational nexus "'between the need for additional capital facilities and the growth in population generated by the subdivision'" and 2) a rational nexus "'between the expenditures of the funds collected and the benefits accruing to the subdivision.'"[342] Scrutiny is applied to determine whether the fee is being used as a general revenue-raising regulation and should be classified as a tax. An impact fee that fails the dual rational nexus test because it appears to be general revenue-raising legislation, not reasonably related to the adverse impacts created by the development, may be treated as a tax.[343] The tax may then be invalidated if the local government does not have the power to tax or if the imposition of new taxes requires approval by a super majority of voters.[344]

Other states have applied differing levels of scrutiny to impact fees. For example, in *Homebuilders Ass'n of Metropolitan Portland v. Tualatin Hills Park & Recreation District*,[345] an Oregon appellate court noted that under Oregon law, a legislatively imposed exaction of money that is applicable generally to a large number of people cannot be challenged as a taking.[346] Developers in this case challenged a system development charge ("SDC") that charged fees to new developments for funding parks and recreation facilities.[347] The court concluded, as it had done in an earlier case involving traffic impact fees, that the *Nollan/Dolan* test does not apply to legislatively imposed fees calculated by a formula based on the impact that the development will have on infrastructure.[348] Instead, the court reviewed various federal and state decisions involving legislative fees and noted that some jurisdictions applied a "reasonable relationship" test that is "only slightly more rigorous than the 'rational basis' test."[349] The court declined to decide between these two tests as it concluded that the SDC would easily pass either test.[350]

Similar to Oregon courts, Arizona courts declined to apply the *Nollan/Dolan* test to impact fees. In *Home Builders Ass'n of Central Arizona v. City of Scottsdale*,[351] the Arizona Supreme Court examined cases that applied the "dual nexus test" to uphold development fees imposed to finance public improvements

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[342] *Id*. at 226 (quoting Hollywood, Inc. v. Broward Cnty., 431 So. 2d 606, 611–12 (Fla. Dist. Ct. App. 1983) (noting that the second prong of the test will not be satisfied unless "the ordinance . . . specifically earmark[s] the funds collected for use in acquiring capital facilities to benefit the new residents")).

[343] *Id.* at 249 (noting that the most common attack against impact fees is that it is a tax and the municipality does not have taxation authority).

[344] *Id.* at 249–50.

[345] 62 P.3d 404 (Or. Ct. App. 2003).

[346] *Id.* at 408.

[347] *Id.* at 406.

[348] *Id.* at 409 (citing Rogers Mach., Inc. v. Washington Cnty., 45 P.3d 966 (Or. Ct. App. 2002), *cert. denied*, 52 P.3d 1057 (Or. 2002)).

[349] *Id.* at 410.

[350] *Id.* at 411.

[351] 930 P.2d 993 (Ariz. 1997).

that would be needed in the foreseeable, albeit not immediate, future.[352] In resolving a challenge by developers to a water resources development fee, the court declined to apply the *Nollan/Dolan* test because *Dolan* "involved a city's *adjudicative* decision to impose a condition tailored to the particular circumstances of an individual case . . . [while] the Scottsdale case involve[d] a generally applicable *legislative* decision by the city."[353] Because the court observed that nothing in its opinions required it "to plunge into the thicket of the levels of scrutiny in this case,"[354] the court equated the *Dolan* standard of rough proportionality with the Arizona statutory requirement that the fee "bear a reasonable relationship 'to the community burden.'"[355] It held that Scottsdale's fee meets the state standard, which requires that a municipality intends, in good faith, to use legislative development fees to provide additional public services, as required by the new development, within a reasonable time.[356]

Courts in Georgia have also declined to apply *Nollan/Dolan* scrutiny to impact fees. Tree protection fees were challenged in the Georgia Supreme Court's decision in *Greater Atlanta Homebuilders Ass'n v. DeKalb County.*[357] The court concluded that the Tree Ordinance applied uniformly to all property in the county and regulated the building and development permits that disturb land and affect tree coverage.[358] In analyzing the "facial" challenge to the Tree Ordinance as a taking requiring compensation, the court refused to undertake an analysis under *Dolan* because *Dolan* involved an "as-applied" challenge whereas "this case involve[d] a facial challenge to a generally applicable land-use regulation."[359] Additionally, the Georgia court noted that in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*,[360] it had refused to apply *Dolan* to legislative determinations.[361] The two dissenting justices in *DeKalb*, who also dissented in *Parking Ass'n of Georgia*,[362] objected to the majority's efforts to uphold the ordinance, claiming that the Tree Ordinance "results in a taking of property without compensation." The *DeKalb* dissenters pointed out that Justice Thomas, joined by Justice O'Connor, dissented to the denial

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[352] *Id.* at 998 (noting that "[i]n none of these cases was the benefit to the developer limited to concrete plans for specific developments").

[353] *Id.* at 1000 (emphasis added) (noting that the question has not been settled by the Supreme Court and citing Parking Ass'n of Ga., Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting)).

[354] *Id.*

[355] *Id.* at 998 (citing A.R.S. § 9-463.05).

[356] *Id.*

[357] 588 S.E.2d 694 (Ga. 2003).

[358] *Id.* at 696.

[359] *Id.* at 697.

[360] 450 S.E.2d 200 (Ga. 1994).

[361] 588 S.E.2d at 697 (citing *Parking Ass'n. of Ga.*, 450 S.E.2d at 203 n.3).

[362] 450 S.E.2d at 204 (Sears, J., dissenting) (advocating that a "benefit-extraction" analysis be applied to the ordinance using the two requirements from the *Nollan/Dolan* decisions).

of certiorari in *Parking Ass'n of Georgia* based on the lack of distinction between legislative and administrative acts.[363] The *DeKalb* dissent also noted that there has not been a consensus in the courts on the issue of whether *Dolan* applies to legislative determinations, but that the two Supreme Court Justices in *Parking Ass'n of Georgia* "make a compelling case that *Dolan* applies beyond strictly adjudicatory decisions."[364]

Colorado does not apply the *Nollan*/*Dolan* takings analysis to legislatively enacted fees that are reasonably related to the impact caused by the development. For example, in *Krupp v. Breckenridge Sanitation District*,[365] the Colorado Supreme Court reviewed a takings challenge by developers to a plant investment fee ("PIF").[366] The fee was assessed on all building projects for purposes of providing wastewater services, as subject to state and federal regulations, in the face of impacts on water quality and quantity from human activity.[367] An expert report was prepared and concluded that the PIF assessed against the Krupps' project was "not excessive in relation to the projected impact" of the project and did, in fact, undercharge the Krupps for certain units.[368] Indeed, some scholars have observed that as municipalities are required to subject exactions to the *Nollan/Dolan* test, these municipalities have discovered that they have been exacting less than what the impact analysis would support.[369] However, the PIF at issue in *Krupp* was not an exaction because "the District has no statutory or regulatory authority to deny or condition the issuance of building permits, and therefore, could not leverage or extort fees under threat of denying the permit."[370] The court held that the PIF was not subject to the *Nollan/Dolan* takings analysis and that it was a "valid, legislatively established fee that is reasonably related to the District's interest in expanding its infrastructure to account for new development."[371]

In contrast to those states refusing to apply *Nollan/Dolan* to impact fees, the Ohio Supreme Court in *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*,[372] identified the test to be applied as "whether the fee is in proportion to the developer's share of the city's costs to construct and maintain roadways that

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[363] 588 S.E.2d at 701 (quoting Parking Assn'n. of Ga. v. City of Atlanta, 515 U.S. 1116, 1117–18 (1995) (Thomas, J., joined by O'Connor, J., dissenting) (concluding that "[t]he distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference")).

[364] *Id.*

[365] 19 P.3d 687 (Colo. 2001).

[366] *Id.* at 689.

[367] *Id.* at 690.

[368] *Id.* at 692.

[369] *See* Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 967 (2003).

[370] 19 P.3d at 692.

[371] *Id.* at 694 (finding that the "specific PIF assessment on the Krupps' project was fairly calculated and rationally based").

[372] 729 N.E.2d 349 (Ohio 2000).

will be used by the general public."[373] The court equated the *Nollan/Dolan* test to a dual rational nexus test and eschewed both the more lenient "reasonable relationship" test from California and the stricter "specific and uniquely attributable" test from Illinois.[374] It concluded that the traffic development fees "were reasonable and that a reasonable relationship existed between the fee paid and the benefits accruing to developers,"[375] which satisfied the test.[376] Unfortunately, it appears that the court conflated the federal standard adopted for exactions in *Nollan/Dolan* and the original state standards used for exactions and labeled the test as the "dual rational nexus test" which was traditionally applied only to impact fees. Indeed, the Court in *Dolan* discussed the three general approaches used by states to evaluate exactions as: 1) the "very generalized statements as to the necessary connection between the required dedication and the proposed development" resulting in a lax standard of review; 2) the "'specifi[c] and uniquely attributable' test" from Illinois, which is too exacting; and 3) the reasonable relationship, or intermediate scrutiny test.[377] These state tests for exactions are different from the dual rational nexus tests applied to impact fees in several states, as discussed above.

The Supreme Court of Illinois also applied *Dolan* scrutiny to transportation impact fees in *Northern Illinois Home Builders Ass'n v. County of DuPage*.[378] The court did not distinguish between exactions and impact fees and applied the standard from *Pioneer Trust & Savings Bank v. Mount Prospect*,[379] which was developed to evaluate the constitutionality under the Fifth Amendment and Illinois law of a requirement that a land developer dedicate 6.7 acres of land for an elementary school site and playground.[380] Shortly thereafter, an Illinois appellate court in *Amoco Oil Co. v. Village of Schaumburg*,[381] held that challenges against exactions under federal law would be governed by the less restrictive "rough proportionality" standard from *Dolan*, but noted that state court challenges would still be evaluated under the stricter *Pioneer Trust* standard.[382] The Illinois appellate court also expressed its agreement with Justice Thomas's dissent from the denial of certiorari in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*,[383] in which the Justice declared that there is no valid

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[373] *Id.* at 354.

[374] *Id.*

[375] *Id.* at 358; *see also id.* at 353 (noting that impact fees, whether labeled as a fee or a tax, were only unconstitutional if they were "unduly burdensome in application").

[376] *Id.* at 355–56 (citing Associated Home Builders of Greater E. Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971); Pioneer Trust & Sav. Bank v. Vill. of Mt. Prospect, 176 N.E.2d 799 (Ill. 1961)).

[377] Dolan v. City of Tigard, 512 U.S. 374, 389–91 (adopting the reasonable relationship test for exactions from the majority of states and renaming it "rough proportionality" to avoid confusion with the laxer rational basis standard).

[378] 649 N.E.2d 384, 388–89 (Ill. 1995).

[379] 176 N.E.2d 799 (Ill. 1961).

[380] 649 N.E. 2d at 389–91 (citing 176 N.E.2d 799 at 800–02).

[381] 661 N.E.2d 380 (Ill. App. Ct. 1995).

[382] *Id.* at 387 n.5.

[383] 515 U.S. 1116 (1995) (Thomas, J., dissenting).

constitutional "distinction between sweeping legislative takings and particularized administrative takings."[384] The Illinois court then noted that even if there were such a distinction, it would nevertheless apply the *Dolan* test to both legislative and adjudicative actions.[385]

While some states have judicially determined the level of scrutiny applied to impact fees, others have statutorily defined and limited the use of impact fees. Hawaii, for example, legislatively defines impact fees and limits the use of these fees to situations where the fees collected are used to fund the improvements required by the development.[386] The public facilities to be benefitted by the fees are identified through a needs assessment study for either future or existing improvements.[387] The developer is then required to pay a pro rata share of the cost, which must be proportional to improvements, and the impact fee must be "fair and reasonable."[388] To determine whether the impact fee assessed is proportional to the cost of improvements, the statute requires that seven factors be considered to ensure that the developer is not charged for more than his or her relative share of the community's increased burden.[389] These detailed factors look to the additional demands placed on public facilities by the development, the availability of other funding for capital improvements, the extent to which the developer has previously paid impact fees without direct benefit, etc.[390] In addition, the Hawaii code requires that impact fees collected be placed in a separate account; that impact fees be collected and expended in the same geographic zone that will benefit the new development; that the fees be related directly to the necessary improvements; that the fees be spent on the type of facilities for which they were collected; and that the fees be spent within six years of collection or else refunded to the developer with interest.[391]

Washington has also adopted a statute to govern impact fees, and in *City of Olympia v. Drebick*,[392] the Washington Supreme Court was called upon to determine the validity of a transportation impact fee.[393] It applied the state statutory framework for impact fees, which is similar to the Hawaii legislation.[394] In Washington, the

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[384] 661 N.E.2d at 390 (citing 515 U.S. at 1118).

[385] *Amoco Oil Co.*, 661 N.E.2d at 390.

[386] DAVID L. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAI'I 96 (2d ed. 2010).

[387] *Id.* at 96–97.

[388] *Id.* at 97.

[389] *Id.* (referring to HAW. REV. STAT. § 46-143(d) (2014)).

[390] HAW. REV. STAT. § 46-143(d) (2014).

[391] CALLIES, *supra* note 386, at 97 (citing HAW. REV. STAT. § 46-144). It should be noted that Professor Callies in early 2015 pointed out that to the best of his knowledge, "Hawai'i's impact fee statute has never been used by any of our four counties." E-mail from David L. Callies, Professor of Law, Univ. of Haw., to author (Jan. 5, 2015) (on file with author).

[392] 126 P.3d 802 (Wash. 2006).

[393] *Id.* at 802.

[394] *Id.* at 804–06 (describing WASH. REV. CODE §§ 82.02.050–.090 of the Land Use Petition Act).

impact fee statute authorizes local governments to impose fees on development activity in order to finance system improvements required to support new development.[395] These impact fees

> (a) [s]hall only be imposed for system improvements that are reasonably related to *the new development*;
> (b) [s]hall not exceed a proportionate share of the costs of system improvements that are reasonably related to *the new development*; and
> (c) [s]hall be used for system improvements that will reasonably benefit *the new development*.[396]

Like the Hawaii legislation, the local government has a six-year period in which to spend the impact fees "'on public facilities *intended to benefit the development activity for which the impact fees were paid*.'"[397] The *Drebick* court upheld the impact fee, distinguishing between impact fees and land dedications and refusing to apply the *Nollan/Dolan* test, as neither *Nollan* nor *Dolan* involved impact fees and instead concerned a requirement that the property owner dedicate a portion of their land for public use.[398]

These state court examples illustrate the variety of approaches used to scrutinize monetary fees that are legislatively enacted.[399] The level of judicial review over these impact fees ranges from the standard rational basis review applied to legislative actions; the *Nollan/Dolan* standard applied to exactions; the dual rational nexus test for impact fees, which requires the government to show that the impact fee does not exceed the costs attributable to the development and that the developer will receive a benefit from the infrastructure; and the more stringent "specific and uniquely attributable" standard from *Pioneer Trust*.[400] This Article proposes that applying a judicial dual rational nexus test, or a similar state statute as found in Hawaii and Washington, will afford municipalities greater flexibility by deferring to legislative judgments about how to reasonably allocate development externalities, while deterring the abuse of power by using a sufficient level of judicial scrutiny to distinguish valid impact fees from invalid taxes.[401]

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[395] *Id.* at 804–05.

[396] *Id.* at 805 (emphasis in original) (quoting WASH. REV. CODE § 82.02.050(3)).

[397] *Id.* at 806 (emphasis in original) (quoting WASH. REV. CODE § 82.02.080(1)).

[398] *Id.* at 807–09.

[399] *See also* B.A.M. Dev., L.L.C. v. Salt Lake Cnty., 128 P.3d 1161, 1171 (Utah 2006) (noting that the *Nollan/Dolan* test applies to both legislative and adjudicative impact fees and finding "that the legislature intended to apply the rough proportionality test to all exactions, irrespective of their source").

[400] *See generally* Garnett, *supra* note 369, at 967 (discussing the evolution of the standards applied to regulatory takings).

[401] *See* Lawrence Friedman & Eric W. Wodlinger, *Municipal Impact Fees in Massachusetts*, 88 MASS. L. REV. 131, 137 (2004) (recommending that Massachusetts courts apply a dual rational nexus analysis to impact fees).

### *D. Impact Fees as Taxation*

Local government must deal with concerns about "the inadequacy of local public infrastructure" when faced with continued development in the community.[402] Impact fees and taxation are two different financial techniques available to address these concerns. However, local government "may regulate and impose fees on the basis of their police power, but they may not impose taxes."[403] If impact fees are considered taxes, it is because they must be paid by private parties to government agencies regardless of whether the private parties get the benefits of whatever activity is financed by the payments.[404] State legislatures generally limit local government's power to tax, but voters who are upset with the taxation can use the election process to vote local officials out of office.[405] However, if the taxes are applied only to land developers, citizens wishing to prevent growth could keep the local officials in office and place the burden of the public as a whole to maintain infrastructure, build schools, provide parks, etc., on the back of developers and newcomers. This is certainly a scenario intended to be addressed by the Fifth Amendment Takings Clause, at least according to the Court in *Armstrong v. United States*,[406] which observed that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[407] However, such a tax on land developers only would violate the basic rule that taxes must be uniform[408] and, in any event, taxes cannot be considered a Fifth Amendment taking[409] "unless the taxation is so 'arbitrary as to constrain to the conclusion that it

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[402] Rosenberg, *supra* note 22, at 22.

[403] *Id.* at 218.

[404] FISCHEL, *supra* note 1, at 40; *see also* McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995) (describing the distinction between an impact fee and a tax).

[405] Rosenberg, *supra* note 22, at 22.

[406] 364 U.S. 40 (1960).

[407] *Id.* at 49.

[408] *See id.*

[409] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2600–01 (2013) (quoting Brown v. Legal Found. of Wash., 538 U.S. 216, 243 n.2 (Scalia, J., dissenting) (recognizing that "[i]t is beyond dispute that '[t]axes and user fees . . . are not "takings"'")); Laborde v. City of Gahanna, 561 F. App'x 476, 479 (6th Cir. 2014) (affirming the district court's recognition of the "well-established proposition that a government's act of taxation is not a 'taking' of private property under the Constitution"); Quarty v. United States, 170 F.3d 961, 969 (9th Cir. 1999) (citing Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 24–25 (1916)); Coleman v. Comm'r of Internal Revenue, 791 F.2d 68, 70 (7th Cir. 1986) ("It is well established that Congress's general exercise of its taxing power does not violate the Fifth Amendment's prohibition on takings without just compensation."); Maxwell v. United States, 104 Fed. Cl. 112, 120 (Fed. Cl. 2012) (holding that plaintiff failed to state a claim "because the imposition of lawful taxes does not constitute a taking"); Montagne v. United States, 90 Fed. Cl. 41, 50 (Fed. Cl. 2009) (quoting Skillo v. United States, 68 Fed. Cl. 734,

was not the exertion of taxation, but a confiscation of property.'"[410] In some states, cities do not have the authority to impose development impact fees as regulatory fees under their police power.[411] If the impact fees operate as taxes, municipalities may violate state statutes that limit local government's ability to impose taxes.[412]

While taxes cannot be considered a taking, there are situations where the government essentially confiscates property, which can constitute a taking. Following the *Koontz* decision, the Seventh Circuit in *Cerajeski v. Zoeller*,[413] found that Indiana's retention of interest on Cerajeski's bank account under an act for unclaimed property was a taking of property.[414] The court quoted *Koontz* as remarking:

> [W]e have repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax. Most recently, in *Brown* [*v. Legal Foundation of Washington*[] we were unanimous in concluding that a State Supreme Court's seizure of the interest on client funds held in escrow was a taking despite the unquestionable constitutional propriety of a tax that would have raised exactly the same revenue. Our holding in *Brown* followed from . . . two earlier cases in which we treated confiscations of money as takings despite their functional similarity to a tax.[415]

According to Professor William Fischel, "economists have not provided especially helpful guidance about exactions and impact fees" and have treated these payments as though they were taxes.[416] However, unlike taxes, a landowner can refuse to pay an exaction or impact fee and decline to receive a development permit.[417] Fischel does not view this bargaining as antidevelopment, but instead sees exactions as giving landowners relief from the underlying regulations.[418] He recognizes that the Supreme Court exaction decisions have been embraced by

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743 (Fed. Cl. 2005)) (noting that "the lawful exercise of the Government's collection powers does not amount to a prohibited Fifth Amendment 'taking'").

[410] *Quarty*, 170 F.3d at 969 (quoting *Brushaber*, 240 U.S. at 24); *see also* Cerajeski v. Zoeller, 735 F.3d 577, 580 (7th Cir. 2013) (finding that Indiana's retention of interest on Cerajeski's bank account under an act for unclaimed property was a taking of property).

[411] *See, e.g.*, Mayor & Bd. of Aldermen, Ocean Springs v. Homebuilders Ass'n of Miss., Inc., 932 So. 2d 44, 53–59 (Miss. 2006) (holding that city's impact fees constitute illegal taxes).

[412] *See, e.g.*, Drees Co. v. Hamilton Twp., 970 N.E.2d 916, 923–24 (Ohio 2012) (applying a test that is similar to the dual rational nexus test to find that the impact fees were taxes in that they raised revenue for the public's benefit and did not specially benefit those paying the fees).

[413] 735 F.3d 577.

[414] *Id.* at 580.

[415] *Id.* (alterations in original) (quoting *Koontz*, 133 S. Ct. at 2601).

[416] FISCHEL, *supra* note 1, at 40.

[417] *Id.* at 41.

[418] *Id.*

developers who believe they face extortionate demands, but he is also concerned that these tests are "likely to inhibit ordinary negotiations."[419]

## IV. EXPANDING THE USE OF IMPACT FEES

The traditional use of impact fees by municipalities to support the infrastructure needed for new development is changing as local government recognizes the impact that growth has on other concerns such as affordable housing, climate change, and environmental resilience and sustainability. Addressing issues such as wetlands mitigation, coastal changes, water resources, flood plains, and general land degradation has increasingly been considered a local responsibility. On the forefront of these issues, local municipalities have attempted to address the critical need for affordable housing by various financing approaches including mandatory set-asides, density bonuses, and linkage fees. Linkage fees "specify the benefits developers are required to provide according to a formula that is uniformly applied to all developers,"[420] thus avoiding the concern about ad hoc negotiating between municipalities and developers during the zoning approval process.[421]

The constitutionality of these approaches to providing affordable housing has been challenged as a Fifth Amendment Taking without just compensation. Mandatory set-asides require commercial or residential developers to provide housing for lower-income groups or contribute funds for public construction of such housing.[422] Density bonuses from zoning officials are valuable when they accompany these set-asides in order to incentivize developers to provide affordable housing when the development creates the need for workforce housing.[423] At issue is whether these inclusionary zoning techniques should be evaluated as exactions subject to a potential taking under the *Nollan/Dolan* standard;[424] land-use regulations subject to substantial deference under the police power; impact fees

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[419] *Id.* at 41–45 (concluding that "the Court's exactions decisions run counter to the economic idea that takings jurisprudence makes governments face a higher cost for regulation").

[420] Jane E. Schukoske, *Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011, 1013 (1991).

[421] *Id.*

[422] David L. Callies, *Mandatory Set-Asides as Land Development Conditions*, URB. LAW., Fall 2010/Winter 2011, at 307, 308 (citing MANDELKER, *supra* note 82, at § 9.23).

[423] *See id.* at 323, 328–29.

[424] *See* Andrew W. Schwartz, *The Impact of* Koontz v. St. Johns River Water Management Dist. *on Inclusionary Housing*, 17th Annual Conference on Litigating Takings Challenges to Land Use and Environmental Regulations, U.C. Davis co-sponsored with Vermont Law, Sept. 2014 (on file with author) (noting the concern that "[b]ecause few inclusionary housing requirements are ad hoc, the prognosis for inclusionary housing under *Koontz* depends largely on whether courts expand the holding in *Koontz* to legislative exactions").

subject to state judicial review standards such as the dual rational nexus test; or as invalid taxes.[425]

Some states have treated mandatory set-asides as impact fees and have rejected the plea to apply heightened scrutiny under *Nollan/Dolan*. For example, in *Holmdel Builders Ass'n v. Township of Holmdel*,[426] the New Jersey Supreme Court held that mandatory set-asides are similar to development fees in that they perform "an identical function."[427] Thus, as a form of inclusionary zoning to supply affordable housing, they are "regulatory measures, not taxes."[428] The California Supreme Court similarly refused to subject all development fees to heightened scrutiny under *Nollan/Dolan* in *San Remo Hotel L.P. v. City & County of San Francisco*,[429] by "adhering instead to the distinction we drew in *Ehrlich* . . . between ad hoc exactions and legislatively mandated, formulaic mitigation fees."[430] The court determined that the housing replacement fee, required when a landowner converted a residential hotel to use by tourists or daily renters, was not a tax designed to raise general revenue, but was instead paid into a special account used to replace the reduced residential housing as a result of the conversion.[431] While refusing to apply the *Nollan/Dolan* test, the court in *San Remo Hotel* did apply increased scrutiny to the fee and noted that "[a]s a matter of both statutory and constitutional law, such fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development."[432]

California appellate courts have reached different conclusions when considering similar housing ordinances and have sometimes applied the reasonable relationship standard under the Mitigation Fee Act or the substantial deference standard applied to the exercise of police power.[433] The California Supreme Court

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[425] *See, e.g.*, Michael Floryan, *Cracking the Foundation: Highlighting and Criticizing the Shortcomings of Mandatory Inclusionary Zoning Practices*, 37 PEPP. L. REV. 1039, 1062–69 (2010) (noting that as among classifying mandatory set-asides as impact fees, taxes, rent control, or exactions for purposes of judicial scrutiny, "[t]he fourth, and most suitable, characterization of mandatory inclusionary zoning ordinances is an 'exaction,'" subject to *Nollan/Dolan* scrutiny); Tim Iglesias, *Framing Inclusionary Zoning: Exploring the Legality of Local Inclusionary Zoning and Its Potential to Meet Affordable Housing Needs*, ZONING & PLAN. L. REP., April 2013, at 1, 4, 13 n.22 (noting that inclusionary zoning may be challenged under different characterizations with "different possible legal tests").

[426] 583 A.2d 277 (N.J. 1990).

[427] *Id.* at 294.

[428] *Id.*

[429] 41 P.3d 87 (Cal. 2002).

[430] *Id.* at 105.

[431] *Id.* at 108.

[432] *Id.* at 105.

[433] *See, e.g.*, Trinity Park, L.P. v. City of Sunnyvale, 124 Cal. Rptr. 3d 26, 45 (Cal. Ct. App. 2011) (requiring that developer sell five of the forty-two planned houses below the market rate is not intended to "defra[y] all or a portion of the cost of public facilities related to the development project" and therefore "does not constitute an 'other exaction'" within the meaning of the Mitigation Fee Act so that the statute of limitations for that Act is not applicable); Bldg. Indus. Ass'n of Cent. Cal. v. City of Patterson, 90 Cal. Rptr. 3d 63, 72–73 (Cal. Ct. App. 2009) (refusing to apply the *Nollan/Dolan* test to an affordable housing charge

in *California Building Industry Ass'n v. City of San Jose*,[434] clarified the legal review standards for affordable housing ordinances by distinguishing housing ordinances that require developers to offset adverse impacts created by the proposed development, from housing ordinances that instead restrict a landowner's use of land for broad general welfare purposes.[435] Housing ordinance provisions that are intended to address direct impacts will likely be considered exactions that must meet the means-end test under *Nollan/Dolan* or under the Mitigation Fee Act. Housing ordinances that limit developers in the use of their property for broader purposes under the police power will be subject to the traditional deferential standard of rational basis review.

In *City of San Jose*, the court held that the city's inclusionary housing conditions imposed on developments are not exactions subject to review under the unconstitutional conditions standards of the Takings Clause, but are instead limitations on the way developers can use their property.[436] The city's ordinance at issue required residential developments of twenty or more units to set aside fifteen percent of the units for below-market pricing for low-income households.[437] The court distinguished its decision in *San Remo Hotel* stating that

> [U]nlike the condition that was at issue in *San Remo Hotel* . . . namely, an in lieu monetary fee that is imposed to mitigate a particular adverse effect of the development proposal under consideration—the conditions imposed by the San Jose ordinance at issue here do not require a developer to pay a monetary fee but rather place a limit on the way a developer may use its property.[438]

The court determined that San Jose's affordable housing ordinance was not an exaction, subject to scrutiny under *Nollan/Dolan*, but was instead a price control that

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and applying instead the reasonable relationship requirement, used by the *San Remo* court, to find that the housing fee revision was not reasonably justified under the Development Agreement because it did not pass the mitigation fee test); Action Apartment Ass'n v. City of Santa Monica, 82 Cal. Rptr. 3d 722, 733 (Cal. Ct. App. 2008) (refusing to apply *Nollan/Dolan* test to a legislative ordinance of general application that required affordable multifamily house as a condition to development approval); Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 66 (Cal. Ct. App. 2001) (declining to apply *Nollan/Dolan* to the housing fee at issue because it was the result of generally applicable economic legislation and not ad hoc bargaining).

[434] Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974 (Cal. 2015), *cert. denied*, 2016 WL 763863 (2016).

[435] *Id.* (disapproving *Building Indus. Ass'n of Cent. Cal.*, 90 Cal. Rptr. 3d 63, to the extent that it subjected an affordable housing in-lieu fee to a means-end test even though it was not imposed to mitigate the developer's impact but was instead imposed to achieve a broader public purpose).

[436] *City of San Jose*, 351 P.3d 974.

[437] *Id.* at 978.

[438] *Id.* at 979.

would not constitute a taking unless it was determined to be a regulatory taking under the multifactor test of *Penn Central*, which the challengers expressly declined to rely upon.[439]

The court in *City of San Jose* also distinguished its opinion in *Sterling Park, L.P. v. City of Palo Alto*,[440] finding that the San Jose ordinance could not be equated with the Palo Alto ordinance because the Palo Alto ordinance required the developer to grant an option to the city to buy the affordable units on the initial sale or resale of the units while the San Jose ordinance did not contain such a requirement.[441] In *Sterling Park*, the court applied the statute of limitations from the Mitigation Fee Act to Palo Alto's affordable housing requirements by treating them as exactions instead of land-use restrictions.[442] The Mitigation Fee Act was enacted to respond to developer concerns that local governments were imposing development fees that were not related to the actual impact the proposed development might have on the local infrastructure.[443] Thus, the *City of San Jose* court determined that the affordable housing ordinance in San Jose was a land-use regulation limiting the developers' use of property, while the Palo Alto ordinance was an exaction covered by the Mitigation Fee Act because it required developers to either pay an in-lieu exaction or sell units below market rate and grant the city options to purchase.[444]

The court made clear that its decision in *Sterling Park* did not establish a "legal test that applies in evaluating the substantive validity of the affordable housing requirements imposed by an inclusionary housing ordinance."[445] Instead, the court explained that

> [W]hen a municipality enacts a broad inclusionary housing ordinance to increase the amount of affordable housing in the community and to disperse new affordable housing in economically diverse projects throughout the community, the validity of the ordinance does not depend upon a showing that the restrictions are reasonably related to the impact of a particular development to which the ordinance applies. Rather, the restrictions must be reasonably related to the broad general welfare purposes for which the ordinance was enacted.[446]

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[439] *Id.* at 991–92.

[440] 310 P.3d 925 (Cal. 2013).

[441] *City of San Jose*, 351 P.3d at 1005–06.

[442] *Sterling Park*, 310 P.3d at 934 ("The statute governs conditions on development a local agency imposes that divest the developer of money or a possessory interest in property, but not restrictions on the manner in which a developer may use its property.").

[443] *See* Barratt Am., Inc. v. City of Rancho Cucamonga, 124 P.3d 719, 720 (Cal. 2005) (citing Ehrlich v. City of Culver City, 911 P.2d 429, 436 (Cal. 1996)).

[444] *City of San Jose*, 351 P.3d at 1005–06.

[445] *Id.* at 1006.

[446] *Id.* at 1000.

Drawing upon its decision in *Ehrlich*, the court distinguished between the recreational-development fee in that case that was intended to offset the impact of the proposed development and was therefore subject to the *Nollan/Dolan* test, and the public art fee, which constituted general legislation for the public benefit and was subject to the traditional deference standard.[447]

Local government attempts to use impact fees and other revenue-raising techniques, specifically designed to mitigate development impacts on affordable housing needs, climate change, coastal resources, flood plains, water resources, and other environmental impacts,[448] must be rationally tied to the projected impact of the project. It is likely that environmental impact assessments will continue to fill this role when a project potentially presents a significant impact.[449] Exactions or impact fees imposed for the purpose of mitigating future impacts of development may require an immediate burden on a landowner to address harms such as shore protection projects anticipated from a future sea level rise.[450]

Mandatory set-asides and linkage fees supporting inclusionary housing may be subject to scrutiny under *Nollan/Dolan*, particularly if the mechanism for determining such fees involves individualized bargaining between local officials and developers.[451] But it is more likely that inclusionary housing ordinances will be legislative in nature and that *Koontz* should have no impact on such laws unless it is

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[447] *Id.* at 1001.

[448] *See, e.g.*, Michael Castle Miller, Note, *The New Per Se Takings Rule:* Koontz*'s Implicit Revolution of the Regulatory State*, 63 AM. U. L. REV. 919, 945–46 (2014) (noting the concern that requiring coal-fired power plants to install scrubbers to mitigate air pollution as a condition to receive a building permit could be considered a per se taking after *Koontz*); *see also* Schwartz, *supra* note 424, at 16–17 (discussing concern "as to whether exactions that mitigate harm to the users of a new development project from a pre-existing environmental condition that the new development did not cause would satisfy the *Nollan/Dolan* test" and citing a case that will decide a similar issue, California Bldg. Indus. Ass'n v. Bay Area Air Quality Mgmt. Dist., 161 Cal. Rptr. 3d 128 (Ct. App. 2013), *review granted*, California Bldg. Indus. Ass'n v. Bay Area Air Quality Mgmt. Dist., 312 P.3d 1070 (Cal. 2013)).

[449] Ruhl, *supra* note 22.

[450] *See* Mulvaney, *Exactions for the Future*, *supra* note 71, at 526–27.

[451] *See, e.g.*, Lambert v. City & Cty. of S.F., 529 U.S. 1045, 1049 (2000) (Scalia, J., dissenting from denial of petition for writ of certiorari) (favoring remand for analysis of Planning Commission's denial of a permit under *Nollan/Dolan* after commission sought a demand for a $600,000 payment and developer offered only $100,000); *see* Sanjay Bhatt & Daniel Beekman, *Seattle Weighing New Tax on Builders for Affordable Housing*, SEATTLE TIMES (Sept. 16, 2014), http://seattletimes.com/html/businesstechnology/2024555479_fees17xml.html [http://perma.cc/A4DC-H22Y]; *see also* J. Michael Marshall & Mark A. Rothenberg, *An Analysis of Affordable/Work-Force Housing Initiatives and Their Legality in the State of Florida, Part I*, 82-JUN FLA. B.J. 79, 81 (2008) (arguing that "inclusionary zoning ordinances properly fall within the development exactions category and are subject to the *Nollan/Dolan* analysis"). *See generally* Callies, *Mandatory Set-Asides*, *supra* note 422, at 314–19.

decided that heightened scrutiny should apply to legislative regulations.[452] Taxes may be imposed to spread the responsibility for addressing these impacts to all members of a community or region, but such taxation actions cannot be challenged as Fifth Amendment takings.

If local municipalities or counties wish to mitigate development impacts on climate change and other natural resources, a neutral and generally applicable legislative scheme that is developed through expert studies will be the best approach to help prevent government from behaving badly in individualized situations. Depending upon the state, even these legislatively developed fees may require judicial scrutiny in the form of the dual rational nexus test, which may have the same practical effect as heightened judicial scrutiny under *Nollan/Dolan*. *Nollan/Dolan* scrutiny should be reserved for individualized government demands in a permitting situation when either land or money is exacted to specifically mitigate the proposed development's impact. Legislatively determined impact fees should be subject to a means-ends test, sometimes referred to as the dual rational nexus test, to check for abuse and verify that fees are not being imposed as taxes. And legislation regulating the use of land under the police power should be subject to the traditional rational basis test for deference to the government if the validity of the action is "fairly debatable."

## V. CONCLUSION

The majority's decision in *Koontz*, to submit monetary in-lieu exactions to the *Nollan/Dolan* test, fits into the overall regulatory takings structure established by the Supreme Court since the *Pennsylvania Coal* decision in 1922. *Koontz* echoes the objective developed in *Nollan* and *Dolan* to "provide important protection against the misuse of the power of land-use regulation."[453] This has been a consistent theme as noted by the Court in *Lingle* when it repudiated the "substantially advances" means-ends takings test from *Agins*.[454] The Court retained the *Nollan/Dolan* test, even though it was developed from the "substantially advances" prong of *Agins*, explaining "that the application of intermediate judicial review in *Nollan/Dolan* was appropriate because, as a condition of ad hoc development approval, a local agency exacted an ad hoc possessory interest in property, tantamount to a physical taking."[455] The *Lingle* Court recognized that it is well established that legislative judgments about the need for regulatory actions and the likely effectiveness of such actions are entitled to deference.[456] Lower court cases decided since *Koontz* have generally cited to it for purposes of saying that taxes are not takings and that the

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[452] *See* Schwartz, *supra* note 424, at 22–24 (proposing that "intermediate scrutiny does not apply to legislative inclusionary housing" by analyzing California cases that have generally upheld inclusionary housing ordinances against takings challenges).

[453] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2591 (2013).

[454] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 545 (2005).

[455] Schwartz, *supra* note 424, at 15 (citing *Lingle*, 544 U.S. at 545–48).

[456] *Lingle*, 544 U.S. at 545.

obligation to pay money, unless tied to a specific property interest, is not a per se taking.[457] *Koontz* has also been cited in reference to the application of the unconstitutional conditions doctrine,[458] but has created confusion in cases applying the *Nollan/Dolan* framework to evaluate a takings challenge to legislation requiring the set-aside of raisins[459] and legislation requiring property owners to pay a lump sum amount to displaced tenants to address affordable housing needs.[460]

Legislatively determined impact or assessment fees, established outside the land-use permitting context, should not be subject to *Nollan/Dolan* scrutiny and should instead be tested under the applicable state law review standard, such as deferential review, statutory review, or the dual rational nexus test. The dual rational nexus test focuses on whether 1) there is a rational nexus "'between the need for additional capital facilities and the growth in population generated by the subdivision'" and 2) there is a rational nexus "'between the expenditures of the funds collected and the benefits accruing to the subdivision.'"[461] While this test may seem similar to the *Nollan/Dolan* test, which requires that there be an essential nexus and proportionality between the exaction requested and the impact caused by the development sought, the dual rational nexus test requires that the impact fee does not exceed the cost of the infrastructure required by the development and that the development receives a benefit from the infrastructure. If the state has not defined a heightened review standard for legislative impact fees, the fees should be treated as any other legislative act and given great deference.[462] However, even if the impact fee passes the state test, landowners can still assert a takings challenge.

Any physical occupation or confiscation of real property, whether based upon administrative or legislative action should be a per se taking under *Loretto* unless it is part of a land-use permitting process. *Nollan/Dolan* heightened scrutiny was developed to address government demands that would otherwise be a per se taking if made outside the context of land-use permitting. However, because the government could deny the permit outright, it is allowed instead to condition the permit on exactions that mitigate the project's impact so long as the conditions are not unconstitutional. Therefore, the *Nollan/Dolan* test should be applied only to

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[457] *See, e.g.*, Fitchburg Gas & Elec. Light Co. v. Dep't of Pub. Util., 7 N.E.3d 1045, 1055 (Mass. 2014) (noting that "[o]n the whole, Federal courts have established that an obligation to pay money is not a per se taking where the obligation does not affect or operate on a specific, identified property interest").

[458] *See, e.g.*, Madison Teachers, Inc. v. Walker, 851 N.W.2d 337, 393 (Wisc. 2014) (quoting *Koontz*, 133 S. Ct. at 2594) (noting that "[t]he doctrine of unconstitutional conditions provides that 'the government may not deny a benefit to a person because he exercises a constitutional right'")).

[459] *See* discussion of *Horne*, *supra* Section II.A.

[460] *See* discussion of *Levin*, *supra* Section II.A.

[461] Rosenberg, *supra* note 22, at 226 (quoting Hollywood, Inc. v. Broward Cty., 431 So. 2d 606, 611–12 (Fla. Dist. Ct. App.1983) (noting that the second prong of the test will not be satisfied unless "the ordinance . . . specifically earmark[s] the funds collected for use in acquiring capital facilities to benefit the new residents")).

[462] *See* Schwartz, *supra* note 424, at 25 (suggesting that municipalities conduct a nexus study to support an inclusionary housing ordinance against potential challenges).

government actions conditioning the grant of land-use permits on individualized exactions, either physical or monetary.

The physical occupation or confiscation of personal property through administrative or legislative action is also considered a per se taking based on a long line of precedential decisions that precede the *Loretto* decision. Legislative regulations of either personal property or real property should not be evaluated under *Nollan/Dolan* heightened scrutiny because regulations are not part of the individualized land-use permitting process.

Takings challenges may be successful against either legislative or administrative government actions, if such regulation "goes too far." However, unless the context of the challenge is a land-permitting process, such takings challenges should be analyzed using the Court's regulatory takings framework, without the *Nollan/Dolan* scrutiny needed to address the unconstitutional conditions doctrine. If the government action causes a permanent physical occupation or confiscation of property, it is a per se taking under *Loretto*. If the government action deprives the property owner of all economically viable use, it is a per se taking under *Lucas*, unless excepted under state law concepts of property. Finally, if it is not a per se taking, but instead deprives the property owner of partial economic value, it should be analyzed under the *Penn Central* factors by looking at the severity of the impact on the property value, the interference with the property owner's investment-backed expectations, and the character of the government action.

The land-use law framework, developed at both the state and federal levels, is designed to apply heightened scrutiny to government actions in situations where there is a potential for the abuse of power. When government officials make decisions that are tied to a specific landowner in an administrative, rather than legislative capacity, there is the concern that the landowner is being either unjustly favored or disfavored. Thus, challenges to these individualized actions will be subject to greater scrutiny. The Supreme Court's approach to takings law appropriately recognizes this potential for abuse in applying the *Nollan/Dolan* test to both physical and monetary exactions in the context of land-use permitting. However, this Article proposes that *Nollan/Dolan* scrutiny is not appropriate for generalized legislative actions that impose financial burdens on property owners and that "in lieu" exactions individually assessed as part of the permitting process should be distinguished from impact fees applied equally to all developers without regard to a specific project.

## APPENDIX A: TAKINGS FLOWCHART