

January 2015

## Koontz v. St. Johns River Water Management District: Can Environmental Impact Analysis Preserve Sustainable Development from the New Reach of the Supreme Court's Exactions Jurisprudence?

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### Recommended Citation

Patrick F. Carroll, *Koontz v. St. Johns River Water Management District: Can Environmental Impact Analysis Preserve Sustainable Development from the New Reach of the Supreme Court's Exactions Jurisprudence?*, 32 Pace Envtl. L. Rev. 336 (2015)

DOI: <https://doi.org/10.58948/0738-6206.1762>

Available at: <https://digitalcommons.pace.edu/pelr/vol32/iss1/7>

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## COMMENT

***Koontz v. St. Johns River Water Management  
District:  
Can Environmental Impact Analysis Preserve  
Sustainable Development From the New  
Reach of the Supreme Court's Exactions  
Jurisprudence?***

PATRICK F. CARROLL\*

### I. INTRODUCTION

The United States Supreme Court has raised the legal standard for a municipality to use land use exactions for sustainable development. Land use exactions frequent local government affairs and occur when a government demands a dedication of land or money in exchange for a municipal approval, such as a permit.<sup>1</sup> *Koontz v. St. Johns River Water Management*

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1. W. Andrew Gowder, Jr., *Recent Developments in Exactions and Impact Fees: Public Dedications Required of Private Land*, 44 URB. LAW. 667, 676 (2012) (discussing what constitutes a land use exaction).

*District*<sup>2</sup> found certain proposed government exactions for land use permits as “demands” on the applicant<sup>3</sup> and required a “‘nexus’ and ‘rough proportionality’ between the property that the government demands and the social costs of the applicant’s proposal,” regardless of whether the exaction was a condition precedent or a condition subsequent.<sup>4</sup> Even without incurring a “takings” for purposes of the Fifth and Fourteenth Amendments to the United States Constitution,<sup>5</sup> if government-imposed exactions are found to be “[e]xtortionate demand[s],”<sup>6</sup> this would still “run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.”<sup>7</sup> Thus, if there is no “essential nexus” and “rough proportionality,” the exaction is an actionable “unconstitutional condition.”<sup>8</sup> After *Koontz*, this standard now applies even if an applicant has only been asked to make payments to improve public land.<sup>9</sup> However, this comment argues that municipalities can use environmental impact review to shield themselves from the threat of uncertain, broad, and costly litigation during negotiations with developers.

Part II of this paper discusses the import of municipal exactions to environmental stewardship and sustainable development. Part III provides an overview of the Unconstitutional Conditions Doctrine, which played a decisive role in the *Koontz* case. Part IV centers around the majority and dissenting opinions in *Koontz*, as well as the issues settled, and those now raised, by the Court’s ruling. Part V analyzes the New York State Environmental Quality Review Act (SEQRA) and focuses on its procedural and substantive requirements.

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2. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

3. *Id.* at 2598.

4. *Koontz*, 133 S. Ct. at 2595 (citing *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) and *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987)).

5. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

6. *Koontz*, 133 S. Ct. at 2586.

7. *Id.* at 2586.

8. *Id.* at 2596 (“As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.”).

9. *Id.* at 2598.

Comparative treatment is also given to the environmental review statutes in the States of California and Washington. Part VI concentrates on case illustrations that reveal how these statutes satisfy the Unconstitutional Conditions Doctrine, as extended by *Koontz*. This Part focuses chiefly on SEQRA, but also explores possible outcomes under its analogous state counterparts. Part VII concludes with potential ramifications for local environmental law and sustainable development.

## II. EXACTIONS IN MUNICIPAL GOVERNANCE AND SUSTAINABLE DEVELOPMENT

### A. Exactions in General

Land use exactions frequent municipal governance and occur if the government demands an action, such as a dedication of land or a payment of money, in exchange for an authorized approval.<sup>10</sup> Exactions can help municipal governments attain certain development strategies. For example, a municipality might not have enough revenue to furnish necessary amenities to its citizens without asking developers to share in the costs of providing the services now required by their projects.<sup>11</sup> Exactions may be imposed in traditional or non-traditional forms, or through impact fees.<sup>12</sup> Traditional exactions usually require developers to dedicate some property upon which the development is intended for public facilities, such as a park, or to pay an in-lieu-of fee if the site is unsuitable for a land

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10. Gowder, *supra* note 1, at 676.

11. Home Builders Ass'n of Cent. Ariz. v. City of Mesa, 243 P.3d 610, 616-18 (Ariz. Ct. App. 2010) (holding that a cultural facilities impact fee, legislatively imposed by the City, was allowable to offset the impact of a subdivider's development, in part because it provided a beneficial use that the City would have been unable to render to maintain the "current level of service" due to the new development); Twin Lakes Dev. Co. v. Town of Monroe, 801 N.E.2d 821, 823 (N.Y. 2003) (holding that a recreational fee "in lieu of" a dedication of real property to be imposed on certain residential subdivisions could be used to improve "existing facilities for active recreation [that were] severely limited and [were] inadequate to accommodate the needs of its residents").

12. JOHN R. NOLON & PATRICIA E. SALKIN, LAND USE IN A NUTSHELL 118-22 (2006).

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dedication.<sup>13</sup> The payment is used solely to bolster the targeted amenities.<sup>14</sup> The main difference between a traditional exaction and a non-traditional exaction is that the non-traditional form may apply the benefit exacted to public lands outside the project property.<sup>15</sup> Each exaction must address a need created by the developer's project and must serve those directly benefiting from that project, such as residents in a subdivision.<sup>16</sup> An impact fee assesses a cost on the project applicant for "off-site improvements necessitated as a direct result of the proposed development."<sup>17</sup> While these fees raise revenue, they are not taxation tools, but, due to their "fee" status, are mechanisms to regulate land use.<sup>18</sup> Notably, impact fees can apply to *all* new developments, while traditional and non-traditional exactions are generally imposed on subdivisions, and whereas traditional exactions are usually limited to funding amenities such as "open space, parks, and infrastructure," impact fees can apply to other improvements.<sup>19</sup>

### B. Exactions in the Context of Sustainable Development

Modern trends have encouraged sustainable land use practices and capital infrastructure. It is a common practice to preserve forests or wooded areas to achieve sustainability objectives by ordinances that charge a developer a fee, instead of a dedication of land, to support a "tree preservation fund" to protect greenspaces.<sup>20</sup> "Linkage fees" are also used to support public transit systems to lower the vehicle miles traveled by personal automobiles and thus, greenhouse gases that contribute

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13. *Id.* at 119.

14. N.Y. TOWN LAW § 277(4)(c) (McKinney 2013); NOLON & SALKIN, *supra* note 12, at 119.

15. NOLON & SALKIN, *supra* note 12, at 120.

16. *Id.*

17. *Id.* at 121.

18. *Id.* at 120-21.

19. *Id.*

20. Carl J. Circo, *Should Owners and Developers of Low-Performance Buildings Pay Impact or Mitigation Fees to Finance Green Building Incentive Programs and Other Sustainable Development Initiatives?*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 55, 103 (2009).

to climate change.<sup>21</sup> Such fees require a developer to bear a “fair share” of the infrastructure costs necessary to support the new development.<sup>22</sup> Recent offshoots of the impact fee tool include mitigation fee programs that require compensation for the ecological harms of a development or that subsidize green building programs to encourage sustainable design and construction.<sup>23</sup> The difference between linkage fees and mitigation fees is that the former funds necessary capital expenditures for community infrastructure, while mitigation fees compensate for the social cost of a project through “environmental cost accounting” systems.<sup>24</sup> This method values the social costs of greenhouse gas emissions or waste disposal and charges conventional developers that amount to supply funds for sustainable initiatives.<sup>25</sup> The economic rationale for fee programs is akin to that of wetlands mitigation programs already in use.<sup>26</sup> Even if emission reduction objectives, such as energy-efficiency improvements, were too costly for a developer, a conventional project could continue if the municipality was paid a fee that would be used in other sustainable proposals.<sup>27</sup> Still, these fees would likely be subject to the Unconstitutional Conditions Doctrine as expounded by *Koontz*, which, given the uncertainty in the valuation of environmental benefits,<sup>28</sup> may make its heightened standard difficult to satisfy.<sup>29</sup>

### III. OVERVIEW OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

The Fifth Amendment’s Takings Clause, incorporated through the Fourteenth Amendment, underlies the environmental issues of *Koontz*.<sup>30</sup> It provides, “nor shall private

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21. *Id.*

22. *Id.* at 102.

23. 34 WM. & MARY ENVTL. L. & POL’Y REV. at 104-05.

24. *Id.* at 108.

25. *Id.*

26. *Id.*

27. *Id.* at 110-11.

28. *Id.* at 112.

29. *See infra* Part III.

30. *Nollan*, 483 U.S. at 827.

property be taken for public use, without just compensation.”<sup>31</sup> The government may not, by law or by permit, compel a person to yield a constitutional right, such as “just compensation,” for a governmental benefit that is too attenuated from the property in question.<sup>32</sup> As discussed above, if the government impermissibly conditions a governmental benefit on the surrender of a constitutional right, this creates a “constitutionally cognizable injury.”<sup>33</sup> Consequently, the government faces a potential suit for monetary damages.<sup>34</sup> When a “takings” has occurred, the requisite remedy under the Fifth Amendment is “[j]ust [c]ompensation.”<sup>35</sup> Yet, the Court has refrained from imposing a specific mode of relief if no “takings” has occurred.<sup>36</sup> Koontz filed suit under the laws of the State of Florida,<sup>37</sup> where “monetary damages” were an appropriate redress for a “final agency action [that] is an unreasonable exercise of the state’s police power constituting a taking without just compensation.”<sup>38</sup> The Court believed the applicability of that statute to “an unconstitutional conditions claim like the one at issue here [wa]s a question of state law that the Florida Supreme Court did not address” and thus, the Court declined to resolve it.<sup>39</sup>

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31. U.S. CONST. amend. V.

32. *Dolan*, 512 U.S. at 385.

33. *Koontz*, 133 S. Ct. at 2596.

34. *Id.* at 2597.

35. *First English Evangelical Lutheran Church of Glendale v. L.A. Cnty.*, 482 U.S. 304, 321 (1987) (“[W]here the government’s activities have already worked a taking . . . no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”).

36. *Koontz*, 133 S. Ct. at 2597 (“In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies.”).

37. *Id.* at 2593.

38. FLA. STAT. § 373.617(2) (2013).

39. *Koontz*, 133 S. Ct. at 2598 (“But we need not decide whether *federal* law authorizes plaintiffs to recover damages for unconstitutional conditions claims predicated on the Takings Clause because petitioner brought his claim under *state* law. Florida law allows property owners to sue for damages whenever a state agency’s action is an unreasonable exercise of the state’s police power constituting a taking without just compensation. Whether that provision covers an unconstitutional conditions claim like the one at issue here is a question of state law that the Florida Supreme Court did not address and on which we will not opine.” (emphases retained) (internal citations and quotations omitted)). *See*

### A. General Formation of the Law Pre-*Koontz*

This legal subject has been defined by several Supreme Court decisions, but the two most significant cases are *Nollan v. California Coastal Commission*, and *Dolan v. City of Tigard*.<sup>40</sup> *Nollan* held that in the absence of an “essential nexus” between a condition and the impact to be mitigated, the condition is not a valid land use regulation, but is an extortionate demand and a “takings.”<sup>41</sup> The *Dolan* case further defined the test such that the government must also prove a “rough proportionality” between the exaction burdening the property and the impact of the desired action by an “individualized determination.”<sup>42</sup> The *Nollan-Dolan* test was considered limited to the “special context of [land use] exactions.”<sup>43</sup> Arguably, this was thought to include only dedications of real property, or at least five Supreme Court justices supported that proposition.<sup>44</sup> Additionally, these dedications were thought to arise from adjudicative ad hoc demands,<sup>45</sup> as by an administrative body, rather than from broad generally applicable legislative determinations.<sup>46</sup> *Koontz* must be understood against this legal backdrop.

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St. Johns River Water Mgmt. Dist. v. Koontz, No. SC09-713, 2013 WL 5878147, at \*1 (Fla. Oct. 30, 2013) (remanding the case to the Fifth District Court of Appeal for further proceedings consistent with the U.S. Supreme Court’s decision); *infra* note 95.

40. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 827 (1987). These cases shifted the burden from the landowner, as is generally the case for municipal actions under the rational basis test, *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-95 (1926), to the government, and they raised the scrutiny required to pass muster. See *Dolan*, 512 U.S. 374; see *Nollan*, 483 U.S. 825.

41. *Nollan*, 483 U.S. at 837.

42. *Dolan*, 512 U.S. at 390-91.

43. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999).

44. *E. Enters. v. Apfel*, 524 U.S. 498, 540, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part); *id.* at 556 (Breyer, J., dissenting).

45. *Ehrlich v. City of Culver City*, 911 P.2d 429, 438 (Cal. 1996) (*Nollan-Dolan* heightened scrutiny applies to adjudicatory demands that amount to “land use ‘bargains’ . . . in which the local government conditions permit approval for a given use on the owner’s surrender of benefits which *purportedly* offset the impact of the proposed development . . . where the individual property owner-developer seeks to negotiate approval of a planned development.”).

46. *Dolan*, 512 U.S. at 384-85.



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#### IV. KOONTZ V. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT<sup>47</sup>

##### A. The Majority's Analysis

In 1972, Coy Koontz bought a 14.9-acre tract in the State of Florida, but he did not seek to develop it until 1994.<sup>48</sup> During that time, Florida enacted two statutes, the Water Resources Act of 1972 and the Warren S. Henderson Wetlands Protection Act, to protect state waters.<sup>49</sup> The Water Resources Act created water districts across the state as well as regional authorities to manage them, and required, among other things, that developers who wished to “construct . . . in or across the waters of the state” to obtain a permit.<sup>50</sup> The management authority could “impose such reasonable conditions on the permit as [were] necessary to assure that construction w[ould] not be harmful to the water resources of the district.”<sup>51</sup> By 1984, Florida still faced a wetlands crisis.<sup>52</sup> Thus, it enacted the Warren S. Henderson Wetlands Protection Act that required an additional permit to “dredge or fill in, on, or over surface waters,” which could be obtained by giving “reasonable assurance” that the work was “not contrary to the public interest.”<sup>53</sup> Consistent with the Wetlands Protection Act, St. Johns River Water Management Authority (“Authority”) required the creation, preservation, or enhancement of wetlands elsewhere to mitigate the impacts of a permitted project that developed wetlands in its jurisdiction.<sup>54</sup>

Koontz sought to develop 3.7-acres of wetlands, applied for the permits, and offered an eleven-acre easement to the Authority.<sup>55</sup> The Authority suggested he limit development to one acre and offer a 13.9-acre easement, or that he deed the

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47. *Koontz*, 133 S. Ct. at 2586.

48. *Id.* at 2591–92.

49. *Id.* at 2592.

50. *Id.* (citations omitted).

51. *Id.* (citations omitted).

52. *Id.*

53. *Koontz*, 133 S. Ct. at 2592 (citations omitted).

54. *Id.*

55. *Id.* at 2592–93.

eleven acres, but also pay to improve public wetlands offsite.<sup>56</sup> The offsite condition was not required, as the Authority indicated it was open to comparable alternatives.<sup>57</sup> Yet, Koontz claimed this action was “an unreasonable exercise of the state’s police power constituting a taking without just compensation.”<sup>58</sup>

The Supreme Court concluded that if a landowner valued a permit more than any “just compensation” from a “takings” caused by it, governments could force one to surrender this right by conditioning permit approval on a transfer of private land for public use.<sup>59</sup> Still, the Court also stated that land dedications were often used to offset environmental costs of development otherwise imposed on the public.<sup>60</sup> The Court opined the *Nollan-Dolan* “nexus” and “rough proportionality” test balanced these concerns.<sup>61</sup> It turned to the two issues presented: 1) whether *Nollan-Dolan* review applied to both conditions precedent and conditions subsequent to permit approval;<sup>62</sup> and 2) whether monetary exactions were also subject to this heightened scrutiny.<sup>63</sup>

With little dispute, the Court held that *Nollan-Dolan* applied to permits subject to conditions subsequent or conditions precedent.<sup>64</sup> It found little difference in the application of the Unconstitutional Conditions Doctrine to cases when the government approved a permit, but conditioned it on “the applicant turn[ing] over property,” or when it rejected a permit “because the applicant refuse[d] to do so.”<sup>65</sup> Otherwise, an impermissible condition could be imposed by manipulating the permit language to state, “denie[s] until” instead of “approve[s] if.”<sup>66</sup>

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56. *Koontz*, 133 S. Ct. at 2593.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 2595.

61. *Id.*

62. *See Koontz*, 133 S. Ct. at 2595.

63. *See id.* at 2596.

64. *Id.*

65. *Id.* at 2595.

66. *Id.* at 2596.

The second holding, however, raised serious questions regarding land use permitting. As in *Nollan* and *Dolan*, the Court stated that if the government had just demanded the land outside the permitting process, it would have been a “takings.”<sup>67</sup> The Authority, the Florida Supreme Court, and four Supreme Court Justices, believed an option to pay for improvements, a monetary exaction not akin to the dedications in *Nollan* and *Dolan*, was not subject to “takings” analyses.<sup>68</sup> The *Koontz* majority distinguished the dissent’s use of *Eastern Enterprises* by finding the duty to pay at bar “‘operate[d] upon . . . an identified property interest’ by directing the owner of a particular piece of property to make a monetary payment.”<sup>69</sup> Since this fee was tied to a “specific parcel,” this “direct link” compelled *Nollan-Dolan* review.<sup>70</sup> The Court determined that such demands to improve public lands would “transfer an interest in property from the landowner to the government” and would entail “a *per se* taking similar to the taking of an easement or a lien.”<sup>71</sup>

### B. The Dissenting Analysis

*Eastern Enterprises* seemed to limit *Nollan-Dolan* review to demands for real property, requiring only a due process analysis for monetary exactions.<sup>72</sup> *Nollan* and *Dolan* were found

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67. *Koontz*, 133 S. Ct. at 2598–99.

68. *Id.* at 2599.

69. *Id.* at 2599 (citing *E. Enters. v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in judgment and dissenting in part)).

70. *Id.* at 2599–2600.

71. *Id.* at 2600.

72. *E. Enters.*, 524 U.S. at 545 (Kennedy, J., concurring in judgment and dissenting in part). Justice Kennedy’s opinion is controlling here since the decision resulted in a plurality opinion with him concurring on the narrowest grounds in result, but not in rationale. *Id.* at 539. If “no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977) (citations omitted). Justice Kennedy opined that a “takings” analysis was improper for exactions that “do[] not operate upon or alter an identified property interest” and believed monetary exactions need only satisfy a due process analysis. *E. Enters.*, 524 U.S. at 540, 545 (Kennedy, J., concurring in judgment and dissenting in part).

applicable only in the “special context of [land use] exactions,”<sup>73</sup> and, before *Koontz*, appeared limited to administrative agency demands for dedications of real property.<sup>74</sup> Indeed, there were five Justices in *Eastern Enterprises* who thought an analogous fee was a due process issue.<sup>75</sup> Arguably, *Nollan* and *Dolan* should not apply beyond this special niche.

The dissent would not extend *Nollan-Dolan* review to monetary exactions,<sup>76</sup> noting that the government’s action would have been a *per se* “takings” outside the permitting process in *Nollan* and in *Dolan*.<sup>77</sup> Yet, in *Eastern Enterprises*, Justice Kennedy’s controlling opinion found that a broad duty to pay, without specifying how it was to be met or upon what property it was to be used, was not a “takings.”<sup>78</sup> Justice Breyer’s four-Justice dissent agreed that a demand for a “specific interest in physical or intellectual property” or “a specific, separately identifiable fund of money,” causes a “takings,” but “an ordinary liability to pay money” does not.<sup>79</sup> A general condition to pay for the repair of public wetlands would seem broad enough to avoid a *Nollan-Dolan* “takings” analysis. The dissent faulted the majority’s analogy to a lien, as there was no appropriation of “an income stream from a parcel of land,” that affected a “specific and identified . . . property right,” since *Koontz* had broad discretion in financing the fee.<sup>80</sup>

### C. Questions Settled

*Koontz* arguably raised more issues than it resolved, but it also provided some answers for later land use exaction cases. First, municipalities can still impose conditions on land-use

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73. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999).

74. *Dolan v. City of Tigard*, 512 U.S. 374, 384–85 (1994).

75. *E. Enters.*, 524 U.S. at 558 (Breyer, J., dissenting).

76. *Koontz*, 133 S. Ct. at 2603 (Kagan, J., dissenting).

77. *Id.* at 2605 (Kagan, J., dissenting).

78. *Id.* at 2603.

79. *Id.* at 2605 (quoting *E. Enters.*, 524 U.S. at 554–55 (Breyer, J., dissenting)).

80. *Id.* at 2606 (quoting *E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring in judgment and dissenting in part)).

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permits; *Nollan-Dolan* review extends to more of them, now applying to conditions subsequent and conditions precedent.<sup>81</sup> Second, government demands for fees to be used for public benefit, from any source, cannot be conditionally imposed by permit unless the *Nollan-Dolan* test is met.<sup>82</sup> Third, while the prior standard for monetary exactions was met because the challenger proved the action to be unreasonable,<sup>83</sup> by imposing *Nollan-Dolan* scrutiny, *Koontz* shifted the burden of satisfying this standard to the government.<sup>84</sup> Lastly, although it is unclear if *Koontz* extends *Nollan-Dolan* review to generally applicable legislative exactions,<sup>85</sup> administrative ad hoc exactions, unequivocally, must satisfy the Unconstitutional Conditions Doctrine.<sup>86</sup>

#### D. Possible Repercussions

While these ascertainable outcomes are likely to cause unease for municipalities, the decision's unresolved issues may further discourage local officials from pursuing sustainable initiatives to mitigate the harm of development projects. Instead, localities may simply refrain from allowing a project to move forward despite its benefits to the community if properly planned. Officials may also find the cost of imposing sustainable exaction measures too great in light of the heightened litigation risk, thereby missing the opportunity to integrate economic development with socially and environmentally beneficial goals.

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81. *Koontz*, 133 S. Ct. at 2596 (majority opinion).

82. *Id.* at 2600.

83. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394–95 (1926) (holding zoning laws that are a valid exercise of the police power as constitutional).

84. *Koontz*, 133 S. Ct. at 2599.

85. *Id.* at 2608 (Kagan, J., dissenting). See *Powell v. Cnty. of Humboldt*, 166 Cal. Rptr. 3d 747 (Cal. Ct. App. 2014) (Refraining to reach the trial court's conclusion "that the *Nollan/Dolan* analysis applies only to discretionary, adjudicatory impositions of exaction conditions, not to exactions applied to all similarly situated property owners on an identical, nondiscretionary basis by legislative enactment.").

86. *Koontz*, 133 S. Ct. at 2603.

### 1. A “Demand” by Government to Trigger *Nollan-Dolan* Review

*Koontz* obscured the certainty municipalities rely upon in using permit fees for land use regulation.<sup>87</sup> While the Court found a demand was made upon *Koontz*, he was never required to cede specific property or to engage in specific mitigation.<sup>88</sup> The Court seemed to assume the Authority’s action created an “extortionate demand,” and it declined to suggest how concrete a demand must be to trigger *Nollan-Dolan* review.<sup>89</sup> *Koontz* was given options in meeting the permit criteria as well as in his choice of funds for the payment, and the Authority was willing to discuss comparable projects.<sup>90</sup> Arguably, *Koontz* did not fail to comply with an “extortionate demand or condition,” but rather, he refused to act at all.<sup>91</sup> If similar cases of recalcitrance arise in the future, the dissent predicted local entities with “decent lawyer[s]” would refuse mitigation guidance if it risks litigation.<sup>92</sup> If so, the permittee now stands in a greater position to leverage a municipality into approving a project notwithstanding its attendant ecological or social harms. Instead of mutually beneficial negotiations, *Koontz*, as applied to equivocal conditions, may incent outright permit approvals, regardless of the harm or benefit likely to stem from the development, to avoid litigation costs.<sup>93</sup> While *Koontz* refrained from declaring that monetary damages would *always* be the appropriate relief, since the remedy here was to be ascertained from the state or federal cause of action underlying the extortionate demand,<sup>94</sup> the potential for liability is both uncertain in substance and scope. Even if monetary damages apply, if there is no actual “takings” the

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87. See *Koontz*, 133 S. Ct. at 2609 (Kagan, J., dissenting).

88. *Id.* at 2593; cf. *Powell v. Cnty. of Humboldt*, 166 Cal. Rptr. 3d 747, 750, 753 (Ct. App. 2014) (finding the County’s action to inform the landowner’s “counsel it would not approve the permit application without dedication of the overflight easement” amounted to a “final, definitive decision . . .”); see *infra* note 101.

89. *Koontz*, 133 S. Ct. at 2598.

90. *Id.* at 2611 (Kagan, J., dissenting).

91. *Id.*

92. *Id.* at 2610.

93. *Id.*

94. *Id.* at 2597 (majority opinion).

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remedy for the unconstitutional condition may prove elusive to predict under any existing cause of action, thereby making it too risky for a municipal attorney to counsel a client into offering a mitigating condition.<sup>95</sup>

The point in time in which authorities may be subject to *Nollan-Dolan* review during negotiations was also left unsettled.<sup>96</sup> Local authorities may be subject to suit early on in the process because Koontz was allowed to sue, without giving a counter proposal, after he found the initial proposals too burdensome.<sup>97</sup> The Court also failed to indicate what administrative remedies must be exhausted prior to *Nollan-Dolan* scrutiny.<sup>98</sup> Two Justices on the Florida Supreme Court would have held for the Authority since, in their view, Koontz had

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95. On remand, the District Court of Appeal of Florida affirmed the lower court's ruling, holding that the Authority had worked an exactions taking by unconstitutionally conditioning the permit and thus, Koontz deserved "just compensation." *St. Johns River Water Mgmt. Dist. v. Koontz*, No. 5D06-1116, 2014 WL 1703942, at \*1-2 (Fla. Dist. Ct. App. Apr. 30, 2014). The dissent made a significant argument based on the Supreme Court's distinction between situations when a permit is denied but neither property nor money has been taken, and when a "taking" is actually incurred:

Because there was no "taking" compensable under the Fifth Amendment in this case, the question remains whether Koontz has a damages remedy under section 373.617, Florida Statutes. That statute, however, specifies that "damages" are available whenever a state agency's action is an "unreasonable exercise of the state's police power constituting a taking without just compensation." Unless the language of the Florida statute is considered to be broad enough to authorize the payment of damages for a "taking without just compensation" even though there was no "taking" for Fifth Amendment purposes, Koontz simply has no claim . . . In what legal universe could a law authorizing damages only for a "taking" also provide damages when (as all agree) no taking has occurred? I doubt that inside-out, upside-down universe is the State of Florida. Certainly, none of the Florida courts in this case suggested that the majority's hypothesized remedy actually exists; rather, the trial and appellate courts imposed a damages remedy on the mistaken theory that there *had* been a taking (although of exactly what neither was clear).

*Id.* at \*4-5 (Griffin, J., dissenting). *See infra* note 99 (discussing the cause of action under the Floridian statute).

96. *See generally Koontz*, 133 S. Ct. at 2610–11 (Kagan, J., dissenting).

97. *Id.* at 2593 (majority opinion).

98. *Id.* at 2597.

not exhausted his administrative remedies.<sup>99</sup> However, the U.S. Supreme Court declined to “second-guess a State Supreme Court’s treatment of its own procedural law.”<sup>100</sup> As a practical matter, the point at which there is an affirmative imposition of an impermissible condition, and an affirmative denial there from, may be murky at best, which suggests that even initial municipal mitigation guidance could induce the requisite “extortionate demand.”<sup>101</sup>

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99. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1231–32 (Fla. 2011) (Polston, J., concurring in result). “[A]n attack on the propriety of [an] agency action” should first be pursued in accordance with Chapter 120 of the Florida Statutes, before a “takings” action is to be brought under Section 317.617 of the Florida Statutes. *Id.* Section 317.617(2) requires claims of an “unreasonable exercise of the state’s police power constituting a taking without just compensation” to be brought before a trial court. FLA. STAT. § 373.617(2) (2013). Yet, the Authority argued that while an exaction claim is a takings claim, nothing was exacted here, and so it was truly a claim on the merits of the permit. *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 10–11 (Fla. Dist. Ct. App. 2009), *decision quashed*, 77 So. 3d 1220 (Fla. 2011), *rev’d*, 133 S. Ct. 2586 (2013). When the question is whether the permit was “in accordance with existing statutes or rules and based on competent substantial evidence,” under Chapter 120, the claimant must follow Florida’s Administrative Procedure Act for judicial review, and the claim must be brought “in the appellate district.” FLA. STAT. §§ 373.617(2), 120.68 (2013). Since *Koontz* brought his case before the trial court, it was alleged that he did not follow the proper administrative process. *Koontz*, 5 So. 3d at 10–11. However, the appellate district believed the Authority was actually arguing that there could be no exaction claim when a “land owner refuses to agree to an improper request from the government resulting in the denial of the permit.” *Id.* at 11. The appellate district, while acknowledging the “ongoing debate” over this position, relied on *Dolan* to illustrate an instance where permit conditions were refused and yet the exaction claim was reached. *Id.* It concluded that *Dolan*’s dissent addressed this stance and so, while not taken up by the majority, it was “implicitly rejected by the majority.” *Id.* Unfortunately for the Authority, the U.S. Supreme Court, while refusing to interpret the intricacies of the Florida statutes, held that if a landowner refuses an impermissible condition precedent to the issuance of a permit, this has the same exaction effect as a condition subsequent. *Koontz*, 133 S. Ct. at 2595–96. Thus, it is not likely that any difference between the procedural laws amongst the three States analyzed here, would provide a municipal entity, using the same argument as the Authority, with any additional support.

100. *Koontz*, 133 S. Ct. at 2597.

101. For a recent application of *Koontz* in this respect, see *Powell v. County of Humboldt*, 166 Cal. Rptr. 3d 747 (Ct. App. 2014). After the County of Humboldt required the Powells to dedicate an “overflight” easement over their property as a condition to the approval of a building permit, the Powells protested that this condition was unconstitutional. *Id.* The County responded to the Powells’



Holding a proposed, but not yet required, condition as a “demand,” where the landowner could give alternatives to a government’s proposals, seems contrary to the Court’s articulation of judicial ripeness for a “takings.” A unanimous Court has held that “a Fifth Amendment claim is premature until it is clear that the Government has both taken property *and* denied just compensation.”<sup>102</sup> When a plaintiff did “not s[ee]k] ‘compensation through the procedures the State ha[d] provided for doing so,’” the claim was not ripe.<sup>103</sup> Arguably, Koontz’s inaction during negotiations was not a good faith effort to comply with an authorized permitting process, and it is debatable whether his challenge was ripe. Even so, the *Koontz* Court did not address this consideration. Thus, municipalities are left with vague impressions as to when the Unconstitutional Conditions Doctrine may be applied against them.

## 2. The Scope of Application

Without a clear notion as to the new extent of *Nollan-Dolan* scrutiny, the dissent may be right to conclude this “new rule now casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money.”<sup>104</sup> Many local permit fees, often used to mitigate “traffic or pollution—or [the] destruction of wetlands,” or to pay for services, such as wastewater treatment, must now pass a heightened review.<sup>105</sup> Even the majority recognized that “internaliz[ing] the negative externalities of [landowner] conduct is a hallmark of

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counsel, stating that it would not approve the permit without the easement. *Id.* “*The Powells took no further administrative action, such as obtaining a denial of the application, seeking a variance, or taking an appeal from an adverse ruling on the permit or variance application to the County’s board of supervisors (“Board”).*” *Id.* (emphasis added). The Court found that this “correspondence . . . sufficiently established a final, definitive decision by the County that no permit would be issued without the easement. No more was required to satisfy the ripeness requirement. Any doubt on this score was removed by . . . *Koontz* . . .” *Id.*

102. *Horne v. Dep’t of Agric.*, 133 S. Ct. 2053, 2062 (2013).

103. *Id.* (citing *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985)).

104. *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting).

105. *See id.* at 2607.

responsible land-use policy, and [the Court] ha[s] long sustained such regulations against constitutional attack.”<sup>106</sup> Thus, the dissent offered several limits to *Koontz*. For instance, *Dolan* was limited to adjudicative decisions as to one parcel and did not involve a broad legislative plan.<sup>107</sup> Yet, the Court did not decide whether *Koontz* was applicable to adjudicative exactions alone, or whether it extended to general legislative fees imposed on entire jurisdictions.<sup>108</sup>

Justice Thomas had previously declared that “takings” analyses should not differ based on whether a decision was adjudicative, as by a planning commission, rather than legislative, as by a city council.<sup>109</sup> While recognizing a split amongst the lower courts, he noted several state jurisdictions that imposed *Nollan-Dolan* scrutiny in such cases.<sup>110</sup> Still, if the issue was directed to the Court, it is likely to hold otherwise as the *Dolan* majority emphasized that its use of the “rough proportionality” test was in the context of an adjudication, and set this apart from the legislative judgments upheld under the state police powers in *Village of Euclid v. Ambler Realty*.<sup>111</sup>

In addition, the Court denied a writ of certiorari when the California Supreme Court held that “monetary exactions [were] more like zoning restrictions,” and have been “accorded substantial judicial deference.”<sup>112</sup> In *Ehrlich v. City of Culver City*, Ehrlich gained approval to develop a “private tennis club and recreational facility” and in accordance with this approval, the city amended its zoning and general plan ordinances to

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106. *Koontz*, 133 S. Ct. at 2595 (majority opinion).

107. *Dolan*, 512 U.S. at 385.

108. *Koontz*, 133 S. Ct. at 2600 n.2 (“[B]ecause the proposed offsite mitigation obligation in this case was tied to a particular parcel of land, this case does not implicate the question whether monetary exactions must be tied to a particular parcel of land in order to constitute a taking.”). *See id.* at 2608 (Kagan, J., dissenting).

109. *Parking Ass’n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting) (denying certiorari from a decision where a broadly applicable ordinance was a valid use of state police powers).

110. *Id.* at 1117.

111. *Dolan*, 512 U.S. at 391 n.8 (1994) (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926)). *See also Euclid*, 272 U.S. at 387.

112. *Ehrlich v. City of Culver City*, 911 P.2d 429, 454–55 (Cal. 1996), *cert. denied*, 519 U.S. 929 (1996).

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accommodate the use.<sup>113</sup> However, Ehrlich closed the facility several years later and applied for a rezoning and a general plan amendment to allow him to build a “condominium complex valued at \$10 million.”<sup>114</sup> After performing a feasibility study, the city discovered it did not have the funds to buy and operate the facility, but still decided to deny Ehrlich’s application due to the “loss of a recreational land use needed by the community.”<sup>115</sup> After several discussions with Ehrlich, the city reconsidered and decided to approve his application, but required that he pay monetary exactions.<sup>116</sup> One fee was “for additional [public] recreational facilities as directed by the City Council,” and another fee fell under an “art in public places” ordinance to be paid into the “city art fund.”<sup>117</sup> Ehrlich had contended the fees were unconstitutional takings without just compensation.<sup>118</sup> A plurality opinion resulted however, and a concurrence reasoned that “general governmental fees” do not implicate *Nollan-Dolan* review, but under “takings” analyses, require the ad hoc determination of whether the imposition was arbitrary under the Court’s well-recognized balancing of factors.<sup>119</sup> Furthermore, the

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113. *Ehrlich*, 911 P.2d at 433–34.

114. *Id.* at 434.

115. *Id.*

116. *Id.* at 434–35.

117. *Id.* at 435.

118. *Id.*

119. *Ehrlich*, 911 P.2d at 457–58. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (“In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.”). *See also* San Remo Hotel L.P. v. City & Cnty. of S.F., 41 P.3d 87, 105 (Cal. 2002) (“The ‘sine qua non’ for application of *Nollan/Dolan* scrutiny is thus the ‘discretionary deployment of the police power’ in ‘the imposition of land-use conditions in individual cases.’ Only ‘individualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan*.’ . . . We decline plaintiffs’ invitation to extend heightened takings scrutiny to all development fees, adhering instead to the distinction . . . between ad hoc exactions and legislatively mandated, formulaic mitigation fees. 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. . . . Ad hoc individual monetary exactions deserve special judicial

Washington Supreme Court, in *City of Olympia v. Drebeck*, cited this concurrence in its decision that “legislatively prescribed development fees” were not subject to *Nollan-Dolan* review.<sup>120</sup> While *Koontz* failed to determine this issue, there is some authority to suggest general legislatively imposed fees are not subject to *Nollan-Dolan* review.<sup>121</sup>

### V. LIMITING THE SCOPE OF *KOONTZ* FOR ACTIONS INVOLVING ENVIRONMENTAL IMPACT ANALYSIS

If local officials wish to encourage sustainable development,<sup>122</sup> it may be necessary to impose remedial conditions to mitigate destructive developmental impacts.<sup>123</sup> However, *Koontz* forces municipal officials to navigate potentially litigious posturing to achieve such objectives.<sup>124</sup> Thus, a means to provide some certainty in the permitting process would likely reduce the apprehension felt by engaging such laudable goals. Moreover, if such a mechanism could also shield against the

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scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.” (citations omitted)).

120. *City of Olympia v. Drebeck*, 126 P.3d 802, 808 (Wash. 2006) (en banc). See *Alto Eldorado P’ship v. Cnty. of Santa Fe*, 634 F.3d 1170, 1178 (10th Cir. 2011) (“The developers’ claim in this case does not fall within *Nollan* and *Dolan* for this reason alone: the regulatory action amounts to a restriction on how the developers may use their land should they choose to subdivide it or, in the alternative, the imposition of a fee.” (footnote omitted)).

121. *But see* George B. Speir, *Will Koontz Mean Big Changes or Business as Usual for Real Estate Development in California?*, 24 no. 1 MILLER & STARR, REAL EST. NEWSALERT, Sept. 2013, at 10-1 (“However, it is not clear whether the distinction drawn in *Ehrlich* between legislatively formulated development assessments imposed on a broad class of property owners, which would be judged under the lesser rational relationship standard, and exactions imposed on a specific project on an individual and discretionary basis, which would be subject to heightened judicial scrutiny, is still a legitimate distinction.”).

122. Sustainable development has been defined as “development . . . [that is] adequate to meet the needs of the present without compromising the needs of future generations.” John R. Nolon, *Zoning and Land Use Planning*, 36 REAL EST. L.J. 351, 355 (2007). Sustainable practices include the present preservation of open space to allow future generations to foster from its benefits. *Id.*

123. *Id.* at 368–70, 373.

124. See discussion *supra* Part III.

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threat of litigation under the *Nollan-Dolan* test, the municipal exaction would better retain its continued vitality as a tool to achieve societal goods.

At least one possible solution to the uncertainty wrought by *Koontz* exists in the form of the environmental impact review process. After a brief overview of several SEQRA provisions, a comparison will be made between SEQRA and two similar statutes. Several case illustrations will then be presented in support of the proposition that environmental impact analyses can evince a rough proportionality and essential nexus between the exaction and the property burdened. Thus, municipalities may be able to use environmental impact review findings as a shield from the threat of uncertain, and potentially costly, litigation during negotiations with developers.

In 1970, the federal government passed the National Environmental Policy Act (NEPA) to require federal agencies that engage in “major Federal actions significantly affecting the quality of the human environment” to evaluate the environmental impacts of their action and its alternatives.<sup>125</sup> If a proposed action is significant enough, the analysis must include a detailed report, known as an environmental impact statement (EIS), early on in the decision-making process to address environmental considerations.<sup>126</sup> About half the states enacted similar state environmental review legislation, but only a handful of those apply to local government agency actions.<sup>127</sup> The New York SEQRA, the California Environmental Quality Act (CEQA), and the State of Washington’s State Environmental Policy Act (SEPA)<sup>128</sup> are among those that govern local agency actions.<sup>129</sup> The U.S. Supreme Court has held NEPA to be a procedural

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125. National Environmental Policy Act of 1969, 42 U.S.C. § 4332(c) (2012).

126. 40 C.F.R. § 1501.1 (2014).

127. JOHN R. NOLON & PATRICIA E. SALKIN, LAND USE AND SUSTAINABLE DEVELOPMENT LAW: CASES AND MATERIALS 1109 (8th ed. 2012).

128. To be clear, these types of statutes are often referred to as state environmental policy acts because they are considered, “mini-NEPAs.” Dean B. Suagee & Patrick A. Parenteau, *Fashioning a Comprehensive Environmental Review Code for Tribal Governments: Institutions and Processes*, 21 AM. INDIAN L. REV. 297, 299 (1997).

129. NOLON & SALKIN, *supra* note 127, at 1109.

statute, with little substantive force.<sup>130</sup> Where NEPA fails to offer substantive means to mitigate development impacts, these three state statutes do not.<sup>131</sup>

#### **A. New York State's State Environmental Quality Review Act (SEQRA)**

SEQRA's purpose was to mandate state, regional, and local government agencies to engage themselves with the environmental issues involved in their decision-making and planning activities.<sup>132</sup> It requires that "all agencies determine whether the actions they directly undertake, fund, or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an [EIS]."<sup>133</sup> Moreover, "consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action [must be] one that avoids or minimizes adverse environmental impacts to the maximum extent practicable" through mitigation.<sup>134</sup> SEQRA covers many state and local agencies, due to its broad definition of "Agency" as "any state or local agency," and its definition of "local agency" as "any local agency, board, district, commission or governing body, including any city, county, and other political subdivision of the state."<sup>135</sup>

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130. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

131. *Id.* at 352 ("There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other."); Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 254 (1992).

132. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1(c) (2014).

133. *Id.* § 617.1(c).

134. *Id.* § 617.11(d)(5).

135. N.Y. ENVTL. CONSERV. LAW § 8-0105(2), (3) (McKinney 2014).

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### 1. Procedural Requirements - The Preparation of an EIS

An EIS contains the following sections: 1) the proposed action and its environmental circumstances; 2) the short-term and long-term environmental effects of the action; 3) the expected adverse environmental impacts if the proposed action was executed; 4) alternatives to that action; 5) irreversible or irretrievable resources that would be used or lost if the action was undertaken; 6) mitigation measures to ameliorate environmental impacts; 7) any significant growth-inducing consequences of the action; 8) any significant energy demands; and 9) other information consistent with SEQRA and its guidelines.<sup>136</sup>

This detailed analysis functions to determine whether or not the proposed action should be undertaken by “incorporat[ing] the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time.”<sup>137</sup> Given its comprehensive scope, it is no small wonder that the EIS has been considered “the heart of SEQRA.”<sup>138</sup> Still, SEQRA pervades state and local agency decision-making even if there is no significant effect on the environment to analyze.<sup>139</sup>

The lead agency is “principally responsible for undertaking, funding or approving an action[,] . . . for determining whether an environmental impact statement is required in connection with the action, and for the preparation and filing of the statement if one is required.”<sup>140</sup> Before determining the environmental significance of the action, the lead agency may be required to complete an Environmental Assessment Form (EAF), which is “a form used by an agency to assist it in determining the

136. MICHAEL B. GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 1.03 (Matthew Bender & Co., Inc. 2014), *available at* LexisNexis.

137. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1(c) (2014).

138. Jackson v. N.Y. State Urban Dev. Corp., 494 N.E.2d 429, 435 (N.Y. 1986).

139. N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 2014). This provision requires an EIS for all agency actions that “may” have a significant effect on the environment, a determination that may require using an EAF. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7(b)(3) (2014).

140. *Id.* § 617.2(u).

environmental significance or non-significance of actions.”<sup>141</sup> An EAF must “describe the proposed action, its location, its purpose and its potential impacts on the environment.”<sup>142</sup> While an exhaustive review of the factors and procedures used in developing an EAF are beyond the scope of this paper, a basic synopsis will illustrate its importance.

First, an EAF requires an outline of the specific factual circumstances of the proposed action, such as environmental and physical site considerations, and the particular aspects of the proposed action itself.<sup>143</sup> Secondly, this information is used to “evaluat[e] the proposed action . . . to ascertain its probable environmental effects and consequences.”<sup>144</sup> Notably, the model EAF was recently revised to consider modern environmental concerns of proposed actions, such as greenhouse gas emissions,<sup>145</sup> and became effective on October 7, 2013.<sup>146</sup>

If a lead agency finds “no adverse environmental impacts or that the identified adverse environmental impacts will not be significant,” no EIS is required, the agency makes a determination of no significance, and the SEQRA process concludes.<sup>147</sup> If the “action may include the potential for at least one significant adverse environmental impact,” the lead agency makes a determination of significance, closes the environmental assessment phase, and begins an EIS.<sup>148</sup> Yet, some actions that could cause adverse significant impacts may not require a full EIS, if appropriately mitigated, as described below.<sup>149</sup>

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141. *Id.* § 617.2(m).

142. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7(m).

143. GERRARD, ET AL., *supra* note 136, § 3.04.

144. *Id.*

145. *Id.*

146. *Frequently Asked Questions Regarding the SEQR Environmental Assessment Forms*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/permits/93240.html> (last visited Nov. 9, 2014).

147. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7(a)(2); GERRARD, ET AL., *supra* note 136, § 3.05.

148. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7(a)(1).

149. *Id.* § 617.7(d) (discussing when an action that may cause significant adverse environmental impacts may receive a conditioned negative declaration due to the imposition of SEQRA mitigation conditions).



There are three action varieties that an agency may confront: Type I, Type II, and Unlisted actions.<sup>150</sup> Type I actions are “more likely to require preparation of an EIS than Unlisted actions,”<sup>151</sup> while Type II actions “have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8.”<sup>152</sup> Unlisted actions are just that, “all actions not identified as a Type I or Type II action [under the SEQRA regulations], or, in the case of a particular agency action, not identified as a Type I or Type II action in the agency’s own [SEQRA] procedures.”<sup>153</sup> A conditioned negative declaration (CND) is a negative declaration of significance that may be issued for an Unlisted action, even if it is likely to cause an adverse significant environmental impact, if mitigation conditions ensure no such impact will occur.<sup>154</sup>

In the context of an adjudicatory hearing, the aforesaid process creates a record from which a court assesses the agency action under a “substantial evidence” review.<sup>155</sup> This standard requires there be “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,”<sup>156</sup> and if so, “the courts may not substitute their judgment for that of the agency for it is not their role to ‘weigh the desirability of any action or [to] choose among alternatives.’”<sup>157</sup> The case law also

150. *Id.* § 617.2(ai)-(ak).

151. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.4(a).

152. *Id.* § 617.5(a).

153. *Id.* § 617.2(ak).

154. *Id.* § 617.2(h). A CND is applicable to “Unlisted actions” that may have an adverse significant environmental impact, but, due to the imposition of mitigation measures, no such impact will occur. *Id.* § 617.2(ak). While this substantive measure is laudable, its application is subject to *Nollan-Dolan* review. *Koontz*, 133 S. Ct. 2586; GERRARD ET AL., *supra* note 136, § 6.04. Thus, if a SEQRA condition does not have a “rough proportionality” and “essential nexus” “to the state’s interest in protecting the environment from the threat posed by the landowner’s proposed project,” it will likely be declared invalid. *Id.* § 6.04(3).

155. N.Y. C.P.L.R. 7803(4) (McKinney 2013); 9 WEINBERG ET AL., N.Y. PRACTICE, ENVIRONMENTAL LAW AND REGULATION IN NEW YORK § 4:44 ¶ 13 (2d ed. 2013), *available at* Westlaw.

156. *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938).

157. *Merson v. McNally*, 688 N.E.2d 479, 484 (N.Y. 1997) (quoting *Akpan v. Koch*, 554 N.E.2d 53, 57 (N.Y. 1990)).

suggests that agency findings in EAFs may evince the requisite proportionality and nexus between the condition and the action's impacts.<sup>158</sup> Under a "substantial evidence" standard, such findings would be granted deference.

## 2. Substantive Requirements

SEQRA not only mandates a procedural consideration of environmental impacts, but it also requires choosing alternative actions and mitigation "to the maximum extent practicable, [to] minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process."<sup>159</sup> "[U]nlike its Federal counterpart and model, [NEPA], . . . SEQRA is not merely a disclosure statute; it 'imposes far more action-forcing or substantive requirements on state and local decision makers than NEPA imposes on their federal counterparts.'"<sup>160</sup> Thus, SEQRA regulations allow agencies to "impose substantive conditions" after completing a final EIS or a CND to ensure satisfaction of this statutory command.<sup>161</sup> SEQRA independently grants the power to require mitigation as a condition of approval that is different in its enabling mechanism than the traditional conditioning authority used by municipalities under their police powers.<sup>162</sup>

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158. *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821, 825 (N.Y. 2003); *Grogan v. Zoning Bd. of Appeals of E. Hampton*, 633 N.Y.S.2d 809, 810 (App. Div. 1995).

159. N.Y. ENVTL. CONSERV. LAW § 8-0109(1) (McKinney 2014).

160. *Jackson v. N.Y. State Urban Dev. Corp.*, 494 N.E.2d 429, 434 (N.Y. 1986) (quoting Philip H. Gitlen, *The Substantive Impact of the SEQRA*, 46 ALB. L. REV. 1241, 1248 (1982)).

161. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(b) (2014).

162. See N.Y. ENVTL. CONSERV. LAW § 8-0109(1), (2)(f); N.Y. TOWN LAW § 276(4)(e) (McKinney 2013). See also *Morse v. Gardiner Planning Bd.*, 563 N.Y.S.2d 922 (App. Div. 1990); NOLON & SALKIN, *supra* note 127, at 1110. SEQRA provides that

[a]gencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.

In addition, the New York Court of Appeals has set forth a two-prong test to discern whether a negative declaration has been impermissibly conditioned.<sup>163</sup> If “the project, as initially proposed, might result in the identification of one or more ‘significant adverse environmental effects’ . . . [and] proposed mitigating measures . . . were ‘identified and required by the lead agency’ as a condition precedent to the issuance of the negative declaration,” then the negative declaration has been impermissibly conditioned.<sup>164</sup> Importantly, the court elaborated on the second prong, finding that the measures must be made as “part of an open and deliberative process . . . [such that the] mitigating measures could be viewed as part of the ‘give and take’ of the application process.”<sup>165</sup> The court applied this test in *Merson v. McNally*, where a planning board addressed noise and mining activities it deemed significant.<sup>166</sup> However, open and deliberative discussions with the developer quelled these concerns through mitigation conditions.<sup>167</sup> The developer achieved compliance with the zoning code’s noise provision and conformed to the planning board’s stipulation that Saturday activities would only entail the sale of materials.<sup>168</sup> The developer also agreed to the planning board’s proposals for traffic mitigation, and adjusted its activities to avoid an

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N.Y. ENVTL. CONSERV. LAW § 8-0109(1). Moreover, SEQRA also requires that the EIS “shall include a detailed statement setting forth . . . mitigation measures proposed to minimize the environmental impact.” *Id.* § 8-0109(2)(f). This authority is distinct from municipal police powers that allow a municipality to engage in conditional zoning, where the municipality may consent to the exercise of its zoning authority, but unilaterally conditioned on the project applicant’s agreement to perform reasonable actions designed to protect neighboring property owners and the character of the community as a whole from the effect of the project. *Church v. Town of Islip*, 168 N.E.2d 680, 682 (N.Y. 1960). In fact, unilaterally imposed conditions are deemed impermissible mitigation measures under SEQRA, *Merson v. McNally*, 688 N.E.2d 479, 486 (N.Y. 1997), and this stance appears congruent with the prohibited use of extortionate demands under the Unconstitutional Conditions Doctrine. *See Koontz*, 133 S. Ct. at 2603.

163. *Merson*, 688 N.E.2d at 484.

164. *Id.*

165. *Id.* at 484–85.

166. *Id.* at 485.

167. *Id.*

168. *Id.*

environmentally sensitive aquifer area.<sup>169</sup> The court held that since the conditions were not “unilaterally imposed by the lead agency, but essentially were adjustments incorporated by the project sponsor to mitigate the concerns” of the public and other agencies, the negative declaration was not impermissibly conditioned.<sup>170</sup>

New York courts have recognized that conditions are permissible when they are not unilaterally imposed but are brought about through open and deliberate processes.<sup>171</sup> Moreover, this view appears consistent with the language in *Koontz*. The *Koontz* majority believed the Authority imposed extortionate demands,<sup>172</sup> but declined to offer guidance as to when a “demand” might be “indefinite,” leaving that decision to the Florida Supreme Court on remand.<sup>173</sup> Arguably, conditions not “unilaterally imposed by the lead agency, but [that] essentially were adjustments incorporated by the project sponsor to mitigate the concerns” of the public and the reviewing agencies,<sup>174</sup> would not be so extortionate as to trigger *Nollan-Dolan* review. Thus, monetary exactions akin to those in *Koontz*,<sup>175</sup> when requested in an open and deliberative manner, supported by environmental impact review materials, public

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169. *Merson*, 688 N.E.2d at 485–86.

170. *Id.* at 486.

171. *Thorne v. Millbrook Planning Bd.*, 920 N.Y.S.2d 369, 371 (App. Div. 2011), *leave to appeal denied*, 954 N.E.2d 1182 (N.Y. 2011) (“The modifications may not be conditions unilaterally imposed by the lead agency, but adjustments incorporated by the project sponsor to mitigate concerns identified by the public and the reviewing agencies, and be publicly evaluated prior to the issuance of the negative declaration.”); *Hoffman v. Town Bd. of Queensbury*, 680 N.Y.S.2d 735, 737 (App. Div. 1998) (holding that where the Town Board took a “hard look” at the environmental impacts in compliance with its SEQRA obligations, engaged public hearings, and solicited public comment from the community as well as involved agencies, its conditions were part of an open and deliberative process and were permissible); *Wilkinson v. Planning Bd. of Thompson*, 680 N.Y.S.2d 710, 713 (App. Div. 1998) (holding that since issues arose through the impact analysis and subsequent public comment and hearings, the CND was not impermissible because the changes were simply adaptations by the applicant to the concerns of the community and the reviewing agencies).

172. *Koontz*, 133 S. Ct. at 2603.

173. *Id.* at 2598.

174. *Merson*, 688 N.E.2d at 486.

175. *Koontz*, 133 S. Ct. at 2603.

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hearings, and input by affected parties and agencies, are more likely to pass muster.

### B. Comparison to the States of California and Washington

The California Environmental Quality Act (CEQA) and Washington's State Environmental Protection Act (SEPA) share similar qualities with SEQRA. Each governs the actions of local government agencies as well as state agencies.<sup>176</sup> Each also requires an environmental impact analysis for actions that may have a significant effect on the environment,<sup>177</sup> an Environmental Impact Report (EIR) under CEQA, and the familiar EIS under SEPA.<sup>178</sup> Moreover, all three statutes have substantive requirements that can influence decision-making processes above and beyond their procedural mechanisms.<sup>179</sup> However, while SEQRA and CEQA require mitigation measures, SEPA only permits their use.<sup>180</sup>

Under CEQA, "deferred mitigation measures," measures formulated at a later point in the review process, while usually barred, are allowed if they are not "loose or open-ended."<sup>181</sup> This prevents applicants from avoiding the statute's mandate to ensure impacts are not significant.<sup>182</sup> When mitigation "provide[s] for specific actions," "set forth with . . . particularity," such as a buffer zone "no less than 22 acres" for an animal species directly impacted by a project, this is not "loose and open-ended"

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176. NOLON & SALKIN, *supra* note 127, at 1109. See CAL. PUB. RES. CODE § 21001(a) (West 2014); WASH. REV. CODE § 43.21C.060 (2013). Only six state environmental review statutes, including California and Washington, govern both local government and state actions in the United States. NOLON & SALKIN, *supra* note 127, at 1109.

177. CAL. PUB. RES. CODE § 21002.1(a) (West 2014); N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 2014); WASH. REV. CODE § 43.21C.030-43.21C.031 (2013).

178. CAL. PUB. RES. CODE § 21002.1(a); WASH. REV. CODE § 43.21C.031.

179. Ferester, *supra* note 131, at 230–31.

180. CAL. PUB. RES. CODE § 21002.1(a); N.Y. ENVTL. CONSERV. LAW § 8-0109(1); WASH. REV. CODE § 43.21C.060.

181. *Save Panoche Valley v. San Benito Cnty.*, 158 Cal. Rptr. 3d 719, 737–38 (Ct. App. 2013).

182. *Id.* at 738 (citing *Rialto Citizens for Responsible Growth v. City of Rialto*, 146 Cal. Rptr. 3d 12 (Ct. App. 2012)).

and is permissible.<sup>183</sup> The language requiring “particularity” and “specificity” between a condition and a remedy seems analogous to the spirit and rationale of *Nollan-Dolan* scrutiny, even if the terminology is different.

CEQA also allows for fee-based conditions if there is evidence that the fee will incur the necessary mitigation.<sup>184</sup> In *Save Our Peninsula Committee v. Monterey County Board of Supervisors*, an EIR concluded that a proposed residential development would greatly add to traffic and congestion issues.<sup>185</sup> The county board conditioned approval of the project on the payment of a traffic mitigation fee to avoid halting regional development.<sup>186</sup> The fee was intended for street improvements consistent with a Master Plan.<sup>187</sup> The Court of Appeal for the Sixth District of California reviewed the EIR and found the “traffic impact mitigation fees were sufficiently tied to the actual mitigation of the impacts of increased traffic[,] . . . the EIR’s discussion of traffic mitigation measures was adequate and the Board’s adoption of the conditions of approval was supported by the evidence.”<sup>188</sup>

*Save Our Peninsula Committee* indicates that courts will give deference to decisions consistent with well-performed EIRs supported by requisite evidence.<sup>189</sup> Here, the court relied upon the record formed by the EIR to find that the fee condition was “sufficiently tied” to the development impacts.<sup>190</sup> Again, while this is not the *Nollan-Dolan* language as expounded by *Koontz*, it suggests that in determining the relationship between a condition and an impact, reliance on the EIR would nevertheless be appropriate under the Unconstitutional Conditions Doctrine.

The authority of local agencies to condition approvals on mitigation measures under SEPA appears more limited. SEPA

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183. *Id.*

184. *Save Our Peninsula Comm. v. Monterey Cnty. Bd. of Supervisors*, 104 Cal. Rptr. 2d 326, 356 (Ct. App. 2001).

185. *Id.*

186. *Id.* at 352–53.

187. *Id.* at 353.

188. *Id.* at 356.

189. *See id.* at 342–43 (“Determinations in an EIR must be upheld if they are supported by substantial evidence.” (citing *Barthelemy v. Chino Basin Mun. Water Dist.*, 45 Cal. Rptr. 2d 688, 694 (Ct. App. 1995))).

190. *Save Our Peninsula Comm.*, 104 Cal. Rptr. 2d at 357.

provides that an applicable “action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter.”<sup>191</sup> The conditions must also be “based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes,” and be “reasonable and capable of being accomplished.”<sup>192</sup> This language has been interpreted quite literally. In *Prisk v. City of Poulsbo*, the Second Division of the Court of Appeals of Washington found there to be no environmental policy within the city’s jurisdiction to support a fee to be used for park resources as a condition for subdivision approval.<sup>193</sup> Without an otherwise stated policy within the city code, the city could not use SEPA to circumvent the illegitimacy of a fee that was deemed an unauthorized tax.<sup>194</sup> Yet, without even reaching the issue of whether a sufficient policy basis was present to support certain proposed conditions, the Washington Supreme Court has found it sufficient to affirm the issuance of a building permit by relying on an impact analysis, which failed to show any need for mitigation.<sup>195</sup>

A more recent case indicates some flexibility within SEPA’s mitigation provisions. In *Brinnon Group v. Jefferson County*, Jefferson County “enacted an ordinance that amended its comprehensive plan to permit the development of a master planned resort.”<sup>196</sup> The ordinance conditioned approval on thirty items.<sup>197</sup> The Brinnon Group sued for, among other things, the fact that there was no policy basis to support each condition.<sup>198</sup> The Court ruled that SEPA did not require a specific policy in support of each condition, but rather it was permissible for the

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191. WASH. REV. CODE § 43.21C.060 (2013).

192. *Id.*

193. *Prisk v. City of Poulsbo*, 732 P.2d 1013, 1018–19 (Wash. Ct. App. 1987).

194. *Id.*

195. *Levine v. Jefferson Cnty.*, 807 P.2d 363, 366 (Wash. 1991) (relying on *Nagatani Bros. v. Skagit Cnty. Bd. of Comm’rs*, 739 P.2d 696, 699 (Wash. 1987) (“SEPA mandates that [an] action is to be conditioned or denied only on the basis of specific, proven significant environmental impacts . . . identified in a final or supplemental EIS.”)).

196. *Brinnon Grp. v. Jefferson Cnty.*, 245 P.3d 789, 793 (Wash. Ct. App. 2011).

197. *Id.* at 796.

198. *Id.* at 805.

county to base its “written conditions on the general SEPA policies.”<sup>199</sup>

The conditions imposed by local agencies under each statute are subject to *Koontz*. Thus, it is important to determine how these laws may reduce the uncertainty wrought by that decision. Yet, the differences between the statutes may affect how effectively each can shield their respective municipalities, under an environmental impact analysis, from *Koontz*’s implications.

## VI. SATISFYING *KOONTZ* AND THE UNCONSTITUTIONAL CONDITIONS DOCTRINE THROUGH THE ENVIRONMENTAL REVIEW PROCESS

The environmental impact analysis is a means of proving a rough proportionality and an essential nexus between an exaction and the property burdened. As such, municipalities in some jurisdictions may resort to impact reports to shield themselves from uncertain and costly litigious posturing by developers in negotiations. This should encourage their continued pursuit of sustainable development through mitigation conditions as well as fees to fund “green” capital infrastructures. The following cases illustrate how environmental impact reviews have satisfied the *Nollan-Dolan* test, but also now have bearing on the monetary exactions under *Koontz*.

### A. *Sudarsky v. City of New York*<sup>200</sup>

In *Sudarsky*, property owners claimed their development was unconstitutionally restricted after New York City amended the City’s Zoning Resolution and therefore prevented them from building their project.<sup>201</sup> Plaintiffs sought to develop land located in a “Special Transit Land Use District,” which was intended for a “Second Avenue subway line.”<sup>202</sup> If deemed necessary by the

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199. *Id.* at 808.

200. *Sudarsky v. City of New York*, 779 F. Supp. 287 (S.D.N.Y. 1991), *aff’d*, 969 F.2d 1041 (2d Cir. 1992), *cert. denied*, 506 U.S. 1084 (1993).

201. *Id.* at 291–93.

202. *Id.* at 291.



Department of City Planning, the Zoning Resolution required the conveyance of a transit easement by landowners developing within this District to assist the subway project.<sup>203</sup> Plaintiffs claimed the Department of City Planning schemed to require a transit easement on their property to delay the issuance of a building permit until it could rezone the site to make their project illegal.<sup>204</sup> On the claim that the transit easement conditions violated *Nollan*, the District Court found that the property owners' assertions would require the City "to undertake an *individualized inquiry such as an environmental impact study* to determine whether plaintiffs' proposed development would have any effect on street congestion or subway use."<sup>205</sup> The District Court found that "the federal constitution does not require the City to undertake the *type of detailed study* that plaintiffs argue is necessary," and found *Nollan's* nexus analysis to be satisfied through less scrutinizing determinations.<sup>206</sup>

This is a notable construction of the "essential nexus" element of *Nollan-Dolan* review. If the requisite nexus can be satisfied without an environmental impact review, then it suggests the more detailed SEQRA review can protect against assertions of the Unconstitutional Conditions Doctrine grounded in the nexus component. The decision also provided foresight into the "individualized determination" envisioned by *Dolan*, and may infer that impact analyses can meet the "rough proportionality" requirement.<sup>207</sup> In addition, here, a federal court interpreted a land use decision and its impacts on the applicant. The U.S. Supreme Court has stated that "state courts undoubtedly have more experience than federal courts . . . in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations."<sup>208</sup> While this statement was made in the context of determining the competence of state courts and federal courts to hear such issues,<sup>209</sup> it acknowledged the well-known

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203. *Sudarsky*, 779 F. Supp. at 291.

204. *Id.* at 293.

205. *Id.* at 299 (emphasis added).

206. *Id.* (emphasis added).

207. *See Dolan*, 512 U.S. at 391.

208. *San Remo Hotel, L.P. v. City & Cnty of S.F.*, 545 U.S. 323, 347 (2005).

209. *Id.*

primacy of state law over land use issues. Thus, it was proper for *Sudarsky* to rely on a New York Court of Appeals decision, *Jenad, Inc. v. Village of Scarsdale*, “cited approvingly in *Nollan v. California Coastal Comm’n*[.]” to determine if the nexus asserted by the City was sufficient.<sup>210</sup> The next case affirmatively indicates SEQRA’s value in satisfying the “rough proportionality” requirement.

***B. Grogan v. Zoning Board of Appeals of Town of East Hampton***<sup>211</sup>

This case directly evinces how the SEQRA process may be interpreted to satisfy the Unconstitutional Conditions Doctrine. A negative conservation easement, which limits the grantor’s use of the property without providing the grantee any use rights,<sup>212</sup> was imposed as a condition for the Zoning Board of Appeals to approve construction of an addition to a house.<sup>213</sup> The import of this case was not so much the court’s finding of a rough proportionality between the easement and the environmental impacts of the project,<sup>214</sup> but instead how it used the “environmental assessment form prepared by the Town of East Hampton Planning Department,” as offering determinative evidence to support this conclusion.<sup>215</sup> While the petitioners argued that a no-develop conservation easement was arbitrary and capricious and an unconstitutional taking of its property, the Second Judicial Department put great weight on the fact that the “[EAF] . . . discusse[d] the specific environmental impacts of the proposed construction and the best manner by which to ameliorate them.”<sup>216</sup> The court concluded that this was evidence of “a valid, individualized determination that the easement [wa]s

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210. *Sudarsky*, 779 F. Supp. at 299.

211. *Grogan v. Zoning Bd. of Appeals of E. Hampton*, 633 N.Y.S.2d 809 (App. Div. 1995).

212. JAMES W. ELY, JR. & JON W. BRUCE, *THE LAW OF EASEMENTS & LICENSES IN LAND* § 12:2 (2014), available at Westlaw.

213. *Grogan*, 633 N.Y.S.2d at 810.

214. *Id.*

215. *Id.*

216. *Id.*

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an appropriate measure to address the specific environmental impacts of the petitioners' proposal."<sup>217</sup>

*Grogan* illustrates that a properly completed EAF can suffice to show the conditions imposed are connected to the impacts of the proposed action and are proportional in scope to meet the *Nollan-Dolan* test. It makes no difference that subsequent decisions have held that *Grogan* should not have applied an exactions analysis to a negative conservation easement.<sup>218</sup> While the New York Court of Appeals has now made clear that the *Nollan-Dolan* inquiry only applies to dedications of real property and to fees paid in-lieu-of a dedication,<sup>219</sup> the indispensable matter is that the *Grogan* court found it appropriate to defer to an EAF to evince an essential nexus and rough proportionality.<sup>220</sup>

***C. Twin Lakes Development Corp. v. Town of Monroe***<sup>221</sup>

*Twin Lakes* indicates that the same deferential treatment to municipal decision-making and to the imposition of conditions on developers pursuant to impact analyses seen in *Grogan*, also apply to fees in-lieu-of a dedication. Twin Lakes Development Corporation applied to the Planning Board of the Town of Monroe (Board) for approval to subdivide its property into twenty-two residential lots.<sup>222</sup> The Board reviewed the application under SEQRA and decided to conduct a full-fledged EIS.<sup>223</sup> After the SEQRA process concluded, the Board adopted a "Resolution of Conditional Final Approval" that approved the application, but conditioned it on several demands; including payment of a fee for community recreational purposes instead of a dedication of land for such activities.<sup>224</sup> Notably, the resolution cited Town Law Section 277 for the authority to require such a condition under

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<sup>217.</sup> *Id.*

<sup>218.</sup> *Smith v. Town of Mendon*, 771 N.Y.S.2d 781, *aff'd*, 822 N.E.2d 1214 (N.Y. 2004).

<sup>219.</sup> *Consumers Union of U.S., Inc. v. State*, 840 N.E.2d 68, 83 (N.Y. 2005).

<sup>220.</sup> *Grogan v. Zoning Bd. of Appeals of E. Hampton*, 633 N.Y.S.2d 809, 810 (App. Div. 1995).

<sup>221.</sup> *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821 (N.Y. 2003).

<sup>222.</sup> *Id.* at 822.

<sup>223.</sup> *Id.*

<sup>224.</sup> *Id.* at 822–23.

Monroe's Code.<sup>225</sup> Twin Lakes argued the fee did not have a rough proportionality to the recreational needs that would be created by its residential subdivision.<sup>226</sup> The New York Court of Appeals disagreed and not only found that the *Nollan-Dolan* test was satisfied, but did so through the Board's findings in the EIS.<sup>227</sup> This illustrates that even conditions not arising from SEQRA authority can be supported by the SEQRA process.

*Twin Lakes* and *Grogan* suggest that an environmental impact review constitutes an "individualized consideration of the project's impact [as] contemplated by *Dolan v. City of Tigard*."<sup>228</sup> While *Dolan* required "[n]o precise mathematical calculation," it obliged "some sort of individualized determination that the required dedication [wa]s related both in nature and extent to the impact of the proposed development."<sup>229</sup> Other jurisdictions are in accord. In *City of Olympia v. Drebeck*, the Washington Supreme Court, in evaluating whether *Nollan-Dolan* review applied to legislatively prescribed impact fees, discerned the "individualized assessment" as the key analysis in *Dolan*.<sup>230</sup> An environmental impact review may very well fit this criterion.

#### D. California Environmental Quality Act and State Environmental Policy Act

While SEQRA and its corresponding case law seem to be powerful tools for municipalities to bolster themselves against *Koontz*-related arguments in New York, CEQA and SEPA represent similar shields to such assertions of *Nollan-Dolan* scrutiny. In California, the conditional approval of a building permit, requiring the dedication of land for street realignment in a professional office use zone, was invalidated as having no

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225. *Id.*

226. *Twin Lakes Dev. Corp.*, 801 N.E.2d at 823.

227. *Id.* at 825.

228. *Id.*; *Grogan v. Zoning Bd. of Appeals of E. Hampton*, 633 N.Y.S.2d 809, 810 (App. Div. 1995) (By using the findings in the EAF, the court found "a valid, *individualized determination* that the easement [wa]s an appropriate measure to address the specific environmental impacts of the petitioners' proposal." (emphasis added)).

229. *Dolan*, 512 U.S. at 391.

230. *City of Olympia v. Drebeck*, 126 P.3d 802, 808 (Wash. 2006) (en banc).

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essential nexus to the project as a mitigation measure for traffic impacts.<sup>231</sup> The Court relied on the EIR to find “that the conversion of the property would impose no significant traffic problems in the area.”<sup>232</sup> By negative implication, it may be inferred that environmental review materials can be used to prove an essential nexus between an exaction and the property burdened. Yet, as here, when such necessary factual bases are absent from an EIR, this may evince the absence of a nexus as well.<sup>233</sup>

The “Guidelines for the Implementation of [CEQA]” promulgated in the California Code also require that the “*Contents of [EIRs]*” consider and discuss mitigation measures under the constitutional principles set by *Nollan*, *Dolan*, and *Ehrlich v. City of Culver City*.<sup>234</sup> In essence, the Unconstitutional Conditions Doctrine was drafted into the regulations. If the EIR discusses the “essential nexus” and “rough proportionality” of an adjudicative mitigation condition and finds these constitutional requirements satisfied in a nexus study, such a decision would likely be given deference. An agency approval in an EIR will be upheld if “supported by substantial evidence in the record.”<sup>235</sup> Substantial evidence is “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.”<sup>236</sup> “[T]he reviewing court must resolve reasonable doubts in favor of the administrative finding and decision” and must not set aside an EIR mitigation decision just because an alternative was just as or even more

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231. *Rohn v. City of Visalia*, 263 Cal. Rptr. 319, 328 (Ct. App. 1989).

232. *Rohn*, 263 Cal. Rptr. at 328.

233. See *Levine v. Jefferson Cnty.*, 807 P.2d 363, 366 (Wash. 1991) (“The draft EIS contained only a recommendation for minor traffic changes . . . and comments by a neighbor expressing concern about traffic and flood levels.” The court found that because “[t]his constituted the complete record upon which the denial [of a permit] was based . . . the record d[id] not support attachment of the mitigative restrictions.”).

234. CAL. CODE REGS. tit. 14, § 15126.4(a)–(b) (2014).

235. *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 764 P.2d 278, 283 (Cal. 1988) (en banc) (citing CAL. CODE REGS. tit. 14, § 15091(b) (2014)).

236. CAL. CODE REGS. tit. 14, § 15384(a) (2014).

reasonable.<sup>237</sup> The court will only disturb an agency decision under CEQA if “the agency [did] not proceed[] in a manner required by law or if the determination or decision [was] not supported by substantial evidence,” under an “abuse of discretion” standard of review.<sup>238</sup> Thus, if the lead agency can prove the condition satisfies *Nollan*, *Dolan*, and *Ehrlich* within its nexus study, this result would enjoy vast judicial deference, as long as the “nexus” and “rough proportionality” findings are not mere fabrications. This offers a strong deterrent to *Koontz*-type confrontations, and may protect local sustainable development initiatives if the appropriate studies are properly undertaken.<sup>239</sup>

The State of Washington offers additional examples of environmental review safeguards. In dicta, a Washington appellate court found that requiring access ramps on a freeway to remedy a purported increase in traffic as a condition to construct and operate a new asphalt plant did not satisfy the *Nollan-Dolan* test.<sup>240</sup> The court found this EIS inadequate and thus, the record was insufficient to require a condition to mitigate traffic concerns, at least without the completion of a supplemental EIS.<sup>241</sup> This case provides another inverse inference that the record can

237. *Laurel Heights Improvement Ass’n*, 764 P.2d at 293 (quoting *Topanga Ass’n for a Scenic Cmty. v. Cnty. of L.A.*, 522 P.2d 12, 16 (1974)) (internal quotation marks omitted).

238. *Laurel Heights Improvement Ass’n*, 764 P.2d at 283 (citing CAL. PUB. RES. CODE § 21168.5 (West 2014)).

239. As discussed above, *Koontz* did not address whether *Nollan-Dolan* review applies to generally applicable legislative fees. See *supra* notes 108, 119-21 and accompanying text. This is important for California communities. While administrative ad hoc monetary exactions have had to satisfy *Nollan-Dolan* scrutiny since the *Ehrlich* decision, “most communities have adopted development impact fees under the Mitigation Fee Act . . . [such as] across-the-board fees imposed on virtually all applications for development . . . [or] more specialized fees . . . on certain types of development, or development within certain geographic areas.” Speir, *supra* note 121, at 4. “These fees may have been adopted as a result of an impact fee analysis which generally meets the deferential ‘reasonable relationship’ standard of the Mitigation Fee Act.” *Id.* Thus, if *Koontz* is interpreted as extending *Nollan-Dolan* review to general fee ordinances, it is probable that some of these legislatively imposed fees will not satisfy *Nollan-Dolan*’s heightened standard “when applied to the specific circumstances of a particular property or development project.” *Id.*

240. *Kiewit Constr. Grp., Inc. v. Clark Cnty.*, 920 P.2d 1207, 1209, 1213 (Wash. Ct. App. 1996).

241. *Id.* at 1209, 1213.

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support a rough proportionality and an essential nexus by reference to environmental impact review procedures and documents, as long as they are properly performed.

Washington's mitigation fee statute allows "voluntary agreements with [local governments] that allow a payment in lieu of a dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat."<sup>242</sup> However, it only provides a list of requirements for the *authorization* of a mitigation payment, and does not *grant* the power to impose them.<sup>243</sup> The authority to require such exactions must have some independent statutory origin, and SEPA has been upheld as "one such source."<sup>244</sup> Given the statutory synergy between SEPA and the mitigation fee statute, it is important that the *Nollan-Dolan* test be satisfied when imposing a mitigation fee even if the harm preexisted the project under review.<sup>245</sup> Thus, the EIS must make an adequate "individualized determination" not only as to the unique harm created by the project, but also of how the proposed action exaggerates a "preexisting deficiency" for the mitigation payment to be properly imposed.<sup>246</sup> There is some indication that the Washington courts would concur with *Merson v. McNally*,

242. *City of Fed. Way v. Town & Cnty. Real Estate, LLC*, 252 P.3d 382, 398 n.33 (Wash. Ct. App. 2011) (citing WASH. REV. CODE § 82.02.020 (2013)).

243. *Id.*

244. *Id.* at 396 (citing *City of Olympia v. Drebeck*, 126 P.3d 802 (Wash. 2006) (en banc)).

245. *Id.* at 396 (referring to *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 49 P.3d 867 (Wash. 2002) (en banc)). In *Isla Verde International Holdings, Inc.*, the court upheld a condition to mitigate a deficiency that preexisted the proposed development, but also held that the record did not support an open space mitigation condition as a necessary requirement to mitigate development impacts since there was a "determination of nonsignificance." *Isla Verde Int'l Holdings, Inc.*, 49 P.3d at 878–79. While the court emphasized that the value of this determination was "not dispositive" and "should not be overemphasized," *id.* at 879 n.15, the environmental impact analysis clearly played a role in the court's decision. This is another instance where it could be argued, by negative inference, that SEPA findings can connect an impact and a condition, but that the absence of such findings, as was the case here, may also indicate no such relationship. It should be noted, however, that this case, while alluding to "roughly proportional" language, seems to use "reasonably necessary" as its standard. *Id.* at 878–79.

246. *See City of Fed. Way*, 252 P.3d at 399 (interpreting *Isla Verde Int'l Holdings, Inc.*, 49 P.3d at 879).

regarding mitigation, on the import of “an open and deliberative process” towards forming conditions.<sup>247</sup> Conditions brought on by comments of a concerned agency, as well as correspondences and studies by the agency and the project sponsor,<sup>248</sup> seemed to be part of a review process “to mitigate the concerns” of the public and other agencies and not “unilaterally imposed by the lead agency” despite the project sponsor’s ultimate disapproval.<sup>249</sup>

## VII. CONCLUSION

The value of municipal exactions, either through land dedications or a fee in-lieu-of a dedication, cannot be overstated. They pervade the governance of land use decisions faced by local officials on a daily basis. Moreover, municipalities may use mitigation conditions to replace existing conventional development strategies and land use patterns with more sustainable practices. This may occur in an environmental context (i.e. open space preservation or by incentivizing green development funds),<sup>250</sup> economic context (i.e. traffic fees to prevent the deterioration of infrastructure by funding repairs and construction),<sup>251</sup> and social context (i.e. recreational and cultural facilities, or maintenance fees to protect such facilities in existence).<sup>252</sup> Yet, Koontz’s extension of *Nollan-Dolan* scrutiny to monetary exactions, at least in the context of adjudicative ad hoc decisions, as well as the uncertainty wrought by the majority’s refusal to delineate the scope of its decision, may discourage such tactics. Indeed, the Koontz dissent predicted that the majority opinion would impede future land use decisions by stifling

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247. *Merson v. McNally*, 688 N.E.2d 479, 484-85 (N.Y. 1997).

248. *City of Fed. Way*, 252 P.3d at 386–87.

249. *Merson*, 688 N.E.2d at 486. See *City of Fed. Way*, 252 P.3d at 387.

250. See *NOLON & SALKIN*, *supra* note 12, at 118-22; *Circo*, *supra* note 20, at 108.

251. *City of Fed. Way*, 252 P.3d at 386–87; *Save Our Peninsula Comm. v. Monterey Cnty. Bd. of Supervisors*, 104 Cal. Rptr. 2d 326, 356 (Ct. App. 2001).

252. *Home Builders Ass’n of Cent. Ariz. v. City of Mesa*, 243 P.3d 610, 616, 618 (Ariz. Ct. App. 2010); *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821, 822–23 (N.Y. 2003).



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negotiations and, in turn, causing rampant rejections of development projects and mitigation guidance alike.<sup>253</sup>

The Koontz decision invited many environmental legal scholars to consider alternative mechanisms to sustain the viability of the land use exaction as a prominent tool for municipal land use governance. While this comment has argued what it believes to be the strongest of these methods, in light of the fact that not every State has enacted such robust mini-NEPA statutes, at least two other positions are worth mentioning: the “development agreement,”<sup>254</sup> and “contingency bargaining.”<sup>255</sup> Nonetheless, this comment emphasizes that the state environmental impact review process is a wide-ranging and effective tool to protect against some of Koontz’s risks,<sup>256</sup> and,

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253. *Koontz*, 133 S. Ct. at 2610 (Kagan, J., dissenting).

254. Development agreements are contracts negotiated between a municipal authority and a developer that authorize the local entity to pursue comprehensive planning by requiring improvements beyond what would be allowed under its local code, and are statutorily authorized in thirteen states. David L. Callies, *Land Development Conditions After Koontz v. St. Johns River Water Management District: Sic Semper Nexus and Proportionality*, in SUPREME COURT TAKINGS: A FIRST LOOK AT KOONTZ AND HORNE pt. 5, at 1 (Am. Bar Ass’n et al. eds., 2013), available at <http://apps.americanbar.org/cle/programs/nosearch/materials/2013/t13sctcm1.pdf>.

255. In the context of sea-level rise, there has been some acknowledgement that “contingency bargaining,” or a form of “negotiated project review,” between a developer and a municipal agency that “accommodate [for] disagreements about future events,” and which contemplate “future costs” may satisfy or even fall outside *Koontz*’s heightened scrutiny for monetary exactions. John R. Nolon, Commentary, *Sea Level Rise and the Legacy of Lucas: Planning for an Uncertain Future*, 66 PLAN. & ENVTL. L. 3, 22 (2014). Negotiated, “open and deliberative,” and bilaterally constructed conditions seem to frequent the discussion over what is or is not an “impermissible condition,” and infers that conditions produced by a negotiated process will be less likely to face challenges under *Nollan-Dolan* review. See *Merson v. McNally*, 688 N.E.2d 479, 484–86 (N.Y. 1997).

256. Other scholars have also suggested that *Koontz* will influence, and can be circumvented by, the environmental review statutes. See Robert H. Freilich & Neil M. Popowitz, *How Local Governments Can Resolve Koontz’s Prohibitions on Ad Hoc Land Use Restrictions*, 45 URB. LAW. 971, 985 (2013). Yet, this proposed solution relies on the use of “tiering” the environmental review by engaging in a large programmatic analysis of several actions that are related in a manner contemplated by CEQA. *Id.* at 986. For example, tiering can be applied to certain regional development plans that include “a sustainable communities strategy” to mitigate air pollution caused by poor transportation planning. *Id.* at 986–87. These strategies are usually exempt from CEQA review or will only undergo a restricted analysis. *Id.* The authors suggest that such a “[l]arge-scale

where applicable, should be considered as one of the most compelling instruments to preserve this vital function of local government. The statutory provisions, corresponding regulations, and case law in three states seem to indicate that the requirements of some state environmental policy statutes can shield against or even satisfy *Nollan-Dolan* litigation.<sup>257</sup> Courts often seek to avoid embroiling themselves in public policy debates, given that such arguments are held primarily in the legislative and executive branches of government. Yet, in a world of scarce resources, sustainable development is irrefutably a sound policy for our communities, states, and nation to aspire towards. In fact, all three aforementioned state statutes evince a legislative intent to protect and maintain the environment for present and future generations, and to prevent the deterioration of limited environmental resources from the effects of societal expansion and development.<sup>258</sup> This is not a mandate to halt all development, but a directive that environmental considerations be part of our decision-making due to their great value to human civilization. It is logical that when municipal officials follow the provisions of these statutes, conditions that develop through an “open and deliberative process” envisioned by the sovereign legislative authority of the respective states, and that consider the environmental, economic, and social impacts of a proposed action, would be granted deference. This analysis does not propose that municipal authorities are completely immune from *Nollan-Dolan* scrutiny under *Koontz*. Rather, the contention asserted here maintains that the procedural and substantive

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regulatory mechanism[]” is sufficiently dissimilar from “demand[s] directly tied to . . . particular ownership of a particular piece of land” such that municipalities could avoid *Koontz* altogether. *Id.* at 988 (footnote omitted). Still, these authors concede that “[u]nfortunately . . . courts have determined that only certain off-site issues can be deferred to later analysis and not just any regional, county or city-wide analysis can be used for future individual project EIRs.” 45 URB. LAW. 971, 987. If the environmental review process, and its resulting impact statement, can in and of itself indicate the requisite nexus and proportionality by way of an “individualized determination,” *see supra* Part VI, there would be no need to side-step challenges grounded in *Koontz* because the Unconstitutional Conditions Doctrine could be directly satisfied.

257. *See* discussion *supra* Part V.

258. *See* CAL. PUB. RES. CODE § 21000 (West 2014); N.Y. ENVTL. CONSERV. LAW § 8-0103 (McKinney 2014); WASH. REV. CODE § 43.21C.020 (2013).

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provisions of these state environmental policy statutes and their implementing regulations provide pillars of stabilization to ensure local efforts, aggregated over the national sphere, toward sustainable development do not collapse.