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Are Critical Area Buffers Unconstitutional? Demystifying The Doctrine of Unconstitutional Conditions

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Cover Page Footnote
Brian T. Hodges is a senior attorney at Pacific Legal Foundation's Northwest Center. Mr. Hodges represented the petitioner in the unconstitutional conditions case, Koontz v. St. Johns River Water Management District, 133 S. Ct. 2586 (2013). Pacific Legal Foundation also represented the homeowner in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), and participated an amicus curiae in Dolan v. City of Tigard, 512 U.S. 374 (1994). Mr. Hodges earned his J.D. from Seattle University School of Law, 2001, his M.A. from University of Washington, 1998, and his B.A. from University of Washington, 1996.

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Brian T. Hodges[†]

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I. INTRODUCTION

Washington's Growth Management Act (GMA) and Shoreline Management Act (SMA) require cities and counties to adopt and regularly update regulations that protect against further degradation of the natural environment resulting from development.[1] Although neither statute requires any one method for achieving that directive, most jurisdictions carry out

[1]*See* Wash. Rev Code § 36.70A.030(5) (defining critical areas); Wash. Rev. Code § 36.70A.060(2) (requiring each county and city planning under the GMA to adopt development regulations that protect critical areas); Wash. Rev Code § 36.70A.172(1) (requiring designation and protection of critical areas to include best available science); Wash. Rev. Code § 90.58.020 (requiring local governments to manage shorelines with an emphasis on the preservation of "fragile" shoreline, "natural resources," "the land and its vegetation and wildlife," "the waters and their aquatic life," "ecology," and "environment," among other goals). *See generally* Richard L. Settle, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. Puget Sound L. Rev. 867 (1993) (giving a history of the GMA and detailed discussion of the Act's various requirements); Eric S. Laschever, *An Overview of Washington's Growth Management Act*, 7 Pac. Rim L. & Pol'y J. 657 (1998); Alan D. Copsey, *Including Best Available Science in the Designation and Protection of Critical Areas Under the Growth Management Act*, 23 Seattle U. L. Rev. 97 (1999); Geoffrey Crooks, *The Washington Shoreline Management Act of 1971*, 49 Wash. L. Rev. 423, 423-24 (1974) (giving a history of the SMA).

this mandate by requiring that owners of property adjacent to sensitive areas, like streams or shorelines, dedicate a "critical area buffer" as a mandatory condition on any new permit approval.[2] Despite the ubiquity of critical area buffer provisions, a government demand that a landowner dedicate a strip of private property as a conservation area must still comply with the Takings Clauses of the U.S. and Washington Constitutions.[3]

Typically, a land-use permit condition demanding that a landowner dedicate his or her property to the public's benefit must satisfy the doctrine of unconstitutional conditions as set out by the U.S. Supreme Court in *Nollan v. California Coastal Commission*[4] and *Dolan v. City of Tigard*.[5] Together, those cases established the "essential nexus" and "rough proportionality" tests, which hold that the government may only require a landowner to dedicate property where the dedication is necessary to mitigate the negative impacts of the proposed development on the public.[6] A condition that satisfies the nexus and proportionality requirements is considered a proper exercise of the government's land-use authority.[7] However, a condition indirectly takes property when it demands property in excess of what is necessary to mitigate adverse impacts of a proposed development.[8] Thus, the permit condition violates the doctrine of unconstitutional conditions.[9]

The U.S. Supreme Court has readily applied this doctrine to conditions demanding the dedication of stream and wetland buffers.[10] Washington's appellate courts, however, are split on whether the heightened scrutiny demanded by *Nollan* and *Dolan* apply to the same type of buffer conditions. In early decisions, Washington closely followed *Nollan* and *Dolan*, holding that generally applicable land use regulations that demand that

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[2] A "critical area buffer" is a strip of land contiguous to a sensitive area that is vegetated with native trees and shrubs and where no land use activities are allowed. *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*,161 Wash.2d 415, 430-31 (2007); *see also* Thomas Hurby, *Update on Wetland Buffers: State of the Science*, Publication Number 13-06-011, Wash. Dep't of Ecology (2013).

[3] Wash. Const. art. I, § 16; U.S. Const. amend. V.

[4] *Nollan v. California Coastal Commission* 483 U.S. 825 (1987).

[5] *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

[6] *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594-95, 186 L. Ed. 2d 697 (2013); *see also Dolan*, 512 U.S. at 385 ("[G]overnment may not require a person to give up the constitutional right . . . to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit [that] has little or no relationship to the property").

[7] *Koontz*, 133 S. Ct. at 2594-95.

[8] *Id.*

[9] *Id.*

[10] In *Dolan*, the Court invalidated the government's demand that a landowner dedicate a stream buffer. *Dolan*, 512 U.S. at 393-94. And in *Koontz*, the Court held a fee imposed in lieu of a conservation easement was subject to the unconstitutional conditions doctrine. *Koontz*, 133 S. Ct. at 2592.

owners dedicate a buffer as a condition of permit approval must satisfy the nexus and proportionality tests.[11]

But in recent decisions, the courts of appeals has held laws imposing critical area buffer conditions exempt from the nexus and proportionality tests.[12] Those cases hold that a buffer dedication automatically satisfies the doctrine of unconstitutional conditions if the city or county relied on science to show that the demanded dedication may provide environmental benefits to the public.[13] Despite this deep and irreconcilable split of authority, Washington's Supreme Court has declined review in each and every case involving an unconstitutional conditions challenge to a critical area buffer.[14] As it stands today, Washington's body of unconstitutional conditions case law is comprised of incoherent and contradictory appellate decisions, many of which are in direct conflict with the very federal precedents they purport to apply.[15]

The conclusion that buffers should not be subject to heightened scrutiny is predicated on two arguments, neither of which has any merit under the doctrine of unconstitutional conditions. Most commonly, buffer proponents claim that *Nollan* and *Dolan* only apply in the limited context of

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[11] *See Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (KAPO)*, 160 Wash.App 250, 273, 255 P.3d 696 (2011) (Holding that a critical area buffer imposed as a mandatory condition on a development permit "must comply with the nexus and rough proportionality tests."); *Honesty in Envtl. Analysis Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (HEAL)*, 96 Wash.App 522, 533, 979 P.2d 864 (1999) (Critical area buffers "must comply with nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications."); *see also Citizens' All. for Prop. Rights v. Sims*, 145 Wash.App 649, 661, 187 P.3d 786 (2008) (Applying *Nollan* and *Dolan* through a state statute, the court held that a code provision that prohibited rural property owners from clearing vegetation retention areas as a condition of permit approval constituted a dedication and was subject to nexus and proportionality requirements).

[12] *See*, *e.g.*, *KAPO*, 160 Wash.App at 273-74.

[13] *Id.*

[14] *See Common Sense All. v. San Juan Cty.*, 184 Wash. 2d 1038, 380 P.3d 406 (2016); *Olympic Stewardship Found. v. W. Washington Growth Mgmt. Hearings Bd.*, 174 Wash. 2d 1007, 278 P.3d 1112 (2012) (denying review); *Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 171 Wash. 2d 1030, 257 P.3d 662 (2011) (denying review); *Citizens' All. for Prop. Rights v. Sims*, 165 Wash. 2d 1030, 203 P.3d 378 (2009) (denying review).

[15] It is no secret that Washington's regulatory takings law is in dire need of comprehensive reform. For years, legal scholars from both the public and private sectors have repeatedly noted that state takings law is "mired in a cumbersome, confusing, and constitutionally suspect takings analysis." Roger D. Wynne, *The Path Out of Washington's Takings Quagmire: The Case for Adopting the Federal Takings Analysis*, 86 Wash. L. Rev. 125, 128 (2011); *see also* P. Dayton and L. Clark, *Lingle Lingering: Seven Years after the United States Supreme Court's Lingle v. Chevron USA, Inc., Washington Courts Have Not Reformed the State's Regulatory Takings Test,* 39 Envtl. & Land Use Law (WSBA, May 2012); *see also* John M. Groen & Richard M. Stephens, *Takings Law, Lucas, and the Growth Management Act*, 16 U. Puget Sound L. Rev. 1259, 1293 (1993); Jill M. Teutsch, Comment, *Taking Issue with Takings: Has the Washington State Supreme Court Gone Too Far?,* 66 Wash. L. Rev. 545 (1991); Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't,* 12 U. Puget Sound L. Rev. 339 (1989).

an adjudicative permit condition—conditions mandated by an act of general legislation, such as critical areas ordinances that impose buffer conditions on all properties in a predetermined and preset manner, should be exempt from heightened scrutiny.[16] That argument, however, is readily dismissed by looking to the historical development and application of the doctrine of unconstitutional conditions—there is simply no basis in the doctrine itself for distinguishing between the particular branch of government that is making the unconstitutional demand.

In the alternative, buffer proponents argue that a government demand that landowners set aside a portion of his or her land as a conservation area does not take a protected interest in real property.[17] Therefore, they argue that, even if *Nollan* and *Dolan* apply to legislatively mandated conditions, a buffer condition does not implicate any of the protections guaranteed by the Takings Clause and is not subject to the doctrine of unconstitutional conditions.[18] That argument, however, fails to acknowledge a large body of case law recognizing that a law demanding that private property be preserved as a conservation area forces that land into public environmental use and must comply with the Takings Clause.

This article will consider the doctrine of unconstitutional conditions with particular regard to the doctrine's applicability to buffer conditions imposed pursuant to acts of general legislation. Part II provides an overview and analysis of the U.S. Supreme Court's unconstitutional conditions case law. Part III discusses the state of Washington's unconstitutional conditions case law. Part IV argues that a critical area buffer on private property constitutes a valuable and protected property right. Part V asks whether the U.S. Supreme Court's decisions in *Lingle v. Chevron U.S.A. Inc.*,[19] and *Koontz v. St. Johns River Water Mgmt. Dist.*,[20] compels changes to Washington's case law. In light of those cases, the article considers whether there is any meaningful purpose for distinguishing so-called "legislative" exactions from those conditions that are imposed as part of an adjudicative procedure under the Takings Clause. Part V concludes that there is no special environmental exception to the law of takings. Public burdens, including the cost of environmental regulation, may not be placed on an individual property owner. Instead, such burdens must be borne by the public as a whole, as the framers of the Constitution intended.[21]

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[16] *See*, *e.g.*, Jeffrey M. Eustis, *Square Pegs in Round Holes: The Washington Courts' Misapplication of Federal Regulatory Takings Law*, 4 Seattle J. Envtl. L. 1, at 20-22 (2014).

[17] *Id.* at 22.

[18] *See id.* at 22-24.

[19] *Lingle v. Chevron*, 544 U.S. 528, 542-43 (2005).

[20] 133 S. Ct. 2586.

[21] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

II. THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS AND ITS SPECIAL APPLICATION TO LAND-USE EXACTIONS

Over the years, the Washington Supreme Court has repeatedly held that decisions of the U.S. Supreme Court interpreting the Fifth Amendment of the U.S. Constitution "set[] a minimum floor of protection, below which state law may not go."[22] Thus, although the State's high court has yet to explicitly recognize the doctrine's application to property rights,[23] the most appropriate starting point for this analysis is the U.S. Supreme Court's unconstitutional conditions case law.

The doctrine of unconstitutional conditions finds its roots in a series of mid-Nineteenth century cases responding to a wave of protectionist state laws that had placed unconstitutional conditions—such as a waiver of the right to remove lawsuits to federal court—on foreign companies seeking permission to do business in the state.[24] As originally expressed by the U.S. Supreme Court, the doctrine was structural in nature, strictly enforcing an outer limit on government authority to demand that citizens waive a constitutionally protected right in exchange for a government benefit. The doctrine recognizes that, on the one hand, the sovereign generally enjoys broad power to attach conditions to its provision of a gratuity or bounty to an individual.[25] On the other hand, that authority ends when the government conditions the provision of a discretionary benefit upon a requirement that a person waive or surrender up a constitutionally protected right.[26] In other words, the doctrine holds that the government may not do indirectly that which it could not constitutionally accomplish directly:

> "[T]he power of the state […] is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. […] It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.[27]

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[22] *Orion Corp. v. State*, 109 Wash. 2d 621, 652, 747 P.2d 1062 (1987).

[23] Eustis, *Square Pegs*, 4 Seattle J. Envtl. L. at 17, n.90 (noting that the Washington Supreme Court has yet to recognize the unconstitutional conditions doctrine outside the context of criminal sentencing).

[24] *See, e.g.*, *Lafayette Ins. Co v. French*, 59 U.S., 404, 407 (1855) ("This consent [to do business as a foreign corporation] may be accompanied by such condition as Ohio may think fit to impose; … provided they are not repugnant to the constitution of laws of the United States."); *see also Doyle v. Continental Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) ("Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so").

[25] *Ivanhoe Irrigation Distr. v. McCracken*, 357 U.S. 275, 294-95 (1958).

[26] *Id.* at 295.

[27] *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926); *see also* Richard A. Epstein, Bargaining with the State 5 (1993) (The doctrine holds that even if the government has

Importantly, the U.S. Supreme Court did not couple the doctrine to any single clause of the constitution.[28] Over the years, the Court invoked the doctrine in defense of rights secured by the Free Speech and Freedom of Religion Clauses,[29] the Commerce and Due Process Clauses,[30] among others.[31]

The unique nature of land-use permitting compelled the U.S. Supreme Court to devise a "special application of the 'doctrine of unconstitutional conditions'"[32] that is designed to protect a landowner's rights in property[33] while at the same time recognizing the government's authority to plan for appropriate community development.[34] In lieu of the strict scrutiny typically applied in an unconstitutional conditions case, the Court in *Nollan* and *Dolan* devised the "essential nexus" and "rough proportionality" tests to define the limited circumstances in which the government may lawfully condition permit approval upon the dedication of a property interest to the public: (1) the government may require a landowner to dedicate property to a public use *only* where the dedication is necessary to mitigate for the negative impacts of the proposed development on the public; and (2) the government may not use the permit process to coerce landowners into giving property to the public that the government would otherwise have to pay for.[35]

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absolute discretion to grant or deny any individual a privilege or benefit—such as a land-use permit, "it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

[28] James Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 407 (2009) (The unconstitutional conditions doctrine has been invoked in a wide range of cases in which "government has traded with people for their right to free speech, their right to freedom of religion, their right to be free from unreasonable searches, their right to equal protection, and their right to due process of law").

[29] *Perry v. Sindermann*, 408 U.S. 593 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Speiser v. Randall*, 357 U.S. 513, 529 (1958).

[30] *Hanover Ins. Co. v. Harding*, 272 U.S. 494, 514-15 (1926); *W. Union Tel. Co. v. Kansas*, 216 U.S. 1, 34-48 (1910).

[31] *See* James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 407 (2009).

[32] *Lingle*, 544 U.S. at 530. Indeed, outside the context of permit applications, conditions demanding the surrender of private property are subject to strict scrutiny. "For example, a state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without the due process of law[.]" *Baltic Min. Co. v. Mass.*, 231 U.S. 68 (1913).

[33] *Nollan*, 483 U.S. at 833 ("[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements —cannot remotely be described as a 'governmental benefit'").

[34] *See Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926).

[35] *Koontz*, 133 S. Ct. at 2594-96. The heightened scrutiny demanded by *Nollan* and *Dolan* is essential because landowners "are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit

A. The Nexus and Proportionality Tests Protect Against Abuse of the Permit System by Requiring that Exactions be Sufficiently Related to the Burdened Development to Justify the Property Demand

A brief overview of the U.S. Supreme Court's exactions cases illustrates how the nexus and proportionality tests are intended to work. In *Nollan*, the California Coastal Commission, acting pursuant to the requirements of state law, required the Nollans to dedicate an easement to allow the public to cross over a strip of their private beachfront property as a condition of obtaining a permit to rebuild their home.[36] The Commission specifically justified the condition on the grounds that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a "wall" of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit,' " and would "increase private use of the shorefront."[37] The Nollans refused to accept the condition and brought a federal takings claim against the Commission in state court, arguing that the condition was unconstitutional because it bore no connection to the impact of their proposed development.[38]

The U.S. Supreme Court agreed, holding that the easement condition violated the Takings Clause because it lacked an "essential nexus" to the alleged public impacts that the Nollans' project caused.[39] Because the Nollans' home would have no impact on public beach access, the Commission could not justify a permit condition requiring them to dedicate an easement over their property.[40] Without a constitutionally sufficient connection between a permit condition and a project's alleged impact, the easement condition was "not a valid regulation of land use but an 'out-and-out plan of extortion.' "[41]

The Court defined how close a "fit" is required between a permit condition and the alleged impact of a proposed land use several years later in *Dolan*. There, the City conditioned Florence Dolan's permit to expand her plumbing and electrical supply store upon a requirement that she dedicate some of her land as a stream buffer and a bicycle path.[42] Dolan refused to

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that is worth far more than property it would like to take." *see also id.* at 2596 ("Extortionate demands for property in the land-use permitting context 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.").

[36] 483 U.S. at 827-28.

[37] *Nollan,* 483 U.S. at 828-29 (quoting Commission).

[38] *Id.* at 828.

[39] *Id.* at 837.

[40] *Id.* at 838-39.

[41] *Id.* at 837 (citations omitted).

[42] 512 U.S. at 377.

comply with the conditions and sued the City in state court, alleging that the development conditions effected an unlawful taking and should be enjoined.[43] The U.S. Supreme Court initially concluded that the City established a nexus between both conditions and Dolan's proposed expansion, but nevertheless held that the conditions were unconstitutional.[44] Even when a nexus exists, the Court explained, there still must be a "degree of connection between the exactions and the projected impact of the proposed development."[45] There must be rough proportionality—*i.e.*, "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[46] The *Dolan* Court held that the City had not demonstrated that the permit conditions were roughly proportional to the impact of Dolan's expansion, and therefore concluded that the conditions violated the Constitution and were void.[47]

Importantly, both *Nollan* and *Dolan* involved demands for land that the government had targeted for acquisition and public use before the owners submitted their land-use applications and without regard to the actual impacts of the development proposal.[48] The Court determined that heightened scrutiny was especially necessary to distinguish a superficial relationship from one that warrants a compelled and uncompensated dedication of land, and to safeguard against extortionate permit conditions.[49]

B. The U.S. Supreme Court Distinguishes the Unconstitutional Conditions Doctrine from General Regulatory Takings Claims

Critical to understanding the doctrine of unconstitutional conditions is the fact that, while *Nollan* and *Dolan* are predicated on a violation of the Takings Clause, the doctrine is distinct from a regulatory takings test. In the decades following *Nollan* and *Dolan*, there was substantial confusion about how and where the nexus and proportionality tests applied. This confusion was exacerbated by two factors. First, although the doctrine has a lengthy pedigree with the U.S. Supreme Court, it remained relatively obscure.[50] And second, the decisions in *Nollan* and *Dolan* had originally

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[43] *Id.* at 382.

[44] *Id.* at 394-95.

[45] *Id*. at 386.

[46] *Id.* at 391.

[47] *Id.*

[48] Mark W. Cordes, *Legal Limits on Development Exactions: Responding to* Nollan *and* Dolan, 15 N. Ill. U. L. Rev. 513, 551 (1995).

[49] *Id.*

[50] In part, the doctrine's obscurity was due to the fact that many of the seminal cases do not mention the doctrine by name. *See*, *e.g.*, Michael Toth, *Out of Balance: Wrong Turns in Public Employee Speech Law*, 10 U. Mass. L. Rev. 346, 384 (2015).

adopted a third prong to the test, holding that a permit condition must also "substantially advance" a legitimate government purpose to be valid.[51] As authority for that prong, the Court cited the now-overruled case, *Agins v. City of Tiburon*,[52] which concerned a facial regulatory takings challenge to the city's adoption of certain zoning ordinances rather than a permit condition.[53] Thus, before the Court eventually clarified the doctrine of unconstitutional conditions, many courts, including Washington's, read *Nollan* and *Dolan* as establishing a test applicable to any land use regulation that diminishes the value of private property.[54]

The U.S. Supreme Court addressed that erroneous application of the nexus and proportionality tests in two cases decided in 1999 and 2005. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[55] a property owner had submitted a series of applications for a permit to build a multi-family residential complex on a coastal property zoned for such use.[56] The city delayed and denied every permit application for a variety of reasons, and the landowner sued alleging two different regulatory takings theories: (1) the reasons provided for the permit denial lacked a sufficient nexus to the government's stated objectives under *Nollan*; and (2) the permit denial deprived the property owner of all economically viable use under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).[57] The jury delivered a general verdict concluding that the government's actions effected a temporary regulatory takings, and awarded compensation.[58]

On appeal, the Ninth Circuit Court of Appeals upheld the verdict, concluding that there was sufficient evidence in the record to support the jury's verdict on either regulatory takings theory.[59] In doing so, however, the Ninth Circuit posited that the evidence could have also established a violation of *Dolan*'s rough proportionality test.[60] The U.S. Supreme Court granted certiorari, in part, to determine whether the Ninth Circuit "erred in assuming that the rough-proportionality standard of [*Dolan*] applied to this case."[61] Ultimately, however, the Court unanimously affirmed the court of appeals' judgment on different grounds, stating that it was unnecessary to discuss *Dolan* where substantial evidence had demonstrated that the city's

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[51] *Nollan*, 483 U.S. at 831; *Dolan*, 512 U.S. at 385.

[52] *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

[53] *Id.* at 260.

[54] *See*, *e.g.*, *Orion Corp. v. State*, 109 Wash.2d 621, 642-43, 653, 655 (1987).

[55] *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999).

[56] *Id.* at 695-98.

[57] *Id.* at 700-01.

[58] *Id.*

[59] *Id.* at 701-02 (citing *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1430-34 (9th Cir. 1996)).

[60] *Id.*

[61] *Id.* at 702.

decision to deny the permit lacked a sufficient nexus to the government's stated objectives.[62]

The *Del Monte Dunes* Court explained that, although the lower court had not provided "a definitive statement of the elements of a claim for a temporary regulatory taking" the trial court's jury instructions were sufficiently consistent with the Supreme Court's previous regulatory takings decisions to establish the city's liability.[63] As a result, the Court declined to rule on the question whether *Dolan* applied to a permit denial, holding only that "it was unnecessary for the Court of Appeals to discuss rough proportionality. That it did so is irrelevant to our disposition of the case."[64] Nonetheless, writing in dicta, the Supreme Court noted that it had "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions-land-use decisions conditioning approval of development on the dedication of property to public use."[65] Although that discussion shed some much-needed light on the doctrine's application to permit conditions, it also resulted in more confusion that will be discussed below.

The Court revisited *Nollan* and *Dolan* several years later in *Lingle v. Chevron U.S.A. Inc.*[66] There, Chevron sued the State of Hawaii alleging that the price cap provisions of legislation designed to lessen the oil company's share of the state's gasoline station market constituted a regulatory taking.[67] The trial court agreed, and granted summary judgment in favor of Chevron, concluding under *Agins* that the statute failed to substantially advance a legitimate public interest.[68] On review, the U.S. Supreme Court concluded that the "substantially advances a legitimate government interest" test was properly categorized as a due process test, not a regulatory takings test, because it "reveal[ed] nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights."[69] It explained that a "test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot

[62] The decision speaks to both *Nollan*'s nexus requirement and the now-excised requirement that the decision substantially advance a legitimate government interest. *Del Monte Dunes*, 526 U.S. at 701.

[63] The jury was instructed that "if the preponderance of the evidence establishes that there was no reasonable relationship between the city's denial of the ... proposal and legitimate public purpose, you should find in favor of the plaintiff." *Del Monte Dunes*, 526 U.S. at 701; *Id.* at 703 (citing *Dolan*, 512 U.S. at 385; *Lucas*, 505 U.S. at 1016; *Yee v. Escondido*, 503 U.S. 519, 534 (1992); *Nollan*, 483 U.S. at 834; *Keystone Bituminous Coal Assn. v. DeBenebrictus*, 480 U.S. 470, 485 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985);, 447 U.S. at 260).

[64] *Del Monte Dunes*, 526 U.S. at 703 (*Dolan* was designed to address the problem of "excessive exactions").

[65] *Id.* at 702.

[66] 544 U.S. 528, 538-39 (2005).

[67] *Id.* at 532-34.

[68] *Id.* at 535-36.

[69] *Id.* at 542.

tell us when justice might require that the burden be spread among taxpayers through payment of compensation."[70]

The Court made clear that its decision to excise the "substantially advances" inquiry from the takings lexicon did not affect the viability of an exactions claim brought under *Nollan* and *Dolan*.[71] In reaffirming the doctrine of unconstitutional conditions, the Court explained that the nexus and proportionality tests are "worlds apart from a rule that says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest."[72]

Like *Del Monte Dunes*, however, the Court's attempt to explain the unique nature of a case brought under *Nollan* and *Dolan* only added to existing confusion about the doctrine's applicability. Many courts and practitioners read *Del Monte Dunes* and *Lingle* as having limited the nexus and proportionality tests to the facts of *Nollan* and *Dolan*, applying to only those adjudicatively imposed permit conditions that require a dedication of real property to the public.[73] By the time the U.S. Supreme Court revisited the doctrine in 2013, there was a deeply entrenched and nationwide split of authority on the question of whether *Nollan* and *Dolan* also applied to legislatively mandated conditions or to permit conditions that demand money (or other personal property) in lieu of a property dedication.[74]

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[70] *Id.* at 543.

[71] *Id.* at 547-48.

[72] *Id.* at 547-48.

[73] The Supreme Courts of Alabama, Alaska, Arizona, California, and Colorado, and the Tenth Circuit Court of Appeals, limit *Nollan* and *Dolan* to administratively imposed conditions. *See*, *e.g.*, *Alto Eldorado Partners v. City of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011); *St. Clair Cnty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007 (Ala. 2010); *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702 (Alaska 2003); *San Remo Hotel L.P. v. City & Cty of San Francisco*, 41 P.3d 87, 102-04 (Cal. 2002); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001); *Home Builders Ass'n of Cent. Arizona v. Scottsdale*, 930 P.2d 993, 996 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997).

[74] The Texas, Ohio, Maine, Illinois, New York, and Washington Supreme Courts and the First Circuit Court of Appeals do not distinguish between legislatively and administratively imposed exactions, and apply the nexus and proportionality tests to generally applicable permit conditions. *Town of Flower Mound*, 135 S.W.3d at 641; *Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Maine 1998); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995); *Northern Ill. Home Builders Ass'n, Inc. v. Cty of Du Page*, 649 N.E.2d 384, 397 (Ill. 1995); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1994); *Trimen Dev. Co. v. King Cty.*, 877 P.2d 187, 194 (Wash. 1994). Meanwhile, the Ninth Circuit is internally conflicted on this question. *See Mead v. City of Cotati*, 389 Fed. App'x 637, 639 (9th Cir. 2010) (*Nollan* and *Dolan* do not apply to legislative conditions); *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 874-76 (9th Cir. 1991) (adjudicating a *Nollan*-based claim against an ordinance requiring developers to provide affordable housing); *Garneau v. City of Seattle*, 147 F.3d 802, 813-15, 819-20 (9th Cir. 1998) (plurality opinion with the court divided equally on whether *Nollan* and *Dolan* apply to legislative exactions).

C. The U.S. Supreme Court Clarifies the Doctrine and its Applicability to Land-Use Permit Conditions in Koontz

The U.S. Supreme Court revisited the unconstitutional conditions doctrine in its 2013 decision, *Koontz v. St. Johns River Water Management District*.[75] There, Coy Koontz, Sr., sought permission to develop a small portion of his 14.9 acre undeveloped, commercial property located at the intersection of two major highways in Orlando.[76] The St. Johns River Water Management District ("the District"), a Florida land-use agency, had designated his property a critical wetland and demanded that, in addition to dedicating 11 acres of his land in a conservation easement, Mr. Koontz pay upwards of $150,000 to improve 50 acres of state-owned property miles away from his proposed development as a mandatory condition of receiving his permits.[77] When Mr. Koontz objected that the off-site mitigation demand was excessive, the agency denied his permits, rendering his property unusable.[78]

Mr. Koontz filed a lawsuit in Florida state court, challenging the agency's off-site mitigation demand under *Nollan* and *Dolan*, which, if faithfully applied, should have provided an easy solution for Mr. Koontz. But, over the years, many lower courts had limited *Nollan* and *Dolan* to their facts, providing ways for local land use authorities to avoid the nexus and proportionality requirements.[79] For example, instead of demanding an interest in real property, agencies began imposing monetary obligations—i.e., requirements that property owners pay a fee in lieu of the desired property dedication as a condition of obtaining a land-use permit.[80] Because

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[75] 133 S. Ct. 2586.

[76] Zoned for commercial use, the property is located in an area of intense residential and commercial development adjacent to State Road 50, a major arterial, and immediately east of Florida's East-West Expressway (S.R. 408). A drainage ditch that channels storm water runoff from the highway runs along the property's western edge. And an easement for high-voltage power lines is located about 300 feet south of the highway, bisecting the lot into northern and southern segments. *Koontz*, 133 S. Ct. at 2591-92.

[77] Florida's inclusion of portions of Mr. Koontz's land in the Riparian Habitat Protection Zone did not mean the land contained wetlands and/or riparian habitat. Instead, the designation created a legal presumption that any use of land within the zone would be harmful to such habitat, therefore requiring affected landowners to obtain environmental permits from the District. *See* Fla. Admin. Code r. 40C-4.301(2)(a)7; Fla. Admin. Code r. 40C-4.301(1), (2); Fla. Admin. Code r. 40C-41.063(5)(d)1, 4.

[78] 133 S. Ct. at 2593.

[79] *See* Richard Epstein, *Introduction: The Harms and Benefits of* Nollan *and* Dolan, 15 N. Ill. U. L. Rev. 477, 492 (1995) (The lower courts "worked a pretty thorough nullification of *Nollan*, which was dutifully confined to its particular facts").

[80] *Id.* ("One of the reasons for *Dolan* was the hostile response in the lower courts to *Nollan*. Everywhere you looked the state satisfied the essential nexus test. The lower courts worked a pretty thorough nullification of *Nollan*, which was dutifully confined to its particular facts."); Steven J. Lemon & Sandy R.Colin, *The First Applications of the* Nollan *Nexus Test: Observations and Comments*, 13 Harv. Envtl. L. Rev. 585, 598-600 (1989); Frank Michelman, *Takings, 1987*, 88 Colum. L.

Nollan and *Dolan* involved interests in real property, and not monetary obligations, numerous courts held that the government did not have to demonstrate nexus and rough proportionality when exacting money or other non-real property from land-use applicants.[81] Thus, at the time Mr. Koontz's case was winding its way through the courts, there was a significant split of authority on whether or not the Takings Clause protects a person's money to the same degree that it protects a person's land.[82]

The Florida trial and appellate courts concluded that the District's permit condition was subject to *Nollan* and *Dolan*, and found the demand for 50 acres of off-site mitigation to be unconstitutional because it lacked the necessary connection to any impacts of the development.[83] The Florida Supreme Court disagreed and reversed the lower court decisions, stating:

> [W]e hold that under the takings clauses of the United States and Florida Constitutions, the *Nollan/Dolan* rule with regard to "essential nexus" and "rough proportionality" is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed.[84]

The U.S. Supreme Court took review of the case in order to settle the federal constitutional questions that had been addressed by the Florida courts.[85]

Most of the parties' arguments were focused on how to best characterize the nexus and rough proportionality tests amongst the Supreme Court's case law, and explaining how the character of the tests impacts the parties' substantive and procedural rights. Mr. Koontz argued that the District's demand that he finance improvements to the government's property

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Rev. 1600, 1608 (1988) (limiting *Nollan* to only permit conditions involving physical invasions of property).

[81] *See*, *e.g., West Linn Corp. Park, LLC v. City of West Linn*, 428 Fed. Appx. 700 (9th Cir. 2011); *West Linn Corp. Park, LLC v. City of West Linn*, 240 P.3d 29, 45 (Or. 2010); *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008).

[82] *Koontz*, 133 S. Ct. at 2594; *see also* Catherine L. Hall, *Valid Regulation of Land Use or Out-and-out Plan of Extortion? Commentary on St. Johns River Water Management Dist.*, 41 Real Est. L.J. 270, 291 (2012) ("A survey of state and federal decisions reveals there is considerable disagreement about when the application of Nollan and Dolan apply to the exactions takings analysis. . . . The Florida Supreme Court and other courts have issued conflicting opinions about whether impact fees and off-site mitigation should be subject to scrutiny under this doctrine."); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307, 369 (2007) (describing split in courts' interpretation).

[83] *St. Johns River Water Mgmt. Distr. v. Koontz*, 5 So.3d 8, 10-12 (Fla. Ct. App. 2009).

[84] *St. Johns River Water Mgmt. Distr. v. Koontz*, 77 So.3d 1220, 1230 (Fla. 2011).

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

as a condition of permit approval was an exaction implicating his property rights in his money and, therefore, triggering review under the unconstitutional conditions doctrine.[86] The District, however, argued that because Mr. Koontz had objected to the condition, no permit was issued and, therefore, there was no taking.[87]

As for the Florida Supreme Court's conclusion that monetary exactions are not subject to the same scrutiny as demands for real property, Mr. Koontz contended that nothing in the unconstitutional conditions doctrine, the Takings Clause, *Nollan*, or *Dolan* recognizes a relevant distinction among the types of permit exaction subject to the nexus and rough proportionality limitations.[88] Government demands for real or personal property—both categories of property protected by the Takings Clause—are subject to the same limitations.[89]

Moreover, Mr. Koontz argued that application of the nexus and proportionality limitations does not depend upon when in the permit process the exaction is imposed.[90] A decision to deny a permit application based on refusal to accede to an unlawful exaction and a decision to approve a permit application subject to acceptance of an unlawful exaction are substantively identical. In both cases, no permit issues unless and until the permit applicant agrees to waive his right to compensation for the confiscated property.[91]

The District, however, characterized *Nollan* and *Dolan* as establishing a regulatory takings test—similar to the argument rejected in *Del Monte Dunes* and *Lingle*.[92] The District then explained that a fundamental prerequisite of a regulatory takings claim is that the government has, in fact, taken property, either directly or through burdensome regulatory measures.[93] Because the District denied Mr. Koontz's permit applications, the exaction remained unfulfilled and no taking had, in fact, occurred.[94] Accordingly, the District insisted that its demand, which had formed the basis of its permit denial, cannot be subject to heightened scrutiny under the nexus and rough proportionality standards.[95]

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[86] Petitioner's Brief on the Merits at 33-39, *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2012) (No 11-1447), 2012 WL 5940280.

[87] Brief for Respondent at 26-38, *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2012) (No 11-1447),.2012 WL 6694053 (U.S.).

[88] *Id.*

[89] *Id.* at 39-44.

[90] *Id.* at 30-32.

[91] *Id.*

[92] Respondent's Brief on the Merits at 26-28, *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2012) (No 11-1447),.2012 WL 6694053.

[93] *Id.* at 28-30.

[94] *Id.* at 27-28.

[95] *Id.*

The Court rejected the District's argument, reaffirming once again that the nexus and proportionality tests of *Nollan* and *Dolan* constitute "'a special application' of the [unconstitutional conditions] doctrine that protects the Fifth Amendment right to just compensation for property that the government takes when owners apply for land-use permits."[96] The Court explained that the nexus and proportionality tests place a limit on the government's authority to condition approval of a land use permit upon a dedication of property to a public purpose.[97] If a condition satisfies the tests, it is constitutional; if not, it is unconstitutional.[98] This principle "do[es] not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so."[99] Thus, the Court unanimously held "that a demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit[.]"[100]

The Court split 5-4 on the question whether a demand for money is subject to *Nollan* and *Dolan*. The majority ruled that money is property; therefore, a permit condition demanding money in lieu of a dedication of real property must satisfy nexus and proportionality.[101] The dissent, however, opined that different types of property should be provided differing degrees of protection under the Takings Clause.[102] Thus, while a demand for real property may be properly subject to heightened scrutiny under *Nollan* and *Dolan*, the dissent suggested that a demand for money should be subject to less scrutiny—if any at all.[103] The Court ultimately reversed and remanded the case for the Florida state courts to enter a decision consistent with the U.S. Supreme Court's opinion and to determine whether the District had preserved a series of factual and state-law questions for further consideration.[104]

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

[97] *Id.* at 2595.

[98] *Id.*

[99] *Id.* (A "contrary rule would be especially untenable … because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval. … and would effectively render *Nollan* and *Dolan* a dead letter").

[100] *Id.* at 2603; *see also id.* at 2603 (Kagan, J., dissenting) ("I think the Court gets the first question it addresses right").

[101] *Koontz*, 133 S. Ct. at 2603.

[102] *Id.*. at 2604-09 (Kagan, J., dissenting).

[103] *Id.* at 2609 n.3.

[104] *Id.* at 2603. On remand, the Florida Supreme Court upheld the trial court's conclusion that the permit condition violated *Nollan* and *Dolan*. The trial court then ordered the state to compensate Mr. Koontz for having temporarily taken his property for a period of years during which the District had refused—despite a court order—to issue the permit without the unconstitutional condition. *See St. Johns River Water Mgmt. Dist. v. Koontz,* 183 So. 3d 396 (Fla. Dist. Ct. App. 2014), *rev. denied* __ So.2d __, 2016 WL 688284 (2016).

III. Washington Case Law on Buffer Conditions is Riddled with Contradictory and Incoherent Decisions

Washington courts are in a state of disarray on the topic of *Nollan* and *Dolan*. Over the years, state courts have applied the nexus and proportionality tests (1) as a direct regulatory takings theory,[105] (2) as a due process theory,[106] or (3) as incorporated into a state statute limiting local government authority to impose impact fees.[107] Unsurprisingly, those courts have arrived at very different conclusions about how and where the doctrine applies and whether the government must support a demand for a critical area buffer with evidence of its necessity. Making matters worse, the state appellate courts have split on whether a critical area buffer requirement exacts an interest in real property,[108] and more generally, whether *Nollan* and *Dolan* apply to permit conditions required by an act of generally applicable legislation.[109] Unless the state Supreme Court resolves these conflicts, landowners and the government will be forced to plan for future development in an uncertain and unpredictable legal environment.

A. Early Washington Decisions Apply Nollan/Dolan to Permit Conditions Requiring the Dedication of a Conservation Area

The earliest Washington decisions that considered legislation requiring landowners to dedicate critical area buffers held the conditions subject to *Nollan* and *Dolan*. In *Honesty in Environmental Analysis & Legislation v. Central Puget Sound Growth Management Hearings Board (HEAL)*, the court considered amendments to Seattle's steep slope regulations, which the City had adopted as part of its critical areas update.[110] The stated purpose of the city's development restrictions was to prevent further erosion.[111] Seattle, however, failed to consider contrary scientific conclusions contained in its legislative record, which opined that the City's prohibition against steep slope disturbance would not actually prevent erosion.[112] The

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[105] *Sparks v. Douglas Cty.*, 127 Wash.2d 901, 908 (1995); *Burton v. Clark Cty*, 91 Wash.App 505, 530 (1998).

[106] *Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wash.App 250 (2011).

[107] *See Trimen Dev. Co. v. King Cty*, 124 Wash. 2d 261 (1994); *Citizens' All. for Property Rights v. Sims*, 145 Wash.App 649 (2008); *Cobb v. Snohomish Cty*, 64 Wash.App 451 (1991).

[108] *Compare KAPO*, 160 Wash.App at 272, *with Common Sense All. v. Growth Mgmt Hearings Bd*, 189 Wash.App 1026, 2015 WL 4730204 at * 7-8 (2015) (unreported).

[109] *Id.*

[110] *HEAL*, 96 Wash.App at 535.

[111] *Id.*

[112] *Id.* at 529-30.

court concluded that the identification of critical areas is a uniquely scientific inquiry that should identify the "nature and extent of [the critical areas'] susceptibility" to damage that will in fact result from use or development of the property.[113] As part of its development of a critical areas ordinance, a city must show that its critical area buffers satisfy the nexus and proportionality tests.

> . . . . [The City] cannot ignore the best available science in favor of the science it prefers simply because the latter supports the decision it wants to make. If it does, that decision will violate either the nexus or rough proportionality rules or both.[114]

Applying the nexus and proportionality standards through a state statute, Washington courts decided two crucial cases invalidating legislatively-mandated exactions of conservation areas.[115] In *Isla Verde International Holdings, Inc. v. City of Camas*, a property developer sought a permit to build a 51-lot subdivision on 13.4 acres in the City of Camas.[116] Pursuant to a code provision requiring all subdivisions to set aside open space, Camas conditioned permit approval upon a requirement that Isla Verde set aside 30 percent of its land to provide recreation and environmental benefits.[117] The developer challenged the set-aside development conditions.[118]

Although the court of appeals concluded that the condition violated *Nollan* and *Dolan*,[119] the Washington Supreme Court analyzed the condition on statutory grounds under the doctrine of avoidance of constitutional issues.[120] Under the statute's nexus and proportionality requirement, the Court held that the city bore the burden of demonstrating that a dedication is "reasonably necessary as a direct result of the proposed development or plat."[121] The court emphasized that nexus and proportionality require "that development conditions must be tied to a specific, identified impact of a

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[113] *Id.* at 533.

[114] *Id.* at 533-34.

[115] In 1992, the Washington Supreme Court held that the nexus and proportionality tests were codified into a state statute that limited local government's authority to exact impact fees from permit applicants in RCW 82.02.020, providing courts with a nonconstitutional basis upon which to evaluate exactions. *Trimen Dev. Co. v. King Cty*, 124 Wash.2d 261, 274 (1994).

[116] *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wash.2d 740, 746, 49 P.3d 867 (2002).

[117] *Id.* at 749-50.

[118] *Id.* at 750.

[119] *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 99 Wash.App 127, 139-42, 990 P.2d 429, 437 (1999), *as clarified on denial of reconsideration* (Feb. 11, 2000), *aff'd on other grounds*, 146 Wash.2d 740, 49 P.3d 867 (2002).

[120] *Isla Verde*, 146 Wash.2d at 757-58; *see also San Telmo Assocs. v. City of Seattle*, 108 Wash.2d 20, 24, 735 P.2d 673 (1987) (shifting general social costs onto developer is an in-kind tax).

[121] *Isla Verde*, 146 Wash.2d at 761.

development on a community."[122] Under this standard, the Court held that a city cannot lawfully impose a preset condition applicable to "all new development collectively."[123] Accordingly, the Court held that a set-aside requirement cannot be "uniformly applied, in the preset amount, regardless of the specific needs created by the given development" and invalidated the condition.[124]

Similarly, in *Citizens Alliance for Property Rights v. Sims*, a citizen group challenged King County's adoption of a critical areas ordinance that required rural property owners to set aside 50 to 65 percent of their land as an environmental "resource area" in a uniform and pre-set manner as a mandatory condition on all new development.[125] Like the condition at issue in *Isla Verde*, King County's ordinance did not take into consideration whether a proposed rural development would actually cause any increased impacts to identified critical areas, and did not take into account whether existing regulations or other site-specific management practices could satisfactorily mitigate any impacts of development.[126] As a result, the court of appeals concluded that King County's set-aside requirement failed to satisfy the proportionality requirement that a condition on development must be impact-specific.[127]

Between 1992 and 2008, Washington courts, for the most part, faithfully applied the nexus and proportionality tests in a manner consistent with the U.S. Supreme Court. During this time, *Isla Verde* and *Citizens' Alliance* marked the high point in the courts' willingness to strictly enforce the nexus and proportionality requirements against local governments' use of the permit process to exact large tracts of land for public environmental purposes.

B. The Appellate Courts Abandon Nexus and Proportionality Tests in Favor of a Substantially Advances Inquiry When Considering Buffer Conditions

Over the course of three recent decisions, the court of appeals abandoned the nexus and proportionality inquiries required by *Nollan* and *Dolan* in favor of a rational basis test that alleviates the government of both heightened scrutiny and the burden of proof. In so doing, the appellate courts created significant conflicts, calling into question the doctrine's ap-

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[122] *Id.*
[123] *Id.*
[124] *Id.* at 763.
[125] *Citizens' All. for Prop. Rights v. Sims*, 145 Wash.App 649, 660–61, 187 P.3d 786 (2008).
[126] *Id.*
[127] *Id.* at 668-69.

plicability and predictability. *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Bd.* (*KAPO*),[128] a case decided shortly after *Citizen's Alliance*, set the stage for the current status of Washington state takings law. Like *Isla Verde* and *Citizens' Alliance*, *KAPO* involved a citizen lawsuit challenging the county's adoption of an ordinance that required all shoreline property owners to dedicate a shoreline buffer that was predetermined in size, and was imposed without regard to any site-specific conditions.[129] The court of appeals, however, reached the opposite conclusion as the previous cases, upholding the mandatory permit condition.[130]

The *KAPO* court applied *Nollan* and *Dolan* directly to the ordinance, correctly concluding that environmental regulations that impose conditions on development applications, like the county's critical areas ordinance, "must comply with the nexus and rough proportionality tests."[131] But the court then declined to apply nexus and proportionality scrutiny—as defined by prior state and federal precedent—to the buffer condition.[132] Instead, the court mistakenly characterized *Nollan* and *Dolan* as establishing a "due process" doctrine, under which a regulation is subject only to rational basis scrutiny.[133] Then, applying this lower level of scrutiny, the court concluded that *Nollan* and *Dolan* would be satisfied if the government engaged in a "reasoned process" to determine "the necessity of protecting functions and values in the critical areas" when adopting CAO buffers.[134]

In two decisions issued shortly after *KAPO*, the appellate courts further entrenched the decision to replace the heightened scrutiny demanded by *Nollan* and *Dolan* with minimal scrutiny. In *Olympic Stewardship Foundation v. Western Washington Growth Management Hearings Board*, the court of appeals adopted a per se rule that "any dedications of

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[128] 160 Wash.App 250, 273, 255 P.3d 696 (2011).

[129] *Id.* at 272-74.

[130] *Id.*

[131] *Id.* at 273.

[132] *Id.* at 272-74.

[133] *Id.* at 272.

[134] *Id.* at 272-74. Of course, the fact that the government developed a scientific record only begs the question whether there is any evidence of nexus and proportionality. The idea that a government's reliance on generalized science to determine how much land to put to public use should obviate the need for *Nollan* and *Dolan*'s factual inquiry turns this Court's regulatory takings case law on its head. Standing alone, a determination of public need has never been sufficient to justify a government's decision to put private property to a public use. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416 ("[A] strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change."). Science is not a talisman that precludes judicial scrutiny; instead, it constitutes evidence that should be considered as part of a nexus and proportionality analysis.

land within the critical areas are de facto 'reasonably necessary as a direct result of the proposed development or plat.'"[135]

The most recent appellate decision addressing exactions, *Common Sense Alliance v. Growth Management Hearings Board*,[136] marks the furthest retreat from the standards set forth by the U.S. Supreme Court. In that case, a group of property owners challenged a county's adoption of an ordinance that required, as a mandatory condition on any new permit approval, that all shoreline property owners dedicate a significant portion of their shorefront as a conservation area designed to filter pollutants from stormwater before it reaches the shoreline.[137] The final ordinance established buffers large enough to filter pollution caused by neighboring land uses (including city streets and subpar drainage), doing nothing to limit the size of the conservation areas to only that land necessary to mitigate for pollution attributable to the effected property owner's land use.[138]

Despite this clear violation of nexus and proportionality, the court of appeals rejected CSA's unconstitutional conditions claim on three grounds.[139] First, relying on the dicta from *Del Monte Dunes*, the court held that a landowner may not challenge a legislative exaction under the doctrine of unconstitutional conditions.[140] Second, the court misattributed Justice Kagan's dissenting opinion, in which she suggested that legislative exaction be subject to lesser scrutiny than adjudicative exactions, to the majority opinion, which was silent on the issue.[141] And third, relying on the dissenting opinion in *Koontz* (without indicating that the portion of the opinion it cited was the dissent), the court held that a landowner may not challenge a legislative exaction under the doctrine of unconstitutional conditions.[142] Second, citing no authority, the court held that a government demand that a property owner dedicate a conservation buffer to a public

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[135] *Olympic Stewardship Found. v. W. Wash Growth Mgmt. Hearings Bd.*, 166 Wash.App 172, 199, 274 P.3d 1040 (2012) (applying *Nollan* and *Dolan* through the state's impact fee statute).

[136] *Common Sense All. v. Growth Mgmt. Hearings Bd.*, 189 Wash.App 1026, 2015 WL 4730204 (2015) (unpublished). The court's analysis of *Nollan* and *Dolan* was marred by obvious errors, including the incorrect conclusion that *Dolan* had upheld the challenged stream buffer conditions. *Id.* at *6. The court of appeals refused to correct that patent error on reconsideration, and the State Supreme Court denied review. *Common Sense All. v. San Juan Cty.*, 184 Wash. 2d 1038, 380 P.3d 406 (2016).

[137] 189 Wash.App. 1026, 2015 WL 4730204 at *1.

[138] *See Friends of the San Juans v. San Juan Cty*, Western Washington Growth Management Hearings Board No. 13-2-0012c, 2013 WL 5212385, at *36 (Final Decision and Oder, Sept. 6, 2013) (remanding original buffers and directing the county to increase the buffer size to "take into account the intensity of impacts from adjacent land uses").

[139] 189 Wash.App. 1026, 2015 WL 4730204 at *3-8.

[140] *Id.* at *7 (citing *Del Monte Dunes*, 526 US at 702.).

[141] *Id.* at *7 (citing *Koontz*, 133 S. Ct. at 2594-96; but see *Koontz*, 133 S. Ct at 2608 (Kagan, J., dissenting)).

[142] *Id.*

environmental use would not qualify as a taking if imposed directly.[143] Third, relying on *KAPO*'s mischaracterization of *Nollan* and *Dolan* as establishing a due process test, the court held that the buffer demand satisfied the minimal scrutiny applicable to a due process challenge.[144] Specifically, the court concluded that a local government's reliance on a scientific opinion when developing a mandatory dedication automatically satisfies the unconstitutional condition doctrine.[145]

Despite the conflict between the *KAPO*-rational basis line of cases and cases relying on the heightened scrutiny standard set out by *Nollan*, *Dolan*, *Lingle*, and *Koontz*—the Washington Supreme Court inexplicably declined review in *Citizens Alliance*, *KAPO*, *OSF*, and *CSA*. The court's failure to timely address this plain conflict of law has allowed a significant split of authority regarding the doctrine's applicability to continue.

IV. BUFFERS EXACT A VALUABLE INTEREST IN REAL PROPERTY AND ARE PROTECTED BY THE TAKINGS CLAUSE

Until *CSA*, Washington courts had uniformly held that critical area buffers exacted an interest in real property and were, therefore, subject to *Nollan* and *Dolan*—even though the courts had been anything but consistent in their interpretation and application of the nexus and proportionality tests. *CSA* is an unsupported outlier that only operates to further confuse landowners and governments alike. Indeed, citing no authority, the court ruled "[n]o interest in land will be transferred or conveyed by operation of the … ordinances" imposing buffers on new development.[146] The *CSA* court was simply wrong on that account and must be overturned at the earliest opportunity.

A critical area buffer is a strip of land contiguous to a sensitive area, such as a wetland, stream, or shoreline, that is vegetated with native trees and shrubs and where no land use activities are allowed.[147] The idea behind imposing buffers as a regulatory control is two-fold. First, a buffer physically separates human activity from a sensitive area, leaving the area untouched.[148] Second, if the vegetated area is large enough and dense enough, a buffer can mimic a variety of natural processes that could exist

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[143] *Id.*

[144] *Id.* at *5 (citing *KAPO*, 160 Wash.App at 273-74).

[145] *Id.* ("Because the county had considered the best available science and employed a reasoned process in adopting its shoreline critical areas ordinance . . . permit decisions . . . based on those regulations would satisfy the nexus and rough proportionality tests").

[146] 189 Wash.App 1026, at *8.

[147] *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*,161 Wash.2d 415, 430, 166 P.3d 1198 (2007).

[148] *See* A.J. Castelle et al., *Wetland and Stream Buffer Size Requirements – A Review*, 23 J. Environ. Qual. 878, 878 (1994).

if the surrounding land remained in an undisturbed state.[149] Studies generally indicate that, based on a variety of site specific factors, a fully vegetated buffer can provide a variety of ecological benefits (often referred to a "functions"), including impoundment of storm water runoff; filtration of sediment, nutrients, and pollutants; and creation of habitat corridors.[150] Because buffers are inexpensive, easy to administrate, and generally thought to be effective at addressing such general problems as increasing storm water runoff due to urbanization, mandatory buffers have become the most common tool employed by government when developing regulations intended to protect environmentally sensitive areas.[151]

The manner in which buffers are imposed is also important to understand when evaluating the claim that they do not exact a property interest. In a typical case, a parcel of land that is presently used for residential purposes must file a binding site plan and notice to title that designates and separates the buffer area from the rest of the lot, as a condition on any permit approval.[152] These filings operate to sever all development and use rights from the buffer zone and are binding on all future owners.[153] The government retains oversight and control over the buffer zone, including a right to enter the property to assure that the designated buffer area is only being used in a manner that maximizes the protection of ecological values.[154] The owner of the underlying estate may retain some passive use rights, such as the right to pass over the buffer, but is generally proscribed from any additional development or use of the property that could disturb vegetation in the buffer.[155] The purpose behind the designation of a buffer

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[149] *Id.*

[150] The actual functions provided by a parcel of property will vary greatly based on a number of site-specific conditions such as soil type, slope, vegetation density and type, neighboring land uses, etc.

See, *e.g.*, Alan Desbonnet et al., *Development of Coastal Vegetated Buffer Programs*, 23 Coastal Management 91, 93-95 (1995).

[151] *See*, *e.g.*, *Swinomish*, 161 Wash.2d at 430-31.

[152] *See*, *e.g.*, San Juan County Code (SJCC) § 18.35.150, Table 3.6 (establishing mandatory buffers); SJCC § 18.35.100(D)-(E) (requiring that permit applicants dedicate the buffer by designating it and recording it on a site plan or plat).

[153] *See also Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wash.2d 740, 758-59, 49 P.3d 867 (2002) (a code provision requiring "reservation of open space" as a condition of permit approval is the equivalent of a dedication); *Citizens' All. for Prop. Rights v. Sims*, 145 Wash.App 649, 661, 187 P.3d 786 (2008) (a code provision that prohibited rural property owners from clearing vegetation retention areas as a condition of permit approval constituted a dedication and was subject to nexus and proportionality requirements).

[154] *See*, *e.g.*, City of Bainbridge Island Shoreline Master Program at § 7.2.1 (citing Bainbridge Island Municipal Code § 1.16) (available at http://www.bainbridgewa.gov/DocumentCenter/View/5072).

[155] *Id.* at § 4.1.3.7.

zone is to provide a mechanism that will *permanently* protect the designated land from development and dedicate the land to the sole purpose of providing ecological benefits to the environment.

From a real property perspective, a governmental exertion of control over a buffer zone deprives landowners of a valuable interest in real property.[156] Washington state property law expressly recognizes that a conservation buffer is a valuable interest in real property: "A development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect . . . or conserve for open space purposes . . . constitutes and is classified as real property."[157] And, under both Washington state property law and federal constitutional law, a public dedication of a property interest can be achieved via notice on a binding public document, such as a site plan.[158]

A requirement that an owner establish and maintain a conservation area plainly constitutes a public use of private land.[159] Accordingly, the U.S. Supreme Court has twice applied the unconstitutional conditions doctrine to conservation areas. In *Dolan*, the Court invalidated the government's demand that a landowner dedicate a stream buffer.[160] In *Koontz*, the Court held that a fee imposed in lieu of a conservation easement was subject to the unconstitutional conditions doctrine.[161] The Washington courts have similarly concluded that critical area buffers must satisfy the nexus and proportionality requirements of *Nollan* and *Dolan*.[162]

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[156] John M. Groen and Richard M. Stephens, *Takings Law, Lucas, and the Growth Management Act*, 16 U. Puget Sound L. Rev.1259, 1309 (1993).

[157] 64.04.130 Wash. Rev. Code.

[158] *See*, *e.g.*, *Richardson v. Cox*, 108 Wash.App 881, 884, 890-91, 26 P.3d 970 (2001); *Nollan*, 483 U.S. at 833 n.2; *id.* at 859 (Brennan, J., dissenting) (dedication achieved via a deed restriction).

[159] *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1292 (Fed. Cir. 2008) ("[T]here is little doubt that the preservation of the habitat of an endangered species is for government and third party use—the public—which serves a public purpose."); *see also Nw. Louisiana Fish & Game Pres. Comm'n v. United States*, 446 F.3d 1285 (Fed. Cir. 2006) (a taking may occur when government policies cause vegetation overgrowth that interferes with property rights).

[160] *Dolan*, 512 U.S. at 393-94.

[161] *Koontz*, 133 S. Ct. at 2592.

[162] *KAPO*, 160 Wash.App at 273 ("Regulations adopted under the GMA that impose conditions on development applications must comply with the nexus and rough proportionality tests."); *HEAL*, 96 Wash.App 522, 533 ("[P]olicies and regulations adopted under GMA must comply with nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications."); *see also Dunlap v. City of Nooksack*, 158 Wash.App 1016 (2010) (not reported) (holding that application of a critical area buffer to preclude reasonable development of a residential zoned lot effected a total regulatory taking requiring payment of just compensation).

V. LINGLE AND KOONTZ DEMAND THAT WASHINGTON'S SUPREME COURT RECOGNIZE THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS AND REFORM ITS BODY OF REGULATORY TAKINGS CASE LAW

Over the years, the Washington Supreme Court has repeatedly held that decisions of the U.S. Supreme Court interpreting the Fifth Amendment of the U.S. Constitution "set[] a minimum floor of protection, below which state law may not go."[163] Yet, the Washington State Supreme Court has failed to act when faced with a series of appellate decisions adopting rules that directly conflict with *Nollan*, *Dolan*, *Lingle*, and *Koontz* (not to mention conflicts with past state precedents). As it currently stands, the State's law of unconstitutional conditions is marred by a significant split of authority in regard to two important questions: (1) whether legislatively-mandated exactions are subject to the doctrine; and (2) what is the proper standard of review?

A. There Is No Meaningful Distinction Between A Permit Condition Imposed Pursuant to Legislative Direction and One Imposed in an Adjudicative Proceeding

Prior to *CSA*, Washington courts had uniformly held legislatively mandated exactions of real property subject to *Nollan* and *Dolan*.[164] Without acknowledging that large body of case law, the *CSA* court concluded that legislative exactions are exempt from heightened scrutiny based solely on Justice Kagan's dissent in *Koontz* and a passage from *Del Monte Dunes*, reading:

> We have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use.[165]

In reaching that conclusion, however, the *CSA* Court failed to acknowledge that at least four other appellate decisions had rejected *CSA*'s conclusion, concluding that the particular passage from *Del Monte Dunes* was dicta and intended only to summarize the posture of past decisions (which had involved adjudicative land-use decisions).[166]

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[163] *Orion Corp. v. State*, 109 Wash.2d 621, 652, 747 P.2d 1062 (1987).

[164] See, *e.g.*, *KAPO*, 160 Wash.App at 273 ("Regulations adopted under the GMA that impose conditions on development applications must comply with the nexus and rough proportionality tests."); *HEAL*, 96 Wash.App at 533 ("[P]olicies and regulations adopted under GMA must comply with nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications").

[165] *Del Monte Dunes*, 526 U.S. at 702.

[166] *See*, *e.g.*, *HEAL*, 96 Wash.App at 534 (rejected supposed limitation as non-binding dicta); *Benchmark Land Co. v. City of Battle Ground*, 103 Wash.App 721, 723-28 (2000) (rejected because Supreme Court has in fact extended exactions beyond the definition in *Del Monte Dunes*); *affirmed*

There is simply no basis in the U.S. Supreme Court's unconstitutional conditions case law to conclude that conditions imposed pursuant to an act of generally applicable legislation are exempt from the nexus and proportionality requirements. Indeed, in practice, it is often hard to differentiate one from the other.[167] Although courts like *CSA* frequently state that *Nollan*, *Dolan*, and *Koontz* involved only conditions imposed as part of an adjudicative process, that conclusion is incorrect. All three U.S. Supreme Court cases involved conditions mandated by general legislation—a fact specifically noted in each of the opinions. The dedication of the Nollans' beachfront, for example, was required by a state law requiring that coastal property owners provide public access to the beach as a condition on all new development permits.[168] Both the bike path and greenway dedications at issue in *Dolan* were mandated by the city's community planning code.[169] And the in-lieu fee at issue in *Koontz* was required by a state statute demanding that owners of land within designated areas dedicate land or money to offset presumed impacts to wetlands and their buffers.[170]

Indeed, *Koontz* is illustrative of the interplay between the legislature and the permitting desk.[171] Acting pursuant to state water protection laws, and nearly a decade before Koontz submitted his permit applications, Florida's Department of Environmental Protection adopted regulations that placed mandatory conditions on any property owner seeking to develop land within designated wetland areas.[172] The regulations required all local permitting authorities to determine the size of the required dedication of

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on other grounds, 146 Wash.2d 685 (2002); *Isla Verde*, 146 Wash.2d at 757-58; *Isla Verde*, 99 Wash.App at 138.

[167] Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487, 514 (2006) (describing the difficulty in drawing a line between legislative and administrative decision making in the land-use context).

[168] *Nollan*, 483 U.S. at 828-30 (California Coastal Act and California Public Residential Code imposed public access conditions on all coastal development permits); *see also id.* at 858 (Brennan, J., dissenting) (Pursuant to the California Coastal Act of 1972, a deed restriction granting the public an easement for lateral beach access "had been imposed [by the Commission] since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract").

[169] *See Dolan*, 512 U.S. at 377-78 (The city's development code "requires that new development facilitate this plan by dedicating land for pedestrian pathways"); *id.* at 379-80 ("The City Planning Commission . . . granted petitioner's permit application subject to conditions imposed by the city's [Community Development Code]").

[170] *Koontz*, 133 S. Ct. at 2592 (Florida's Water Resources Act of 1972 and Wetland Protection Act of 1984 require that permitting agencies impose conditions on any development proposal within designated wetlands).

[171] *Id.* at 2592-93.

[172] *Id.*

land pursuant to a preset and generally-applicable mitigation ratio schedule.[173] The condition at issue in Koontz was set by the district pursuant to that schedule.[174] The fact that the fee was legislatively required did not deter the Court from concluding that it was subject to the nexus and proportionality tests[175]—a fact that compelled Justice Kagan, writing in dissent, to question whether the majority had rejected the legislative-versus-adjudicative distinction.[176]

Whether or not *Koontz* rejected the legislative-versus-adjudicative distinction is ultimately an irrelevant question because *Nollan* and *Dolan* are rooted in the unconstitutional-conditions doctrine, which "does not distinguish, in theory or in practice, between conditions imposed by different branches of government."[177] The U.S. Supreme Court has frequently relied on the doctrine to invalidate legislative acts that impose unconstitutional conditions on individuals.[178] Indeed, the very purpose of the doctrine—to enforce a constitutional limit on government authority—explains why it applies without regard to the type of government entity making the unconstitutional demand: it constrains the state itself, not a subordinate branch thereof.

> [T]he power of the state [. . .] is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, compel

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[173] *Id.*; *see also* Respondent's Brief in Opposition at 5 n.4, *Koontz*, 133 S.Ct. 2586 (2012) (No. 11–1447), 2012 WL 3142655, at *5 n.4 (citing Fla. Dep't of Env. Reg., Policy for "Wetlands Preservation-as-Mitigation" (June 20, 1988)).

[174] Brief for Respondent at 11-12, *Koontz*, 133 S.Ct. 2586 (2012) (No. 11–1447), 2012 WL 6694053.

[175] *Koontz*, 133 S. Ct. at 2599-2600.

[176] *Id.* at 2608 (Kagan, J., dissenting); *see also Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1083, n.4 (N.D. Cal. 2014) (concluding that *Koontz* undermines the reasoning for holding legislative exactions exempt from scrutiny under *Nollan* and *Dolan*).

[177] Burling & Owen, 28 Stan. Envtl. L.J. at, 400.

[178] *See Lafayette Ins. Co v. French*, 59 U.S. 404, 407, (1855) (Invalidating provisions of state law conditioning permission for a foreign company to do business in Ohio upon the waiver of the right to litigate disputes in the U.S. Federal District Courts because "This consent [to do business as a foreign corporation] may be accompanied by such condition as Ohio may think fit to impose; . . . provided they are not repugnant to the constitution of laws of the United States."); *see also Marshall v. Barlow's Inc.*, 436 U.S. 307, 315 (1978) (invalidating provisions of the Occupational Safety and Health Act, holding that a business owner could not be compelled to choose between a warrantless search of his business by a government agent or shutting down the business); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (holding a state statute unconstitutional as an abridgement of freedom of the press because it forced a newspaper to incur additional costs by adding more material to an issue or remove material it desired to print); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (provisions of unemployment compensation statute held unconstitutional where government required person to "violate a cardinal principle of her religious faith" in order to receive benefits); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (a state constitutional provision authorizing the government to deny a tax exemption for applicants' refusal to take loyalty oath violated unconstitutional conditions doctrine).

> a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.[179]

"Giving greater leeway to conditions imposed by the legislative branch is inconsistent with the theoretical justifications for the doctrine because those justifications are concerned with questions of the exercise [of] government power and not the specific source of that power."[180] A property owner, after all, suffers the same injury whether a legislative or administrative body forces him to bargain away his rights in exchange for a land-use permit. There is "little doctrinal basis beyond blind deference to legislative decisions to limit [the] application of [*Nollan* or *Dolan*] only to administrative or quasi-judicial acts of government regulators."[181]

Although Justice Kagan noted uncertainty regarding this question, two Justices have expressed marked skepticism at the very idea that the need for heightened scrutiny is obviated when a legislative body—as opposed to some other government entity—decides to exact a property interest from developers. In *Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga.*, the Atlanta City Council, motivated by a desire to beautify the downtown area, adopted an ordinance that required the owners of parking lots to include landscaped areas equal to at least 10% of the paved area at an estimated cost of $12,500 per lot.[182] Despite an apparent lack of proportionality, Georgia's Supreme Court upheld the ordinance, concluding that legislatively-imposed exactions are not subject to *Nollan* and *Dolan*.[183] The dissenting justices stated that there appeared to be no meaningful distinction between legislatively-imposed conditions and other exactions.[184]

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[179] *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926) (invalidating state law that required trucking company to dedicate personal property to public uses as a condition for permission to use highways). *See also Doyle v. Continental Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) ("Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so."); Richard A. Epstein, *Bargaining with the State* 5 (1993) (The doctrine holds that even if the government has absolute discretion to grant or deny any individual a privilege or benefit—such as a land-use permit, "it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights").

[180] Burling at 438.

[181] David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 567-68 (1999).

[182] 515 U.S. 1116, 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari).

[183] *Id.* at 1117.

[184] *Id.* at 1117-18 ("It is not clear why the existence of a taking should turn on the type of government entity responsible for the taking. A city council can take property just as well as a planning commission can").

Both justices argued that the question warrants review because it raises a substantial question of federal constitutional law.[185]

Justice Thomas reaffirmed that position in his concurring opinion in support of the Court's denial of certiorari in *California Bldg. Indus. Ass'n v. City of San Jose*.[186] There, he wrote that the "lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one" for at least two decades.[187] Once again, he expressed "doubt that 'the existence of a taking should turn on the type of governmental entity responsible for the taking.'"[188] Justice Thomas further noted that this issue must be decided "at the earliest practicable opportunity."[189] Until then, "property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively." These factors present compelling reasons for resolving this conflict at the earliest practicable opportunity.[190] Those same policy concerns demand a resolution to this patent conflict in Washington's unconstitutional conditions case law.

B. Only Heightened Scrutiny Enshrined in the Nexus and Proportionality Tests Will Protect Both the Government's Authority to Require Permit Applicants to Mitigate for Negative Externalities and the Owners' Property Rights

The heightened scrutiny required by *Nollan*, *Dolan*, and *Koontz* is essential to the integrity of the permitting process. Typically, a permit decision will include conditions designed to minimize and/or mitigate adverse impacts caused by a new development. If limited to the impacts of the proposed development, those conditions are likely within the government's land use authority, which includes the power to direct development in a manner that promotes communities and avoids nuisance or waste.[191] But government officials by their very nature are politically motivated and, if allowed unrestricted land use authority, will use the permit process to

[185] *Id.* at 1118.

[186] 136 S. Ct. 928, 928 (2016) (Thomas, J. concurring in denial of certiorari).

[187] *Id.* at 929.

[188] *Id.* (citing *Parking Ass'n of Georgia*, 515 U.S. at 1117-18).

[189] *Id.*

[190] *Id.*; *see also Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting) (The fact that this Court has not yet resolved the split of authority on this question "casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money").

[191] *See Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Lawton v. Steele*, 152 U.S. 133, 136-37 (1894).

advance policies that may be unrelated to the proposed development.[192] In this regard, Professor Mark W. Cordes notes that *Nollan* and *Dolan* were intended to curtail "the common municipal practice of using the development exaction process as a means to capture already targeted tracts of land without paying just compensation[.]"[193]

The test created by *KAPO*, *OSF*, and *CSA* cannot distinguish an improper, politically-motivated permit condition from a proper condition seeking to mitigate or minimize a harmful externality. Those decisions focus solely on whether the development condition is "reasonably necessary to achieve a legitimate government objective."[194] When the test is formulated that way, the government's ability to demand land for politically-motivated purposes is only limited by an official's imagination. So, it was not surprising that in the three decisions applying that standard, the courts upheld a condition that required owners to dedicate a predetermined amount of waterfront property as a conservation buffer based solely on the government's argument that converting residential lots to nature preserves would advance its environmental restoration and enhancement goals.[195] In none of the cases was the county required to show that the dedication of a conservation area was in any way necessary to minimize or mitigate for impacts caused by a proposed use of the burdened lots.[196]

Because the *KAPO* court based its decisions on the wrong constitutional provision, the due process rather than the takings clause, it is unsurprising that the rule focuses on a substantively different question than that answered by *Nollan* and *Dolan*. *KAPO*, *OSF*, and *CSA* ask only whether the government relied on a scientific document to determine "the necessity of protecting functions and values in the critical areas," *i.e.*, the alleged public need.[197] By contrast, the *Nollan* and *Dolan* tests require that governments justify an exaction by demonstrating a sufficient relationship between the development condition and the impact caused by the proposed development.[198] In this regard, *Koontz* clarified that the unconstitutional conditions doctrine "does not implicate normative considerations about

[192] Stuart Meck & Rebecca Retzlaff, *The Zoning Hearing Examiner and Its Use in Idaho Cities and Counties: Improving the Efficiency of the Land Use Permitting Process*, 43 Idaho L. Rev. 409, 410-11, 442-43 (2007).

[193] Mark W. Cordes, *Legal Limits on Development Exactions: Responding to* Nollan *and* Dolan, 15 N. ILL. U. L. REV. 513, 551 (1995).

[194] *See* KAPO, 160 Wn. App. 250 at 272-274.

[195] *KAPO*, 160 Wash.App at 272-74; *OSF*, 166 Wash.App at 199; *CSA*, 189 Wash.App 1026, *5, *7-8.

[196] *Id.*

[197] *Id.*

[198] *Lingle*, 544 U.S. at 546-47.

the wisdom of government decisions," nor does it posit whether the exaction is "arbitrary or unfair."[199] Instead, the court's task is to determine whether a permit condition bears the "required degree of connection between the exactions imposed by the [government] and the projected impacts" of the property owner's proposed change in land use.[200]

The U.S. Supreme Court explained this important distinction in *Lingle*, when it rejected the "substantially advances a legitimate government interest" test as a takings test, because it "reveal[ed] nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights."[201] "A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through payment of compensation."[202] In the context of the takings clause, a determination that a regulation serves a public need, without more, is not sufficient to justify a regulation that appropriates property for a public use.[203]

Because the Washington rule cannot distinguish legitimate conditions from illegitimate demands, the rule threatens to undermine the anti-coercion underpinnings of the nexus and proportionality tests.[204] By designating public need as the sole determinative factor when an exaction is challenged, the Washington rule endorses the very type of opportunistic taking of property that the U.S. Supreme Court expressly disallowed in *Nollan* and *Dolan*. In *Dolan*, the Court explained that nexus and proportionality analysis is necessary to determine whether a development condition is "'merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.'"[205] Without meaningful scrutiny, it is impossible for a court to determine whether there is a sufficient relationship between the exaction and the development impact, making it possible that the demand "would be fortuitous, since the type and extent of the exaction is determined by the preexisting determination of the plan rather than the impact

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

[200] *Dolan*, 512 U.S. at 377.

[201] 544 U.S. at 542.

[202] *Id.* at 543.

[203] *Id.* at 542-43; *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change").

[204] *See Koontz*, 133 S. Ct. at 2594 (The doctrine of unconstitutional conditions "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up").

[205] *Dolan*, 512 U.S. at 390 (quoting *Simpson v. City of North Platte*, 292 N.W.2d 297, 301 (Neb. 1980)).

of the development."[206] Thus, the analysis required by *Nollan* and *Dolan* is especially important where the government seeks to exact benefits relating to popular policy goals, such as environmentalism.[207]

C. The Ordinary Deference Given to General Legislative Acts Cannot Protect Against Unconstitutional Conditions and Cannot Replace the Heightened Scrutiny Required by Nollan and Dolan

The most common argument in favor of excluding legislative demands for money and/or property from *Nollan* and *Dolan*—deference to the Legislature[208]—demonstrates precisely why heightened scrutiny is necessary. Typically, when reviewing a challenge to an act of legislation, courts will defer to the will of the people because generally-applicable laws are subject to the democratic process, which operates as a check on legislative authority.[209] However, that justification fails in the context of exactions, because the Takings Clause is founded on the anti-majoritarian principle that "public burdens ... should be borne by the public as a whole" and cannot be shifted onto individual property owners.[210] When the government places public costs on a small number of people, the democratic process, which is majoritarian in nature, works as an endorsement, not a check.[211] In that circumstance, "it [is] entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate, but applaud, so long as burdens they would otherwise bear were shifted to others."[212]

That is precisely what occurred in each of the state cases where the courts refused to subject buffer exactions to heightened scrutiny. In *KAPO*, the court upheld a dedication of a 100-foot conservation buffer where the county admitted in the record that the mandatory dedication was not related to any identified impacts of shoreline development—instead, the county wanted to impose buffers that were larger than necessary to pre-

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[206] Mark W. Cordes, *Legal Limits on Development Exactions: Responding to* Nollan *and* Dolan, 15 N. Ill. U. L. Rev. 513, 551 (1995).

[207] *See* James L. Huffman, *Dolan v. City of Tigard: Another Step in the Right Direction*, 25 Envtl. L. 143, 152 (1995) ("The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure").

[208] *See CSA*, 189 Wash.App 1026, at *8; Eustis, *Square Pegs*, 4 Seattle J. Envtl. L. 1 at 21-24.

[209] *See*, *e.g.*, *Schroeder v. Weighall*, 179 Wash.2d 566, 586, 316 P.3d 482 (2014).

[210] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

[211] Huffman at 152.

[212] *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004).

serve private shorelines until such a time as the county could do the necessary studies to learn what impacts *could* occur if the land was developed.[213]

Similarly, in *CSA*, San Juan County decided to address its general water quality concerns by adopting an ordinance requiring individual landowners to dedicate buffers designed to filter pollutants from area runoff.[214] The County did this despite the fact that itsstudies had concluded that a significant amount of the pollutants originate from upland properties, including runoff from public roads.[215] There is no question that the County could have implemented its policy by condemning land or existing buildings for a public use.[216] Instead, the County made its demand in the form of a permit condition, circumventing the just compensation requirement.

These cases demonstrate that, without a requirement that the government prove a sufficient connection between a legislative exaction and the project impacts, there is no limit to the amount of money or property that the government can demand as a permit condition, and there is no end to the types of social problems that the government can burden an individual permit applicant with. In this regard, the U.S. Supreme Court has repeatedly cautioned that "[i]f . . . the uses of private property were subject to unbridled, uncompensated qualification under the police power, the 'natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared.'"[217] Thus, a rule requiring only that the government show that a buffer will advance its interest in protecting the environment cannot address the protections guaranteed by the Takings Clause and cannot supplant the wisdom and balance written into the nexus and proportionality tests.

VI. CONCLUSION

Washington's current rule encourages the very type of government abuse of the permitting process that *Nollan*, *Dolan*, and *Koontz* intended to stop. In its current state, Washington case law violates two of the most basic principles of takings law. First, that "a strong public desire to

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[213] *See Hood Canal Envtl. Council et al v. Kitsap Cty*, Western Wash. Growth Mgmt. Hrngs. Bd. Case No. 06-3-0012c, 2006 WL 2644138, at *32-34 (Final Decision and Order, 2006) (upholding oversized buffers that were not related to actual site conditions under what the board called, the "immature science dilemma" which requires precautionary buffers until science can be developed addressing the location).

[214] Petition for Writ of Certiorari at 4-6, *Common Sense All. v. San Juan Cty*, 137 S.Ct. 58(2016) (No. 15-1366), 2016 WL 2754833 (citing San Juan County Code (SJCC) 18.35.100).

[215] *Id.*

[216] *See United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984).

[217] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 322 (1922)).

improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change."[218] Second, that "public burdens ... should be borne by the public as a whole" and cannot be shifted onto individual property owners.[219] Resolution of this constitutional conflict is a matter of utmost importance to private and public interests, which both rely on predictability in the law in order to plan for future development. It is also a matter of extreme importance to environmental interests because local governments are myopically relying on private buffer dedications as the primary tool to mitigate for development impacts, thereby exposing the government to significant liability should the legal tactic fail.

[218] *Pennsylvania Coal*, 260 U.S. at 416.

[219] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).