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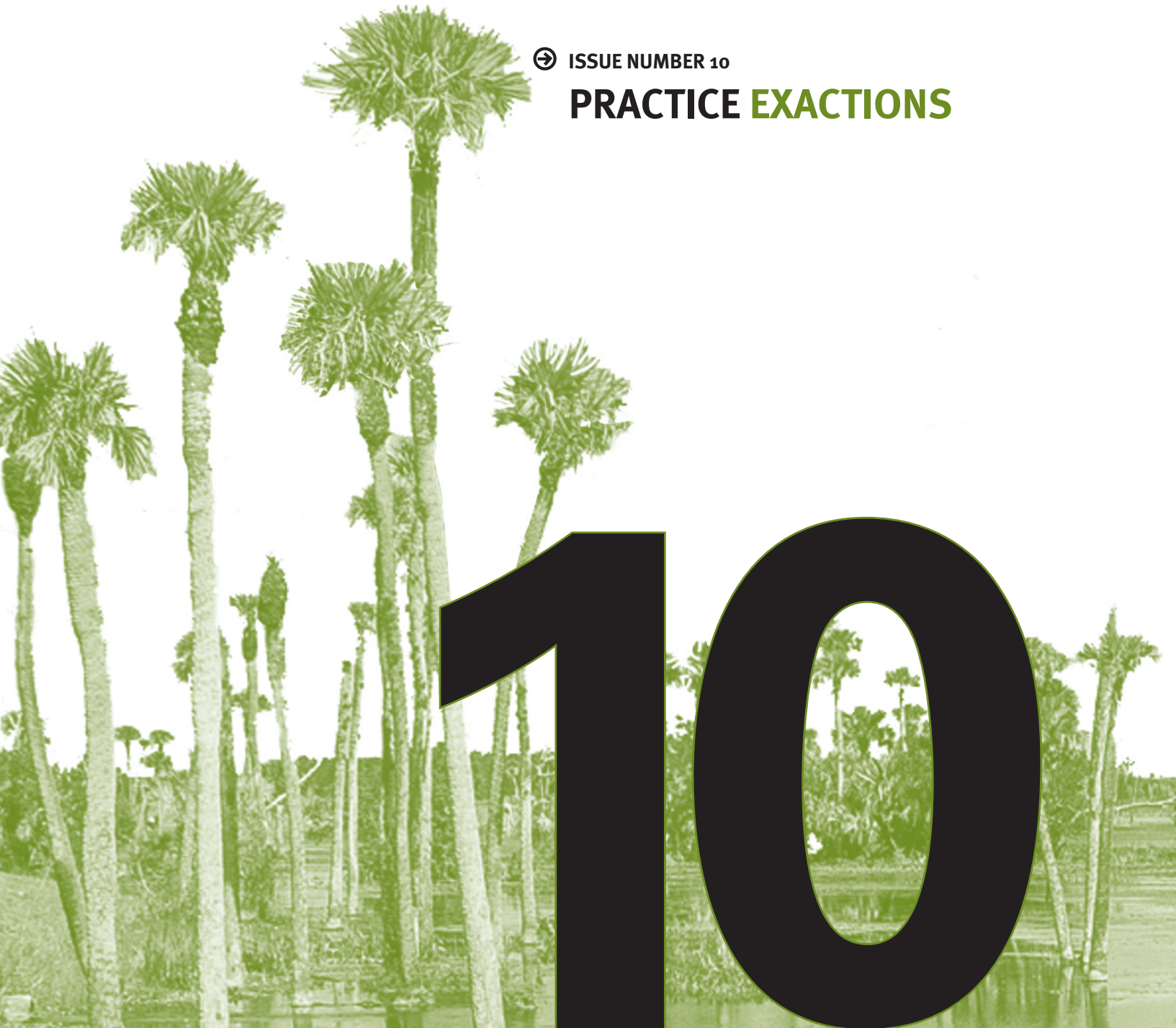

ISSUE NUMBER 10

PRACTICE EXACTIONS

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What *Koontz v. St. Johns River Water Management District* Means for Planners . . . For Now

By Tyson Smith, AICP

On June 25, 2013, the U.S. Supreme Court issued a ruling in *Koontz v. St. Johns River Water Management District*. Some will view *Koontz* as a significant case that corrects an imbalance of power between government officials and property owners negotiating discretionary exactions in zoning cases.

Others will say that it does not—that the distinctions the case purports to draw (between property-based and monetary exactions) are not commonly made in practice and that the protections the case suggests are needed are already in place. One thing is for sure, however: the *Koontz* decision has gotten everyone talking and it may have raised more issues than it settled. In any case, the opinions of both the majority and the dissent—it was a 5–4 decision in favor of the property owners—suggest that a reexamination of current protocol is in order for planners and local officials who find exactions and mitigation part of their daily routine.

The holdings in the case, standing alone, at first appear to clarify a long-standing disagreement among lower courts about whether the Supreme Court decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) apply to permit denials (not just approvals) and to monetary exactions (not just property exactions). The majority answered yes to both questions. However, given the facts in this case, the issues the Supreme Court sent back to the Florida courts, and the commentary and reasoning of the *Koontz* majority, a closer look at the case gives one the sense that very little may have been clarified.

The relevant underlying facts and key legal issues for the planning practitioner are set out in this article, as are several steps local governments should take to ensure compliance with *Koontz*. To understand *Koontz*, however, one must first understand *Nollan* and *Dolan*.

NOLLAN AND *DOLAN*

Nollan and *Dolan* involve a special application of the doctrine of "unconstitutional conditions" and of taking jurisprudence. Taken together, these two cases have become the established standard in land-use exactions and governmental negotiations. Their princi-

Rickymar Photography

Wetlands play an important role in water quality management in Central Florida. These man-made wetlands at the Orlando Wetlands Park ensure that nitrogen and phosphorous levels from outflows remain significantly below background levels in the St. Johns River.

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About the Author
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ples of "nexus" and "proportionality" circumscribe the types and extent of public facilities and resources for which land developers are responsible based on their developments' impacts.

In *Nollan*, the U.S. Supreme Court held that, in order to withstand scrutiny under the Takings Clause of the Constitution, there must be an "essential nexus" between real property dedications required by government as a condition of development approval and the governmental objective to be achieved. In the *Nollan* case, the Court held that this nexus did not exist because the California Coastal Commission's demand for an easement running north-south along the beach was not sufficiently related to the "east-west" objective of protecting public access to (not along) the beach. It is often said that *Nollan* requires that "the nature" of the required dedication be related to the governmental objective.

Seven years later, in *Dolan*, the U.S. Supreme Court clarified that a taking also may occur if a required dedication is not related in extent, as well as in nature, to the governmental objective to be accomplished; in that case, mitigating the impacts of a proposed development on the local floodplain and bike and pedestrian paths. The *Dolan* Court overturned the governmental condition for land dedication because there was no evidence in the record that the amount of land to be dedicated was "roughly proportionate" to the extent of impact the new development would have on the public.

There were, however, a few questions *Nollan* and *Dolan* left unanswered, such as, for example, whether they apply to exactions of money and not just to dedications of real property. In addition, and perhaps more esoterically, what if a potential dedication is merely discussed between governmental officials and a property owner, but the conditional approval is never consummated, only talked about? Is there a point in discussions when the property owner can stand up from the conference room table, declare that staff's proposals violate *Nollan* and *Dolan*, and dart out to the courthouse? After all, if a proposed condition is rejected, no property (or money) is actually converted to public ownership. Most agree, nonetheless, that the principles of nexus and proportionality remain the standards by which even failed negotiations should be governed. What to do?

KOONTZ V. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

Coy Koontz Sr. purchased a 14.9-acre property in the St. Johns River Water Management District (the District), east of Orlando, Florida, in 1972. The northern 3.7 acres of the property, though classified as wetlands, were viewed as the most appropriate for development. Pursuant to state law, two District permits were required to develop the property. In order to meet state law requirements, the District required applicants to offset environmental impacts through mitigation either on-site or by "creating, or preserving wetlands elsewhere" (*Koontz* Slip Opinion p. 3).

In 1994, Koontz applied for permits to develop the 3.7-acre portion of his property and, in order to meet his mitigation requirements, he offered to give the District a conservation easement over the remaining 11.2 acres. As a counterproposal, if you will, the District proposed approval under two different scenarios:

(a) that only one acre be developed, with the conservation easement then applying to the remaining 13.9 acres; or

(b) that the 3.7 acres be developed as proposed (along with the proposed conservation easement for the rest) and that off-site mitigation be provided either by (1) enhancing 50 acres of off-site District wetlands or (2) an equivalent off-site alternative.

The District also invited Koontz to propose equivalent mitigation alternatives. However, believing the District's alternatives to be excessive, he instead filed suit in state court.

Based on expert testimony at trial, the state court found that the 11.2-acre easement originally proffered by Koontz sufficiently offset the development's impacts and, therefore, the alternatives proposed by the District failed to meet *Nollan*'s "essential nexus" and *Dolan*'s "rough proportionality" requirements. The intermediate appellate court affirmed, but, distinguishing *Nollan* and *Dolan* from Koontz's situation, the Florida Supreme Court reversed in favor of the District.

The Florida Supreme Court found *Nollan* and *Dolan* inapplicable because, since the District never approved Koontz's application, the mitigation never occurred and, therefore, no taking ever occurred. In addition, it distinguished the property-based dedications of *Nollan* and *Dolan* from the mitigation that required Koontz to spend money.

Since there has been a division of authority among the lower courts on exactly these points, the U.S. Supreme Court agreed to review the case. It is worth noting, of course, that within a day of the *Koontz* decision, the Supreme Court also issued headline-grabbing decisions related to affirmative action, the Voting Rights Act, adoption and the Indian Child Welfare Act, and the Defense of Marriage Act.

The *Koontz* Holding

The government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when the government's demand is for money.

Nonetheless, the reasoning that the majority lays out and the opportunity it took to comment on and to characterize land-use negotiations the way it did, are significant and undoubtedly will result in conflicting interpretations.

KOONTZ: WHAT THE U.S. SUPREME COURT HELD AND WHY

Some believe that the holdings in *Koontz*, on their face, do not necessitate a significant change of course for most planners who already use *Nollan* and *Dolan* as their guide; or, as the *Koontz* dissent put it, no evidence was presented that local officials "routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development's costs."

Holding 1: *Nollan* and *Dolan* Apply Even in Permit Denials

The majority held that the principles of *Nollan* and *Dolan* apply regardless of "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." In other words, *Nollan* and *Dolan* can be violated regardless of whether mitigation is required as a condition of final approval or is demanded and rejected, resulting in denial. In reaching its holding, the majority touched on four key areas.

Excessive conditions may not be used to withhold a governmental benefit to a person who exercises a constitutional right. Specifically, government cannot deny a land-use permit (a benefit) on the condition that an applicant makes a dedication in excess of its proportionate impact on the public facilities or resources (a constitutional right violation). The majority makes this well-settled point, it seems, to demonstrate the potential for government to "coerce" property owners to dedicate more property or contribute more mitigation than their impacts require by threatening to withhold approval.

The government's authority to deny approval outright is not a basis for exacting an excessive demand. The majority goes on to say that the government's authority to withhold approval does not mean it may do so simply because "someone refuses to give up constitutional rights" (i.e., the right to have mitigation limited only to the development's proportionate impact). Conversely, it would follow that approval may be lawfully withheld if an applicant refuses to make a dedication that does meet nexus and proportionality requirements. The question on this point and the preceding point, for the planner, will turn out to be whether the exaction does, in fact, comply with *Nollan* and *Dolan*. More on this below.

The Takings Clause may be violated even where there is no taking. "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," the majority writes. It goes on to conclude that "[w]here the permit is denied and the condition is never imposed, nothing has been taken."

The idea that the Takings Clause can be violated without there being a taking was a point of disagreement among the lower courts (and land-use attorneys) since *Dolan* was decided, which usually boils down to the question of the appropriate remedy if a demand for mitigation is rejected and, therefore, the transfer of land (or money) to the government never occurs.

The majority concluded that if *Nollan* and *Dolan* are violated, but no property is taken, just compensation is not available as a remedy. The dissent suggests that the appropriate remedy in this circumstance would be removal of the unconstitutional condition and recovery of any damages available under state law. The majority leaves this question to the Florida courts to resolve on remand.

Mitigation alternatives complying with Nollan *and* Dolan *preclude a taking.* As noted, the District offered several mitigation alternatives to Koontz and invited him to propose others. This raised the question of whether a taking can be found if alternatives determined to be constitutional under *Nollan* and *Dolan* are among those rejected by an applicant. The *Koontz* opinion is clear on the point: "so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition."

Holding 2: *Nollan* and *Dolan* Apply Even if the Demand Is for Money

The District argued that an obligation to spend money does not amount to a taking. The majority disagreed and held that where there is a "*direct link* between the government's demand and a specific parcel of real property" the monetary exaction is sufficiently land-based to trigger the *Nolan*/*Dolan* analysis. The dissent, conversely, viewed the District's off-site mitigation option as simply imposing "an obligation to perform an act (the improvement of wetlands) that costs money."

In sum, the Court's majority concluded *Nollan* and *Dolan* would apply to the monetary exaction in *Koontz* because the off-site mitigation Koontz could have paid for "several miles away" was sufficiently related to the property proposed for actual development.

On Remand

Beyond the holdings themselves, the majority leaves to the Florida courts a number of key points to resolve, including:

1. whether the manner in which the case was brought precludes adjudication of the unconstitutional conditions claim;
2. what damages, if any, are appropriate in the case;

3. whether the "demand" by the District was sufficiently concrete to trigger a *Nollan*/*Dolan* claim; and
4. whether the District did, in fact, comply with the requirements of *Nollan* and *Dolan*.

THE SCOPE OF THE *KOONTZ* DECISION

A concern of the dissent and of commentators following the decision is how far the *Koontz* decision extends in the realm of land-use exactions. For example, a key disagreement among lower courts has been whether to apply *Dolan* to legislatively adopted, generally applicable mitigation of impacts, like impact fees. Though it purports to limit the extent of its holdings, the majority does not address directly the distinction between ad hoc exactions and legislatively adopted regulatory fees or mitigation, despite numerous conflicting lower court opinions on this particular issue.

The majority felt that its holdings would be sufficiently limited by settled law and, otherwise, would not have the dramatic impact on planning that the dissent predicts. The majority, for example, references "in-lieu" fees as the types of exactions that *should* be subject to *Nollan* and *Dolan*, noting their "functional equivalent to other types of land use exactions." It then goes on to say that its holdings do not affect "property taxes, user fees, and similar laws and regulations," but gives little idea of what it would include in those categories in the land-use context.

> *Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land use policy, and we have long sustained such regulations against constitutional attack.*
>
> —Justice Alito, writing for the majority

By distinguishing "user fees" and "laws and regulations" it may be that the Court would not apply *Nollan* and *Dolan* to impact fees and other "legislatively imposed" mitigation. On the other hand, the majority cites cases that applied, "or something like it," in dealing with impact fees and subdivision exactions to suggest, it would appear, that doing so will not create "significant practical harm."

In short, it is unclear whether the parameters the majority intended to draw distinguish ad hoc exactions like those in *Koontz* from other legislatively imposed mitigation tools, like impact fees, mitigation fees, or inclusionary housing requirements. As the dissent put it: "Maybe today's majority accepts that distinction; or then again, maybe not."

WHAT ARE PLANNERS (AND THEIR ATTORNEYS) TO DO?

The extent to which the *Koontz* opinion will change daily life for planners will vary, of course, from jurisdiction to jurisdiction. Nexus and proportionality are so ingrained in the existing practice that the two central holdings in the case, standing alone at least, may not change the way of doing business for some. In those cases, the jurisprudential meanderings of the justices will remain largely a concern for lawyers and less one for planners. However, with this opinion, one can only conclude that the Supreme Court intended to expand the reach of *Nollan* and *Dolan* and and that a few precautionary steps are advisable until the courts clear things up.

So what are the options?

Option 1: Approve Everything Without Mitigation

Commentators have suggested that, in light of *Koontz*, some agencies will be too afraid to impose *any* conditional exactions on approvals and will simply approve development without regard to off-site impacts on public infrastructure and resources. Perhaps some may, but this would be an overreaction to the *Koontz* opinion. Even the majority notes that dedications of property are a reality of the permitting process.

While *Nollan* and *Dolan* may have a broader reach after *Koontz*, their nexus and proportionality principles have a long-standing presence in planning, and this case should not mark the end of reasonable and proportionate development conditions as a part of the permitting process.

Wikimedia Commons/Aboutmovies

A required dedication for the creation of this bicycle pathway running behind the A-Boy hardware store in Tigard, Oregon, was central to the *Dolan* case.

Option 2: Deny Everything Without Mitigation

At the other extreme have been those (including the dissenting justices) who suggest governmental agencies will now deny applications without requiring (or even discussing) mitigation simply to avoid new threats of litigation. Again, this takes *Koontz* too far. First, as is discussed further below, most agencies either are already conducting some level of nexus and proportionality analysis or can do so without significant increases in time or expertise in most cases. Second, a lawsuit resulting from a denial without conditions would simply be a different kind of lawsuit.

Dolan on Establishing 'Rough Proportionality'

With respect to the pedestrian/bicycle pathway, we have no doubt that the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District. The city estimates that the proposed development would generate roughly 435 additional trips per day. Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use. But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway 'could offset some of the traffic demand . . . and lessen the increase in traffic congestion.'

As Justice Peterson of the Supreme Court of Oregon explained in his dissenting opinion, however, '[t]he findings of fact that the bicycle pathway system '*could* offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will*, or *is likely to*, offset some of the traffic demand' (317 Or., at 127, 854 P.2d, at 447) (emphasis in original). No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.

—*Dolan*, 114 S.Ct. 2309, 2321–22, 512 U.S. 374, 395–96 (footnotes excluded)

Denying applications without requiring or accepting mitigation will not deter litigation and, in fact, may encourage it.

Option 3: Stop Negotiating

Another option would be to accept offers of mitigation, but not to respond to them or to negotiate alternatives. After all, if your agency risks a *Nollan*/*Dolan* claim by suggesting mitigation options, the safest way to avoid one is to refuse to negotiate, right? Perhaps, but in reality, this benefits no one and sells planners and property owners short—neither desires litigation and, of course, most do not end up in litigation. The technical expertise needed to determine whether a development has met the requirements of *Nollan* and *Dolan* are available and widely used and should be part of ongoing negotiations.

Property owners benefit from open communication with their public agencies and from understanding the rationale for an exaction needed to maintain the levels of public service existing residents enjoy. It seems, again, that cutting off all negotiation could deter good planning and actually create or exacerbate disputes.

Option 4: Apply *Nollan* and *Dolan* to All Exactions and Discussions Related to Exactions

The reality is that, in light of *Koontz*, local governments should reexamine existing protocols and standards to ensure that all discussions related to mitigation and exactions, whether ad hoc or legislatively adopted, are grounded in the principles of *Nollan* and *Dolan*. Here are some tips.

Avoid open-ended, informal discussions without following established protocol and nexus/proportionality standards. The question the majority leaves open in *Koontz* is at what point mitigation suggested by government becomes a "demand" that is sufficiently concrete to trigger scrutiny under *Nollan* and *Dolan*. The majority regarded the point to have been settled by the lower courts but noted the issue may be addressed on remand. In any case, agency officials should avoid open-ended discussions or communications (including e-mails) that are not based on adopted protocol and nexus/proportionality standards or before enough information has been gathered to fully grasp the scope of the development and its public impacts. Otherwise a preliminary communication could be misinterpreted as (or build into) a concrete governmental "demand." Of course, if the communications comply with *Nollan* and *Dolan*, the point likely is moot, which leads to the next point.

Establish nexus/proportionality protocols and standards. With respect to the dedications in *Dolan*, the Supreme Court said: "No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication . . . beyond the conclusory statement that it could offset some of the traffic demand generated."

Ensuring compliance with this standard could, in some cases, add costs for local government. However, in the case of ad hoc, discretionary exactions, a documented set of calculations likely will suffice. With most public facilities, this can be a fairly simple calculation. With others, like housing mitigation, transportation, and environmental resources, the process and calculations will be a bit more complex. In the case of impact fees, concurrency or adequate public facility programs, and other legislatively adopted tools, the technical bases for them are well established and the expertise readily available.

Adopt procedures for negotiated or discretionary exactions. Local government should formally document the process of requesting, evaluating, and providing mitigation alternatives for property owners. For example, procedures may specify:

1. existing level of service standards and service areas for impacted public facilities and resources;
2. a specific pre-application process;
3. that mitigation, where needed, is limited to facility types impacted by the development (*Nollan*) and to only the development's proportionate share of new facility demand (*Dolan*);

Voluntary Offers and *Nollan*/*Dolan*

The question commonly comes of up whether a "voluntary" offer is subject to the Takings Clause and *Nollan* and *Dolan*. Legal arguments exist on both sides of this question. Relevant factors will include whether the application is pending or has been submitted, whether the facilities are being offered in response to a staff or board request, and whether the amount of mitigation was offered by the property owner or suggested by the government.

In the end, the best planning approach will continue to be to negotiate and implement regulations under the rubric of *Nollan* and *Dolan*. Why risk the success of a good project on the unsettled question of voluntariness?

Often these cases . . . have little impact beyond those litigating them. The appropriate course of action . . . is to reevaluate all procedures related to mitigation or dedications . . . to ensure ongoing compliance with *Nollan* and *Dolan*.

4. that any communication or opinion, other than those issued as a formal assessment, are nonbinding and are not intended to be relied upon for purposes of development approval or final agency approval;
5. the calculations or assumptions the government will use to guide mitigation assessments; and
6. the official or governing body with final decision-making authority.

Development agreements also provide a more formalized framework for developing appropriate mitigation alternatives and an opportunity to document how the parties mutually arrived at its terms.

Emphasize legislatively adopted fees and programs. Since the 1970s, local governments have increasingly relied upon formally adopted standards and procedures for measuring the public impacts of private development against available capacity and for handling situations where those impacts would overburden public facilities. These programs are referred to variously as adequate public facility ordinances or concurrency management systems. Over the same period, impact fees, inclusionary housing requirements, housing mitigation fees, and the like have allowed local governments to handle off-site impacts with an established, generally applicable set of standards, instead of through ad hoc negotiations.

These legislatively adopted techniques have historically been based on pre-adoption nexus and proportionality studies, which reduce the chances of running afoul of *Nollan* and *Dolan*. Certainly some local governments and some developers prefer the predictability of this approach. In any case, some local governments will consider formal concurrency programs and impact fees as a safer alternative to ad hoc, negotiated exactions after *Koontz*.

Note, however, this is not to say *Nollan* and *Dolan* do not apply to these legislative programs (indeed, they very well may under *Koontz*). It is to say, simply, that concurrency and impact fees are established tools that, by definition, have always included a rigorous verification of nexus and proportionality.

CONCLUSION

The confusion that resulted from the Supreme Court's "inelegant" decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) took 25 years and a follow-up opinion (in *Lingle v. Chevron U.S.A. Inc.*, 554 U.S. 528 (2005)) to correct. Will it take that long to sort out the questions created by *Koontz*? Has the majority's treatment of the issues created enough confusion to affect planners' daily lives, or do the overarching holdings merely verify a standard that most planners already apply?

It is too soon to tell, of course. Often these cases, despite the heights from which they are handed down, have little impact beyond those litigating them. The appropriate course of action at this point, however, is to reevaluate all procedures related to mitigation or dedications, whether discretionary or a product of legislatively adopted ordinances, to ensure ongoing compliance with *Nollan* and *Dolan*.

Cover: The Orlando Wetlands Park, located about 25 miles east of Orlando, consists of more than 1,220 acres of man-made wetlands near the St. Johns River. Image by Ricymar Photography; design concept by Lisa Barton.

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DOES *KOONTZ* CHANGE THE RULES FOR DEVELOPMENT EXACTIONS?

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