

*KOONTZ V. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT*  
WAS NOT A BIG DEAL

NOTE

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The exactions doctrine is a hybrid of the Fifth Amendment’s Takings Clause and the doctrine of unconstitutional conditions. The theory, as outlined in *Nollan v. California Coastal Commission* and *Dolan v. Tigard*, limits what demands land-use regulators may make when granting permits to landowners. Until *Koontz v. St. Johns River Water Management District*, states could easily avoid *Nollan-Dolan* scrutiny altogether by demanding an exaction of cash rather than of land, or by calling the demands “conditions precedent.” In 2013, *Koontz* closed those loopholes and reframed exactions law.

*Koontz* has been hailed as a landmark property rights case, and it has been lamented as a decision that irreparably harms land-use regulations and negotiations between developers and local government. But academic literature in the wake of *Koontz* has been theoretical—and often hyperbolic.

This Note is the first to explore whether *Koontz* has created significant, measurable effects in the real world. It concludes that it has not. With the benefit of hindsight, I criticize the authors who focused purely on legal concepts when they postulated the changes *Koontz* would precipitate.

I suggest we look at when and where exactions litigation actually occurs and consider practical—not theoretical—reasons as to why the exactions doctrine remains irrelevant. Land-use negotiations are frequently imbalanced. Either the developer or the government can usually walk away, and the stronger party has something the other desperately wants. Exactions litigation, on the other hand, is expensive, harmful to relationships, and uniquely not worth the trouble given the lack of a constitutionally mandated remedy. Considering these factors, I

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\* J.D. 2016, University of Virginia School of Law; A.B. 2009, College of William & Mary. I owe special thanks to Professor Richard Schragger, without whose guidance and inspiration this Note would not exist, and to Professor Jon Cannon, who taught the land-use law class that made me fall in love with the subject. The Virginia Environmental Law Journal’s editing team—led by Joe Zaleski, Olivia Glasscock, and Seuren Gourley—has my gratitude for accepting this Note and raising it to publishable quality. I also thank Monica Haymond, Andrew Lemens, Devon McCurdy, and most of all Hannah Wiegard for their patience and generosity in reviewing and critiquing so many earlier and poorer versions of this work.

predict *Koontz* should not result in any more exactions litigation. I then confirm my prediction and support my thesis using data that show no increase in the volume of exactions litigation since *Koontz*.

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Land use is regulated—a lot. Alterations to real property are regulated in a way that would seem unreasonable if applied to personal property. If you want to put new tires on your car, you do not need to fill out a permit application to do so; you just buy new tires. If you want to give your car a new place to park by widening your driveway, however, you often need to ask the government for permission first.

This seems like a legal anomaly. After all, the Constitution canonizes property rights, but only when it comes to real property. Personal property rights are treated as second-class or even nonexistent rights by courts, while a person's property interest in land is supposed to be fiercely protected by the Fifth Amendment.<sup>1</sup> But in reality, a person's control over personal property like a car is free, while the ability to modify or build on one's own land is subject to stringent regulations.

The Supreme Court crafted the exactions doctrine as a purported attempt to stand up for the rights of landowners against oppressive local land-use authorities. Exactions are conditions—usually in the form of land or money—that the government demands of permit applicants. The doctrine of unconstitutional exactions is a marriage of the Fifth Amendment's Takings Clause and the theory of unconstitutional conditions. The theory acknowledges the state's right and need to require land-use permits, but it declares the substance of those permits to be constitutionally circumscribed.

The exactions doctrine demands that conditions bear an “essential nexus”<sup>2</sup> and be “rough[ly] proportional[.]”<sup>3</sup> to any externalities that proposed land modifications might produce. These rules were plagued with legal and practical weaknesses. This Note will explain that, despite *Koontz*—a recent Supreme Court decision propping up the exactions doctrine—the Court's exactions jurisprudence remains unlikely to be useful in protecting property rights through litigation in the real world.

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<sup>1</sup> Compare *Andrus v. Allard*, 444 U.S. 51, 54, 65–68 (1979) (finding that the Fifth Amendment's Takings Clause did not forbid the government from barring all sale or transfer of eagle feathers without compensation even if that ban deprived the personal property of all economic value), with *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 1027–28 (holding that “when the owner of *real* property has been called upon to sacrifice all economically beneficial uses in the name of the common good . . . he has suffered a taking,” but distinguishing *Andrus* and exempting personal property from the new rule on account of “the State's traditionally high degree of control over commercial dealings” (emphasis added)).

<sup>2</sup> *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

<sup>3</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 390–91 (1994) (“A number of state courts have taken an intermediate position, requiring the municipality to show a ‘reasonable relationship’ between the required dedication and the impact of the proposed development. . . . We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment.” (quoting *Simpson v. North Platte*, 206 Neb. 240, 245 (1980))).

The first Section lays out the background of exactions—culminating in *Koontz v. St. Johns River Water Management District*—and explains why this Note adds a new, realist claim to the literature on the topic. Section II explains the holes in the exactions doctrine *Koontz* attempted to fill. Section III reviews *Koontz* and early reactions to the case, and begins to look at Virginia’s legislative response to it. Virginia was the only state to pass a law in direct response to *Koontz*, and that law inspired this Note by illuminating the theory that the case was doctrinally beneficial to landowners but did not actually have any impact in the real world. Section IV then explains why that theory is correct and suggests that the academic response to *Koontz*, both in favor and against the holding, would have been wise to predict that it would not lead to a noticeable increase in exactions litigation.

### I. BACKGROUND AND EXISTING LITERATURE

Twenty-six years after the Court first conceived the exactions doctrine, all nine justices realized that it lacked the teeth necessary for effective enforcement. *Nollan* and *Dolan* applied only in cases where the government granted a permit with unconstitutional conditions, such that the state remained free to evade exactions scrutiny altogether by denying permits until those same conditions were satisfied.

*Koontz v. St. Johns River Water Management District* corrected this defect.<sup>4</sup> Writing for a five-justice majority, Justice Alito remarked that the existing rule was “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.”<sup>5</sup> Justice Kagan’s dissent, joined by three other justices, agreed.<sup>6</sup>

The Court split, however, on the question of whether to extend the exactions doctrine even further to apply to instances where the government demands money, and no real property interest, in exchange for a land-use permit. Both sides cited concerns about the practical applications of the exactions doctrine.<sup>7</sup>

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<sup>4</sup> 133 S. Ct. 2586 (2013).

<sup>5</sup> *Id.* at 2595.

<sup>6</sup> *Id.* at 2603 (Kagan, J., dissenting) (“I think the Court gets the first question it addresses right. The *Nollan-Dolan* standard applies not only when the government approves a development permit conditioned on the owner’s conveyance of a property interest (i.e., imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (i.e., imposes a condition precedent).”).

<sup>7</sup> *See id.* at 2599 (majority opinion) (citing the practical concern that “it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*” if monetary exactions were not covered). *But see id.* at 2609, 2612 (Kagan, J., dissenting) (believing the opinion to be a

Outside observers were quick to pile on their own forecasts of *Koontz*'s policy implications. A few proponents of strong property rights hailed the case as a major victory that would finally fulfill *Nollan* and *Dolan*'s promise to landowners.<sup>8</sup> Critics derided the decision for limiting the flexibility of land-use negotiations, believing it tilted the tables so far in the direction of developers that necessary local regulations would likely die out as a result.<sup>9</sup>

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“prophylaxis in search of a problem” and predicting that “the Court will rue [the *Koontz*] decision.”).

<sup>8</sup> Ilya Somin, *Two Steps Forward for the “Poor Relation” of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, CATO S. CT. REV. 215, 216, 231–34 (2013) (believing that *Koontz* “could turn out to be the most important property rights victory in the Supreme Court in some time” and challenging the notion that the holding will impede beneficial regulation); Brian T. Hodges, *Koontz—A Banner Day for Property Rights*, PACIFIC LEGAL FOUNDATION LIBERTY BLOG (June 23, 2015), <http://blog.pacificlegal.org/koontz-a-banner-day-for-property-rights> (praising *Koontz* doctrinally for improving the unconstitutional conditions doctrine as it relates to the Takings Clause); Rocky Horde & Hans Clausen, *Koontz—A Win for Real Estate Developers*, LAW360, (June 25, 2013, 5:10 PM), <http://www.law360.com/articles/453034/koontz-a-win-for-real-estate-developers> (acknowledging some potential drawbacks of *Koontz* but believing that the Court intentionally set out to improve the regulatory landscape in favor of developers).

<sup>9</sup> Professor John Echeverria led both the doctrinal and normative attacks on *Koontz* in a comprehensive critique describing the case as the one of the worst in the entire Takings Clause canon. John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, 22 B.U. J. SCI & TECH L. 1, 20–46 (2014) [hereinafter “Echeverria, *The Very Worst*”]. Specifically regarding the issue of hampering local land-use negotiations, Echeverria concluded that:

[*Koontz*] will create a perverse, wasteful incentive for local officials to decline to work cooperatively with developers to design projects that make business sense and protect the interests of the community. The decision will also make the land use regulatory process more cumbersome, expensive, and time-consuming, and will lead to the rejection of some development proposals that previously would have been approved.

*Id.* at 3. More academic literature was critical of *Koontz* than was laudatory. See Michael Farrell, *A Heightened Standard for Land Use Permits Redefines the Power Balance Between the Government and Landowners*, 3 U. BALT. J. LAND & DEV. 71, 74 (2013) (“[L]andowners are now incentivized to only offer the easiest and cheapest mitigation condition and if this is not accepted then the landowner will feel empowered to sue.”); Julie A. Tappendorf & Matthew T. DiCianni, *The Big Chill?—The Likely Impact of Koontz on the Local Government/Developer Relationship*, 30 TOURO L. REV. 455, 471–72 (2014) (“[Developer/Government negotiations are] essential to an orderly and efficient system of land use regulation. Unfortunately, *Koontz* serves as a major obstacle to this collaboration. *Koontz* makes it significantly easier for developers to drop out of negotiations” and “will almost certainly spawn more litigation between local governments and developers.”); Elizabeth Tisher, *Land-Use Regulation After Koontz: Will We “Rue” the Court’s Decision?*, 28 VT. L. REV. 743, 772–74 (2014) (concluding that localities will be frightened away from imposing impact fees because of the uncertainty left after *Koontz*); Kristin N. Ward, *The Post-Koontz Landscape: Koontz’s Shortcomings and How to Move Forward*, 61 EMORY L.J. 129, 155–59 (finding that “regulatory flexibility is a positive and necessary element of local land-use decision-making,” and that *Koontz* threatens that flexibility); Rick Hills, *Koontz’s Unintelligible Takings Rule: Can Remedial Equivocation Save the Court from a Doctrinal Quagmire?*, PRAWFSBLAWG (June 25, 2013, 3:41 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2013/06/koontzs-unintelligible-takings-rule-can-remedial-equivocation-make-up-for-an-incoherent-substantive-.html> (a day-of reaction to *Koontz* criticizing the case for further entangling federal

This Note explains that *Koontz* has not had a considerable effect on litigation and stakes out a realist position in the existing debate over the case. It argues that *Koontz*'s lack of impact stems from a lack of incentives for landowners to avail themselves of the exactions doctrine in court, combined with the opportunity to resolve such issues outside of court. Simply because developers can sue the government more after *Koontz* does not mean they will. And indeed, they have not. This Note supports this conclusion by looking at the raw numbers of exactions cases filed in the years before *Koontz* and in the years after *Koontz* to find no change.

This Note proposes that exactions litigation has not increased significantly because such litigation only occurs when it is beneficial for a developer to sue. That situation requires a complex factual cocktail, where there is: 1) a landowner unwilling or unable to move to a different jurisdiction to develop property; 2) a local government confident enough in its own market position in attracting development that it is willing to make extortionate demands of permit-seekers;<sup>10</sup> 3) a developer willing to harm his relationship with local politicians who govern the zoning laws on which his own future success relies; and 4) the possibility the lawsuit will produce a positive result for the plaintiff (e.g., strong remedies). Because this Note is a response to *Koontz*, which did not alter any of these factors besides when a landowner may sue, it explores the final prong and the actual remedies now available to prospective plaintiffs.

In weighing the costs and benefits that lawsuits provide landowners, this Note concludes the benefits are low because of meager remedies, but the costs can be high. In *Koontz*, the Court reiterated that unconstitutional exactions violations do not come with any constitutionally mandated remedy.<sup>11</sup> Therefore, depending on the jurisdiction, victorious landowner-plaintiffs might win nothing more than a sternly worded decision telling the locality to do better or, if lucky, an order for the locality to issue the desired permit with no (or more palatable)

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courts in a local issue that they are institutionally incapable of handling). Professor Echeverria renewed his critique of *Koontz* with an even more detailed explanation of how the case will increase the costs of local land-use negotiations and therefore chill the beneficial process. John D. Echeverria, *The Costs of Koontz*, 39 VT. L. REV. 573, 606–10 (2015) [hereinafter Echeverria, *Costs of Koontz*] (believing that the holding will harm landowners and government alike by “creat[ing] a perverse set of incentives for local officials that will make them less willing to work with developers to formulate project plans that may serve the interests of both the developer and the community”).

<sup>10</sup> Note that “confident” municipalities are not the same as anti-growth governments. Those can just deny permits unconditionally and avoid triggering *Koontz*.

<sup>11</sup> *Koontz*, 133 S. Ct. at 2597.

conditions.<sup>12</sup> The costs of litigation, on the other hand, are quite high. Besides attorney's fees, repeat players in the land-use game risk souring their relationship with the people who have authority over the rezoning process on which developers rely.<sup>13</sup>

Furthermore, as has already been discussed and lamented in other literature, *Koontz* litigation is relatively easy for local land-use authorities to avoid.<sup>14</sup> The state need only stay quiet and avoid making demands of landowners, perhaps by withdrawing from negotiations entirely.

Because one of the weightiest reasons to avoid litigation is the lack of a strong remedy, this Note will explore the results of a state "*Koontz* fix" statute—legislation passed in order to provide stronger remedies in unconstitutional exactions cases. Virginia offers compensatory damages and attorney's fees to successful landowner plaintiffs, theoretically making litigation more appealing. But even with this law in place, the state has not experienced an uptick in exactions lawsuits. This further proves that *Koontz* was not the game-changer that its proponents or critics claimed it would be.

I do not ignore the possibility that *Koontz* has chilled land-use negotiations or increased litigation threats against government by landowners, but unfortunately it is impossible to collect data on what parties discuss behind closed doors. This Note will not draw specific conclusions on what the case's impact outside the courtroom *has been*, just what it *should be*. The litigation data, combined with Virginia's perceived need to add more remedies in unconstitutional exactions cases, support my position that those who reacted viscerally and strongly in support of, or in opposition to, *Koontz* were overreacting.

The world of land-use regulation has not fallen apart, and governments should not resign themselves to such an apocalyptic conclusion. Similarly, landowners are not vindicated in the way the Court envisioned, because land-use regulators and land users have strong incentives to get along and have other avenues besides costly litigation to resolve their differences.

Even when power is imbalanced between the parties, *Koontz* litigation should still be very rare. When local government has a dominant bargaining position, it can "just say no" to development without attaching conditions. When developers have a dominant bargaining position, it is unimaginable that the municipality would make the sorts of demands that

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<sup>12</sup> *Id.* ("In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies.").

<sup>13</sup> See *infra* Part IV.A.

<sup>14</sup> See, e.g., Echeverria, *The Costs of Koontz*, *supra* note 9 at 606–10.

rise to the level of a *Nollan-Dolan* violation. *Koontz v. St. Johns River Water Management District* was, in short, not a big deal.

## II. THE EXACTIONS CASES AND THEIR FUNDAMENTAL WEAKNESS

The fundamental weakness of the exactions doctrine is that it lacks a strong remedy, and parties therefore have little incentive to challenge exactions in court. Indeed, the Supreme Court has held that the Constitution mandates no remedy in cases where no property has been taken from the plaintiff.<sup>15</sup> While this conclusion is perfectly typical in most unconstitutional conditions cases regarding other constitutional rights, it is odd in the context of the Takings Clause. This is because the Takings Clause, unlike the Free Speech Clause for example, explicitly allows the government to deprive individuals of the right in question, so long as the government provides compensation for that deprived right.<sup>16</sup>

Unless state law provides otherwise, however, the landowner who refuses to go along with the conditions demanded for a land-use permit because he finds them unconstitutional and convinces a federal court to agree—the facts in *Koontz*—gets nothing.<sup>17</sup> The losing regulatory agency receives only a wag of the finger and a decision reminding them they may not condition issuance of a permit on conditions that do not satisfy *Nollan* and *Dolan*. Nothing in the Constitution, however, precludes agencies from denying the permit unconditionally or from simply not returning that landowner's calls in the future. Both parties will have suffered the costs of litigation just to arrive at *status quo ante bellum*.<sup>18</sup>

If this is the state of the exactions doctrine, one might wonder why developers would ever even bother going to court over permitting conditions. A brief history of the pre-*Koontz* exactions cases will help illustrate why, explain how *Nollan* and *Dolan* also set the stage for the

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<sup>15</sup> *Koontz*, 133 S. Ct. at 2597.

<sup>16</sup> Compare U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”), with U.S. CONST. amend. V (“Nor shall private property be taken for public use, without just compensation.”) (emphasis added).

<sup>17</sup> The Supreme Court entertained the notion that Congress could pass a federal statute providing for remedies in unconstitutional exactions cases, but quickly noted that, since Coy Koontz brought his case under a state law cause of action, “the Court ha[d] no occasion to discuss what remedies might be available for a *Nollan-Dolan* unconstitutional conditions violation . . .” *Koontz*, 133 S. Ct. at 2597.

<sup>18</sup> To be sure, both parties suffer from intransigence in this hypothetical. Besides attorney's fees, the local government loses the economic boost of new development and the landowner loses the increased value to his land that a permit would provide. If we assume, however, that government does not always want new development but applicants for development permits always do want new development, the government holds the balance of power even in the *Koontz* regime so long as it may deny permits unconditionally.



loopholes *Koontz* was supposed to fill, and show that it inadvertently created a new one.

*A. The Early Exactions Cases*

The modern constitutionalization of land-use issues traces its roots to *Penn Central Transportation Company v. City of New York*.<sup>19</sup> Exactions cases—a special subset of regulatory takings—share this genealogy.<sup>20</sup> Judicial scrutiny of exactions, however, is seen as “stricter” than the “less rigid balancing test set out in *Penn Central*.”<sup>21</sup>

Nine years after *Penn Central*, the Supreme Court in *Nollan* held that the Takings Clause places constitutional limits on the types of property that the state may demand from landowners in exchange for a land-use permit.<sup>22</sup> The case featured sympathetic landowners: a married couple who owned a small, run-down beachfront bungalow and wanted permission to tear it down to build a “three-bedroom house in keeping with the rest of the neighborhood.”<sup>23</sup> The California Coastal Commission demanded that the Nollans provide a public access easement along one side of their land in exchange for the permit, and ultimately granted the permit with the easement attached (over the landowners’ objections).<sup>24</sup>

Unlike in *Koontz*, the exaction demanded of the Nollans was unquestionably a taking—the Supreme Court noted that a public access easement destroys the “right to exclude,” which is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”<sup>25</sup> Turning to the then-novel issue of exactions, the Court held that the introduction of the land-use permitting process “alters the outcome” of the Takings Clause analysis.<sup>26</sup> The Court reasoned that states have a legitimate police power authority to refuse building permits on the grounds that new development might harm the community, therefore allowing states to condition permit approval on mitigating those harms.<sup>27</sup> *Nollan* is notable for placing a limit on this power. There must be an

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<sup>19</sup> 438 U.S. 104 (1978).

<sup>20</sup> *Koontz*, 133 S. Ct. at 2604 (Kagan, J., dissenting) (“Claims that government regulations violate the Takings Clause by unduly restricting the use of property are generally governed by the standards set forth in *Penn Central Transp. Co. v. New York City*.” (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005))).

<sup>21</sup> Tisher, *supra* note 9, at 761 (citing *McClung v. City of Sumner*, 548 F.3d 1219, 1225–28 (9th Cir. 2008)).

<sup>22</sup> *Nollan v. Cal. Coastal Comm’n*, 583 U.S. 825, 840–41 (1987).

<sup>23</sup> *Id.* at 827–28.

<sup>24</sup> *Id.* at 828.

<sup>25</sup> *Id.* at 831 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))).

<sup>26</sup> *Id.* at 834, 836–38.

<sup>27</sup> *Id.* at 836.

“essential nexus” between the “condition substituted for the prohibition” and the “end advanced as the justification for the prohibition.”<sup>28</sup>

*Nollan*’s requirement was nothing revolutionary—every court that had confronted exactions (besides the California state courts) had already come to a similar conclusion<sup>29</sup>—but it did mark the birth of the federal exactions doctrine.

The Supreme Court returned to exactions in 1994, adding the “rough proportionality” rule in *Dolan v. City of Tigard*, a five-to-four decision.<sup>30</sup> The Portland, Oregon suburb of Tigard determined that a proposed doubling in size of Florence Dolan’s plumbing supply store would increase local traffic and, in keeping with *Nollan*’s nexus test, demanded that she allow a municipal bike path to run through the rear portion of her property along Fanno Creek.<sup>31</sup> The Court accepted that a new bike path would alleviate vehicle traffic on city roads to some extent but held that the *Nollan* test demanded something more.

*Dolan* confirmed that the Constitution forbids land-use authorities from asking an unlucky property owner, who happens to be applying for a permit, to bear the cost of the negative externalities of other development in an area.<sup>32</sup> Florence Dolan’s store no doubt increased traffic in Tigard, but so did every other store downtown. The city’s demand was unconstitutional because it did not achieve “rough proportionality” to the specific harm the requested land-use change would cause.<sup>33</sup> This test, the Court claimed, occupied a fair middle ground between jurisdictions allowing a “generalized statement[] as to the necessary connection between the required dedication and the proposed development” and those that “require a very exacting correspondence.”<sup>34</sup>

#### B. Why *Nollan* and *Dolan* Might Have “Failed”

*Nollan* and *Dolan* were not without their critics. Both drew dissents complaining that the majority veered too far off the more deferential Takings Clause course charted in *Penn Central*.<sup>35</sup> *Dolan* was “politically

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<sup>28</sup> *Id.* at 836–37.

<sup>29</sup> *Id.* at 839–40, (citing twenty-five state and federal court decisions).

<sup>30</sup> 512 U.S. 374 (1994).

<sup>31</sup> *Id.* at 380–82.

<sup>32</sup> *Id.* at 384 (“One of the principal purposes of the Takings Clause is ‘to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))).

<sup>33</sup> *Id.* at 391.

<sup>34</sup> *Id.* at 389–91.

<sup>35</sup> *See id.* at 400–01 (Stevens, J., dissenting); *Nollan v. Cal. Coastal Comm’n*, 583 U.S. 825, 842–43 (1987) (Brennan, J., dissenting).

popular,” but detractors believed that its holding was doctrinally unsound and could even lead to the bankruptcy of state and local governments.<sup>36</sup>

Other observers noticed that the exactions cases left an enormous loophole: What happens if the government makes a big demand of a permit applicant and the landowner, hesitant about whether he will prevail in Court under *Nollan-Dolan* or uncomfortable with the costs of litigation, just says no? Professor Mark Fenster called these situations “failed exactions—regulatory conditions on property development that government agencies contemplate but that are never finalized or enforced.”<sup>37</sup> Fenster wondered whether *Nollan* and *Dolan* would apply to failed exactions, and whether they should.<sup>38</sup>

Here we also see the first glimmers of the Catch-22 behind the exactions cases: the more the Court constrains localities in the name of property rights, the more tempted localities are to avoid granting permits that could lead to litigation. This in turn could both weaken property rights and make the land-use negotiations process considerably less efficient for all parties involved. Critics such as Fenster cited this normative rationale as one reason why *Nollan* and *Dolan* should not have reached failed exactions.<sup>39</sup> In *Koontz* however, the Supreme Court chose to ignore these arguments, and it finally answered Fenster’s inquiry about failed exactions in the affirmative: Yes, *Nollan* and *Dolan* apply.<sup>40</sup>

### III. KOONTZ AND ITS (LACK OF) EFFECTS

#### A. Coy Koontz’s Pyrrhic Victory

It took Florida landowner Coy Koontz nineteen years to win a legal battle against his local land-use authority, during which time he died.<sup>41</sup> Koontz owned 14.9 acres of wetlands, and he wished to convert 3.7 of

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<sup>36</sup> Julian R. Kossow, *Dolan v. City of Tigard, Takings Law, and the Supreme Court: Throwing the Baby Out with the Floodwater*, 14 STAN. ENV. L.J. 215, 253–55 (1995).

<sup>37</sup> Mark Fenster, *Failed Exactions*, 36 VT. L. REV. 623 (2012).

<sup>38</sup> *Id.* at 624. Professor Fenster argued against applying *Nollan* and *Dolan* to failed exactions, calling the Takings Clause remedy “inappropriate and irrelevant” and believing that extending the doctrine “backwards in the regulatory process would stifle the reasonably functional, albeit imperfect and second-best universe of land use regulations . . .” *Id.* at 625.

<sup>39</sup> *Id.* at 644 (“The threat that failed negotiations can serve as the basis for a *Nollan* and *Dolan* challenge to an agency’s preliminary and informal offers will have significant effects on the bargaining process . . . [and] property owners might ultimately be harmed. Wary government agencies might simply deny permits and face lower scrutiny under the *Penn Central* test rather than discuss mitigation measures as conditions for approval and face heightened scrutiny under *Nollan* and *Dolan*.”).

<sup>40</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2588 (2013).

<sup>41</sup> *Id.* at 2592–93. Koontz applied for a permit in 1994. *Id.* at 2593. His case reached the Florida Supreme Court in 2010, and the United States Supreme Court issued an opinion favorable to his estate in 2013. *Id.* at 2594.

those acres into land suitable for development.<sup>42</sup> In recognition of the detrimental impact that draining, raising, and grading that tract would have on the environment, Koontz offered to deed to the St. Johns River Water Management District—a state agency from whom he needed a permit in order to modify wetlands—a conservation easement on his remaining property.<sup>43</sup> Unsatisfied, the District preferred that the development be confined to one acre, with 13.9 acres used for a conservation easement; or in the alternative, would allow Koontz to develop 3.7 acres in exchange for paying contractors to make improvements on District-owned land elsewhere in the area.<sup>44</sup> Koontz thought the demands were unreasonable, so he, *without formally accepting or declining the conditional permit*, filed suit against the District in state court<sup>45</sup>—and that order of events was the crux of the case.

Justice Alito framed the decision’s important place within Takings Clause jurisprudence explicitly. On the first page of his opinion, he explained that the Florida District “believe[d] that it circumvented *Nollan* and *Dolan*” when it “denied [Koontz’s] application” instead of “approv[ing] his application on the condition that he surrender an interest in land.”<sup>46</sup> But “*Nollan* and *Dolan*,” the Court concluded, “cannot be evaded in this way.”<sup>47</sup>

This part of the opinion was unanimous.<sup>48</sup> The Court explained its conclusion as simply bringing exactions in line with other unconstitutional conditions jurisprudence. “[R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right,” Justice Alito wrote, “the unconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.”<sup>49</sup> The decision also made note of the practical argument that *Nollan* and *Dolan* would mean nothing if land-use authorities could simply change the words on permit conditions from “approved if” to “denied until” and avoid exactions challenges altogether.<sup>50</sup>

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<sup>42</sup> *Id.* at 2591–92.

<sup>43</sup> *Id.* at 2592–93.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 2593.

<sup>46</sup> *Id.* at 2591.

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

<sup>48</sup> *Id.* at 2603 (Kagan, J., dissenting) (“I think the Court gets the first question it addresses right. The *Nollan-Dolan* standard applies not only when the government approves a development permit conditioned on the owner’s conveyance of a property interest . . . but also when the government denies a permit until the owner meets the condition (*i.e.*, imposes a condition precedent).”). Justices Ginsburg, Breyer, and Sotomayor joined Justice Kagan’s dissent. *Id.*

<sup>49</sup> *Id.* at 2595 (majority opinion).

<sup>50</sup> *Id.* at 2595–96.

In explaining the extension of *Nollan* and *Dolan* to conditions precedent, *Koontz* also added two insights that are particularly relevant to this Note. First, governments may still deny land-use permits unconditionally (subject to *Penn Central* and its descendant Takings Clause jurisprudence). The unconstitutional conditions doctrine cannot apply when there are no conditions to parse.<sup>51</sup> Second, while the Takings Clause comes into play for un-granted permits, its “just compensation” remedy does not.<sup>52</sup> That is, the Constitution guarantees *Koontz* and plaintiffs like him nothing, even if they win. States may provide their own remedies by statute, however, and since *Koontz* brought his claim pursuant to Florida law, his case was remanded to Florida courts.<sup>53</sup> This is what makes *Koontz*’s victory pyrrhic, and this is the initial foundation for why this Note suggests the case was not as important as its detractors and defenders claim.

The Court split five to four on whether permit conditions demanding that an applicant spend money rather than convey a real property interest fall under the *Nollan-Dolan* rubric. The majority found that they did.<sup>54</sup> This Note is not concerned with this secondary holding.

On remand, Florida’s Fifth District Court of Appeal reinstated a 2009 decision it issued (*Koontz IV*), upholding the trial court’s finding that Coy *Koontz* was entitled to compensation under Florida law.<sup>55</sup> The St. Johns River Water Management District temporarily took *Koontz*’s land by conditioning a permit on unconstitutional conditions, and for that the District owed him \$376,154.<sup>56</sup>

### *B. The Academic Panic*

The academic response to *Koontz* was predominantly negative.<sup>57</sup> Within a year of the opinion, it was attacked as “wrongly decided,”<sup>58</sup> “unfortunate,”<sup>59</sup> and “the worst takings decision of all time.”<sup>60</sup> More recently, Professor John Echeverria, an outspoken critic of *Koontz*,

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<sup>51</sup> *Id.* at 2596.

<sup>52</sup> *Id.* at 2597.

<sup>53</sup> *Id.* at 2597, 2603.

<sup>54</sup> *Id.* at 2598–602.

<sup>55</sup> *St. Johns River Water Mgmt. Dist. v. Koontz*, 2014 Fla. App. LEXIS 6371 (2014) (*Koontz VIII*) (affirming *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8 (Fla. 5th DCA 2009) (*Koontz IV*)). The District appealed this ruling again, but in 2015, the Florida Supreme Court denied rehearing, avoiding a “*Koontz IX*” and ending the saga more than two decades after it began.

<sup>56</sup> *Koontz IV*, 5 So. 3d at 16–17.

<sup>57</sup> See *supra* notes 8 (summarizing some positive reactions to *Koontz*) and 9 (summarizing some negative reactions to *Koontz*).

<sup>58</sup> Tisher, *supra* note 9, at 744.

<sup>59</sup> Echeverria, *The Very Worst*, *supra* note 9, at 1.

<sup>60</sup> Tappendorf & DiCianni, *supra* note 9, at 467–68.

updated his critique of the decision in greater detail than has been written about elsewhere.<sup>61</sup>

Professor Echeverria categorizes the four primary ills of *Koontz* as: 1) “doctrinal costs;” 2) “upsetting the system of separated powers;” 3) “undermining federalism;” and 4) “undermining effective and efficient land use governance.”<sup>62</sup> This Note addresses Echeverria’s fourth critique: that *Koontz* diminishes the quality and increases the costs of land-use governance, a criticism echoed by several other authors.<sup>63</sup> This Note does not argue that *Koontz* was positively beneficial to land-use governance, but data show that Echeverria’s assertion that *Koontz* was harmful is unsupported. It is therefore helpful to know why, precisely, the academic panic wrongly predicted the end of land-use regulation as we know it and failed to foresee the conclusions of this Note.

Echeverria first addresses the costs of additional work that *Koontz* will require land-use regulators to do. Since the case extends *Nollan* and *Dolan* to apply to many more situations (specifically: proposed but not finalized conditional permits and monetary exactions), there are now many more instances where local government must confirm an essential nexus and calculate rough proportionality.<sup>64</sup> This will make the permitting process slower and more expensive, creating costs that Echeverria believes localities will pass on to developers.<sup>65</sup>

On top of this, Echeverria also criticizes *Koontz* for creating a “perverse set of incentives for local officials that will make them less willing to work with developers to formulate project plans that may serve the interests of both the developer and the community.”<sup>66</sup> Since the government may still deny permits unconditionally without wading into *Nollan-Dolan/Koontz* waters and the expensive litigation that goes along with that, non-negotiation could become the default.<sup>67</sup> Fewer negotiations mean fewer opportunities for developers and government officials to brainstorm results maximally beneficial to both parties.<sup>68</sup> First, these two

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<sup>61</sup> See Echeverria, *The Very Worst*, *supra* note 9.

<sup>62</sup> Echeverria, *Costs of Koontz*, *supra* note 9, at 575, 586, 595, 606.

<sup>63</sup> See *supra* note 9 (summarizing several articles that make normative critiques of *Koontz*).

<sup>64</sup> Echeverria, *Costs of Koontz*, *supra* note 9, at 606.

<sup>65</sup> *Id.* at 607.

<sup>66</sup> *Id.* The “negotiations chilling” attack on *Koontz* is a recurring theme in literature criticizing the decision. See, e.g., Farrell, *supra* note 9, at 74 (claiming that landowners are now incentivized to lowball regulators when in negotiations with them); Tappendorf & DiCianni, *supra* note 9, at 470–73 (criticizing the Court for not considering the “practical effects of its decision,” which include among them serious damage to the balance of land-use negotiations); Tisher, *supra* note 9, at 758–62 (explaining that a new, more flexible type of negotiation is necessary in the wake of *Koontz*).

<sup>67</sup> Echeverria, *Costs of Koontz*, *supra* note 9, at 607.

<sup>68</sup> *Id.* at 608.

problems are mutually exclusive. If a land-use authority refrains from negotiating, then it does not need to worry about compliance with *Nollan* and *Dolan*. If, on the other hand, the government agency goes through the extra work of a careful *Nollan-Dolan* analysis of each set of proposed conditions it has in mind, then it will go into negotiations with little fear of litigation.

Professor Echeverria's conclusions are predicated on four assumptions: 1) that developers and government usually disagree; 2) that land-use authorities will follow *Koontz* strictly; 3) that developers will frequently threaten (and often follow through with) litigation; and 4) that those threats will be perceived as credible.<sup>69</sup>

Echeverria believes taking *Koontz* litigation threats seriously is the "prudent" thing for local officials to do, and that the decision will therefore change behavior.<sup>70</sup> He offers a modicum of empirical evidence to support this assertion.

First, Echeverria notes that *Dolan* challenges are more successful than *Penn Central* challenges. The "impressive" fact that exactions challenges succeed about 50 percent of the time has "undoubtedly been noticed by lawyers representing local governments."<sup>71</sup> This, he concludes, lends credibility to developers' threats to sue over permit conditions.<sup>72</sup>

Additionally, Echeverria points to the one known on-the-ground study of *Nollan* and *Dolan*'s influence over land-use regulators. While its results were "ambiguous," there was evidence that the exactions cases did in some instances cause authorities to abandon conceived-of demands.<sup>73</sup> By "expanding the domain of *Nollan* and *Dolan*," Echeverria conceives that *Koontz* will "compound these losses."<sup>74</sup>

Professor Echeverria's conclusions and evidence are persuasive, but his baseline assumptions are unfounded. This Note pushes back on the (admittedly attractive) idea that affected parties actually follow the Supreme Court's directives, beginning with a story of what one affected party in Virginia did in reaction to *Koontz*.

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<sup>69</sup> *Id.* at 606–09.

<sup>70</sup> *Id.* at 607–08.

<sup>71</sup> *Id.* at 609.

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

<sup>73</sup> *Id.* (citing Anne E. Carlson & Daniel Pollack, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 106–08 (2001)).

<sup>74</sup> *Id.*

### C. The Political Reality and Virginia's Reaction

Fanfare and hand-wringing over *Koontz* were not limited to the pages of law journals. Political rivals lined up to praise or condemn the decision, with national trade associations claiming the case would have major consequences.

The National Association of Homebuilders (“NAHB”), which had filed an amicus brief in support of Coy Koontz’s position, was delighted when the opinion came down.<sup>75</sup> The organization claimed that “some local governments seem all too willing” to make extortionate demands of developers.<sup>76</sup> *Koontz* eliminated an “easy workaround for the *Nollan/Dolan* test” and gave “landowners ammunition to fight permitting officials that attempt to hold up approvals until the landowner surrenders to their extortion.”<sup>77</sup> The NAHB concluded “[t]his is a huge victory.”<sup>78</sup>

The trade association representing the other side of the land-use negotiating table was as unhappy as the NAHB was pleased. The American Planning Association (“APA”), which had filed an amicus brief explaining why *Nollan* and *Dolan* should not be expanded to non-finalized conditions, called the decision a “terrible precedent” that gave landowners disproportionate power.<sup>79</sup> Like Echeverria, the APA believed *Koontz* was a “blow to . . . good-faith discussions with landowners” and would “instill fear in local agencies to even begin” negotiations.<sup>80</sup> Developers, on the other hand, are now “emboldened to sue . . . based on little more than the informal offers of a government agency.”<sup>81</sup>

Elsewhere, however, at least one interested party quickly realized that *Koontz* is nearly worthless without a strong remedy.

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<sup>75</sup> *Supreme Court Decision in Koontz v. St. Johns River Water Management District*, NAT’L ASS’N OF HOMEBUILDERS, <https://www.nahb.org/en/research/nahb-priorities/property-rights/supreme-court-decision-in-koontz-v-st-johns-river-water-management-district.aspx> (last visited Nov. 12, 2015) [hereinafter NAHB, Statement on *Koontz*]. The National Association of Homebuilders describes itself as the “voice of America’s housing industry.” A federation of more than 140,000 members, the NAHB represents the builders of eighty percent of annual new residential development in the United States. *About NAHB*, NAT’L ASS’N OF HOMEBUILDERS, <https://www.nahb.org/en/about-nahb.aspx> (last visited Nov. 12, 2015) [hereinafter About NAHB].

<sup>76</sup> NAHB, Statement on *Koontz*, *supra* note 75.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Press Release, Am. Planning Ass’n, Supreme Court Expands Takings Test (June 25, 2013) (on file with author) [hereinafter APA Press Release]. The APA represents “planning commissioners, elected officials, and engaged citizens.” *History*, AM. PLANNING ASS’N, <https://www.planning.org/apaatagance/history.htm> (last visited July 7, 2015). The Association states its mission as “provid[ing] leadership in the development of vital communities . . . and providing the tools and support necessary to meet the challenges of growth and change.” *APA at a Glance*, AM. PLANNING ASS’N, <https://www.planning.org/apaatagance/> (last visited July 7, 2015).

<sup>80</sup> APA Press Release, *supra* note 79.

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



### *1. Virginia Developers found Koontz Lacking and Asked for More*

In the first Virginia state legislative session after *Koontz*, the Homebuilders Association of Virginia (“HBAV”) pushed for legislation to create powerful remedies in state court for landowners who prevail in challenging an exaction as unconstitutional.<sup>82</sup> The “Koontz Remedies Act”<sup>83</sup> was a direct response to the Supreme Court’s decision.<sup>84</sup>

Virginia’s battle over the Koontz Remedies Act looked like a microcosm of the national debate over exactions. Homebuilders battled local government, but in the legislature instead of the courts. Each side called forth citizen lobbyists and put out press releases. The HBAV called the bill their “Number 1 Priority” [sic] for the entire year,<sup>85</sup> and the Virginia Association of Counties (“VACo”) pushed to defeat the legislation.<sup>86</sup>

The HBAV asked its membership to “travel to Richmond” by the “busload,” wearing hardhats and company logo apparel to let the “House of Delegates and State Senate . . . know that the ‘Housers have come to Town!’”<sup>87</sup> VACo, in turn, put out a “Capitol Contact ALERT!” encouraging supporters to call members of the relevant House and Senate committees in the days before the bills were considered.<sup>88</sup> Their announcement explicitly referenced *Koontz*, stating that the proposed bills would go “considerably beyond what the *Koontz* decision requires.”<sup>89</sup>

VACo provided seven “talking points” in opposition to the Koontz Remedies Act, many of which were more particularized than the general doom-and-gloom predictions of Professor Echeverria and the APA.<sup>90</sup> One point, however, looked familiar: “The bills will actually discourage some

<sup>82</sup> HOMEBUILDERS ASSOC. OF VA., 2014 Legislative Bulletin, 4th ed. 2–3 (Jan. 31, 2014), available at <http://www.hbav.com/site/publisher/files/pdfs/legislative-bulletin/2014-LB4-1.31.14.pdf> [hereinafter HBAV Legislative Bulletin].

<sup>83</sup> This is a nickname I give to HB 1084 and SB 578. In Virginia, bills and acts of the assembly rarely, if ever, have formal names, and HB 1084 did not have one to the best of my knowledge.

<sup>84</sup> HBAV Legislative Bulletin, *supra* note 82, at 3 (naming *Koontz* as the motivation behind the bill).

<sup>85</sup> *Id.*

<sup>86</sup> Gage Harter, *VACo Opposes Attorney’s Fees Bills up for Consideration on Monday* VA. ASS’N OF COUNTIES (Jan. 23, 2014), <http://www.vaco.org/vaco-opposes-attorneys-fees-bills-up-for-consideration-on-monday/> [hereinafter VACo Press Release]. The Virginia Association of Counties, a state counterpart to the National Association of Counties, “exists to support county officials,” lobbies at the state and federal levels, and is governed by “a board of directors made up of local government officials.” VACo, VA. ASS’N OF COUNTIES, <http://www.vaco.org/vaco/> (last visited Nov. 12, 2015).

<sup>87</sup> HBAV Legislative Bulletin, *supra* note 82, at 2–3.

<sup>88</sup> VACo Press Release, *supra* note 86.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

zoning approvals,” wrote VACo, “because localities will find it less risky simply to deny requests rather than negotiating conditions that applicants can challenge later.”<sup>91</sup> The HBAV’s policy argument, on the other hand, was that the new law would “encourage localities to stay within the parameters of the *Nollan-Dolan* test when considering local land use decisions in the future.”<sup>92</sup>

The Virginia Koontz Remedies Act passed with almost no opposition and was signed into law by Governor Terry McAuliffe.<sup>93</sup> The debate over and passage of the legislation exemplifies the attention that interested parties paid to *Koontz*, while also illuminating the decision’s practical futility in the absence of better remedies. Checking in on the status of the Virginia law eighteen months after its enactment will also help show that *Koontz* has not turned out to be the litigation-spawning machine some feared it would become.<sup>94</sup>

#### IV. WHY THE EXACTIONS DOCTRINE REMAINS JUDICIALLY INEFFECTIVE AND GOVERNMENT STILL HAS NOT LOST CONTROL OF LAND-USE NEGOTIATIONS; AND NUMBERS TO PROVE IT

This Section details the biggest deficiency in the efficacy of the *Nollan-Dolan/Koontz* doctrine. That is, developers are still deterred from engaging in exactions litigation because of the high costs of a lawsuit and the relatively small reward that comes with a win in court. Both of these factors stand in stark contrast to the lower costs and higher benefits of agreeing to terms offered in negotiations or even walking away without an agreement.<sup>95</sup>

This Note does not argue that *Koontz* did nothing to shift the balance of land-use negotiations, nor does it suggest that local government should

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<sup>91</sup> *Id.* VACo added a curious, perhaps ominous, prediction to this talking point, asking: “Do we really want to return to the zoning litigation wars of 20 years ago?” *Id.*

<sup>92</sup> HBAV Legislative Bulletin, *supra* note 82, at 3.

<sup>93</sup> The House version of the Act (HB 1084) passed the Senate by a vote of thirty-eight to two, and the House by a vote of ninety-five to three. LEGISLATIVE INFO. SERVS., HB 1084 PERMITS AND APPROVALS, CERTAIN; DAMAGES FOR UNCONSTITUTIONAL GRANT OR DENIAL BY LOCALITY, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=141&typ=bil&val=hb1084> [hereinafter HB 1084 Legislative History]. The Senate version (SB 578), which was identical, passed the Senate unanimously and the House by a vote of ninety-eight to one, with one abstention. LEGISLATIVE INFO. SERVS., SB 578 PERMITS AND APPROVALS, CERTAIN; DAMAGES FOR UNCONSTITUTIONAL GRANT OR DENIAL BY LOCALITY, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?141+sum+SB578> [hereinafter SB 578 Legislative History]. The lone abstention came from Delegate Randy Minchew, a practicing land-use attorney. *Id.*; Walsh Colucci Lubeley & Walsh PC, J. Randall Minchew, <http://thelandlawyers.com/j-randall-minchew/> (last visited Nov. 12, 2015).

<sup>94</sup> See *infra* Part IV.C.2.

<sup>95</sup> In some cases there may even be *no* remedy available to successful exactions plaintiffs. See *infra* Part IV.A.3.

consider itself free to make extortionate demands in violation of *Nollan* and *Dolan* with no fear of being sued. It does, however, push back against *Koontz*'s opponents' assertion that the decision put landowners firmly in the driver's seat of the land-use permitting process,<sup>96</sup> and it likewise concludes that supporters exaggerated in calling the case a major victory for property rights.<sup>97</sup> With the high costs and low rewards of litigation in mind, the threat of exactions litigation is not as credible as some believe it to be, and land-use negotiations are therefore still somewhat evenly balanced in the wake of *Koontz*.

*A. Weighing the Costs and Benefits of Litigation from a Developer's Perspective*

*1. Litigation Costs Start to Explain Why Repeat Players Don't Sue*

Going to court over a land-use regulation is rarely worth it.<sup>98</sup> Lawsuits are very expensive,<sup>99</sup> and in the case of *Koontz* challenges to never-finalized permits, landowners risk spending a great deal of money for the prospect of little to nothing in return.<sup>100</sup> This severe imbalance between the costs and benefits of exactions litigation could be the last words on the subject, for *Koontz* would mean nothing if landowners were never in a position to gain from a lawsuit over unconstitutional conditions proposed during negotiations.

There are exceptions to the very general principle that land-use litigation is not worth it, notably the (sometimes famous) cases of individual landowners, backed by property-rights advocates, seeking symbolic victories. Coy Koontz, for example, was fortunate to have the Pacific Legal Foundation—a non-profit public interest law organization<sup>101</sup>—take his case to the Supreme Court.<sup>102</sup> David Lucas, the

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<sup>96</sup> See APA Press Release, *supra* note 79 (“This decision . . . allow[s] landowners to determine what they feel are sufficient mitigation efforts” and “[i]f a local agency disagrees, the landowner is emboldened to sue.” (internal quotation marks excluded)).

<sup>97</sup> NAHB, Statement on *Koontz*, *supra* note 75 (“[*Koontz*] is a huge victory.”).

<sup>98</sup> The economics of land-use regulations and litigation have been written about far more extensively than this Note can explore. See generally THOMAS J. MICELI & KATHLEEN SEGERSON, COMPENSATION FOR REGULATORY TAKINGS: AN ECONOMIC ANALYSIS WITH APPLICATIONS 6–12 (1996) (introducing the economic concerns that frame a normative analysis of the value of land-use regulations versus judicially mandated compensation).

<sup>99</sup> See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 379 (5th ed. 2008) (“[L]itigation is expensive and sometimes ruinously so.”).

<sup>100</sup> See *infra* Part IV.A.3.

<sup>101</sup> *About PLF*, PAC. LEGAL FOUND., <http://www.pacificlegal.org/about1> (last visited Nov. 22, 2015).

<sup>102</sup> *St. Johns River Water Management District v. Koontz*, PAC. LEGAL FOUND., <http://www.pacificlegal.org/cases/Theres-no-off-site-exception-to-Fifth-Amendments-takings-clause> (last visited Nov. 22, 2015).

plaintiff in *Lucas v. South Carolina Coastal Council*, saw himself as such a crusader that he published a book about his efforts, subtitled: “The landmark Supreme Court property rights decision by the man who won it against all odds, and his continuing fight to protect YOUR property rights!”<sup>103</sup> Indeed, some of the most memorable and important property law decisions feature sympathetic individual landowners as plaintiffs; people like Susette Kelo, Florence Dolan, or Jean Loretto, whose cases concerned only a single piece of property on which they resided or did business.<sup>104</sup> But the reality is that most development is undertaken by professionals—repeat players in the world of land-use negotiations who might behave differently in negotiations and in the courtroom.<sup>105</sup>

Of greater importance is the *threat* of litigation that repeat players might bring up during negotiations to reduce their exactions burden. Even if exactions litigation were never successful (and research shows it is successful about half the time),<sup>106</sup> litigation is costly for both sides and is something local governments will want to avoid when they can.<sup>107</sup> Whether threats make a difference in negotiations, in turn, depends on their credibility.

## 2. Incredible Threats and Intangible Costs

Repeat players in the zoning market have several reasons to avoid litigation beyond the direct costs of going to court. First, both sides stand to benefit when land is developed,<sup>108</sup> and filing complaints delays pouring concrete.

Developers also have an incentive to maintain good relationships with land-use regulators that single-property landowner plaintiffs like Susette Kelo or Coy Koontz do not. Indeed, local government officials frequently rely on campaign contributions from developers, which some observers claim are used to buy influence.<sup>109</sup> While there are cases of regulators and

<sup>103</sup> DAVID LUCAS, *LUCAS V. THE GREEN MACHINE* (1995) (emphasis in original).

<sup>104</sup> See *Kelo v. City of New London*, 545 U.S. 469, 475 (2005); *Dolan v. City of Tigard*, 512 U.S. 374, 379 (1994); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

<sup>105</sup> See, e.g., About NAHB, *supra* note 75 (More than eighty percent of new residential development in the United States is built by National Association of Homebuilders members.).

<sup>106</sup> Echeverria, *Costs of Koontz*, *supra* note 9, at 609.

<sup>107</sup> COOTER & ULEN, *supra* note 99, at 380 (hypothesizing that the high costs of litigation make potential defendants more cautious in their behavior in order to avoid being sued).

<sup>108</sup> See *infra* Part IV.B. As the value of land goes up with development, its landowner directly benefits and local government indirectly benefits by collecting more property taxes. *Id.*

<sup>109</sup> See, e.g., Aaron C. Davis, *Big Money for the White House and for Congress. Now for D.C. City Hall, Too?*, THE WASH. POST, Oct. 17, 2015 (reporting that “corporations that either have business before the city or that are actively seeking it” are the largest contributors to the D.C. Mayor’s PAC, with multiple developers bidding for the same project “hav[ing] each donated \$10,000” or more); Justin Miller, *The New Public Option*, THE AMERICAN PROSPECT, Fall 2015

developers not getting along,<sup>110</sup> a common critique of the land-use regulatory scheme is that developers have too close a relationship with government.<sup>111</sup> Developers suing those same politicians they backed might be counterproductive toward building the friendly relationships desired.

So long as the government is aware of these costs to the developer, the threat of a potentially successful lawsuit will become less credible, and negotiations will shift in favor of the regulators. In turn, the state can propose its own drastic threat: to withdraw from negotiations entirely and deny the requested permit unconditionally.<sup>112</sup> While such a decision could harm the locality, the developer concerned with one particular piece of land has far more to lose than a big municipality with many interests, making the government's threat to walk away more "valuable" than the developer's threat to litigate.<sup>113</sup>

Further exploration of the value of these threats requires understanding what landowners have to gain from an exactions lawsuit (usually very little), and the size of the constitutional backstop on the government's ability to withdraw from negotiations (usually small).

### 3. *The Constitutionally Mandated Remedy And the Extent to Which Government Can "Just Say No" to Permits*

Remember that the United States Supreme Court provided no remedy to Coy Koontz, and stated that when nothing is taken the Takings Clause of the U.S. Constitution does not require any compensation.<sup>114</sup> Instead,

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("In New York City, real-estate developer money has long run roughshod over the political process. . . . 'Without public campaign financing, New York City politics would be completely owned by the real estate industry . . .,' says Bill Lipton, director of the New York Working Families Party."); Bill Mahoney, *REBNY Members Gave a Tenth of All N.Y. Campaign Money*, POLITICO NEW YORK (Apr. 15, 2015, 5:49 AM), <http://www.capitalnewyork.com/article/albany/2015/04/8566024/rebny-members-gave-tenth-all-ny-campaign-money> ("Members of the Real Estate Board of New York and their firms gave \$21.7 million in campaign contributions to state-level elections in the last cycle, accounting for more than 10 percent of the money that entered the campaign finance system.").

<sup>110</sup> See, e.g., *supra* Part III.C (detailing a political face-off between homebuilders and localities in Virginia).

<sup>111</sup> See, e.g., JAN RATH, *TOURISM, ETHNIC DIVERSITY AND THE CITY* 160 (2007) ("[W]ide-reaching political influence [is] available to major developers," in contrast with local governments' "neglect of small-scale . . . local ethnic entrepreneurs."); BERNARD H. ROSS & MYRON A. LEVINE, *URBAN POLITICS: CITIES AND SUBURBS IN A GLOBAL AGE* (2011) (explaining how proponents of exclusionary zoning sometimes justify the practice by claiming that "[p]roperty developers . . . possess significant influence in the developmental arena" and that "growth advocates" tend to "exacerbate this power imbalance.").

<sup>112</sup> Remember that the unconditional denial of a permit does not trigger *Nollan-Dolan/Koontz* scrutiny. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596 (2013).

<sup>113</sup> See COOTER & ULEN, *supra* note 99, at 79–81 (explaining threat values).

<sup>114</sup> *Koontz*, 133 S. Ct. at 2597.

*Koontz* and cases like it are more appropriately classified as unconstitutional conditions rather than regulatory takings. The unconstitutional conditions doctrine holds that the government is free to dole out or withhold benefits at its own discretion, but, as soon as the state places conditions on receipt of those benefits, the conditions must not burden a constitutional right.<sup>115</sup>

On remand, the Florida courts awarded Koontz \$376,154 in compensatory damages.<sup>116</sup> By denying the applicant use of his own land under unconstitutional conditions for six years, the St. Johns River Water Management District had temporarily taken Koontz's land and had to pay for that taking under state law.<sup>117</sup> At the federal level however, the "temporary takings" principle is not so cut-and-dry.

The Supreme Court took up the issue in 2002 and held that a temporary ban on all development might sometimes be a regulatory taking requiring just compensation, but in most instances it is not.<sup>118</sup> The Court's decision in *Tahoe-Sierra* instructed federal courts to look at the reasonableness of the length of time the temporary taking occurs in relation to the state's purpose to restrict development, along with the seriousness of the burden placed on affected landowners.<sup>119</sup> If these standards sound familiar, that is because they come straight from *Penn Central*.<sup>120</sup>

The challenge of temporary takings, however, required the Court to balance *Penn Central* with another major takings case, *Lucas v. South Carolina Coastal Commission*.<sup>121</sup> Ultimately, the *Tahoe-Sierra* Court partially distinguished temporary takings from *Lucas*, quoting that case's own caveat that it was limited to "extraordinary circumstance[s]."<sup>122</sup> The upshot was that delaying a permit under unconstitutional conditions only might be a temporary taking, and even if it is, the aggrieved applicant might not get compensation under Takings Clause jurisprudence.<sup>123</sup>

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<sup>115</sup> BLACK'S LAW DICTIONARY 1757 (10th ed. 2014).

<sup>116</sup> St. Johns River Water Mgmt. Dist. v. Koontz, 2014 Fla. App. LEXIS 6371 (2014) (*Koontz VIII*) (affirming *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8 (Fla. 5th DCA 2009) (*Koontz IV*)).

<sup>117</sup> *Koontz IV*, 5 So. 3d at 17 (Griffin, J., dissenting) (describing the trial court's findings of fact). The damages were calculated by counting the rental value that Koontz could have obtained from the property had the permit been issued.

<sup>118</sup> *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321–42 (2002).

<sup>119</sup> *Id.* at 340–42.

<sup>120</sup> *Id.* at 325–27.

<sup>121</sup> 505 U.S. 1003 (1992).

<sup>122</sup> *Tahoe-Sierra*, 535 U.S. at 330 (quoting *Lucas*, 505 U.S. at 1019–20, n.8).

<sup>123</sup> In cases where a state or local government deprives a person's constitutional rights and actual damages occur, the aggrieved party may seek a remedy in federal courts under 42 U.S.C. § 1983. See JOHN C. JEFFRIES ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 43–50 (2d ed. 2007).

*Lucas* is also important in the context of this Note because it draws a clear line that localities may not cross when they refuse outright to grant land-use permits.<sup>124</sup> Specifically, if a property owner is not allowed to build anything on her land without a permit, that is almost definitely a “total taking” in violation of *Lucas*, and a court would order the state to either allow some development or purchase the land at fair market value. The “total taking” issue is relatively easy to avoid: Per the *Tahoe-Sierra* Court’s own words, *Lucas* rarely comes into play, so the constitutional backstop on localities’ ability to “just say no” is fairly small.<sup>125</sup> Land-use regulators have other, political reasons to avoid denying permits outright,<sup>126</sup> but they have little to lose in court if and when they choose to do so.

#### 4. *The Maximum Benefit: Virginia’s Statutory Remedies*

The Virginia legislature, with encouragement from the state’s Homebuilders Association, enacted a statute intended to provide for stronger remedies when landowners successfully challenge exactions as unconstitutional.<sup>127</sup> The law’s supporters mentioned *Koontz* and stated a desire to “encourage localities to stay within the parameters of the *Nollan/Dolan* test when considering local land use decisions” as part of their lobbying efforts.<sup>128</sup>

This Koontz Remedies Act substantially bolstered the attractiveness of exactions litigation in Virginia. It applies to “any applicant aggrieved by the grant or denial by a locality of any approval or permit . . . where such grant included, or denial was based upon, an unconstitutional condition.”<sup>129</sup> That hypothetical applicant is “entitled to . . . compensatory damages” and, perhaps most importantly, to “an order remanding the matter to the locality with a direction to grant or issue such permits or approvals without the unconstitutional condition . . . .”<sup>130</sup>

At the very least, this eliminates the possibility of a futile challenge to exactions where, even if the court finds the permit conditions unconstitutional, the land-use authority would have the opportunity go back and re-deny the permit unconditionally. But the law does much more to tilt the balance in favor of developers by granting attorney’s fees and

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<sup>124</sup> *Lucas*, 505 U.S. at 1015–16.

<sup>125</sup> *Tahoe-Sierra*, 535 U.S. at 330 (quoting *Lucas*, 505 U.S. at 1019–20, n.8).

<sup>126</sup> See *infra* Part IV.B.

<sup>127</sup> See *supra* Part III.C.1.

<sup>128</sup> HBAV Legislative Bulletin, *supra* note 82, at 3.

<sup>129</sup> VA. CODE ANN. § 15.2-2208.1 (2014).

<sup>130</sup> *Id.* (emphasis added).

court costs to a victorious landowner (but not to a locality that successfully defends its actions).<sup>131</sup> The statute even places the burden on the government to prove, by clear and convincing evidence, that any unconstitutional conditions present during the permitting process were not the basis for approval or denial of that permit.<sup>132</sup>

Virginia law enhances the remedy available to aggrieved permit-seekers while also reducing the costs of litigation and making success more likely. This would hypothetically increase exactions litigation, force localities to more readily give into developer demands, or do both. But the law would have little practical effect if developers and localities had already struck a working balance before the Koontz Remedies Act took effect. Section IV.C, explores data supporting this latter theory.

### *B. A Realist Explanation for Why We Shouldn't Expect Exactions Litigation*

This Note's cost-benefit analysis of exactions litigation fits into the larger theory that developers and government want to get along. Cooperation produces optimal results,<sup>133</sup> and both parties stand to benefit when land is actually developed. Localities are property-tax dependent,<sup>134</sup> and when development increases the value of property, the state increases its tax base.

Development is not free, so land-use negotiations concern who bears which costs. Exactions are a way for localities to force developers to absorb externalities, enable government to provide facilities for faster growth, and generally encourage more efficient growth patterns.<sup>135</sup> But this does not suggest that governments will routinely demand so much from landowners that any proposed development will become unprofitable and never be completed. The related idea that the Supreme Court's efforts to constrain exactions are unnecessary is not new.

In the early years after *Nollan*, Professor Vicki Been explained in great detail why the market—not the Constitution—provides sufficient protection from excessive exactions. She wrote, “A primary source of discipline in the market is . . . the availability of exit—the opportunity a

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

<sup>132</sup> *Id.*

<sup>133</sup> COOTER & ULEN, *supra* note 99, at 78–79 (introducing bargaining theory and the mutual detriment of failed negotiations).

<sup>134</sup> TAX POLICY CENTER, LOCAL PROPERTY TAXES AS A PERCENTAGE OF TOTAL LOCAL TAX REVENUE, SELECTED YEARS 1977–2012 1 (Jan. 12, 2015), available at [http://www.taxpolicycenter.org/taxfacts/Content/PDF/dqs\\_table\\_84.pdf](http://www.taxpolicycenter.org/taxfacts/Content/PDF/dqs_table_84.pdf) (In 2012, 75.9 percent of local tax revenue derived from property taxes.).

<sup>135</sup> Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 482–83 (1991).



dissatisfied person has to . . . move from the jurisdiction.”<sup>136</sup> Been advocated for giving localities more leeway with how and to what degree they demand exactions, concluding that because localities compete for development, market “pressures” usually do enough to “constrain local governments’ exactions practices.”<sup>137</sup>

Exit, however, can be expensive and unattractive for developers. Investors who have purchased land with the expectation of being able to increase the value of that property through development (which in turn might require a zoning variance or at least a permit) stand to lose more than just the marginal value that the development would have added should they fail; they have sunk expenses into the acquisition and holding of that land that they might not recoup. Furthermore, new investors are unlikely to purchase that land for anything more than its present value if they know about the current owners’ attempt and failure to increase its future value.<sup>138</sup>

Professor Stewart Sterk pushed back on Been’s conclusions on an even broader theoretical basis. Sterk admitted that municipalities might compete for development, but he argued that anti-growth politics, the unique value of land, and the “monopoly power” that localities have over developers allow and encourage government to rent-seek from landowners.<sup>139</sup> Sterk did not assert that land-use authorities will usually make extortionate demands, simply that “competition *alone* will not prevent municipalities” from doing so.<sup>140</sup> He admitted, however, that developers’ participation in the political process combines with exit to amplify their influence.<sup>141</sup>

Ultimately, Been and Sterk each conceded that, despite their disagreement over the merits of constitutionalizing the exactions doctrine, many land-use negotiations really are balanced. Both developers and governments will try to force the other to absorb as many costs as possible, but sufficient factors check each party’s willingness to do anything too extreme.<sup>142</sup>

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<sup>136</sup> *Id.* at 476.

<sup>137</sup> *Id.* at 478, 529–31.

<sup>138</sup> *See, e.g.*, ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 42–43 (6th ed. 2012) (explaining that the expected monetary value of a good takes into account the likelihood—in the purchaser’s mind—that a future event will occur that will make the product more or less valuable).

<sup>139</sup> Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 *VAND. L. REV.* 831, 833–34 (1992).

<sup>140</sup> *Id.* at 867 (emphasis added).

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

<sup>142</sup> Been, *supra* note 135, at 503–06; Sterk, *supra* note 139, at 867. Professors Been and Sterk also each hypothesize a great deal that cannot be true, and in doing so, both are right and both are wrong. Foremost, both must (and do) admit the reality is that not all municipalities are created equal: some are desperate for growth while others have strong anti-growth contingencies. Been,

Professor Been's and Professor Sterk's conclusions as applied to *Koontz* are not much different from what they were as applied to *Dollan* more than two decades ago. In most cases, local governments will not be in a bargaining position to demand disproportionate conditions, but neither will developers want to walk away from negotiations the moment they notice their own costs rising to a level they consider unfair.

If localities will not usually demand the kinds of conditions that would rise to the level of a *Nollan-Dolan* violation, and if developers have their own reasons to work things out rather than sink more costs into litigation, parties are not any more likely to end up in court than they were before *Koontz*. This Note strengthens this conclusion by detailing how little developers have to gain by bringing a costly lawsuit.

*Koontz*, in other words, may move the needle of negotiations slightly in favor of developers by giving them one more opportunity to threaten a lawsuit, but knowing that land-use negotiations were already in a state of relative balance helps explain why exactions litigation is so uncommon to begin with.

Furthermore, if both parties have strong incentives to get along, we should never have expected to see a rise in exactions litigations after *Koontz*. The next section provides the empirical evidence to confirm this conclusion.

### C. The Results are (Still Coming) in: Data on Exactions Litigation

#### 1. Exactions Litigation Has Not Increased in Federal or State Courts Since *Koontz*

In the twenty-four months preceding the *Koontz* decision, federal and state courts decided over 1400 cases concerning land-use conditions.<sup>143</sup> In the twenty-four-month period since the January after *Koontz* was

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*supra* note 135, at 530; Sterk, *supra* note 139, at 859–61. These are the kinds of local factors that might tilt the balance of exactions negotiations heavily toward one side or the other, but just as Been and Sterk had their eyes on *Nollan* and the Supreme Court's exactions doctrine's national implications, so too must this Note conjure up an imaginary "regular" local government and a "typical" developer and ask: in the balance, what difference if any did *Koontz* make?

<sup>143</sup> A Lexis Advance search under the "real property law—zoning" category narrowed to "June 30, 2011 to June 30, 2013" with the keyword "conditions", available at <https://advance.lexis.com/search/practicepagesearch/?crd=07a940f1-86a5-436e-813b-7d3aacd06bd9&pdmfid=1000516&pdquerytemplateid=urn%3aquerytemplate%3a243f72d451e6d112482cceda7268afc3&pdqtdisplaytext=Federal+%26+State+Real+Property+Cases&prid=1d02205d-0ae5-489a-8388-66410b3ff4a6&ecomp=hng7k>, [hereinafter pre-*Koontz* cases search] produced this result. This data set is certainly over-inclusive, as it includes disputes over land-use conditions between private parties. But to the extent it is over-inclusive, the search for the same parameters but for the time period after *Koontz* contains the same defect. Post-*Koontz* cases search, *infra* note 144. The comparative result of whether land-use conditions litigations has increased, therefore, is not affected.

decided, that number declined to around 1200.<sup>144</sup> Of those roughly 1200 post-*Koontz* land-use conditions opinions, only eight cited *Koontz*.<sup>145</sup>

This Note does not claim to prove that *Koontz* has had no effect on exactions litigation. These empirical data, however, are meant to stand in stark contrast with the litany of post-*Koontz* literature asserting that the decision would make developers much quicker to sue.<sup>146</sup> Three years since the Supreme Court expanded the scope of the unconstitutional exactions doctrine, there is no definitive evidence that more landowners have availed themselves of this newfound opportunity to go to court. This Note suggests that the lack of movement on the litigation front is caused in part by the lack of strong remedies in *Nolan*, *Dollan*, and *Koontz*,<sup>147</sup> and in part by the incentives that both developers and local governments have to avoid litigation.<sup>148</sup> It is also possible that land-use regulators are behaving more conservatively in negotiations after *Koontz* out of some fear of litigation, but this Note argues that regulators should temper their concerns because there are few good remedies, there is an incentive for developers to “get along,” and these data show no increase in exactions litigation.

## 2. Even Virginia’s Added Incentives for Developers to Sue Have Not Moved the Needle

If a state did provide strong remedies for *Koontz* violations, eliminating one of the aforementioned three factors suggesting the case has not turned out to be a blockbuster in lower courts, would there be an uptick in litigation? Virginia is the test case for this scenario, and the results are inconclusive.

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<sup>144</sup> A Lexis Advance search under the “real property law—zoning” category narrowed to “Jan. 1, 2014 to Jan. 1, 2016” with the keyword “conditions”, available at <https://advance.lexis.com/search/practicepagesearch/?crd=482c743c-8663-4232-b887-63fc55fd418e&pdmfid=1000516&pdquerytemplateid=urn%3aquerytemplate%3a243f72d451e6d112482ccda7268afc3&pdqtdisplaytext=Federal+%26+State+Real+Property+Cases&prid=1d02205d-0ae5-489a-8388-66410b3ff4a6&ecomp=hng7k>, [hereinafter post-*Koontz* cases search] produced this result. I chose to set the date range to begin on January 1, 2014—over six months after the *Koontz* decision—in an attempt to factor in the time it would take parties and courts to figure the new precedent into their complaints and opinions.

<sup>145</sup> A Lexis Advance search under the “real property law—zoning” category narrowed to “Jan. 1, 2014 to Jan. 1, 2016” with the keywords “conditions” and “Koontz”, available at <https://advance.lexis.com/search/practicepagesearch/?crd=bbfb8506-66ee-48ab-89ac-65029cedc3fe&pdmfid=1000516&pdquerytemplateid=urn%3aquerytemplate%3a243f72d451e6d112482ccda7268afc3&pdqtdisplaytext=Federal+%26+State+Real+Property+Cases&prid=1d02205d-0ae5-489a-8388-66410b3ff4a6&ecomp=hng7k>, produced this result.

<sup>146</sup> See *supra* note 9 (citing several articles proposing normative critiques of *Koontz*).

<sup>147</sup> See *supra* Part IV.A.3.

<sup>148</sup> See *supra* Parts IV.A.1, IV.A.2, IV.B.

Virginia's Koontz Remedies Act has been in effect for over two years, and it has only produced one lawsuit. In *Viridis Development Corporation v. Board of Supervisors*, a federal district court dismissed the developer's challenge under the new law.<sup>149</sup> The plaintiff wanted damages and injunctive relief under the Koontz Remedies Act, but the Fourth Circuit has held that "a challenge to a local zoning decision has no place in federal court," so the district court invoked *Burford* abstention.<sup>150</sup> As of August 2016, the plaintiff has not re-filed the case in state court.

Given that the law is so new and does not apply retroactively,<sup>151</sup> it is likely that few land-use negotiations have reached the point of ripeness for litigation. But it is also likely that the Act was intended more to change behavior than it was to produce lawsuits. The bill's supporters, after all, stated a goal of "encourag[ing] localities to stay within the parameters of [exactions case law] when considering local land use decisions in the future."<sup>152</sup>

It may be too early to know for certain, but the Koontz Remedies Act appears to have had as little visible effect in city halls as it has in courthouses. Specifically, Virginia localities have not decreased the fees they charge for development since the law passed.

State law forbids localities from demanding exactions themselves, but landowners applying for a permit to build may "proffer" a certain amount of money commensurate with the size and impact of their proposed development.<sup>153</sup> Some counties and cities in Virginia make the proffer process more transparent and predictable by publishing a proffer fee schedule.<sup>154</sup>

Localities did not scale back their fee schedules after enactment of the Koontz Remedies Act. Fairfax County—the most populous municipality in the state<sup>155</sup>—actually increased its permitting fees in late 2014.<sup>156</sup> The

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<sup>149</sup> 92 F. Supp. 3d 418, 425 (2015).

<sup>150</sup> *Id.* at 423–25 (citing *Burford v. Sun Oil Co.*, 319 U.S. 315, 317–18 (1943)).

<sup>151</sup> See HB 1084 Legislative History, *supra* note 93 ("[T]he provisions of this bill shall only apply to approvals or permits that are granted or denied on or after July 1, 2014.").

<sup>152</sup> HBAV Legislative Bulletin, *supra* note 82, at 3.

<sup>153</sup> VA. CODE ANN. § 15.2-2303 (2014) (Localities may impose "reasonable conditions" upon zoning changes, but those conditions must have "been proffered in writing.").

<sup>154</sup> See, e.g., *infra* notes 156–59.

<sup>155</sup> UNIV. OF VA. WELDON COOPER CENTER FOR PUB. SERV., *Demographics Research Group: Demographics Interactive Map*, <http://www.coopercenter.org/demographics/interactive-map> (Jan. 27, 2015) [hereinafter WELDON COOPER, *Demographics Map*] (As of 2014, Fairfax County has an estimated population of 1,118,884 while Virginia Beach—the next largest locality—has a population of 451,672.). This subsection of the Note discusses a variety of Virginia counties and cities, and the Weldon Cooper Center's maps are an excellent resource for mapping demographics in the Commonwealth and visualizing where pressure for growth is most concentrated.

<sup>156</sup> BD. OF SUPERVISORS OF FAIRFAX CNTY., VA., ADOPTION OF AN AMENDMENT TO APPENDIX Q (LAND DEVELOPMENT SERVICES FEE SCHEDULE) OF THE 1976 CODE OF THE

high-growth Richmond suburb of Chesterfield County<sup>157</sup> simply reaffirmed its cash proffer policy without modification in 2015.<sup>158</sup> Other localities have not yet bothered to officially reexamine their fee schedules.<sup>159</sup>

In a world where developers and localities often enjoy a symbiotic relationship, these results are to be expected. *Koontz* and Virginia's statutory response to the case are, in reality, reserved for extreme cases of negotiations failure.

Similarly, courts remain an uncommon venue for settling disputes between developers and government. Most of this Note has focused on the importance of direct negotiations at the local level, but municipalities and landowners alike can and do air their grievances in the state legislature, getting their preferred position written into the code.

In 2016, the Virginia General Assembly further clarified the state's proffers laws. Virginia law now presumes a proffer—whether demanded *or accepted* by a locality—is “unreasonable unless it addresses an impact that is specifically attributable to a proposed new residential development.”<sup>160</sup> This law, more controversial than the Koontz Remedies Act,<sup>161</sup> was similarly pushed by the Homebuilders Association<sup>162</sup> and opposed by the Association of Counties. County leaders warned the state legislature from getting so deeply involved in local issues and again

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COUNTY OF FAIRFAX, VIRGINIA 2–25, Dec. 2, 2014, available at <http://www.fairfaxcounty.gov/dpwes/publications/pfm/appendixqamendment.pdf>. The Fairfax County Board of Supervisors increased the base permit fees for single-family detached dwellings by twenty percent. *Id.* at 3. For very small homes, this meant an increase from \$470 to \$564; for very large homes the fee jumped from \$2,435 to \$2,922. *Id.* Various other permit fees, including site inspection, installation of a hot water storage tank, sewer hookup, easement platting, and fire plan review, increased by various amounts. *Id.* at 2–25. Several other fees were not modified, but none were reduced. *Id.*

<sup>157</sup> See WELDON COOPER, *Demographics Map*, *supra* note 155 (Chesterfield county grew by 4.37 percent between 2010 and 2014 and is predicted to become the third most populous locality in the state, with a population of 572,693, by 2040).

<sup>158</sup> CHESTERFIELD CNTY., VA., CASH PROFFER POLICY 6, June 24, 2015, available at [www.chesterfield.gov/WorkArea/DownloadAsset.aspx?id=8589943188](http://www.chesterfield.gov/WorkArea/DownloadAsset.aspx?id=8589943188).

<sup>159</sup> See, e.g., CITY OF RICHMOND, VA., ZONING ORDINANCE I, Dec. 12, 2013, available at <http://www.richmondgov.com/planninganddevelopmentreview/documents/ZoningOrdinance.pdf> (The City of Richmond last amended its zoning code in December of 2013.).

<sup>160</sup> VA. CODE ANN. § 15.2-2303.4 (2016).

<sup>161</sup> Unlike the nearly unanimously approved Koontz Remedies Act, the 2016 proffers bill tallied 26 “no” votes in the Virginia House of Delegates. LEGISLATIVE INFO. SERVS., SB 549 CONDITIONAL ZONING; PROVISIONS APPLICABLE TO CERTAIN REZONING PROFFERS, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?161+vot+HV0843+SB0549>.

<sup>162</sup> HOMEBUILDERS ASSOC. OF VA., 2016 Legislative Bulletin, 7th ed. 4 (Feb. 26, 2016), available at <http://www.hbav.com/site/publisher/files/pdfs/2016-LB7.pdf>.

suggested that pro-developer changes could stunt negotiations or even shut down new development entirely.<sup>163</sup>

The law was “a win for developers,”<sup>164</sup> but it has only been in effect since July 1, 2016, so it is still too early to know what effect, if any, it will have on exactions litigation in Virginia. In keeping with the data I have gathered nationwide after *Koontz* and in Virginia since 2014, I predict that the new law will not lead to many more lawsuits between landowners and localities over proffers.

#### *D. A Disclaimer on the Immeasurable*

Several critics of *Koontz* predicted that the decision would result in skyrocketing land-use litigation,<sup>165</sup> but an equally common refrain was that it would “chill” negotiations.<sup>166</sup> This Note, on the other hand, argues that the balance of power between localities and developers remains level and that the two parties have strong incentives to get along. Negotiations, therefore, should not be chilled. Yet there is no way to prove this with empirical evidence. Neither party talks about what occurs behind closed doors.

Exactions doctrine literature has produced only one empirical study on the effect of the Supreme Court’s jurisprudence on local land-use

<sup>163</sup> Antonio Olivo, *Va. Bills Seek to Weaken Land-Use Tool Behind New Roads, Parks, and Schools*, THE WASH. POST (Feb. 7, 2016), [https://www.washingtonpost.com/local/dc-politics/va-bills-seek-to-weaken-land-use-tool-behind-new-roads-parks-and-schools/2016/02/07/f50fe23c-cb88-11e5-ae11-57b6aeab993f\\_story.html](https://www.washingtonpost.com/local/dc-politics/va-bills-seek-to-weaken-land-use-tool-behind-new-roads-parks-and-schools/2016/02/07/f50fe23c-cb88-11e5-ae11-57b6aeab993f_story.html) (quoting Fairfax County Chairman Sharon Bulova as insisting that “[t]he General Assembly doesn’t do land use, and often they don’t understand the land-use process and how it works” and suggesting that “new restrictions may ultimately lead to development projects not being approved”).

<sup>164</sup> Katherine Hafner, *A Win for Developers, New State Proffers Law Frustrates Chesapeake*, THE VIRGINIAN-PILOT (Mar. 12, 2016), [http://pilotonline.com/news/government/virginia/a-win-for-developers-new-state-proffer-law-frustrates-chesapeake/article\\_3d3685d8-9b62-5341-a9a5-8a635f1cd017.html](http://pilotonline.com/news/government/virginia/a-win-for-developers-new-state-proffer-law-frustrates-chesapeake/article_3d3685d8-9b62-5341-a9a5-8a635f1cd017.html).

<sup>165</sup> See APA Press Release, *supra* note 79 (As a result of *Koontz*, “the landowner is emboldened to sue.”). See also Echeverria, *The Very Worst*, *supra* note 9, at 47 (“Equipped with this new, robust legal claim, developers will now be more likely to initiate lawsuits seeking to invalidate development fees.”); Farrell, *supra* note 9, at 74 (claiming that *Koontz* will result in more situations of landowners feeling “empowered to sue”); Tappendorf & DiCianni, *supra* note 9, at 472 (“*Koontz* will almost certainly spawn more litigation between local governments and developers. Fights over development, once waged in local zoning board hearings, will now take place in federal court, where it will be more expensive and time consuming.”).

<sup>166</sup> See APA Press Release, *supra* note 79 (“The 5-4 decision is an unnecessary blow to . . . good-faith discussions” between local government and landowners.”). See also Echeverria, *Costs of Koontz*, *supra* note 9, at 607 (“*Koontz* creates a perverse set of incentives for local officials” to “never enter[] into a discussion . . . with a developer,” and local governments will frequently now “avoid entering into any type of negotiations.”); Tappendorf & DiCianni, *supra* note 9, at 470–73 (summarizing the ways in which *Koontz* will damage the relationship between government and developers and chill negotiations).

regulators' decision-making process.<sup>167</sup> In the wake of *Nollan* and *Dolan*, Professor Ann E. Carlson and policy analyst Daniel Pollack surveyed planners in California in an attempt "to gauge planners' knowledge of takings law, the impact of takings jurisprudence on land use planning and regulation, and its impact on localities' use of exactions and fees."<sup>168</sup> The survey found that almost all planners were familiar with *Nollan* and *Dolan*.<sup>169</sup> The actual effect of the cases, unsurprisingly, varied widely depending on other features of the locality: "Jurisdictions near build-out with significant infrastructure needs" may be constrained by the Court's exactions doctrine while "those with large amounts of developable land . . . seem to provide ample protection to developer interests" on their own.<sup>170</sup>

There has not, unfortunately, been a repeat of Carlson and Pollack's study in the wake of *Koontz*, so the case's effect on land-use negotiations remains unknown. Neither the Homebuilders Association of Virginia nor the Virginia Association of Counties was willing to speak on the record for this Note on how their membership has reacted to the *Koontz* Remedies Act or whether they have noticed any difference in land-use negotiations in the wake of changes to Virginia law.

But while anti-*Koontz* literature decries the case because those authors insist it will chill negotiations (despite lacking the proof that it actually has), this Note asserts that it does not matter whether *Koontz* has actually chilled negotiations. Rather, I claim the decision should not be making any noticeable difference in the vast majority of negotiations, because usually either regulators are pro-growth or developers' threats to sue are not credible.

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<sup>167</sup> See Echeverria, *Costs of Koontz*, *supra* note 9, at 609 (asserting that the Carlson & Pollack study stands alone as "[t]he one major empirical study of local governments' use of exactions,") (citing Anne E. Carlson & Daniel Pollack, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 106–08 (2001)).

<sup>168</sup> Ann E. Carlson & Daniel Pollack, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 108–09 (2001).

<sup>169</sup> *Id.* at 116–17 ("76% of county planners and 62% of city planners described themselves as 'very familiar' with *Nollan*, while no county planners and fewer than 10% of city planners report no familiarity with the decision."). The survey had a fairly high answer rate: A total of 311 planning departments responded (out of 530 California counties and cities). *Id.* at 109.

<sup>170</sup> *Id.* at 107; *see also id.* at 125–31 (finding evidence supporting theories that localities have disproportionate power in land-use negotiations as well as evidence that developers can exert influence through "exit" and concluding that localities do not behave in a "monolithic way").

## V. CONCLUSION

Justice Kagan predicted that every “local government official with a decent lawyer” would, in reaction to *Koontz*, cease all land-use negotiations.<sup>171</sup> This read of the Court’s opinion quickly gained traction in academic literature, but it presupposes a regulatory agency that is not so much prudent as it is skittish and irrational.

*Koontz* opened up the door to a new type of litigation in federal courts, and in doing so gave landowners the right and ability to make new threats. But in order for the case to have had a major practical effect on land-use negotiations, the newly created threat must be both commonly employed and credible. The lack of subsequent *Koontz* litigation suggests it is neither.

Without supplemental state law remedies, the threat of litigation is almost laughable. It is incredible to think that a real-estate developer, whose purpose is to maximize the value of land, would spend money on litigation when no financial benefit can come from a favorable result. Even the imposition of strong remedies for *Koontz* violations, such as those enacted in Virginia, do not appear to have made a difference.

This lack of movement is most readily explained by recognizing the fact that the pre-*Koontz* land-use negotiations landscape was already in a state of relative equilibrium. Developers and local governments had enough incentive to get along as it was, and the Supreme Court’s opinion was a solution in search of a rare problem—that of a non-repeat player with little political clout, seeking to use a specific piece of land located in a built-out or anti-growth jurisdiction for a specific purpose, who is unwilling to move to a different locality. Exactions litigation was not particularly common before *Koontz* because of the high costs of litigation and the fact that interested parties shared a mutual interest in moving land towards development. *Koontz* did nothing to change that preexisting dynamic. It just was not that big a deal.

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<sup>171</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2610 (2013) (Kagan, J., dissenting).