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## **Reverse Exactions**

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## **Reverse Exactions**

**Gregory M. Stein**

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## REVERSE EXACTIONS

Gregory M. Stein\*

### ABSTRACT

When an owner applies for a permit to use property in a certain way, the government body with jurisdiction can either deny the permit, grant the permit outright, or grant the permit subject to conditions. These conditions—known as “exactions”—must meet two constitutional thresholds. First, there must be a close linkage between a problem the owner’s project will create or exacerbate, such as increased traffic caused by a proposed new shopping mall, and the exaction the government proposes, such as the dedication of land for a new right-turn lane. Second, the condition the government suggests must be proportional in magnitude to the problem. The exaction must meet this two-part test even if the applicant rejects the government’s proposal and decides not to proceed.

The Supreme Court’s goal in adopting these rules was to ensure that the government does not obtain for free property rights that it otherwise would have to pay for. In other words, the test presupposes that the government is obtaining a benefit from imposing the exaction. That presupposition is wrong for two reasons. First, a properly designed exaction does not create a benefit for anyone. Instead, it mitigates the negative effects the applicant is imposing on its neighbors. Second, the mitigating effects of the exaction inure to those neighbors and not to the government itself: the government typically gains nothing, because the government is not acting in an enterprise capacity. Rather, the government is serving as a referee, mediating between the competing property rights of an applicant that seeks to develop its land and members of the broader community who do not want their own property rights impaired by a neighbor’s intensified use. If a government agency fears takings liability under this stringent test and decides to grant the permit unconditionally or to impose conditions that are too weak, it is striking an unfair balance between these competing property rights and allowing the applicant to impose external costs on its neighbors. The current test, in short, tips the scales in favor of applicants by pushing government bodies toward proposing weak or no conditions.

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This Article argues that members of the broader community should be permitted to counter this inequity by bringing reverse exaction claims, challenging particular government impositions as insufficient to offset the negative effects of an applicant's proposed development. Like traditional exaction claims brought by permit applicants, these reverse claims would succeed or fail based on the Court's two existing criteria, namely (1) the degree of linkage between the problem and the condition the government exacted and (2) the magnitude of the condition. This claim, however, would be viewed from the opposite perspective. The neighbors would argue that the government's granting of consent with inadequate conditions attached effects a compensable taking of their own property rights. In a traditional exaction claim, the wronged landowner receives compensation that is ultimately paid by the beneficiaries of the government's over-exaction, typically taxpayers; here, the wronged neighbors would be compensated from funds the government would raise from the applicant that received a permit without initially paying the full cost of its own externalities.

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## INTRODUCTION

The Supreme Court's exactions test is designed to balance the rights of an applicant seeking to intensify its use of land against the rights of a broader community that does not wish to be burdened with spillover effects resulting from that intensified usage.<sup>1</sup> However, the Court's three exaction decisions accomplish this goal only partially while concurrently placing burdens and risks on the government body.<sup>2</sup> Governments face significant liability if they are found to have exacted too much.<sup>3</sup> Liability concerns pressure governments either to grant too many permits outright or to impose permit conditions that are too limited.<sup>4</sup> As a result, some applicants do not pay the full cost of their increased use, while some neighbors bear costs that should more appropriately be shouldered by the party that caused them.<sup>5</sup>

This problem can arise in numerous different ways. A retail establishment that expands its building and parking area, for example, may cause some of the stormwater that previously absorbed into the ground on site to flow instead onto neighboring property, increasing the risk of flooding nearby.<sup>6</sup> It would be entirely appropriate for the government to require the applicant to address this problem by conditioning

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<sup>1</sup> As of 2013, all nine Justices—eight of whom are still on the Court as of this writing—agreed. *See* *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013); *id.* at 2604–05 (Kagan, J., dissenting).

<sup>2</sup> *See id.* at 2595 (majority opinion); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>3</sup> *See, e.g., Nollan*, 483 U.S. 825.

<sup>4</sup> This Article uses the term “permit” loosely, with the intention of including government issuance of a building permit, approval of a subdivision plat, approval under environmental or historic preservation laws, and even rezonings. While these and similar actions differ in important ways, in all cases an applicant needs the government's approval before it can proceed. The relevant common feature is that the government has the discretion to refuse the permit for legitimate reasons. Thus, the term “permit,” as used here, is not meant to include purely ministerial actions, such as issuing a building permit upon confirmation that an applicant is licensed or has procured the minimum required insurance.

<sup>5</sup> This Article uses the term “neighbors” broadly, to include any member of the community who might be affected by pollution, degradation of ground water, and other similar effects of intensified land use in the general vicinity. The term as used here is not limited to parties whose land is immediately adjacent to that of the permit applicant. It is possible that a court might apply rigorous standing requirements to the types of claims proposed in this Article, such as those required by *Warth v. Seldin*, 422 U.S. 490 (1975), in which the Supreme Court required the plaintiffs to establish clearly that they were the proper parties to seek judicial resolution of a dispute. Note, however, that the *Warth* plaintiffs did not assert that the government had taken their property without compensation. *Id.* at 493. If a court were to apply *Warth* to the arguments discussed below, then the term “neighbors” might need to be restricted to residents of the jurisdiction that imposes the exaction and might preclude residents of nearby jurisdictions from proceeding.

<sup>6</sup> This hypothetical loosely tracks the facts of *Dolan*, 512 U.S. at 377–83.

its approval on the applicant's regrading of its own land and creation of a detention pond.<sup>7</sup> The exaction protects the neighbors' property rights against unwelcome incursion by the applicant.<sup>8</sup> The applicant enjoys the economic benefits of its enlarged establishment but must internalize the costs its project would otherwise shift to nearby property owners.<sup>9</sup>

Part I reviews this doctrinal problem by exploring the three Supreme Court cases to address the issue.<sup>10</sup> The latest case sets forth, in exceptionally clear language: (1) what the problem is; (2) how the Court believes that its doctrine addresses the issue fairly; and (3) the dissent's prediction of the likely fallout of inappropriately tilting the playing field toward applicants.

Part II explains the central fallacy of the Court's opinions, namely its assumption that government bodies benefit personally by imposing exactions on applicants. This Part demonstrates that the objective of an exaction is not for the government to enrich itself by acquiring a property right for its own use.<sup>11</sup> Rather, the government seeks to ensure that other stakeholders who will suffer from the applicant's intensification in use do not bear an unfair portion of the resulting costs.<sup>12</sup> The goal of an exaction is to internalize the applicant's externalities, thereby ensuring that the party causing a new problem pays all the expenses of remediating it rather than shifting those expenses to owners nearby.<sup>13</sup> In short, the government is acting as a referee and not as an entrepreneur.<sup>14</sup>

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<sup>7</sup> See *id.* at 382.

<sup>8</sup> See *id.*

<sup>9</sup> See Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE: J. POL'Y DEV. & RES. 139, 143 (2005) (discussing how exactions encourage efficiency by forcing the developer to internalize the full cost of its development).

<sup>10</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Dolan*, 512 U.S. 374; *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>11</sup> See *infra* Part II.

<sup>12</sup> See *infra* Part II.

<sup>13</sup> See Been, *supra* note 9, at 143:

[B]y requiring the developer and its customers to pay to mitigate the negative effects a development may have on a neighborhood, such as increased traffic congestion, noise, and environmental degradation, impact fees [a type of exaction] . . . may encourage efficiency by making the developer and its customers internalize the full costs of the harms that the development causes.

<sup>14</sup> See Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 67 (1964):

The precise rule to be applied is this: when an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.

Part III proposes two responses. The more radical and less likely response is for the Court to concede that it needs to re-examine its exaction doctrine. The more realistic recommendation assumes that these cases will remain good law but suggests that the Court acknowledge that its strict exaction standards are a balancing device intended to protect not only disgruntled land use applicants, but also members of the broader community who feel blindsided.<sup>15</sup> Exactions, which are intended to be an equalizing device, can harm the applicant by being too invasive or the broader public by being insufficiently corrective.<sup>16</sup> Under this second approach, the Court would recognize reverse exaction claims by which members of the community may challenge exactions as failing the nexus and proportionality tests and recover compensation, just as unhappy applicants may do under existing doctrine.<sup>17</sup> If the government is to serve as referee, courts must provide legal recourse to both contestants.

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*Cf.* Joshua A. Decker, *Markets in Everything and Another View of the Cathedral: Religious Freedom and Coasian Bargaining*, 26 STAN. L. & POL'Y REV. 485 (2015) (recognizing that some free exercise claims are actually disputes between individuals rather than between an individual and the government).

<sup>15</sup> See John A. Lovett, *Property and Radically Changed Circumstances*, 74 TENN. L. REV. 463, 476 (2007) (“[P]roperty law is designed to create stable environments in which people can exercise predictable control over the tangible and intangible objects of value in their world . . . .”); *cf.* Nestor M. Davidson, *Property’s Morale*, 110 MICH. L. REV. 437, 442–43 (2011) (discussing how unexpected changes in property rules can both increase the demoralization of those who want their expectations protected and comfort those who desire flexibility).

<sup>16</sup> See Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 4–5 (2000) (arguing that tight restrictions on regulatory bargains harm landowners and communities).

<sup>17</sup> At least one commentator has used the term “reverse exactions” previously, but in an entirely different context. See Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 956–57 (2003) (drawing a parallel between economic development public use takings by municipalities and traditional exactions in the sense that the former involve imposing small burdens—in the form of incremental individual expenses for compensation awards—on numerous local taxpayers).

Others have noted the one-sidedness of exactions doctrine and argued for greater reciprocity. See, e.g., Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 504–06 (1991) (noting the possibility of under-regulation); Fennell, *supra* note 16, at 40–41 (observing that claims by neighbors who are harmed are “theoretically possible,” but concluding that such an approach would be both under- and over-inclusive); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 655–56, 655 n.228 (2004) (suggesting that the solution may lie in state law); see also John D. Echeverria, *The Costs of Koontz*, 39 VT. L. REV. 573 (2015) (focusing on the separation of powers, federalism, and efficiency costs of *Koontz*); *cf.* WILLIAM A. FISCHER, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 349–50 (1995) (asking whether such reciprocity might be undemocratic).

## I. HOW DID WE GET HERE?

In *Koontz v. St. Johns River Water Management District*,<sup>18</sup> the Supreme Court thoroughly reviewed the reasons government bodies impose conditions on permits and the problems these exactions can create.<sup>19</sup> Although the Court was divided on the two main issues the case addressed, the Justices seemed largely to agree on these foundational points.<sup>20</sup> Justice Alito’s opinion for the five-member majority begins by summarizing the doctrine of unconstitutional conditions, noting that this doctrine “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.”<sup>21</sup>

Land use permitting agencies must balance two conflicting truths. On the one hand, “land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take.”<sup>22</sup> Balanced against this concern is the competing reality that “many proposed land uses threaten to impose costs on the public that dedications of property can offset.”<sup>23</sup> Applicants that receive permits may benefit in part by imposing external costs on unwilling neighbors. Under existing doctrine, “[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack.”<sup>24</sup> However, government bodies must not use this exaction power coercively.<sup>25</sup> The dissent agrees, summarizing the prior case law as “designed to curb governments from using their power over land-use permitting to extract for free what the Takings Clause would otherwise require them to pay for.”<sup>26</sup>

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<sup>18</sup> 133 S. Ct. 2586 (2013).

<sup>19</sup> Exactions are to be distinguished from community benefits agreements (“CBAs”). CBAs are negotiated between permit applicants and community groups with no government participation; thus, due process and takings concerns do not arise. Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities?*, 37 *CARDOZO L. REV.* 1773, 1776 (2016). By contrast, exactions are negotiated between permit applicants and government bodies.

<sup>20</sup> *Koontz*, 133 S. Ct. at 2595; *id.* at 2604–05 (Kagan, J., dissenting).

<sup>21</sup> *Id.* at 2594 (majority opinion).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 2595.

<sup>24</sup> *Id.* (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)). Exactions also prevent applicants from free-riding on infrastructure improvements that have previously been paid for by others. See Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 *HARV. ENVTL. L. REV.* 295, 358 (2003) (“[E]xactions and impact fees can be viewed not only as a means of forcing developers to compensate the community for the new burdens imposed by the development, but also as a rough means of recapturing givings arising from past community investments that the developer seeks to exploit.”).

<sup>25</sup> *Koontz*, 133 S. Ct. at 2595.

<sup>26</sup> *Id.* at 2612 (Kagan, J., dissenting).



To strike this difficult balance, the Court had previously required, in *Nollan v. California Coastal Commission*,<sup>27</sup> that any government condition bear an “essential nexus” to the problem it seeks to offset.<sup>28</sup> Under this test, a condition must serve the same purpose a permit denial would have.<sup>29</sup> In short, there must be a “close . . . ‘fit’ between the condition and the burden.”<sup>30</sup>

The Court added a second prong to this exaction test, focusing on the scale of the exaction, in *Dolan v. City of Tigard*.<sup>31</sup> Not only must there be an adequate cause-and-effect relationship between the exaction and the externality it seeks to mitigate under *Nollan*, but the exaction also must not be excessive in its magnitude.<sup>32</sup> Under this “rough proportionality” test, “[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”<sup>33</sup> Although the Court has agreed on the two-part test it will apply, that test leaves numerous questions open, only some of which the Court has since answered.<sup>34</sup> For example, the Court later held that this test applies to an applicant that brings a claim after rejecting the exaction, even though it is unclear whether such an applicant has actually relinquished anything.<sup>35</sup>

## II. THE CENTRAL FALLACY OF THE COURT’S EXACTION DOCTRINE

### A. *The Court’s Incorrect Assumption that Governments Are Acting as Entrepreneurs*

The central flaw of these cases is the Court’s assumption that government bodies that impose excessive exactions seek to benefit themselves unjustifiably at the expense of applicants.<sup>36</sup> The Court views land use bodies as nefarious actors that exploit property owners in need of administrative consent by imposing unrelated conditions that enrich themselves improperly.<sup>37</sup>

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<sup>27</sup> 483 U.S. 825 (1987).

<sup>28</sup> *Id.* at 837.

<sup>29</sup> *Id.* at 836–37 (“If a prohibition designed to accomplish [a proper] purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.”).

<sup>30</sup> *Id.* at 838. More precisely, the Court held that any exaction must substantially advance a legitimate state interest. *Id.* at 834–35; *see also infra* Section III.B.1.

<sup>31</sup> 512 U.S. 374 (1994).

<sup>32</sup> *Id.* at 391.

<sup>33</sup> *Id.*; *see also infra* Section III.B.2.

<sup>34</sup> The Court has since ratified its exaction test unanimously. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547–48 (2005) (unanimous opinion).

<sup>35</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

<sup>36</sup> *See id.* at 2596 (calling respondent’s proposed exaction “[e]xtortionate” and “coercive”); *see also Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

<sup>37</sup> *See Koontz*, 133 S. Ct. at 2596.

Under this view, the government is just another opportunistic, profit-seeking property owner. Moreover, while a developer can always seek a different lender or purchase building materials and labor from competing vendors or workers, public agencies have a monopoly over permits within their municipal borders.<sup>38</sup> A developer must cooperate with the public bodies that control the issuance of the permits it needs and ultimately must either accept the best deal it can get from the government or abandon its project.<sup>39</sup>

Worse still, because the government is the government, it has the power to manufacture opportunities for these occasions to arise.<sup>40</sup> Governments may adopt excessive permitting requirements to increase the likelihood that a desperate applicant later will cough up the necessary concessions rather than forsaking the ability to use its property.<sup>41</sup> Or governments can build in discretionary standards that allow them the wiggle room needed to wring out compromises.<sup>42</sup> Ironically, while *Koontz* treats government like a profit-maximizing property owner, it expresses no concerns about actual private property owners seeking to develop their real estate in ways that might harm their neighbors.<sup>43</sup> The government might overreach much like a private real estate developer would, but an actual real estate developer apparently will not.

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<sup>38</sup> See FISCHEL, *supra* note 17, at 271 (“The most distinct characteristics of local governments are the lack of alternative decision-making arrangements . . . and the immobility of certain assets within their borders.”).

<sup>39</sup> This is not quite true, as property owners can always “vote with their feet” and choose more owner-friendly jurisdictions. See Been, *supra* note 17, at 514–28 (discussing evidence supporting and contradicting this hypothesis). Real estate, however, is an immobile asset that is cumbersome to liquidate, and *someone* will end up owning the property in the more heavily restricted jurisdiction. The owner that decides to exit the jurisdiction will take a loss when it sells the restricted property to a successor that knows how difficult it will be to use and factors that into the price it is willing to pay.

<sup>40</sup> Professor Fischel recognized this point long ago. FISCHEL, *supra* note 17, at 342 (“The communities that collect exactions are the ones that have the most regulations. If developers could do projects ‘as of right,’ the community would have almost no leverage to exact any payment beyond property taxes.”).

<sup>41</sup> Fenster, *supra* note 17, at 634 (“In the absence of judicial intervention, the [*Nollan*] Court assumed, municipalities would increase their bargaining leverage by producing more stringent land use regulations, only to waive them in exchange for even more beneficial, unrelated amenities.” (footnote omitted)); see also Fennell, *supra* note 16, at 15–16 (“If the government can make rules costlessly, it can sell violation rights to members of the populace for pure profit.” (footnote omitted)).

<sup>42</sup> *Koontz*, 133 S. Ct. at 2595 (“So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government’s demand, no matter how unreasonable.”).

<sup>43</sup> See generally Gregory M. Stein, David L. Callies & Brian Rider, *Stealing Your Property or Paying You for Obeying the Law? Takings Exactions After Koontz v. St. Johns River Water Management District*, THE ACREL PAPERS 283, 300–02 (Spring 2014) (discussing the Court’s distrust of government actors and noting that “the Court expresses no corresponding concern that property owners, too, may overreach.” (footnote omitted)).

*B. The Risks of Improper Government Behavior Are Low in the Exaction Setting*

This Article does not argue that land use agencies always act appropriately. Landowners and their lawyers can cite numerous cases in which government bodies behaved improperly—perhaps in the ways described in the previous section<sup>44</sup>—in an effort to increase their institutional wealth and power.<sup>45</sup> The same can be said for some of the individuals who act on behalf of those bodies: land use officials are modestly paid civil servants who serve as gatekeepers for valuable permits real estate developers must obtain before they can proceed.<sup>46</sup> Given the potential profits those developers might earn, it is not surprising that they sometimes offer—and that some officials are willing to accept—inappropriate personal benefits in exchange for those permits.<sup>47</sup> The discretionary nature of the land use permitting process generates the possibility of everything from minor mischief to out-and-out corruption, and the fairly typical behavior seen in cases such as *Koontz* falls far short of that type of intentional malfeasance.<sup>48</sup>

But the exaction setting inherently includes checks that greatly reduce the likelihood of this type of calculated overreaching. Exactions may be one of the more mystifying parts of an already murky land use process, but they are a part in which government misconduct is less likely to take place. Most importantly, exactions arise not when the government seeks to act on its own initiative but rather when the government responds to a request initiated by a private actor.<sup>49</sup> These typically are not settings in which the government has pre-existing plans to acquire land for a specific government purpose.<sup>50</sup> The government is not trying to assemble a coherent

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<sup>44</sup> See *supra* Section II.A.

<sup>45</sup> See, e.g., Been, *supra* note 17, at 483–86 (summarizing the potential threats that exactions may produce).

<sup>46</sup> See ROBERT C. ELLICKSON ET AL., *LAND USE CONTROLS: CASES AND MATERIALS* 332–36 (4th ed. 2013) (discussing the prevalence of corruption in the land use control system).

<sup>47</sup> See *id.*; Abraham Bell & Gideon Parchomovsky, *The Hidden Function of Takings Compensation*, 96 VA. L. REV. 1673, 1694 (2010) (“[I]n most contexts, even thoroughly corrupt politicians will be unable to or unwilling to take undisguised cash payments. Rather, corrupt politicians will seek to get paid indirectly. The payments may take a variety of forms, such as campaign contributions, business contracts with associates of the politician, and so forth.”).

<sup>48</sup> For a discussion of the distance between the theoretical benefits of exactions and the ways in which they are employed on the ground, see Bell & Parchomovsky, *supra* note 47, at 1675 (“[T]he desirability of the takings power critically depends on the law’s ability to negate the self-interest of politicians and thereby align their interests with those of the public at large.”); Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 737–40 (2007).

<sup>49</sup> See *Dolan v. City of Tigard*, 512 U.S. 374, 379 (1994) (describing the application process for the Dolans).

<sup>50</sup> Occasionally, an applicant seeks to develop land for which the government does happen to have particular plans. The California Coastal Commission exacted an easement from

parcel, as it might be if it were building a new school or library. It is merely responding to unpredictable requests from assorted owners whenever they happen to cross the transom. The scattershot nature of the application process makes it unlikely that government bodies can use the exaction power to assemble coherent parcels of property.<sup>51</sup> Granted, government bodies may use their natural leverage improperly and may adopt regulations that increase the chances that they will enjoy this type of leverage.<sup>52</sup> But the government has too little control over what applicants might do to engage in the type of pre-planned extortion the Court's majority plainly fears.<sup>53</sup>

Nor are these settings in which the government is just another entrepreneurial market actor out to make as much of a buck as it can. Exactions commonly arise in settings in which the government itself receives no benefit from the applicant, and the government often assumes significant liabilities after exacting property interests.<sup>54</sup> Although the government lost in *Dolan*,<sup>55</sup> the facts in that case are fairly typical of those in which a government exaction seeks to protect the public while allowing the applicant to proceed.<sup>56</sup>

The Dolans wanted to expand a plumbing supply store in a crowded area prone to flooding.<sup>57</sup> The plans included more than doubling the size of the store, increasing the size of the parking lot, and paving the previously gravel lot;<sup>58</sup> these modifications would indisputably increase water runoff into a creek that ran along the property and were specifically aimed at adding to store traffic.<sup>59</sup> The City of Tigard proposed land dedications that would allow for increased absorption of ground water and the expansion of a bicycle path.<sup>60</sup> These responses were plainly designed to mitigate the

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the Nollans similar to 43 others it had already exacted along one stretch of beach. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 829 (1987). Rather than condemning and paying for the easement, as it otherwise would have had to do, the Commission tried to exact the same easement free of charge in exchange for granting the Nollans their permit, or so the Court believed. *Id.* at 831. Governments are unlikely to plan this type of behavior, since they ordinarily do not know when owners will submit applications. The Commission just got lucky.

<sup>51</sup> Cf. *Hillcrest Property, LLP v. Pasco County*, 939 F. Supp. 2d 1240, 1242 (M.D. Fla. 2013), *vacated on other grounds*, 754 F.3d 1279 (11th Cir. 2014) (noting, in a due process case, that “to avoid the nettlesome payment of ‘just compensation,’ the Ordinance empowers Pasco County to purposefully leverage the permitting power to compel a landowner to dedicate land encroached by a transportation corridor. In Pasco County, if there is no free dedication, there is no permit.”). The district court described this type of behavior as “not yet common.” *Id.*

<sup>52</sup> See Stein, Callies & Rider, *supra* note 43, at 300–02 (discussing the Court's distrust of government officials but not property owners).

<sup>53</sup> See *supra* note 36 and accompanying text.

<sup>54</sup> See *supra* note 49 and accompanying text.

<sup>55</sup> 512 U.S. 374 (1994).

<sup>56</sup> See *id.* at 379.

<sup>57</sup> See *id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 387.

<sup>60</sup> *Id.* at 379–80.

negative effects the applicants' expanded store would have on neighbors and the general public.<sup>61</sup> The Court found these exactions to meet the *Nollan* essential nexus standard,<sup>62</sup> as the city plainly was trying to do.<sup>63</sup> The Court's objection was that the city demanded more than it needed to achieve these results, a second component of the exaction test that the Court had not mentioned in *Nollan*.<sup>64</sup>

Although a government agency might acquire facilities such as these in fee simple or at least hold an easement, that government receives no direct benefit from the land, while incurring significant costs.<sup>65</sup> The Dolans formulated their plan with the specific goal of swelling the number of store patrons, and Tigard's exactions were designed to offset the resulting increases in road traffic and floodwater runoff.<sup>66</sup> The city undoubtedly thought it more appropriate for the Dolans to pay the remediation costs generated by their own project, as opposed to Tigard's taxpayers.<sup>67</sup> This approach is more fair to the public and spares the city from having to raise taxes or user fees, spend reserves set aside for future emergencies, or reallocate funds earmarked for other municipal needs. The city garners no benefit from this land, as it would if it were building a new library. It is simply preventing public conditions from worsening.

Moreover, bicycle trails and flood runoff zones are hardly cost-free propositions for the city, which probably would have been better off financially by simply rejecting the Dolans' application.<sup>68</sup> The government will have to purchase or exact other property to complete the two public projects.<sup>69</sup> It will need to pave and maintain the bicycle path and ensure that the floodway remains free of obstructions.<sup>70</sup> The government will have to bear all the security costs and tort liabilities that arise from projects such as these while foregoing some of the real estate taxes the Dolans

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 387–88.

<sup>63</sup> *Id.* at 387.

<sup>64</sup> *Id.* at 386.

<sup>65</sup> *See id.* at 392–95; *id.* at 404 (Stevens, J., dissenting).

<sup>66</sup> *Id.* at 379–82 (majority opinion).

<sup>67</sup> Professor Sax noted early on the unfairness of requiring taxpayers to pick up the tab when the government is acting to resolve disagreements between neighboring landowners: “Requiring the public to pay for the costs generated by every situation of conflicting uses between property owners would wildly expand the reach of the compensation provision of the Constitution . . . .” Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 *YALE L.J.* 149, 153 (1971). Such a requirement also impairs sensible land use planning. *Id.* at 161 (“To bring under the takings clause governmental restrictions designed to mediate between conflicting interests is to introduce a doctrinal rigidity inconsistent with the kind of planning essential to optimal resource allocation.”).

<sup>68</sup> *See Dolan*, 512 U.S. at 404 (Stevens, J., dissenting).

<sup>69</sup> *See* Timothy M. Mulvaney, *Exactions for the Future*, 64 *BAYLOR L. REV.* 511, 527–28 (2012) (addressing issues of land assembly).

<sup>70</sup> *See Dolan*, 512 U.S. at 404 (Stevens, J., dissenting).

previously paid.<sup>71</sup> It will have to field complaints, and perhaps even defend against litigation, from unhappy citizens every time there is a major traffic jam or a heavy rainstorm. In undertaking these public projects—necessitated in part by the Dolans’ desire to enrich themselves at the community’s expense—it is embarking on civic ventures that will create extensive ongoing obligations and from which it receives no institutional benefit beyond its typical function of serving the public.<sup>72</sup> Some government bodies that foresee these long-term, costly tasks would simply deny the Dolans’ permit request outright, rejections unlikely to lead to takings liability under the more flexible *Penn Central* standard.<sup>73</sup> It is hard to imagine that governments will scheme to use exactions as a way to expand their revenues or land holdings when, in many cases, these governments would be better off simply denying these controversial, costly, and often unanticipated permit requests.<sup>74</sup>

Even in cases in which it appears that a government entity receives some individualized benefit, that benefit is often illusory. Inclusionary zoning offers a useful example.<sup>75</sup> At first glance, an inclusionary zoning scheme (in which, for example, a developer is legislatively required to include a certain number of affordable units before receiving a permit to build a market-rate residential project) seems to relieve government of the need to build the affordable units itself.<sup>76</sup> This example features some, but not all, of the attributes of an exaction.<sup>77</sup> But it is apparent that the government’s

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<sup>71</sup> *See id.*

<sup>72</sup> Tigard, for example, “would bear the cost of maintaining a landscaped buffer between the dedicated area and the new store.” *Id.* at 380 (majority opinion).

<sup>73</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (applying, when determining whether a regulatory taking has occurred, a three-part balancing test that takes into consideration the economic impact on the claimant, the extent to which regulation has interfered with investment-backed expectations, and the nature of the government action); *see also* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 64 (2016) (examining implicit takings cases in the lower courts, finding a low rate of success on *Penn Central* claims, and asking, “Why do lawyers persist in litigating these cases to judicial decision when the prospect of success is so low?”); *id.* at 88 (“[I]n state court practice, relegation to ad hoc adjudication has marked the death knell for a takings claim.”).

<sup>74</sup> Professor Fennell describes this doctrinal anomaly as “the worst of both worlds.” Fennell, *supra* note 16, at 4. She notes, “It leaves landowners exposed to excessive land use regulation while constricting their ability to bargain for regulatory adjustments.” *Id.* at 4–5; *see also* Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 300 (“[D]efining the Court’s exactions test in terms of bargaining alone risks allowing the test to slip its bonds and become the basis for wide-ranging heightened judicial scrutiny of land use regulation generally.”).

<sup>75</sup> *See infra* note 77 and accompanying text.

<sup>76</sup> *See infra* note 77 and accompanying text.

<sup>77</sup> It remains to be seen whether the Court will treat inclusionary zoning, typically mandated by statute, in the same manner as it treats exaction cases, which arise following individualized administrative responses to permit requests. The same question arises with respect to incentive zoning, under which a developer receives a statutory bonus in exchange for providing a public service such as open space or day-care facilities. *See, e.g.*, Cal. Bldg. Indus.

role remains that of a mediator and not an entrepreneur. By increasing the number of market-rate units, the developer is contributing to an affordability problem and furthering a need for schools, firefighters, police officers, mass transit, and open space.<sup>78</sup> A legislature might reasonably conclude that this developer needs to construct subsidized units or amenities as a means of offsetting the impact its project will have on neighborhood affordability and quality of life.<sup>79</sup>

In cases such as *Dolan*, an applicant chooses to enrich itself in a way that may harm its neighbors.<sup>80</sup> No one should be surprised or troubled by an owner's proclivity to earn more money from its real estate. The tougher question, though, is who should pay the increased monetary and in-kind public costs this intensification in use will generate. There is no reason why applicants should foist on unwilling neighbors the costs of remediating these problems, including the direct expense of responding to new civic problems, the indirect expense of reduced property values nearby and the resulting drop in assessed valuation, or the in-kind cost of a lower quality of life than the government deems suitable.<sup>81</sup> Instead of simply granting or denying the request, the City of Tigard catered to the Dolans' desires by pursuing the thornier option of finding a palatable middle ground and making the Dolans pay for the problems they would create.<sup>82</sup> This is hardly the type of governmental extortion the *Koontz* Court would decry two decades later.<sup>83</sup>

### *C. Exactions Often Are Wise, Middle-Ground Compromises*

Exactions are compromises proposed by a governmental body to mediate between incompatible uses of adjacent or nearby land.<sup>84</sup> Ideally, they are sensible, incremental

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*Ass'n v. City of San Jose*, 351 P.3d 974, 979 (Cal. 2015) (finding such fees not to be exactions); *616 Croft Ave., LLC v. City of West Hollywood*, 207 Cal. Rptr. 3d 729, 732 (Ct. App. 2016) (finding similar impositions not to be exactions), *cert. denied*, 2017 WL 1064331 (Oct. 30, 2017).

<sup>78</sup> For a discussion of the degree to which privately owned public open space requirements accomplish their goals, see Sarah Schindler, *The "Publicization" of Private Space*, 103 IOWA L. REV. (forthcoming 2018).

<sup>79</sup> *See id.*

<sup>80</sup> *See* 512 U.S. 374 (1994).

<sup>81</sup> *See, e.g., Hallmark Inns & Resorts, Inc. v. City of Lake Oswego*, 88 P.3d 284, 293 (Or. Ct. App. 2004) ("[W]ithout the pathway, the development would impede the flow of pedestrian and bicycle traffic from an adjoining residential area to an adjoining shopping center. The pathway removes that impediment. The need for the pathway is directly related to the development itself . . .").

<sup>82</sup> *See Dolan*, 512 U.S. 374.

<sup>83</sup> *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

<sup>84</sup> *See Lisa Grow Sun & Brigham Daniels, Externality Entrepreneurism*, 50 U.C. DAVIS L. REV. 321, 333 (2016) ("[T]he externality entrepreneur can choose what counts as an 'externality' so long as she can successfully persuade others of that understanding."); John A. Lovett, *The Symmetry Heuristic: American Property Theory's Creative Virtue or Irresistible*

compromises that are more beneficial overall than either a denial or an unconditional grant: the applicant can proceed but must offset some of the negative consequences its change in use will force others to bear.<sup>85</sup> The applicant ends up better off—though not as well off as it had hoped—by receiving a valuable permit and undergoing the more modest expense of mitigating the burden it imposes on others.<sup>86</sup> The neighbors end up no worse off, thanks to the layer of protection the government permitting process provides.<sup>87</sup> Thus the *Koontz* Court’s presupposition of rogue government agencies that must be reined in through strict judicial oversight is often off the mark, and it places courts in the position of having to umpire numerous local, fact-intensive land use battles.<sup>88</sup>

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*Curse?* (forthcoming 2017) (on file with author) (noting that judges do not merely enforce rights and liberties “but rather . . . mediate relationships between individuals”).

Note that the “adjacency” of the incompatibility can be physical, temporal, or both. See Bruce R. Huber, *Temporal Spillovers*, in ENVIRONMENTAL LAW AND ECONOMICS (Klaus Mathis, ed.) (forthcoming 2017) (manuscript at 2), <http://ssrn.com/abstract=2820730> (discussing “uses of land that deliver present benefits but entail residual risks after the cessation of the beneficial use”); J. Peter Byrne & Kathryn A. Zyla, *Climate Exactions*, 75 MD. L. REV. 758, 777 (2016) (“Regulators should account for ways that climate change will affect the currently calculated impacts (e.g., recreation) of a development in the future, as well as how the project may exacerbate future risks of climate change impacts to neighboring properties.”).

<sup>85</sup> See generally *Koontz*, 133 S.Ct. 2586.

<sup>86</sup> If the burden of the project on others exceeds the benefit to the landowners, then a properly calculated exaction will make the project undesirable to the applicant, which will not proceed. This is a classic case in which internalizing an externality prevents a project that should not advance from advancing—the applicant benefits less than the community as a whole will suffer. In fact, if the applicant also owned the burdened parcel, it would not move forward with the project because its personal costs would exceed its benefits. See Sax, *supra* note 67, at 172 (observing how solitary owners naturally internalize their own costs); cf. Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 402 (2003) (“When inefficient takings occur, the wrongdoer might usefully be identified as the constituency that benefits from the taking while externalizing the costs onto other members of the community. Presumably, it is the political support of this constituency that causes elected officials to go forward with the taking.” (footnote omitted)).

<sup>87</sup> This is an illustration of Pareto efficiency. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 17–20 (8th ed. 2011) (defining Pareto-superior transactions as those in which one person is better off and no one is worse off). The neighbors may actually end up better off than before, depending on the terms of the exaction and each neighbor’s particular circumstances. The owner next door to the Dolans, for example, enjoys proximity to a new bicycle path but is burdened by the greater traffic the Dolans’ larger store will attract. That burden, though, may lead to increased traffic to the neighbor’s establishment. Whether a neighbor ends up better off or simply no worse off will vary from neighbor to neighbor and may be impossible to calculate in advance. The agency’s goal is to maximize the odds that no neighbor ends up worse off as a result of the project.

<sup>88</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (“[T]his Court, quite simply, has been unable to develop any ‘set formula’ for determining when [just compensation is due] . . . .”); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994) (decrying the proliferation of federal land use cases).



*Koontz* portrays government bodies as habitual wrongdoers that must be closely monitored, lest they cross constitutional lines whenever they believe they can get away with it.<sup>89</sup> The Court describes the St. Johns River Water Management District as seeking “to evade the limitations of *Nollan* and *Dolan*”<sup>90</sup> and possibly “pressuring someone into forfeiting a constitutional right . . . [and] coercively withholding benefits from those who exercise them.”<sup>91</sup> The respondent’s actions, according to the Court, appear “[e]xtortionate” and an exercise of “coercive pressure.”<sup>92</sup> A contrary decision “would effectively render *Nollan* and *Dolan* a dead letter.”<sup>93</sup>

The Supreme Court of Florida comes in for similar criticism, with the *Koontz* Court stating that Florida’s high court “blessed [the District’s] maneuver” and thereby “effectively interred” *Nollan* and *Dolan*.<sup>94</sup> The thrust of the Court’s discussion here is that it cannot trust state government officials or, for that matter, the justices of the state’s highest court.<sup>95</sup> While government officials may sometimes behave improperly, the Court’s analysis assumes that this is always true, despite the fact that courts show great deference to land use officials in nearly every other context.<sup>96</sup> The Court plainly feared that government bodies will take the greatest possible advantage of an applicant’s intrinsically weaker bargaining position.<sup>97</sup>

Oddly enough, the Court expresses no similar concerns about land use permit applicants.<sup>98</sup> It is hardly outlandish to postulate that a property owner that might

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<sup>89</sup> 133 S. Ct. at 2594–95; see also Stein, Callies & Rider, *supra* note 43, at 300–02.

<sup>90</sup> *Koontz*, 133 S. Ct. at 2595.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 2596.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 2591. The United States Supreme Court’s lack of deference to the Florida Supreme Court is nothing new. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 714 (2010) (4–4 decision) (“It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.”); *Bush v. Gore*, 531 U.S. 98, 109 (2000) (“The contest provision, as it was mandated by the State Supreme Court, is not well calculated to sustain the confidence that all citizens must have in the outcome of elections.”); see also Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247, 266 (2011) (“Justice Scalia’s opinion for the [*Stop the Beach Renourishment*] plurality exudes distrust for state court judgments on questions of state property law . . .”).

<sup>95</sup> *Koontz*, 133 S. Ct. 2586.

<sup>96</sup> See *infra* Section II.D.

<sup>97</sup> See Daniel P. Selmi, *Takings and Extortion*, 68 FLA. L. REV. 323, 354 (2016) (“The extortion narrative presumes that local officials have considerable power and will unfairly use it to coerce developers.”).

<sup>98</sup> Nor does the dissent, which appears to have considerably greater faith in actors on both sides of this question. See, e.g., *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting) (“No one has presented evidence that in the many States declining to apply heightened scrutiny to permitting fees, local officials routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development’s costs.”).

profit greatly by receiving a discretionary permit could overreach in much the way the Court sees the government as having done in *Koontz*.<sup>99</sup> And unlike the typical government official that denies a permit request, an applicant that receives a permit enjoys direct financial benefits.<sup>100</sup> That is why owners apply. The Court worries that a public entity charged with protecting the community and mediating among conflicting land uses might bully permit applicants but seems unconcerned that a developer seeking to maximize its profit might harm its neighbors.<sup>101</sup>

Institutional safeguards serve as a related check on government excesses.<sup>102</sup> Real estate development entities are concerned about the interests of only a small number of like-minded equity holders and are legally obligated to act for the benefit of their shareholders or partners.<sup>103</sup> They thus face consistent, undeviating incentives to maximize the value of their real estate, even if that means externalizing some development costs.<sup>104</sup> By contrast, land use decisionmakers are either elected officials, their political appointees, or the career civil servants who report to these two groups. The chair of a board of zoning adjustment typically serves at the whim of a mayor who must answer to voters at regular intervals and may be pondering her chances for higher office.<sup>105</sup> Rather than focusing only on enriching a small number of equity holders, that chair may idealistically strive to serve the general public or may more cynically do whatever it takes to hang onto his job.<sup>106</sup> Voters are likely to have a broad range of views as to how restrictive permitting officials should be, and consistent overreaching in any direction will likely be contested.<sup>107</sup>

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<sup>99</sup> *Id.* at 2586 (majority opinion).

<sup>100</sup> *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 379 (1994) (applicant sought building permit to double the size of her store and to provide space for complementary businesses).

<sup>101</sup> *See* Been, *supra* note 17, at 487 (noting that the nexus test “ignores the role that exactions play as ‘damages’ for the injuries that developments cause to the public”).

<sup>102</sup> *Id.* at 505 n.150 (describing the public’s ability to pressure elected officials directly or indirectly).

<sup>103</sup> Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 354–55 (2000).

<sup>104</sup> *See* Fenster, *supra* note 17, at 648–52.

<sup>105</sup> *Cf.* Jerry L. Anderson, Aaron E. Brees & Emily C. Reninger, *A Study of American Zoning Board Composition and Public Attitudes Toward Zoning Issues*, 40 URB. LAW. 689, 689–90 (2008) (noting that land use decisions are made by local administrative bodies appointed by elected officials).

<sup>106</sup> *See* Michael B. Kent, Jr., *Viewing the Supreme Court’s Exactions Cases Through the Prism of Anti-Evasion*, 87 U. COLO. L. REV. 827, 870–71 (2016) (contrasting the majority and dissenting opinions in *Koontz* and their differing views as to how well the political process protects applicants).

<sup>107</sup> *See* Been, *supra* note 17, at 505 & nn.150–51 (discussing options available to unhappy citizens, including initiatives, pressure on elected representatives, lobbying against specific applications, and litigation); Sean F. Nolon, *Bargaining for Development Post-Koontz: How the Supreme Court Invaded Local Government*, 67 FLA. L. REV. 171, 192–93 (2015) (emphasizing the high degree of citizen involvement in the process of land use control).

These institutional safeguards serve as a reminder that bodies that propose exactions are acting in a representative capacity and not in an entrepreneurial capacity.<sup>108</sup> If the public body were attempting to condemn the applicant's land to expand city hall, the government would be acting like any entrepreneur in need of real estate, albeit one with less of a profit-making motive than private actors.<sup>109</sup> But an exaction disagreement is not a dispute between two business entities competing for a limited resource each needs. Rather, the government body is acting as a referee, using its land use powers prospectively to address potential incompatibilities that previously could be addressed only post hoc, under nuisance law.<sup>110</sup> Before land use regulations were common, a neighbor would have to wait for a first mover to build something intrusive and then bring a tort claim that might lead to substantial damages, a costly injunction, and an overall waste of resources.<sup>111</sup> Today, the government that proposes an exaction can evaluate in advance whether a project should proceed and can green-light only those that do not unreasonably harm the interests of neighbors.<sup>112</sup>

This is not to suggest that landowners with development plans can rest easy knowing that the voters will keep every anti-development mayor in check. Voter majorities and local views on the real estate industry range from strongly pro- to strongly anti-development in different locales. Moreover, the Takings Clause exists to protect property owners against majoritarian excesses.<sup>113</sup> But in at least some jurisdictions, property owners know that a pro-development voting majority will likely temper whatever anti-development sentiments the planning commission's staff may harbor.

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<sup>108</sup> See Krier & Sterk, *supra* note 73, at 70–71 (observing that “courts treat government-as-enterpriser cases quite differently from government-as-mediator cases” and that “courts apparently consider the political process an adequate check on the behavior of regulators”).

<sup>109</sup> See *id.* at 69–70.

<sup>110</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–88 (1926) (drawing on the common law of nuisance to justify upholding a city's zoning ordinance).

<sup>111</sup> *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 872 (N.Y. 1970) (awarding damages in a nuisance case but denying an injunction because of the devastating economic consequences the offender would suffer).

<sup>112</sup> See Been, *supra* note 17, at 487 (“[T]he major flaw of the nexus test . . . is that it ignores the role that exactions play as ‘damages’ for the injuries that developments cause to the public.” (footnote omitted)).

<sup>113</sup> See, e.g., William A. Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581, 1582 (1988) (“The real regulation problem is one of political success, that is, of political majorities ganging up on effete minorities.”); Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 309 (1990) (noting “[a] central theme of takings law is that protection is offered against the possibility that majorities may mistreat minorities,” and expressing concern about “the realistic fear that the ganging up will too often be at the expense of the neighbor who is most different or most nonconforming”).

*D. The Court Has Shown Little of its Traditional Deference to Governments that Exact*

The Court's exaction jurisprudence also shows none of the deference to government actors that its opinions customarily show in other land use cases.<sup>114</sup> In most land use settings, government actions are presumed to be constitutional.<sup>115</sup> While the dissent calls *Koontz* "a run-of-the-mill denial of a land-use permit,"<sup>116</sup> the majority quite obviously disagrees.<sup>117</sup> This reduced deference applies to both the substantive legal standard government defendants now have to meet and to the procedural question of which party bears the burden of meeting that standard.<sup>118</sup> After *Koontz*, the state must meet the Court's exaction standards in a broader range of cases and also must produce evidence and persuade the finder of fact.<sup>119</sup>

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<sup>114</sup> See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2607 (Kagan, J., dissenting) (discussing the "significant practical harm" flowing from the Court's decision). See generally Fennell & Peñalver, *supra* note 74, at 357 ("In *Nollan* and *Dolan*, the Court started down a path that, if followed beyond a certain point, cannot be reconciled with broad judicial deference to garden-variety land use controls."); Fenster, *supra* note 17, at 652–67 (criticizing the Court for scrutinizing exactions far more closely than other types of alleged takings).

<sup>115</sup> A sharply divided Court allowed government bodies tremendous leeway in interpreting the Fifth Amendment's Public Use Clause in *Kelo v. City of New London*, 545 U.S. 469 (2005). The facts of that case surely provide landowners with more to fear than the facts of *Koontz*. And in many unremarkable land use cases outside of the exaction context, the Court has been willing to presume that government actions are constitutional, most notably in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (upholding a city's landmark preservation law), a case Justice O'Connor later called the Court's "polestar." *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring); see also *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539–40 (2005) (unanimous opinion) (reaffirming the centrality of *Penn Central*).

<sup>116</sup> *Koontz*, 133 S. Ct. at 2611 (Kagan, J., dissenting). The dissent also notes that "[t]he majority turns a broad array of local land-use regulations into federal constitutional questions. . . . It places courts smack in the middle of the most everyday local government activity." *Id.* at 2612.

<sup>117</sup> *Id.* at 2603 (majority opinion); see also Selmi, *supra* note 97, at 325 ("[The extortion] narrative sees local governments not as acting in good faith in the public interest, but as fixed on extorting concessions out of developers. It is a narrative of unbridled governmental coercion and, consequently, of extreme judicial distrust of local governments.").

<sup>118</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 391 n.8 (1994) (imposing this burden on the city); John D. Echeverria, *A Legal Blow to Sustainable Development*, N.Y. TIMES (June 26, 2013), <https://nyti.ms/139bHti> ("After *Koontz*, developers have a potent new legal tool to challenge such charges because now the legal burden of demonstrating their validity is on the communities themselves.").

<sup>119</sup> See Echeverria, *supra* note 118 ("[T]he revolutionary and destructive step taken by the court in *Koontz* is to cast the burden on the government to justify the mandates . . . . This is contrary to the traditional court approach of according deference to elected officials and technical experts on issues of regulatory policy."); Marshall S. Sprung, Note, *Taking Sides: The Burden of Proof Switch in Dolan v. City of Tigard*, 71 N.Y.U. L. REV. 1301, 1304–06

Worse still for government defendants, the Court held in 1987 that a property owner that prevails on a regulatory takings claim is entitled to compensation dating back to the time at which the taking commenced.<sup>120</sup> After *Koontz*, compensation may run from as early as the date on which the government proposed the exaction.<sup>121</sup> In short, governments defending against exaction claims have both a tough burden to carry and much to lose if they cannot carry it.

The *Koontz* Court is highly skeptical that proper land use planning efforts serve the public welfare.<sup>122</sup> The Court does begin by noting the public purposes set forth in the Florida law that authorizes the respondent to manage the state's wetlands.<sup>123</sup> The Court also recognizes, as noted above, that private property rights must be balanced against the public good and that landowners sometimes must internalize the external costs their use of property imposes on their neighbors.<sup>124</sup> But rather than assuming that land use officials are fair-minded public servants who sometimes err, the Court is plainly concerned that these government actors must be vigilantly watched to prevent or deter frequent deliberate wrongdoing.<sup>125</sup> The general tenor of the *Koontz* opinion is to protect the constitutional rights of private actors that have a distinct incentive to overreach and to express strong concerns about the hidden motives of bodies that have long been presumed to be serving the public good.<sup>126</sup>

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(1996) (describing how *Dolan* shifted the burden of proof from the property owner to the government).

<sup>120</sup> *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 322 (1987) (holding “that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy”); Timothy M. Mulvaney, *On Bargaining for Development*, 67 FLA. L. REV. F. 66, 67–71 (2015) (tracing the chilling effect of *Koontz* to *First English*).

<sup>121</sup> Note, however, that normal permitting delays are not compensable. See *First English*, 482 U.S. at 321 (limiting the “holding to the facts presented, and . . . not deal[ing] with the quite different questions that would arise in the case of normal delays”).

<sup>122</sup> See, for example, the Florida Water Resources Act, FLA. STAT. § 373.016(1)–(2) (2016), the statute at issue in *Koontz*, which declares its policy as follows:

The waters in the state are among its basic resources. Such waters have not heretofore been conserved or fully controlled so as to realize their full beneficial use. The department and the governing board shall take into account cumulative impacts on water resources and manage those resources in a manner to ensure their sustainability.

<sup>123</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2592 (2013).

<sup>124</sup> *Id.* at 2595.

<sup>125</sup> *Id.* (“[W]e have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.”).

<sup>126</sup> *Id.* at 2594 (noting that “land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take”).

Thus, applicants merely must “bear the full costs of their proposals,” while governments have to be scrutinized carefully lest they engage in “out-and-out . . . extortion.”<sup>127</sup>

*E. The Point of Most Exactions Is to Internalize the Applicant’s Costs*

An exaction forces a permit applicant to devote part of its profit to compensating its neighbors for the external costs they otherwise would bear. If the applicant will be \$1,000,000 better off but the neighbors will suffer external costs of \$100,000, then any exaction that transfers an amount of at least \$100,000 and less than \$1,000,000 from the applicant to the neighbors guarantees that the applicant still receives a net benefit while the neighbors suffer no loss, and perhaps even benefit themselves. The community as a whole is better off and enjoys the project’s \$900,000 net benefit, no party is worse off after the exaction and some or all of them are better off, and a development that enriches the community overall can proceed.<sup>128</sup> The only question is how that net gain of \$900,000 is shared.

Most importantly, the developer does not profit personally by forcing others to suffer losses, which means that the government is performing an essential role exactly as it should, a point even the *Koontz* majority acknowledges.<sup>129</sup> Making exactions unacceptably costly or risky for government agencies will force those agencies either to grant permits unconditionally or to deny them outright in settings in which an exaction might be desirable and equitable.<sup>130</sup> When this happens, applicants, their neighbors, or both may end up worse off than before.<sup>131</sup> To the extent the *Koontz* majority fears government action that harms neighboring landowners, it might even embrace this Article’s proposals, which are designed to prevent government action from harming someone’s property rights.<sup>132</sup> These proposals preserve the viability of exactions while ensuring that they harm neither an applicant nor other property owners nearby.<sup>133</sup>

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<sup>127</sup> *Id.* at 2595 (citing *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987)); *cf.* *Selmi*, *supra* note 97, at 376 (concluding that judicial adoption of an extortion narrative is misplaced).

<sup>128</sup> *See* POSNER, *supra* note 87, at 17–20.

<sup>129</sup> *Koontz*, 133 S. Ct. at 2595 (“A second reality of the permitting process is that many proposed land uses threaten to impose costs on the public that dedications of property can offset.”).

<sup>130</sup> *Id.* at 2610 (Kagan, J., dissenting):

If a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed, the government might desist altogether from communicating with applicants. That hazard is to some extent baked into *Nollan* and *Dolan*; observers have wondered whether those decisions have inclined some local governments to deny permit applications outright, rather than negotiate agreements that could work to both sides’ advantage.

<sup>131</sup> *See* Fenster, *supra* note 17, at 665 (explaining that rejecting applications may make the property owner “significantly worse off than if she could bargain freely with the local government over conditions that might win an approval”).

<sup>132</sup> *See infra* Part III.

<sup>133</sup> *See infra* Part III.

*F. Summary of the Court's Central Fallacy*

Exaction law today presupposes that government bodies are acting like private developers and maximizing their own financial well-being at the expense of permit applicants.<sup>134</sup> While this may be true in some cases, a court should not assume this type of self-interested behavior as a starting point. Government bodies charged with acting in the public interest as referees rather than as entrepreneurs often have little to gain by using the exaction power too aggressively, a point Professor Joseph Sax recognized more than a half-century ago.<sup>135</sup> Moreover, they may have much to lose if they do so, including increasing their recurring expenses, generating political backlash, and defending inverse condemnation claims. Institutional checks already minimize the risk of government wrongdoing.<sup>136</sup> Voters will not necessarily oppose a given project, while permit applicants frequently are repeat players with sharply focused interests and the benefit of superior legal representation.<sup>137</sup> There is no reason to weaken further the separation of powers doctrine and long-standing judicial deference to government bodies, and certainly no reason to do so in a setting in which misbehavior is relatively unlikely.

If the government is acting as a referee rather than as a developer, courts should safeguard its ability to act as a fair arbiter. Current exaction law, however, does just the opposite, by tipping the scales heavily in favor of one of the contestants.<sup>138</sup> Applicants control both the content and the timing of every proposal, while administrative bodies merely respond to applications as they arrive. Neighbors—the truly interested counterparties who ultimately have the most to lose—may not learn about applications until they have progressed considerably and gained momentum. These neighbors are playing defense throughout, and the best outcome they can typically hope for is maintenance of the status quo. They must organize, retain counsel, and spend their own money and time—assuming that they possess these two important resources—with the sole goal of making sure that nothing changes for the worse. The burden of proof in an exaction claim is on the government.<sup>139</sup> And governments

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<sup>134</sup> See Selmi, *supra* note 97, at 338–39 (arguing that elected officials will seek to extract benefits from developers for voters).

<sup>135</sup> See Sax, *supra* note 14, at 63:

[W]hen economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking. But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power.

<sup>136</sup> See Krier & Sterk, *supra* note 73, at 71.

<sup>137</sup> See Fennell & Peñalver, *supra* note 74, at 316–17.

<sup>138</sup> See Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2607–09 (2013) (Kagan, J., dissenting).

<sup>139</sup> Dolan v. City of Tigard, 512 U.S. 374, 395 (1994).

that lose exaction claims face potentially budget-busting liability under *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.<sup>140</sup> These factors constrain public input and intimidate government bodies whose members already must answer to elected officials and the people who elected them.<sup>141</sup> It is hardly surprising if some government bodies grant their consent unconditionally or with conditions that are too weak, given the risks they face for even suggesting conditions that are more balanced. By assuming the worst of government officials, current doctrine increases the likelihood that they will serve as one-sided decisionmakers rather than truly fair mediators.

### III. TWO POSSIBLE SOLUTIONS

*Nollan*<sup>142</sup> and *Dolan*<sup>143</sup> look only at the losses applicants may suffer if exactions are too muscular and completely disregard the losses neighbors may suffer if exactions are not muscular enough. It is not surprising that the case law has developed in this imbalanced way and that neighbors have fared so poorly under it, given that applicants are the parties that initiate and pursue exaction claims against government bodies. Courts, particularly the Supreme Court, could address this imbalance in two ways.

#### A. Re-Examine the Court's Exaction Case Law

The Court might decide that it needs to re-examine *Nollan*,<sup>144</sup> *Dolan*,<sup>145</sup> and *Koontz*.<sup>146</sup> By so doing, the Court would recognize that it has shown too little deference to government agencies and has established a standard that is too difficult for them to meet. The Court might acknowledge that it provides government bodies more leeway in other areas of takings law and decide to offer greater flexibility here by pulling back from its existing stringent exactions tests.<sup>147</sup>

This approach would be fairly simple to implement, but it seems unlikely that the Court will revisit this body of doctrine. To begin with, the Court has developed this case law incrementally over a period of three decades.<sup>148</sup> This is not a single

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<sup>140</sup> 482 U.S. 304 (1987).

<sup>141</sup> See Fenster, *supra* note 17, at 654 (noting that local governments may fail to impose exactions due to concerns about high legal costs).

<sup>142</sup> 483 U.S. 825 (1987).

<sup>143</sup> *Dolan*, 512 U.S. 374.

<sup>144</sup> *Nollan*, 483 U.S. 825.

<sup>145</sup> *Dolan*, 512 U.S. 374.

<sup>146</sup> 133 S. Ct. 2586 (2013).

<sup>147</sup> See John D. Echeverria, Koontz: *The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 49 (2014) ("It is not beyond the realm of possibility that one or more justices in the majority will have second thoughts about the opinion and seek in the future to limit or possibly jettison one or both rulings.").

<sup>148</sup> See *Koontz*, 133 S. Ct. 2586; *Dolan*, 512 U.S. 374; *Nollan*, 483 U.S. 825.



uncharacteristic opinion, but rather three cases from 1987,<sup>149</sup> 1994,<sup>150</sup> and 2013<sup>151</sup> that build on each other. The *Koontz* Court had the opportunity to reconsider its earlier cases not long ago and opted to ratify the two prior precedential cases.<sup>152</sup>

Given that all of these cases were decided by 5–4 margins, it is always possible that the Court—with only one change in personnel since *Koontz* was decided—might reconsider its three earlier cases.<sup>153</sup> But while the Court is free to rethink case law it views as ill-considered, this Article will not argue that the Court should overrule its precedent.<sup>154</sup> Three overlapping groups of dissenters have already done a fine job of making the arguments against current exaction doctrine, but at the end of the day, they were penning dissents and not opinions of the Court.<sup>155</sup>

While it is not particularly fruitful for a legal scholar to argue that the Court “got it wrong” in three cases and should overrule them,<sup>156</sup> I do note here that it is entirely possible that the Court might limit those three cases considerably without disturbing them.<sup>157</sup> This approach would reaffirm that the existing cases may be an appropriate mechanism for curbing the most flagrant government abuses but that they need to

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<sup>149</sup> *Nollan*, 483 U.S. at 837 (holding that an essential nexus must exist between the government interest and the condition placed on the applicant).

<sup>150</sup> *Dolan*, 512 U.S. at 391 (developing the rough proportionality test).

<sup>151</sup> *Koontz*, 133 S. Ct. at 2603 (holding that “government’s demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money”).

<sup>152</sup> *Id.*

<sup>153</sup> The Court unanimously reaffirmed *Nollan* and *Dolan* in 2005, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545–48 (2005).

<sup>154</sup> *Cf.* Mulvaney, *supra* note 120, at 75–76 (recognizing this option without advocating for it).

<sup>155</sup> Justice Brennan’s dissent in *Nollan* argues that the Court has “given appellants a wind-fall at the expense of the public.” 483 U.S. 825, 842 (1987) (Brennan, J., dissenting). Justice Stevens’s dissent in *Dolan* suggests the burden on city governments is unjustified. 512 U.S. at 403 (Stevens, J., dissenting). Justice Kagan’s dissent in *Koontz* argues that the Takings Clause does not apply because *Koontz* did not surrender any identifiable property. 133 S. Ct. at 2605 (Kagan, J., dissenting).

<sup>156</sup> *Cf.* Ilya Somin, *Putting Kelo in Perspective*, 48 CONN. L. REV. 1551, 1554 (2016) (“[R]easonable and long-accepted’ and ‘part of the legal mainstream’ is not the equivalent of correct or logically sound reasoning.” (quoting Wesley W. Horton & Brendon P. Levesque, *Kelo Is Not Dred Scott*, 48 CONN. L. REV. 1405, 1408 (2016))); *id.* at 1560–61 (“*Kelo* is indeed not as bad as *Dred Scott*, certainly not in every way. But it is bad enough to deserve severe criticism, and bad enough that the Supreme Court should overrule it as soon as possible.”). *Kelo*, like *Koontz*, is the third in a decades-long series of cases the Court has decided in a consistent fashion and, as Professor Somin concedes, *Kelo* was entirely justifiable under existing doctrine. *Id.* at 1554. Moreover, the three cases addressing public use were spread out over an even longer period than *Nollan*, *Dolan*, and *Koontz*, giving a larger number of Justices the opportunity to reconsider the Court’s doctrine, an invitation the Court declined.

<sup>157</sup> See Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1518 (2006) (“[W]e explore in this Article how the *Nollan-Dolan* test can be reformed, rather than argue that it should be overruled.”).

be circumscribed to avoid discouraging much legitimate and appropriate government behavior. The Court, in short, could treat the case law as binding but perhaps too broad—a core of precedent encircled by a penumbra of dicta. When suitable facts arise, the Court could explain that the existing case law provides more balance than some observers currently read into it. For example, the Court might clarify that existing exaction doctrine applies to cases in which overzealous administrative officials exact too much in particular cases without bringing into question the validity of land use restrictions authorized by more broadly applicable legislation.<sup>158</sup>

### *B. Recognize Reverse Exaction Claims*

Rather than arguing that the Court should overrule three established cases, this Part instead would right the imbalance in current doctrine by recognizing a “reverse exaction” claim that neighbors can bring against government officials. In a reverse exaction claim, an applicant’s neighbors would argue that government officials have imposed conditions on the applicant’s development that insufficiently internalize the externalities that the applicant’s project would impose on those neighbors. By under-exacting land use applicants, the government forces the applicants’ neighbors to bear the remaining costs attributable to the project, thereby impairing the neighbors’ property rights unconstitutionally. Under this second and more measured option, the Court would endorse the validity of *Nollan*, *Dolan*, and *Koontz*—perhaps limited as just noted<sup>159</sup>—but recognize reciprocal rights in neighbors affected negatively by an exaction that inadequately internalizes a project’s costs.<sup>160</sup>

To the greatest extent possible, reverse exaction claims would mirror traditional exaction claims, much as inverse condemnation suits reflect direct takings.<sup>161</sup> In a reverse exaction claim, one or more disappointed neighbors would be the plaintiffs, bringing an action against the government. Like permit applicants, neighbors would challenge exactions based on their specific content, with the obvious difference that they would argue that rather than going too far, the proposed exactions do not go far enough.<sup>162</sup> Just as permit applicants that bring direct exaction claims are concerned with impositions that overly safeguard the neighbors’ rights while impairing those

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<sup>158</sup> See *supra* note 77 and accompanying text.

<sup>159</sup> See *supra* Section III.A.

<sup>160</sup> A reverse exaction would exhibit some, but not all, of the attributes of a “passive taking.” See Christopher Serkin, *Passive Takings: The State’s Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 346 (2014). The government will have taken by insufficient action rather than by no action at all. See *id.* at 372–77 (discussing the distinction between acts and omissions).

<sup>161</sup> Complete mirroring is not possible, as discussed below. See *infra* Section III.B.5.

<sup>162</sup> Reverse takings claims can arise in other contexts as well. See, e.g., Michael Pappas, *A Right to be Regulated?*, 24 GEO. MASON L. REV. 99, 105 (2016) (“The key question for this Article is whether the absence, curtailment, or reduction of regulation can interfere with a protected property interest such that it triggers legal protection. When, as a matter of property rights, can we say that government regulation has *not gone far enough?*”).

of the applicant, the concern of neighbors bringing a reverse exaction claim would be that the exaction overly protects the applicant to the neighbors' detriment.<sup>163</sup>

The first prong of a reverse exaction claim would parallel the "essential nexus" requirement set forth in *Nollan*,<sup>164</sup> while the second prong would reflect *Dolan*'s "rough proportionality" mandate,<sup>165</sup> and a neighbor who can make either of these showings would prevail. Any compensation that the government is required to pay to the prevailing neighbors would be charged back to the applicant that effectively took private property by not adequately offsetting the negative effects of its project.<sup>166</sup> This source of funding parallels awards for traditional exaction claims, which are ultimately paid by the taxpayers who benefited collectively from the unconstitutional exaction that took the applicant's property.<sup>167</sup> The remainder of this Part will elaborate on these points and provide illustrations, will note some concerns this approach might raise, and will address those concerns.

If the exaction test is a balancing test that seeks to determine whether an administrative agency has imposed appropriate conditions, then it is unfair to allow only one of the parties whose interests are being balanced to challenge the government's activities. Such an approach protects only the rights of permit applicants. And if the government faces potential liability in only one direction, it inevitably will favor that party's rights, since it can avoid litigation losses in that manner and only in that manner. To ensure a fair balance and to protect the rights of other interested property owners, the ability to challenge exactions must be reciprocal.<sup>168</sup> And since the other

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<sup>163</sup> Cf. *C.I.V.I.C. Grp. v. City of Warren*, 723 N.E.2d 106, 110–11 (Ohio 2000) (holding, in a suit by a private civic association, that the Ohio Constitution prohibits a city from raising money for or loaning its credit to a private corporation).

<sup>164</sup> 483 U.S. 825, 837 (1987) (holding that an essential nexus must exist between the government's interest and the condition placed on the applicant).

<sup>165</sup> 512 U.S. 374, 391 (1994).

<sup>166</sup> Cf. Lee Anne Fennell, *Picturing Takings*, 88 NOTRE DAME L. REV. 57, 103–04 (2012) (suggesting, in the judicial takings context, that "[an] owner could unilaterally get the government not to appropriate the property by making a specified payment" (footnote omitted)).

<sup>167</sup> See, e.g., Levinson, *supra* note 86, at 401 ("Government does not . . . internalize the costs of compensation payments: Taxpaying citizens do. Nor does government benefit from takings: Some constituency of citizens does. . . . Just compensation . . . is effectively a collective sanction imposed on the members of this political community."); Levinson, *supra* note 103, at 347 ("[T]here is every reason to expect government to behave quite differently from private firms. Because government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay."). Note as well that *Koontz* recognizes the possibility that an applicant might prevail and receive an award even though the government has not actually taken its property. 133 S. Ct. 2586, 2597 (2013) ("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>168</sup> Echeverria, *supra* note 17, at 604 ("There is no *a priori* reason to favor property owners whose interests are served by developing property over property owners whose interests are

interested parties here are the neighbors—with the government body serving merely as intermediary—those neighbors must enjoy the right to challenge exactions they believe tilt too far in favor of applicants.<sup>169</sup>

### 1. The *Nollan* Prong of a Reverse Exaction Claim

The first half of the traditional exaction test asks whether there is an essential nexus between a public problem the applicant's project will create and the condition the government agency places on its permit approval to mitigate that problem.<sup>170</sup> When a landowner brings an exaction claim, the government body is put to the dual tasks of enumerating its legitimate state interests and demonstrating how the imposed conditions substantially advances those interests.<sup>171</sup> The California Coastal Commission identified three state interests that the Court was willing to regard as legitimate,<sup>172</sup> but the conditions the Commission imposed on the *Nollans* did not substantially advance those interests—in the Court's view, they did not even come close.<sup>173</sup> Thus, the exaction lacked the requisite “essential nexus.”<sup>174</sup>

The first part of a reverse exaction claim would argue that the government's condition does not adequately mitigate a problem that the applicant's project would create or exacerbate. Just as the *Nollan* Court held that a permit applicant may recover if the exaction does not substantially advance the legitimate state interests the government asserts, a court evaluating a reverse exaction claim would ask whether the exaction substantially advances the legitimate state interest of internalizing the off-premises effects the proposal will generate or worsen. A court will likely find that forcing an applicant to avoid harming its neighbors is a legitimate agency goal,<sup>175</sup> which means that the sole question of law ordinarily will be whether the permit condition is crafted

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served by community protection. The Constitution protects the interests of property owners but it also protects the interests of citizens in the benefits of representative government.”).

<sup>169</sup> Cf. Joseph Belza, Note, *Inverse Condemnation and Fracking Disasters: Government Liability for the Environmental Consequences of Hydraulic Fracturing Under a Constitutional Takings Theory*, 44 B.C. ENVTL. AFF. L. REV. 55 (2017) (arguing that those harmed by fracking should be allowed to bring an inverse condemnation claim against the government actor that permitted the fracking, not just a private law claim against the entity that caused the harm).

<sup>170</sup> See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

<sup>171</sup> *Id.* at 834.

<sup>172</sup> *Id.* at 834–35.

<sup>173</sup> *Id.* at 838–39.

<sup>174</sup> *Id.* at 837 (adopting and describing the “essential nexus” test to be used in exaction cases). Although the *Nollan* Court implemented this standard, it did not define that term. The opinion uses the word “nexus” only twice—with an additional reference in Justice Blackmun's dissent—and modifies “nexus” with the adjective “essential” only once. *Id.*; *id.* at 865 (Blackmun, J., dissenting).

<sup>175</sup> See *id.* at 834–35 (majority opinion) (noting that a broad range of government interests would satisfy the exaction requirements).

in a manner that substantially advances that aim. The intended beneficiary of the government's exaction is arguing that the government, in its capacity as arbiter between incompatible adjacent uses, did not go far enough in protecting its property rights.

If a condition “utterly fails to further the end advanced as the justification for the prohibition,”<sup>176</sup> then it flunks *Nollan*'s direct exaction test.<sup>177</sup> In fact, a condition can do a better job than that and still fail under *Nollan*.<sup>178</sup> But land use agencies have learned since *Nollan* and *Dolan* exactly what types of responses are acceptable and, however much they might be inclined to over-exact, potential liability serves as a powerful brake.<sup>179</sup> If anything, as Professors Carlson and Pollak observed several years after *Dolan*, “The decisions seem to have nudged many localities into more systematic, comprehensive planning through the preparation of reports and studies justifying and documenting the rationale for exacting money or land from developers.”<sup>180</sup> In other words, the two cases have done exactly what they were supposed to do.<sup>181</sup> Similarly, a condition that “utterly fail[ed]” to internalize an externality—or even one that failed in substantially advancing this goal—would lead to government liability for a reverse exaction.<sup>182</sup> The same planners who quickly learned how to avoid exacting too much presumably will learn how to avoid exacting too little. Once reverse exactions are firmly established, successful reverse claims are likely to be as rare as successful claims of direct exactions. The main value of the twin doctrines will be the ways in which they prospectively shape agency practice.

Cases at either extreme might lead to liability, but those extreme cases will arise infrequently and will become even less common as planners learn the new rules. Most conditions that government agents impose will mitigate a negative effect to some degree,<sup>183</sup> falling at neither of these compensable limits. Permit conditions aimed at making applicants pay for the problems they cause will rarely be total failures or total successes. As a result, government entities usually will not face liability, since neither an applicant nor a disgruntled neighbor will be able to meet the difficult thresholds these dual tests demand. Human actors responding to particularized problems will devise one or more responses out of a wide range of possibilities.

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<sup>176</sup> *Id.* at 837.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> For a discussion of five reasons government bodies may over-exact, see Been, *supra* note 17, at 483–506. See also Fenster, *supra* note 48, at 738–40 (highlighting problems exactions can create).

<sup>180</sup> Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 105 (2001).

<sup>181</sup> “Contrary to initially negative reactions to the Court decisions, we found that an overwhelming percentage of California planners now view the *Nollan* and *Dolan* cases not as an encroachment upon their planning discretion but instead as establishing ‘good planning practices.’” *Id.*

<sup>182</sup> *Cf. Nollan*, 483 U.S. at 837.

<sup>183</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 387–88 (1994) (finding an essential nexus for two distinct exactions).

The conditions they ask an applicant to accept are likely to address a problem imperfectly, neither completely solving it nor wholly failing to address it. Such an exaction is a reasonable attempt: it does not take the applicant's property, it does not take the property of the applicant's neighbors, and a government defendant will prevail in either type of claim. Most likely, no such claim will ever be brought and, if it is, it will last only until one party's motion for summary judgment. In short, government bodies will enjoy a considerable margin of error.

Moreover, externalities and exactions both come in many flavors: an applicant's project can cause all different sorts of direct and indirect off-premises effects,<sup>184</sup> and governments can respond to this wide range of negative results in a multitude of different ways.<sup>185</sup> These are the types of localized, site-specific negotiations that exactions are designed to foster and that exaction law ought to encourage.<sup>186</sup> A developer makes a proposal that will enrich itself and harm its neighbors. That developer is naturally more concerned with maximizing its own profits than with spending money that it may not need to spend in order to assuage the concerns of owners nearby. A government actor charged with balancing the developer's desires against the public interest formulates a response that imperfectly mitigates the proposal's negative effects. The actor charged with replying to the request draws on her education and experience, also taking into account past dealings with this particular applicant, while being distracted by whatever other applications are on her plate. From the range of possible responses, the land use official selects the one she determines to be most appropriate. The developer counteroffers in a way that will cost less than the government's proposal, and the government decides that it can live with some but not all of this recrafted bid.<sup>187</sup> The parties behave predictably and bumble through a run-of-the-mill negotiation, most often reaching a compromise that the applicant can live with—or at least will not sue over<sup>188</sup>—and that causes neighbors to grumble but not to initiate litigation.

Through this very common back-and-forth, parties with conflicting interests often are able to achieve imperfect solutions to the problems the developer's project will cause.<sup>189</sup> The externality is partially internalized, the applicant is able to obtain

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<sup>184</sup> See Amnon Lehavi, *Zoning and Market Externalities*, 44 FORDHAM URB. L.J. 361, 382–84 (2017).

<sup>185</sup> See generally *id.* (distinguishing among different types of externalities and discussing the propriety of local government zoning responses to each type).

<sup>186</sup> See Fenster, *supra* note 17, at 615 (“Local governments developed exactions as a political and administrative means to resolve highly charged, individualized, and localized disputes fraught with legal, financial, scientific, emotional, and ultimately political controversy.”).

<sup>187</sup> See, e.g., *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 176–82 (1985) (describing a typically complex multi-year negotiation between a developer and a county planning commission in a non-exaction context).

<sup>188</sup> See Krier & Sterk, *supra* note 73, at 68–69 (finding that exactions are less likely to lead to subsequent litigation than are other types of regulations and surmising that landowners who receive a permit are willing to live with these exactions rather than litigating).

<sup>189</sup> See, e.g., *id.*

its permit while minimizing as much as possible the costs of the exaction that it must bear, and the neighbors' interests are guarded somewhat, if not entirely. The project proceeds, no one is completely happy, and the bargaining works about as well as anyone can expect. The parties reach a satisfactory outcome, and "[a] good compromise leaves everybody mad."<sup>190</sup>

Under both the existing *Nollan* exaction test and the reverse exaction analysis proposed here, unhappy applicants or neighbors should know they are likely to lose these run-of-the-mill claims and likely will not waste their time and energy bothering to bring one.<sup>191</sup> Such an exaction will have no constitutional implications; indeed, developers and government agencies reach these types of compromises every day. The reverse exaction proposal protects neighbors against the most egregious under-exactions, thereby dramatically reducing the likelihood that this behavior will occur and providing a remedy on those infrequent occasions when it does.<sup>192</sup> The primary effect of judicial recognition of reverse exaction claims should be the recentering of permit negotiations in a way that does not unfairly favor applicants in the way that current doctrine does. In other words, a reverse exaction claim does for neighbors precisely what *Nollan* does for permit applicants.

## 2. The *Dolan* Prong of a Reverse Exaction Claim

An exaction may possess the required essential nexus but still fail the second part of the exaction test. The *Dolan* prong of a traditional exaction claim asks "whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development."<sup>193</sup> This second prong focuses on the magnitude of the condition, asking whether the exaction is "roughly proportional[ ]" to the externality it is supposed to internalize or whether the government is asking too much, as the Court found—twice—in *Dolan*.<sup>194</sup> A reverse exaction claim would ask whether the condition proposed by the government under-corrects the problem that the applicant will cause and thereby imposes costs on those neighbors for which they must be compensated. As with traditional claims raised by permit applicants, "[n]o precise mathematical calculation" would be required, but the public body "must make some effort to quantify its findings [that the exaction will be adequate to offset the negative effects

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<sup>190</sup> Bill Watterson, *Calvin and Hobbes: A Good Compromise Leaves Everybody Mad*, <http://thecuriousbrain.com/?p=26200> [<https://perma.cc/C8AQ-BJYF>]; see also *Billions: Indian Four* (Showtime television broadcast Mar. 26, 2017) ("Nobody leaves a negotiation happy.").

<sup>191</sup> *Cf. Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834–36 (1987) (observing that an imposition upon property does not automatically violate the Takings Clause).

<sup>192</sup> *Cf. id.* at 837 (discussing how a landowner is protected against over-exactions in the traditional exaction context).

<sup>193</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 388 (1994).

<sup>194</sup> *Id.* at 391.

of the proposed development] beyond the conclusory statement that it could offset some of the [negative effects].”<sup>195</sup>

Once again, the *Dolan* test is designed to address only the most egregious exactions, cases in which there is not even a rough proportionality between the problem the applicant will cause and the magnitude of the condition the government proposes in response.<sup>196</sup> The second prong of the reverse exaction test aims to accomplish this same goal.<sup>197</sup> In a reverse exaction claim, the government would not have to demonstrate scrupulously that it has exacted precisely the right amount. Rather, it must undertake an “individualized determination” that the exaction it proposes is “related . . . in . . . extent to the impact of the proposed development.”<sup>198</sup> If the exaction bears some proportionality to the problem it seeks to address, as it probably will in the typical case, then neighbors will be unable to carry the burden of meeting this second exaction prong and their claim will fail.<sup>199</sup>

The *Dolan* test penalizes only those governments that miss the mark by a wide margin, and the second prong of the reverse exaction standard would aim to accomplish this same goal at the opposite extreme. Just as with the *Nollan* prong, the *Dolan* half of the reverse exaction standard would leave most government actions unaffected. This expansive middle ground would once again allow for wide-ranging negotiations between applicants and government bodies. The standard proposed here, echoing the Court’s *Dolan* holding, would recognize fully that these mostly local questions should be decided by local parties, who have far greater knowledge of the peculiarities of the area in which the real estate is located than a state or federal judge is likely to possess.<sup>200</sup> Most exactions, and the negotiations leading up to them, would easily avoid constitutional problems, and a dispute would violate constitutional standards only rarely.

Government bodies concerned about reverse exaction claims might choose to be more meticulous than *Dolan* requires, as some surely do now when contemplating traditional claims. These bodies, advised by cautious counsel, are acknowledging that each proposed exaction is a potential lawsuit—especially after *Koontz*<sup>201</sup>—and deciding to dot every “i” and cross every “t.” They are in effect purchasing insurance, opting to spend extra money on traffic studies and pollution consultants today to avoid the small chance of a huge judgment tomorrow.<sup>202</sup> These agencies could

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<sup>195</sup> *Id.* at 395–96.

<sup>196</sup> *See id.* at 388–91.

<sup>197</sup> *Cf. id.*

<sup>198</sup> *Id.* at 391.

<sup>199</sup> *See id.* at 390–91.

<sup>200</sup> *See id.* at 389–91 (discussing cases in which jurisdictions made individualized decisions based on the impact such changes would have in the locale).

<sup>201</sup> *See* 133 S. Ct. 2586 (2013).

<sup>202</sup> *See* Nolon, *supra* note 107, at 211–19 (describing five approaches, including this one, that land use bodies might safely pursue after *Koontz*); *see also* Mulvaney, *supra* note 120,



decide to approach the second prong of a reverse exaction claim in the same way, but nothing in *Dolan* would require them to act so conservatively.<sup>203</sup> More likely, government officials that respond to application requests will seek to establish themselves as conscientious stewards of the public interest and will take their responsibilities seriously, including those under *Nollan* and *Dolan*.<sup>204</sup> That is what they are supposed to do, and concerns about litigation from either type of plaintiff will help focus their attention on the nature and magnitude of the property rights they seek to exact. By behaving in this manner, these government agencies will establish a reputation for proper behavior that might discourage some potential plaintiffs along the way.

### 3. The Source of Any Compensation Award Following a Successful Reverse Exaction Claim

The source of funds for any award resulting from a successful reverse exaction claim similarly would reflect the payment source for traditional exaction claims. In a traditional claim, the government is required under the Fifth Amendment to pay just compensation to the prevailing owner.<sup>205</sup> But “the government” is merely a pass-through entity, raising funds from one group and transferring them to another.<sup>206</sup> The government ordinarily compensates the successful applicant out of general tax revenues or reserve funds, which is to say money that has been paid or will be paid by taxpayers. In the cases of local governments such as cities or counties, this typically means revenues from taxes on income, sales, and real property, although severance taxes, license and motor vehicle fees, insurance proceeds, user fees, and other

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at 67–73 (reviewing Nolon’s article and describing five additional approaches). *But see* Daniel P. Selmi, *Negotiations in the Aftermath of Koontz*, 75 MD. L. REV. 743, 756 (2016) (“The complexity of land use factors and the variable nature of negotiations in light of municipal discretion mean that *Koontz* will not play a large role in negotiations over development approvals.”).

<sup>203</sup> See generally *Dolan*, 512 U.S. 374.

<sup>204</sup> See Carlson & Pollak, *supra* note 180, at 116–17 (describing planners’ high level of familiarity with the *Nollan* and *Dolan* standards).

<sup>205</sup> U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”); *Dolan*, 512 U.S. at 385 (“[T]he government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.”).

<sup>206</sup> Eyal Benvenisti, *Sovereignty and the Politics of Property*, 18 THEORETICAL INQUIRIES L. 447, 448 (2017):

The debate whether property is a limit on or the product of sovereignty envisages a tension between “the individual owner” and “the state.” But “the state” is not more than the aggregate of individuals who define theirs and others’ property rights through the political process. Stated differently, then, the underlying tension between property and sovereignty is a tension between the citizens.

miscellaneous revenue sources may also be available.<sup>207</sup> If the government body has the money on hand, it pays compensation to the successful plaintiff, thereby reducing the funding that is available to meet other government needs.<sup>208</sup> If it does not have the money it needs, the government will have to raise taxes or fees, issue debt that ultimately must be repaid, or forego future projects that it otherwise would have undertaken.<sup>209</sup> The taxpayers pay the compensation either from cash yesterday, cash today, cash tomorrow, or lower quality of life if, for example, the government must reduce spending on other government services.<sup>210</sup>

In this way, the Takings Clause ensures that the beneficiary of the taking, the public at large, compensates the party that suffered the taking, the applicant that did not receive a permit to which it was constitutionally entitled.<sup>211</sup> As the Court stated in *Armstrong v. United States*,<sup>212</sup> “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>213</sup> The government arbiter serves merely as an intermediary: it assesses taxes and fees against members of the general public, collects those funds, and pays just compensation out of those revenues to the specific party from whom it has acquired property.<sup>214</sup>

The neighbors of an over-exacted permit applicant benefit because the applicant is forced to concede more than the Constitution allows, thereby enhancing the value of the neighbors’ property, and the neighbors must comply with the Constitution by paying for this benefit indirectly. The people of California had to compensate the Nollans for an easement that the public otherwise would have received at a price that was constitutionally inadequate.<sup>215</sup> The people of Tigard enjoyed a new bicycle path

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<sup>207</sup> Elizabeth Malm & Ellen Kant, *Fiscal Fact No. 354: The Sources of State and Local Tax Revenues*, TAXFOUND. (Jan. 29, 2013), <https://files.taxfoundation.org/legacy/docs/ff354.pdf> [<https://perma.cc/XE4E-GBWB>].

<sup>208</sup> See Echeverria, *supra* note 17, at 603–04.

<sup>209</sup> See *id.*

<sup>210</sup> See *id.* at 603 (“A major, unexpected takings award based on regulatory activity can throw a small, finely-tuned municipal budget into complete disarray.”).

<sup>211</sup> See *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* But see Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 28–31 (2008) (suggesting that courts should focus less on this question and more on whether a government action is the functional equivalent of a physical appropriation).

<sup>214</sup> In some cases, the payments are not made by precisely the same parties who benefit from an exaction. Jurisdictions often raise revenue from non-residents—who do not vote in local elections—by, for instance, levying taxes and fees on hotel rooms and rental cars. Since these visitors do not live in the community, they did not benefit (or did not benefit very much) when the government over-exacted a neighbor. Even residents who pay taxes to the government may not benefit specifically from that government’s over-exaction.

<sup>215</sup> *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 841–42 (1987) (“California is free to advance its ‘comprehensive program,’ if it wishes, by using its power of eminent domain for

and a new floodway, but they eventually paid the Dolans for the requisite real estate.<sup>216</sup> These were forced sales of property rights by unwilling sellers rather than uncompensated seizures.<sup>217</sup> The government itself did not pay the compensation, merely serving as a transfer agent.

Reverse exaction compensation would exhibit similar characteristics. The party suffering an unconstitutional taking of its property would be the rare neighbor forced to tolerate an exaction so inadequate that it cannot meet the essential nexus and rough proportionality standards applicable to reverse claims.<sup>218</sup> For whatever reasons, a public agency approved a project that was in the public interest overall without adequately mitigating its substantial negative impact on others.<sup>219</sup> Once a court finds that the under-exaction worked a taking of the property of one or more neighbors, *First English* would automatically require compensation for this taking.<sup>220</sup> To paraphrase *Armstrong*,<sup>221</sup> a court would be barring government from forcing the public to bear burdens which, in all fairness and justice, should be borne by specific individuals alone.<sup>222</sup> If anything, compensation to a neighbor for a reverse exaction may be even more justifiable than compensation to an applicant for a direct exaction.<sup>223</sup>

Again, though, the government is not acting in an entrepreneurial capacity and is serving merely as an umpire and go-between. In this case, the true beneficiary of the taking is the applicant that was able to receive the permit it requested while

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this ‘public purpose’ . . . but if it wants an easement across the Nollans’ property, it must pay for it.” (internal citation omitted)).

<sup>216</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994) (“A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922))).

<sup>217</sup> In economic terms, this is an interest protected by a liability rule. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) (defining liability rules).

<sup>218</sup> See Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 555 (2001) (“[I]f a downzoning of a certain magnitude would not have been considered a regulatory taking, an upzoning of the same magnitude should not be seen as a giving.”).

<sup>219</sup> See *Been*, *supra* note 17, at 504–06 (noting the possibility of under-regulation, including, perhaps, by jurisdictions that under-regulate as a means of balancing their budgets without having to increase taxes).

<sup>220</sup> 482 U.S. 304, 322 (1987).

<sup>221</sup> 364 U.S. 40 (1960).

<sup>222</sup> *Cf. id.* at 49.

<sup>223</sup> In a traditional claim, the applicant is the entity disturbing the status quo, and there is no taking until the owner elects to change the property’s use in a manner that may harm others. By contrast, those who suffer reverse exactions do not take any initiative and have little input into the actions of an applicant that seeks to enrich itself. The applicant’s decision whether to proceed presumably does not factor in its neighbors’ well-being, which means that reverse exaction claimants are little more than collateral damage. In short, exaction claimants act because they believe they will be better off than before, while reverse exaction claimants respond in the hope that they will be no worse off.

internalizing only an unconstitutionally tiny portion of the project's costs.<sup>224</sup> The actual casualties of the taking inflicted by the applicant's project are those neighbors, not the government agency.<sup>225</sup> In such a case, the applicant indirectly took property interests from its neighbors, with an assist from a government agency that did not properly perform its role as intermediary.

In this reverse exaction setting, the government body would charge these costs back to the recipient of the government permit, thereby forcing the permit applicant to internalize the costs it nearly succeeded in offloading onto its neighbors.<sup>226</sup> This compensation, once again, transforms an involuntary seizure into a forced sale at a fair market value price, as the Fifth Amendment demands.<sup>227</sup> This is precisely what should have happened all along and what would have happened had the government calculated the exaction correctly from the outset: the applicant would have paid more, in the form of the higher cost of a properly calculated exaction, and the neighbors would have suffered less. The beneficiary of the constitutionally inadequate exaction, in effect, takes property from its neighbors, abetted by the government, and the process described here ensures that this beneficiary compensates those neighbors justly for their property.<sup>228</sup> This compensation will typically be money but could also be paid in the form of a property interest such as an easement, just as the government might have exacted either money or property from the original applicant.

In fact, this process would mirror the private taking statutes some states have adopted, under which private parties enjoy limited condemnation power over other private parties but must pay just compensation for any property right they take.<sup>229</sup>

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<sup>224</sup> If the applicant internalizes its externality in a constitutional way, then there is no reverse exaction and no liability. This will be the outcome in most cases. *See supra* Section III.B.1–2. Most exaction claims fail, and most reverse exaction claims will similarly fail.

<sup>225</sup> *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 387–88 (1994) (noting how permit conditions would reduce off-premises effects).

<sup>226</sup> The neighbors might elect to use the funds they receive to mitigate the externality the applicant's project created or exacerbated, if mitigation is feasible. They might, for instance, erect a fence, install sound-proofing, or invest in air filters. Or they might simply keep the money as compensation for a property right that the government appropriated by not exacting the applicant's property to constitutional standards: the value of their property dropped, and they received compensation for this loss of value.

<sup>227</sup> U.S. CONST. amend. V.

<sup>228</sup> *See Bell & Parchomovsky, supra* note 218, at 556 (“When owners have the option to refuse the benefit of the giving, the state should demand immediate payment of a charge for the giving. Anyone not wishing to pay the charge has the option of refusing to accept the giving.”); *cf. Karen Bradshaw, Using Takings to Undo Givings*, 10 N.Y.U. J.L. & LIBERTY 649 (2016) (discussing when the beneficiary of a statute can challenge it).

<sup>229</sup> *See, e.g., IOWA CODE* § 6A.4(2) (2017) (allowing landlocked private owners to take private property for access to a public road); *see also Abraham Bell, Private Takings*, 76 U. CHI. L. REV. 517, 559 (2009) (arguing that private takings should be allowed in certain circumstances, provided that “payment for the taking must be made by the actual private

In states lacking such statutes, private parties should not enjoy this power, since private parties ordinarily have no right to take property from other private parties. But once the damage is already done, with an assist from a government body that miscalibrated an exaction, it may no longer be feasible to protect the neighbors' rights with a property rule—the improvement may already have been completed—and a liability rule may be the only practical option. The neighbors whose rights were violated recover from the government, and the government charges the cost back to the under-exacted applicant that benefited from this error.

This remedial structure mirrors what happens in cases such as *Nollan* and *Dolan*, in which the beneficiaries of a government over-exaction indirectly pay compensation to the wronged landowner.<sup>230</sup> The neighbors of the Nollans and the Dolans benefited from the government's over-exaction of those applicants by enjoying for free property rights that the state or the city should have had to purchase on their behalf with their tax dollars.<sup>231</sup> Those same neighbors were later forced to pay for these takings when the government body had to pay takings compensation.<sup>232</sup> Here, the applicant would benefit from the government's unconstitutionally inadequate exaction and ultimately would be required to compensate its neighbors for that reverse-exaction taking.

It would be particularly unfair if the government failed to push the cost of a reverse-exaction taking forward onto the permit applicant that created the externality and instead paid compensation out of general tax revenues. Tax revenues are raised from members of the general public, many of whom are the same neighbors suffering from the government's inadequate exaction. In other words, if the payment for a reverse exaction taking simply comes from tax revenues or reserves, the neighbors would, to some extent, be paying compensation to themselves, particularly if the taxing jurisdiction is small.<sup>233</sup> Meanwhile, the under-exacted applicant would be creating externalities that it would not have any obligation to remediate beyond its

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taker, rather than an intermediary such as the government. This ensures that the taker indeed values the property right more highly than the previous owner." (footnote omitted)).

<sup>230</sup> See *Dolan*, 512 U.S. 374; *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>231</sup> See *Dolan*, 512 U.S. 374; *Nollan*, 483 U.S. 825.

<sup>232</sup> See, e.g., *Nollan*, 483 U.S. 825.

<sup>233</sup> Because the Nollans and the Dolans were presumably taxpayers, they, too, may have compensated themselves in part. But in those cases, many people—the entire population of California in *Nollan*—were paying compensation to a single property owner. Thus, the proportion of the compensation attributable to the Nollans' own state tax payments, or anyone else's, would have been minuscule. In the reverse exaction setting, by contrast, there frequently will be numerous neighbors receiving compensation from a single applicant, and each neighbor will receive a much smaller amount. If an applicant is polluting the local air, then everyone in the community is suffering and everyone is entitled to a small amount of compensation. If that award is funded by local taxes, then the local residents would effectively be compensating themselves for someone else's wrong. The polluter, meanwhile, would be allowed to harm others nearly for free.

pro rata share of municipal tax payments. By judicially forcing this expense back onto the applicant that created the problem, the reverse exaction claim ensures that the party that caused the externality is held accountable, which is precisely what the exaction was supposed to accomplish in the first place. Here, though, a claim by the applicant's neighbors is needed to ensure that the externality is internalized fairly, with a judge ordering a remedy that corrects the land use body's failures.<sup>234</sup>

There are numerous precedents for forcing the beneficiaries of government-mandated improvements to pay for those improvements.<sup>235</sup> The most obvious example is the fact that jurisdictions such as cities and counties levy taxes on real estate and use these funds to provide standard local government services such as schools, libraries, and roads. The beneficiaries of the services pay for them. The fit is not perfect, of course: some beneficiaries, such as transient visitors, may enjoy services without paying taxes, and some taxpayers, such as absentee owners of vacant property, may not benefit from the services they are paying for.<sup>236</sup> Moreover, since most property taxes are assessed on an *ad valorem* basis, the funds come disproportionately from those who own the most valuable real estate, including commercial owners that may be taxed at a higher rate while making only limited direct use of these services.<sup>237</sup>

This Section previously noted the unfairness of asking the recipients of takings compensation to remit real estate taxes that are then used to pay the takings compensation they receive.<sup>238</sup> Here, however, tax dollars are used to provide broad-based services that everyone—not just the plaintiff in a takings case—enjoys, and compensation for takings ordinarily makes up only a trivial part of the annual budget. In

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<sup>234</sup> Cf. *William J. (Jack) Jones Ins. Trust v. City of Fort Smith*, 731 F. Supp. 912, 914 (W.D. Ark. 1990) (noting, in the course of ruling in favor of a landowner's exaction claim, that "*Nollan* teaches that the City may constitutionally 'tax' plaintiff to recoup the costs of the negative externalities that its increased business activities cause").

<sup>235</sup> Cf. Levinson, *supra* note 103, at 388–89 (discussing whether mandated compensation leads to efficient investment by private individuals).

<sup>236</sup> School systems are costly to operate, but the school bus does not pick up any students at the factory door. Non-owner residents such as renters pay taxes indirectly, since the rent their landlords charge presumably factors in all costs of providing the housing, including real estate taxes the landlord must pay. Others may pay even more indirectly and in smaller amounts: transient visitors enjoying limited municipal services as they pass through a city may pay something in the form of highway tolls, gasoline taxes, and sales taxes on incidental purchases, for instance. But at least as a first approximation, the local population pays taxes to cover the costs of services that benefit the local population. Taxpayers living in jurisdictions that levy taxes at lower rates presumably are willing to live with a lower level of service.

<sup>237</sup> See, e.g., *How We Tax Your Property*, CITY OF BOSTON, <http://www.cityofboston.gov/assessing/taxrates.asp> [<https://perma.cc/PW7K-A54Y>] (last visited Oct. 22, 2017) (noting that "[t]he City of Boston operates under a property tax classification system. This allows us to charge different rates for residential and commercial property," and setting forth the 2017 rate of \$10.59 per thousand dollars of value for residential property and \$25.37 for commercial, industrial, and personal property).

<sup>238</sup> See *supra* notes 233–34 and accompanying text.

fact, the contrast between this use of tax revenues and the use discussed above highlights a critical distinction. In this case, broad-based revenues support widely used public services enjoyed by much of the general population, while in the previous discussion, broad-based revenues would be used, inappropriately, to compensate the general public for a community-wide loss that it suffers.<sup>239</sup>

Of course, real property taxes are broad-based charges that must be paid by all property owners, just as income taxes are paid by all parties who earn income and sales taxes are paid by all who spend. Taxes are the price the government charges residents and businesses for a wide array of services that everyone enjoys to some degree, and they are imposed legislatively. Reverse exaction compensation, by contrast, will be paid only by the particular owner or small group of owners that benefited from an unconstitutionally weak exaction, and it will be court-ordered. That party enjoyed an undeserved gain when it received a permit with conditions attached that were inadequate to internalize the externalities the owner caused. That owner, moreover, probably received that undeserved gain on a one-off basis, as a result of individualized negotiations with a permitting body as part of the administrative approval process.

State subdivision laws might offer a closer parallel to the structure proposed here.<sup>240</sup> When a developer subdivides agricultural property and creates thirty residential lots, for example, a typical state subdivision law will mandate that the developer build the infrastructure that the subdivision will require.<sup>241</sup> Local jurisdictions do not want to pay the expense for these infrastructure improvements out of general tax revenues or utility fees, presumably because they do not want every resident to have to pay for improvements that are designed to enrich one particular landowner.<sup>242</sup> The developer must obtain final subdivision approval from the

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<sup>239</sup> The most extreme example of this phenomenon would be a government that increases its tax rate to 100% of market value and then condemns all the real estate within its borders, using the funds it just raised to pay compensation to the former owners of this land. Taxpayers, who would pay differing amounts reflecting the relative value of their real estate, would receive compensation in the same proportion as the money they had just paid and would lose their property along the way.

<sup>240</sup> See, e.g., TENN. CODE ANN. § 13-3-403(a)–(b) (2017) (permitting regional planning commissions to condition subdivision approval on provision of roads, utilities, and other infrastructure). To the extent subdivision laws such as this build exactions into the approval process, these exactions are imposed legislatively rather than negotiated administratively in each individual case.

<sup>241</sup> See, e.g., *id.* This infrastructure typically includes essential facilities such as streets, sidewalks, electricity, water, cable television and internet, and storm and sanitary sewers. Some jurisdictions go further than this. See, e.g., *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996) (discussing validity of mitigation fees imposed in lieu of developer's provision of recreational facilities and public art).

<sup>242</sup> In the course of ruling in favor of the exacted landowner, the *Dolan* Court observed without comment that the City of Tigard's drainage plan required property owners along the

relevant land use body,<sup>243</sup> and that body will condition its approval on the subdivider's provision of those services, often secured by a bond.<sup>244</sup> The subdivider presumably pushes these costs forward by pricing them into the lots and the finished homes to be built on them. The ultimate purchaser thereby pays a price that reflects the cost of all services and facilities the new home necessitated. Subdivision laws, in effect, build in exactions legislatively. The community as a whole is not forced to bear the external costs that a developer has generated; the developer profits without imposing capital costs on neighbors.<sup>245</sup> An even closer parallel might be to special taxing districts or to assessments for particular improvements.<sup>246</sup> Rather than the entire city paying to improve the entire city, districts such as these localize both the problem and the solution by allowing assessments on one area to fund improvements in just that area.<sup>247</sup>

Utility assessments operate in a similar way, with entities such as utilities charging fees or assessments against particular lots that benefit from specific new construction. A water company may replace an aging sanitary sewer with a new line and assess the owners who benefit by imposing a sewer-improvement fee on their utility bills for the next thirty years. Economically, this differs little from forcing these owners to replace their own sewer and take out a thirty-year mortgage to cover the cost, but given the community nature of the improvement, the assessment structure is more practical. By acting in this way, the utility ensures that the parties using the new facility are the parties that pay for building it.

This portion of this Article's proposal is also in accord with the academic literature on "givings."<sup>248</sup> In their seminal article on the subject, Professors Bell and Parchomovsky use a state's elimination of development restrictions on wetlands as an illustration of a government "regulatory giving."<sup>249</sup> Holders of wetlands property receive a gratuitous benefit, while neighbors pay the cost in the form of reduced

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affected waterways to pay a disproportionately high share of the cost of the city's improvements, given that they would enjoy a disproportionately high share of the benefits. 512 U.S. 374, 378–79 (1994).

<sup>243</sup> See, e.g., TENN. CODE ANN. § 13-3-403(b) (2017).

<sup>244</sup> See, e.g., *id.*

<sup>245</sup> The cost of maintaining these newly enlarged systems will be marginally higher than it was when they were smaller. But the tax base will also increase, since it has just been expanded by replacing one agricultural lot with thirty new residential ones. That is not unusual and is the hallmark of a healthy, growing community.

<sup>246</sup> See, e.g., TENN. CODE ANN. § 7-84-401 (2017) (allowing municipalities to levy special assessments against properties located within a central business improvement district).

<sup>247</sup> See, e.g., TENN. CODE ANN. § 7-84-203 (2017) (describing which properties may be included in a central business improvement district).

<sup>248</sup> See generally Bell & Parchomovsky, *supra* note 218, at 549–50 ("Givings are ever-present and yet not discussed. They can be found in almost every field of government endeavor related to property.").

<sup>249</sup> *Id.* at 550–51.



quality of life.<sup>250</sup> Had the authors said “relaxation” instead of “elimination,” they might have been describing the facts in *Koontz*, in which the applicant sought permission to develop his lot in a way that would potentially harm his neighbors.<sup>251</sup> The government agency proposed an exaction that the Court later held to be subject to the *Nollan* and *Dolan* standards.<sup>252</sup> Had the government, fearing liability for an improper exaction, proposed a far weaker exaction, the neighbors might have viewed this as an inappropriate giving to *Koontz*, which is effectively an unremedied reverse exaction.<sup>253</sup> Most relevant here, Bell and Parchomovsky would require that the beneficiaries of givings compensate the owners whose property is taken, particularly if the property was taken specifically for the purpose of a giving.<sup>254</sup> Such an approach would weed out unwarranted windfalls.<sup>255</sup>

Most significantly, nuisance law doctrine has long mandated that those who unreasonably interfere with the property rights of their neighbors make those neighbors whole.<sup>256</sup> The entire body of nuisance law is predicated on the recognition that one owner’s use of property can unreasonably interfere with another owner’s.<sup>257</sup>

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<sup>250</sup> *See id.*

<sup>251</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2592–93 (2013).

<sup>252</sup> *See id.* at 2593–94.

<sup>253</sup> *See Bell & Parchomovsky, supra* note 218, at 552 (asking whether General Motors could have been required to pay for a giving on the facts of *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004)).

<sup>254</sup> *Id.* at 555–56; *see also id.* at 597 (“[W]hen compensable takings are associated with chargeable givings, the recipients of the giving should compensate the victims of the taking.”); *id.* at 609–12 (discussing how their proposed “law of givings” might resolve many of the unfairness problems that exactions create). The authors suggest that the law of givings might be a branch of constitutional law, implicit in the Takings Clause. *Id.* at 551 n.16.

<sup>255</sup> *See Eric Kades, Windfalls*, 108 YALE L.J. 1489, 1492 (1999) (“Some legal rules do—and should—dictate that the state capture windfalls, i.e., tax them away from their lucky recipients and redistribute the gains to the rest of the population.”); Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1355 (1991) (“One solution to this problem is the normative suggestion . . . that those who benefit from government interventions should be made to pay those who are burdened. In theory, such a requirement would perfectly encourage desirable projects and discourage inefficient or corrupt interventions.” (footnote omitted)); *see also* Jianlin Chen, *Curbing Rent-Seeking and Inefficiency with Broad Takings Powers and Undercompensation: The Case of Singapore from a Givings Perspective*, 19 PAC. RIM L. & POL’Y J. 1, 28–46 (2010) (describing how Singapore recoups some of the gains property owners receive from government givings).

<sup>256</sup> *See generally* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 767–71 (2001) (discussing American nuisance law, its roots in medieval England, and the modern distinction between public and private nuisance).

<sup>257</sup> For a recent discussion of incompatible nearby land uses outside of the exactions context, see Kris Maher, *Missouri Levee Raises Questions*, WALL ST. J., Sept. 15, 2016, at A3 (quoting the mayor of Fenton, Missouri, as saying: “I hate to put those people back underwater

Courts and commentators have long recognized the problems that incompatible adjacencies create.<sup>258</sup> A party found to have created a nuisance has committed a tort and must pay damages to its plaintiff neighbor. Judges deciding nuisance cases must struggle to find a baseline, a prerequisite to determining exactly which owner is interfering with the other's—presumed “normal”—use.<sup>259</sup> But judges deciding exaction and reverse exaction cases will avoid much of that dilemma, since neither type of claim can succeed unless the government has miscalculated its exaction by a wide mark. Even if a court cannot figure out precisely what the baseline, non-nuisance use is, most exactions fall in the central, “close enough” portion of the bell curve that does not lead to compensation for either party.

Moreover, land use laws, and particularly zoning laws, have long been recognized as little more than prospectively adopted anti-nuisance legislation. The Supreme Court's first foray into zoning law, *Village of Euclid v. Ambler Realty Co.*,<sup>260</sup> relied heavily on the law of nuisance in rejecting a facial challenge to a fairly typical new zoning law.<sup>261</sup> The *Euclid* Court found that “the foundation . . . of the common law of nuisances, ordinarily will furnish a fairly helpful clew [sic]”<sup>262</sup> as to whether a given zoning ordinance is valid. The Court observed that “the law of nuisances . . . may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the [police] power.”<sup>263</sup> It noted that zoning law, like nuisance law, is context-specific.<sup>264</sup> The opinion included the

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that finally get to live in almost a flood-free area now.’ But that might not be fair to others, he added. ‘What right do you have to push water onto someone else?’”).

<sup>258</sup> LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 97 (2003) (“[N]uisance is *not* . . . some kind of ‘exception’ to the otherwise broad and unassailable power of property rights. Rather, it is simply one manifestation of a very basic principle: that the normative basis for the presumed superiority of a property right . . . fails when it is opposed by a public interest that involves values of a similar kind.” (footnote omitted)); Lisa Grow Sun & Brigham Daniels, *Mirrored Externalities*, 90 NOTRE DAME L. REV. 135, 138 (2014) (“[A]ny potential decision that implicates externalities can be described, alternatively, as acting or failing to act and thus can be framed as creating either negative or positive externalities.”); Sax, *supra* note 67, at 153 (“Surely there is no theory of property rights that suggests that property owners should have an advantage in conflict resolution merely because of superior physical position . . .”).

<sup>259</sup> This issue arises throughout takings law. *See, e.g.*, Nestor M. Davidson, *Resetting the Baseline of Ownership: Takings and Investor Expectations After the Bailouts*, 75 MD. L. REV. 722, 724 (2016) (noting, after judicial rejection of several takings claims arising from government bailouts in the financial services industry, that “going forward, officials facing future panics can have greater confidence to take the steps necessary to stop financial wildfires without fear of liability.” (footnote omitted)).

<sup>260</sup> 272 U.S. 365 (1926).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 387.

<sup>263</sup> *Id.* at 387–88.

<sup>264</sup> *Id.* at 388 (citation omitted):

[T]he question whether the power exists to forbid the erection of a

much-quoted statement that “[a] nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard.”<sup>265</sup>

The *Euclid* Court cited earlier state court opinions noting that businesses in residential neighborhoods may amount to nuisances.<sup>266</sup> And it even went so far as to note that, in certain settings, a residential apartment building might constitute a nuisance.<sup>267</sup> The entire basis for the Court’s upholding of this first-generation zoning ordinance is its recognition that zoning law—unsuccessfully challenged as revolutionary by *Ambler Realty*—is merely an extension of the venerable common law of nuisance.<sup>268</sup>

If anything, permit applicants that benefit from exactions that are constitutionally too weak and that are later called on to provide restitution to government bodies for the compensation they must pay to neighbors should be grateful that the neighbors did not seek to have their use of the property enjoined entirely under nuisance law. A useful example of this distinction is the well-known case of *Boomer v. Atlantic Cement Company*,<sup>269</sup> in which the New York Court of Appeals found that the defendant factory was committing an ongoing nuisance by forcing its neighbors to endure dirt, smoke, and vibrations.<sup>270</sup> Under traditional nuisance law, the neighbors would have been entitled to an injunction against the continuation of these harmful activities.<sup>271</sup>

Had the court issued this injunction, the only options available to the factory would have been to cease operations or to purchase an easement to pollute from the plaintiffs.<sup>272</sup> Such a negotiation raises huge collective action problems, given that the neighbors were a large group with potentially divergent goals, and also given the

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building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 390–93 (citing state cases).

<sup>267</sup> *Id.* at 394–95 (“Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.”). The Court also refers to some apartment houses located in districts of detached homes as “mere parasite[s], constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.” *Id.* at 394.

<sup>268</sup> Commentators have also long noted this parallel between land use regulations such as zoning ordinances and the law of nuisance. *See, e.g., Sax, supra* note 67, at 150 (describing property “as an interdependent network of competing uses, rather than as a number of independent and isolated entities”).

<sup>269</sup> 257 N.E.2d 870 (N.Y. 1970).

<sup>270</sup> *Id.* at 871–72.

<sup>271</sup> *Id.* at 872 (noting that traditional doctrine holds that “where a nuisance has been found and where there has been any substantial damage shown by the party complaining an injunction will be granted”).

<sup>272</sup> *See id.* at 872–73.

likelihood of extreme ill will between the parties by the time the litigation was resolved. But even if the factory had been able to surmount these problems, it would have been forced to agree to whatever price the neighbors demanded, unless that price exceeded the value of continuing to operate, in which case the factory would simply shut its doors. In short, if the court had issued an injunction, it would have protected the neighbors' rights with a property rule and placed the factory owners in the position of having to accede to whatever terms the neighbors set.<sup>273</sup>

Recognizing these challenges, however, the court refused to enjoin the continued operation of the factory and instead awarded damages to the plaintiffs, because "to follow the rule literally . . . would be to close down the plant at once."<sup>274</sup> There was apparently no technical method available for abating the nuisance,<sup>275</sup> and the court wished to avoid the inefficiency of shutting the plant down altogether.<sup>276</sup> The neighbors won their case, but the court elected to protect their rights with only a liability rule,<sup>277</sup> namely an award set by the court rather than an easement price set by the neighbors themselves or never agreed to at all.<sup>278</sup>

Permit applicants forced to reimburse government bodies for the costs of successful reverse exaction claims will be unhappy having to pay more for their permit than they initially thought. On reflection, though, they should be grateful that they did not face the injunction that the *Boomer* dissent would have imposed in accordance with the common law of nuisance.<sup>279</sup> Permit applicants in the reverse exaction setting receive the permits they desire, though with constitutionally inadequate conditions attached, and are later forced to pay compensation to the neighbors whose property rights their change in use has damaged. As disappointing as that later payment may be, those applicants nearly always would choose that option over an outright permit denial and would have done so had they confronted that same choice on day one.<sup>280</sup> Moreover, one can only assume that the permit applicant

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<sup>273</sup> Calabresi & Melamed, *supra* note 217, at 1105–06 (citing *Boomer*, 257 N.E.2d 870).

<sup>274</sup> *Boomer*, 257 N.E.2d at 873.

<sup>275</sup> *Id.*

<sup>276</sup> "Respondent's investment in the plant is in excess of \$45,000,000. There are over 300 people employed there." *Id.* at 873 n.\*.

<sup>277</sup> See Calabresi & Melamed, *supra* note 217, at 1105–06.

<sup>278</sup> *Boomer*, 257 N.E.2d at 873 ("[T]o grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the contending parties.").

<sup>279</sup> "[T]he majority is, in effect, licensing a continuing wrong. It is the same as saying to the cement company, you may continue to do harm to your neighbors so long as you pay a fee for it." *Id.* at 876 (Jasen, J., dissenting). See generally Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1282 (2009) (concluding, in the takings context, "that the categorical protection of existing uses extends more protection than appropriate in at least some cases").

<sup>280</sup> In rare cases, the compensation these applicants must pay may make the project economically unfeasible, because its overall cost, including the external damages it imposes on

would rather pay a damage award established by a court than face the vagaries of a nuisance claim brought by its neighbors, including the uncertainty of whether those neighbors will sell an easement to the applicant and at what price.

In short, any property owner that applies for a land use permit and later accepts a very favorable exaction does so with full knowledge that it later may be charged for the costs it imposes on its neighbors, just as it knows it may face a nuisance claim brought by its neighbors under the law of torts.<sup>281</sup> In each of these cases, the applicant is not losing anything when it later pays these additional amounts. Rather, it enjoys less of a gain than it had hoped for, while reimbursing its neighbors for its interference with their property rights.<sup>282</sup> Owners also should remember that an agency occasionally may reverse its granting of a permit, or a court may revoke the permit.<sup>283</sup> This might happen even if the applicant has commenced construction of its project.<sup>284</sup> These actions are certainly less desirable to the owner than having to pay compensation to its neighbors.

In those extremely rare cases in which a reverse exaction claim succeeds, the court would be finding that the applicant's neighbors suffered a constitutional

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neighbors, exceeds its overall benefit. In cases such as this, the project never should have been allowed to proceed in the first place, as the applicant probably should have known from the outset. Stated differently, if the applicant had actually owned all the neighboring land its new development would injure, it would not have proceeded. There is no reason such an applicant should be allowed to proceed just because it is in a position to offload those costs onto others, and there is no reason the neighbors should be forced to bear those costs. Any applicant with a proposal that is so inefficient, and that so harms its neighbors, deserves little judicial sympathy, assuming it can even get its proposal approved by a land use agency. *See* Levinson, *supra* note 86, at 401–02.

<sup>281</sup> *See* Bell & Parchomovsky, *supra* note 218, at 600 (“The involvement of the government should not blind one to the underlying quasi-tortious situation—the taking of one’s private property by another.”).

<sup>282</sup> The legal standards for nuisance claims and takings claims differ, so it is entirely possible that a given plaintiff might prevail on one type of claim but not the other. This does not change the fact that land use laws such as zoning laws are often seen as little more than advance attempts to head off potential nuisances down the road. *See supra* notes 260–68 and accompanying text.

<sup>283</sup> *See, e.g.,* McAllister v. Cal. Coastal Comm’n, 87 Cal. Rptr. 3d 365, 388 (Ct. App. 2009) (“Since approval of the Project rests, in part, on that erroneous finding, it follows, and we conclude, that the Commission abused its discretion in approving the Project and granting the coastal development permit. Therefore, the approval cannot stand, and the matter must be remanded to the Commission . . .”).

<sup>284</sup> *Cf. id.* at 392–93:

[W]hen a developer starts a project without any permit or under an invalid permit—i.e., one that was issued in violation of existing zoning or environmental laws—the developer does not gain a vested right to complete the project; and, in the latter situation, the government is not estopped from challenging the validity of the permit even if the developers expended resources in reliance on it.

violation and that the applicant received an undeserved and unwarranted benefit—a government “giving.”<sup>285</sup> In such a case, the party receiving that inappropriate benefit—here, the applicant enjoying a government-imposed condition that did not exact enough—would have to make the victim of this impropriety whole, presumably by paying compensation in an amount equal to the value of the under-exaction. The initial claim would be a takings claim brought by the neighbors against the government body that under-exacted. But that government entity would be entitled to restitution from the applicant rather than having to pay the award out of public funds. In the end, the government should break even, just as it does in a traditional exaction claim in which it pays the award to the owner whose property was over-exacted out of taxpayer funds (disregarding, in either case, transactions costs such as legal fees).

States would have to develop appropriate procedures for resolving these claims. The claim that an unsuccessful government defendant brings seeking reimbursement from the permit applicant that caused the government’s loss might be commenced shortly after the government is found liable to the neighbors. More likely, though, a government defendant in a reverse exaction claim would want to bring in the applicant as a third-party defendant in the original claim. The applicant facing a possible restitution claim similarly will want to participate in the initial takings claim against the government, given that it will be called on to reimburse the government for any compensation it must pay to the neighbors. That applicant was involved in the facts as they developed and will probably participate in the initial claim as a witness anyway. Conversely, the government may feel that it is likely to break even no matter how the neighbors’ case turns out and thus may have less incentive to defend vigorously against the neighbors than the applicant that will ultimately pay any judgment. The court will prefer resolving these issues together rather than separately, both to avoid inconsistent results and to conserve judicial resources. This consolidated approach also reduces the legal expenses the parties will face. State courts and state legislatures can work out the best procedures for handling reverse exaction claims—perhaps at the administrative level and not only in court—just as they established procedures for inverse condemnation claims when federal courts so required.<sup>286</sup>

Note that reverse exaction claims pursuing just compensation differ from claims by neighbors in which those neighbors seek to enjoin or invalidate government action. In *Municipal Art Society v. City of New York*,<sup>287</sup> the trial court voided a

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<sup>285</sup> See Bell & Parchomovsky, *supra* note 218, at 554 (“[I]t is inequitable to bestow a benefit upon some people that, in all fairness and justice, should be given to the public as a whole.”); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1884 (2007) (“[C]onferring benefits on a select few is not regarded as a morally acceptable use of the state’s power of coercion.” (footnote omitted)).

<sup>286</sup> See *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194–97 (1985).

<sup>287</sup> 522 N.Y.S.2d 800 (Sup. Ct. 1987).

transaction in which the city agreed to provide the buyer of a publicly owned parcel with a 20% zoning bonus in exchange for a \$57 million higher sale price plus the buyer's agreement to make \$35–40 million in improvements to an adjacent subway station.<sup>288</sup> The agreement was rejected in large part because the extra money was not earmarked for local improvements.<sup>289</sup> The plaintiff persuaded the court that this transaction was merely the costly sale of a zoning bonus to a private developer,<sup>290</sup> an argument that might be raised in opposition to many exactions. In part, *Municipal Art Society* may illustrate the distinction highlighted above between government as entrepreneur and government as referee, given that the city was proposing the sale of a very desirable parcel of midtown real estate that it owned for a higher price than it otherwise could have. But even if the proposed transaction had not involved a sale and the city had simply granted a zoning bonus to a private owner in exchange for the promise of privately financed subway improvements, this case was a straightforward effort by neighbors to stop a project they oppose. They did not seek compensation for a loss they had suffered; rather, they succeeded in preventing any such loss from occurring.

#### 4. *Nollan* and *Dolan* as Illustrations

*Nollan* and *Dolan* themselves serve as useful illustrations of how reverse exaction claims might succeed or fail.<sup>291</sup> Imagine that the California Coastal Commission had allowed the Nollans to proceed with their initial development plans and had imposed only a trivial exaction on them. The Nollans would have had no cause to bring a takings claim—they obtained the permit they requested with an acceptable exaction attached to it—but others might object to the Commission's imposition of an exaction that they view as inadequate. The first issue to arise under this Article's proposal would be the identification of the parties who are harmed and thus might become plaintiffs in a reverse exaction claim. To bring a successful takings claim, a potential plaintiff must have been unconstitutionally deprived of a valid property interest;<sup>292</sup> if a neighbor simply dislikes the project, she lacks the standing needed to bring a takings claim.

The Commission asserted three state interests in the case: protection of the public's view of the beach, assistance in overcoming the public's psychological barrier to beach use that a heavily developed beachfront road would create, and prevention

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<sup>288</sup> *Id.* at 800–02.

<sup>289</sup> *Id.* at 803.

<sup>290</sup> *Id.* at 804 (“[G]overnment may not place itself in the position of reaping a cash premium because one of its agencies bestows a zoning benefit upon a developer. Zoning benefits are not cash items.”).

<sup>291</sup> See generally *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

<sup>292</sup> *Nollan*, 483 U.S. at 834–36.

of congestion.<sup>293</sup> It is not entirely clear that any of these interests represent protected property rights enjoyed by neighbors or anyone else. If none of these three interests constitutes a property right, then no one could bring a reverse exaction claim and that would be the end of the discussion. These may be valid goals for a state agency to pursue, they may give unhappy neighbors the ability to bring some type of claim against the agency under another constitutional provision or under state law, they may support a nuisance claim by the neighbors against the Nollans, but they do not appear to implicate the Takings Clause.<sup>294</sup> In other words, the Commission may have been protecting public rights, but these are not property rights that can serve as the basis for a reverse exaction claim or any other type of takings claim under the Fifth Amendment.<sup>295</sup>

The *Nollan* example illustrates several features of the reverse exaction test. First, the plaintiff must possess a property interest that has been taken.<sup>296</sup> Unless California recognizes a view of the beach, the absence of a psychological barrier to the use of the beach, or the absence of congestion as property rights, then a reverse exaction suit cannot proceed.<sup>297</sup> Second, parties who have been wronged may be able to bring other types of claims. A disappointed tourist might have a claim under the Due Process Clause,<sup>298</sup> for example, or state law may provide a remedy.<sup>299</sup> In this instance, the displeased neighbor will have a claim, but not a reverse exaction claim.<sup>300</sup>

Third, in some cases, the interests that individuals lose may be too trifling to protect in any practical way. This is not to suggest that interests of modest value are not safeguarded by the Fifth Amendment or in other ways.<sup>301</sup> Moreover, while each tourist's view might be impaired to only the tiniest degree, the collective loss of all the tourists in coastal California might be huge. Practically speaking, though, each potential plaintiff will likely conclude that a loss so minor is not worth constitutional

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<sup>293</sup> *Id.* at 835.

<sup>294</sup> U.S. CONST. amend. V.

<sup>295</sup> Note that *Koontz* prevailed even though he was not deprived of any property interest. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596 (2013) (“Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.”). The Court’s statement could be read to imply that reverse exaction claims need not fail solely because the neighbor did not lose a property interest. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (“[I]t is clear that in suits against the Government, at least, the concrete injury requirement must remain.”).

<sup>296</sup> *See Nollan*, 483 U.S. at 834–36.

<sup>297</sup> *See id.* at 835–36.

<sup>298</sup> U.S. CONST. amends. V, XIV.

<sup>299</sup> *See, e.g., Koontz*, 133 S. Ct. at 2597–98 (discussing possible state law claims).

<sup>300</sup> *See, e.g., Miller v. Town of Wenham*, 833 F.3d 46, 53–55 (1st Cir. 2016) (recognizing, in a due process case, that a resident may have a local ordinance enforced under Massachusetts law even though a local official chose not to enforce that ordinance directly).

<sup>301</sup> *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (protecting owner against physical occupation of one-eighth of one cubic foot of her roof by cable television equipment).



litigation, and class actions are unlikely in these settings, given the modest loss each potential claimant suffers and the likelihood that each neighbor will present slightly different facts and losses.<sup>302</sup> In the variation of *Nollan* posited above, the Nollans would have appropriated public rights with an assist from the California Coastal Commission, but those rights are so diffuse that there is no practical way to defend them outside of the political sphere.

*Dolan*, by contrast, presents a factual setting in which a neighbor might bring a successful reverse exaction claim. In *Dolan*, the city's concerns focused on increases in traffic and stormwater runoff that a store expansion might inflict on the applicants' neighbors.<sup>303</sup> Suppose the City of Tigard had allowed the Dolans to proceed with their project on the condition that they make some modest modification to their plans. The Dolans then might have built their larger store, expanded their parking lot, and replaced the gravel of the original lot with pavement. As a result, more stormwater would fall on impermeable surfaces and flow into a neighboring creek rather than absorbing directly into the ground on the Dolans' lot, just as the city feared in the actual case.<sup>304</sup> But in this hypothetical variation, the city's exaction is inadequate to offset these negative effects on the Dolans' neighbors.

A neighbor might well succeed with a reverse exaction claim on these facts. The neighbor's argument would be that the city's inadequate exaction took a property interest from her, namely the right to hold her property free of excessive rainwater runoff from neighboring land. The Court in the actual case would not permit Tigard to exact a fee simple in a strip of the Dolans' land without demonstrating an essential nexus and rough proportionality.<sup>305</sup> A court facing this hypothetical variation of the facts would not permit the city to impose an easement for increased stormwater runoff on neighboring property without making the reverse exaction equivalent of these same two showings.<sup>306</sup>

Technically, of course, the neighbors in this hypothetical *Dolan* variation do not have their property "exacted," since they were not a party to the initial compromise

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<sup>302</sup> It is entirely possible that some neighbors will suffer large losses, others will suffer more modest losses, and still others will enjoy gains. The net impact on a neighborhood may be negative, but individual gains and losses can be distributed in a wide range of ways. In a reverse exaction setting, no one neighbor may possess adequate incentives to spearhead litigation, each neighbor might present slightly different facts, and class actions may not be available or practicable.

<sup>303</sup> 512 U.S. 374, 381–83 (1994).

<sup>304</sup> *See id.*

<sup>305</sup> *Id.* at 392–96.

<sup>306</sup> Similarly, the *Boomer* plaintiffs were entitled to a nuisance remedy unless Atlantic Cement could demonstrate that it had internalized the various externalities that the facts of that case presented, which it could not do. *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970). Sadly for the plaintiffs, however, the New York court protected their property rights with only an award of damages and not with the injunctive relief they sought. *See supra* notes 269–78 and accompanying text.

that led to the grant of the permit. The exaction occurred earlier, when the Dolans accepted the conditions proposed by the city in exchange for receipt of their permit, and this negotiation likely involved only the Dolans and the city. The neighbors, rather, are victims of an occupation of their property by increased stormwater runoff, an occupation that does not meet the traditional definition of an exaction. But this incursion meets this Article's definition of a reverse exaction because it was caused by the city's imposition of an inadequate condition in response to the Dolans' permit request. By failing to exact the Dolans sufficiently, the city has, in effect, forced an unconstitutional compromise on their neighbors.<sup>307</sup> The city allows the Dolans to expand their store, and the external effects on neighboring property are supposed to be internalized by this transaction. The condition does not internalize the externality to constitutional standards, however, and this Article's reverse exaction analysis is triggered. Unless the city can meet the two-pronged reverse exaction test, it must pay compensation to the neighbors for a reverse exaction.

In this case, unlike in the "reverse-*Nollan*" hypothetical discussed above,<sup>308</sup> there is unquestionably a property interest at stake: the neighbors are arguing that the city has forced them to give up a flowage easement without compensation. Under the first prong of the reverse exaction test, the court would inquire whether the exaction substantially advances the unquestionably legitimate state interest of mitigating increases in flooding.<sup>309</sup> If the condition does not accomplish this goal, then the plaintiff neighbors would prevail by meeting the first prong of the reverse exaction test. An applicant sought permission to develop property in a way that would create a flooding externality; the government responded to that request by inadequately internalizing this externality; and the applicant's neighbors unconstitutionally must relinquish a property right without compensation. The neighbors' reverse exaction claim, pursuing compensation for this taking, would succeed.

If, however, the city were to survive this first prong of the reverse exaction test, as it usually will, the neighbors also may be able to prevail under the reverse of the *Dolan* standard, by demonstrating that the magnitude of the city's weak exaction is not roughly proportional to the scope of the problem the Dolans' expansion plans will create. Here, the court does not examine the linkage between the exaction and the problem it is meant to address; rather, it focuses on the exaction's magnitude.<sup>310</sup> The *Dolan* Court does not require mathematical precision, but if we imagine a very weak exaction, it is possible that the neighbors might be able to demonstrate that the imposition is not roughly proportional. In this case, their claim would succeed.

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<sup>307</sup> Cf. *Coppi v. City of Dana Point*, No. SACV 11-1813 JGB (RNBx), 2014 WL 12589639 (C.D. Cal. Feb. 24, 2014), at \*5 ("This trial could not turn into a '*Nollan/Dolan* trial' for the simple reason that the unconstitutional conditions doctrine would apply to the developer, but not Plaintiff. The developer is not bringing an action against a governmental unit; therefore this doctrine does not apply.").

<sup>308</sup> See *supra* Section III.B.4.

<sup>309</sup> See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987).

<sup>310</sup> See *Dolan*, 512 U.S. at 395–96.

If the neighbors prevail under either or both of these standards, they would be entitled to compensation from the City of Tigard.<sup>311</sup> The neighbors will have demonstrated that the city's approval of the Dolans' permit application with inadequate conditions attached took their property right to be free of stormwater runoff. By approving the permit as it did, the city will have allowed the Dolans to damage others, thereby taking their property under the reverse *Nollan/Dolan* standard.<sup>312</sup> The city would then be able to seek reimbursement from the Dolans, as described above—in fact, it may already have begun to do so.

This reimbursement might take the form of a tort claim in which the city pursues damages for the financial injury the Dolans' project proximately caused the city.<sup>313</sup> Those damages would arise as a result of the city's obligation to compensate the Dolans' neighbors for the additional flooding they must endure because the city allowed the Dolans to proceed. Alternatively, the reimbursement might take the form of a special tax imposed on those landowners whose actions have depleted the public coffers.<sup>314</sup> Tigard might form a special tax district and assess a flood-prevention tax on those landowners whose real estate development activities have increased the public need for mitigation measures—a group not necessarily limited just to the Dolans.<sup>315</sup>

Courts and legislatures would have to develop procedures for allowing claims of this sort to proceed, just as they have done for inverse condemnation cases.<sup>316</sup> Specific reimbursement procedures might vary from state to state, but state legislatures and courts are capable of developing these procedures if substantive case law requires them to do so.<sup>317</sup> Once reverse exaction claims are widely recognized, permitting bodies will learn to include language in their permit approvals in which the applicant acknowledges that, in the event that a neighbor brings a successful reverse exaction claim, that applicant is required to provide restitution to the jurisdiction for any court-ordered takings compensation.

A neighbor would face the choice of bringing a traditional nuisance or trespass claim, a reverse exaction claim, or, potentially, both. These claims would pursue

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<sup>311</sup> See *supra* Section III.B.3.

<sup>312</sup> See *supra* Section III.B.

<sup>313</sup> Cf. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194–97 (1985); *supra* note 286 and accompanying text.

<sup>314</sup> See *supra* notes 246–47 and accompanying text.

<sup>315</sup> Other property owners might have received permits with similarly weak exactions attached at about the same time, which means that their projects, too, increased the need for mitigation efforts. In fact, these other owners might be required to reimburse the city for separate reverse exaction awards if other neighbor-plaintiffs come forward. Or nearby owners might be required to pay mitigation fees ahead of any development on their property, out of recognition that similar development of their land in the future will further exacerbate the flooding problem.

<sup>316</sup> See *Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 194–97; see also *supra* note 286 and accompanying text.

<sup>317</sup> See, e.g., *Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 194–97.

different defendants, would raise somewhat different elements, would lead to different remedies, and might face different standing and ripeness requirements. And even though the government that loses a reverse exaction claim can pursue reimbursement from the permit applicant, it certainly will prefer to head off a reverse exaction claim entirely. It would rather avoid litigation than risk losing a case in which the best possible outcome is to break even while bearing litigation costs, and there is always the possibility that the permit applicant will be unable to satisfy a judgment for restitution.<sup>318</sup> Thus, these different claims also generate different deterrent effects. An applicant that fears liability to its neighbors may elect to proceed more carefully. Governments that fear reverse exaction liability may propose more balanced exactions.

##### 5. Ways in Which Reverse Exactions May Not Precisely Mirror Traditional Exactions

This Article has asserted that a reverse exaction claim is the mirror image of a traditional exaction claim arising under *Nollan* and *Dolan*. That is true only to a point, and this Section will note the ways in which the two types of claims are not precise inverses of one another. None of these distinctions undercut the major argument of this Article: courts should recognize reverse exaction claims just as they have recognized direct exaction claims. In fact, some of these divergences further strengthen the argument in favor of judicial recognition of reverse exaction claims. It is important to recognize, though, that the property owner that initially seeks a permit holds several substantive, strategic, and institutional advantages over the neighbors who may object to the government's granting of that permit. As a result, exaction claims and reverse exaction claims are somewhat asymmetrical, and the former are likely to arise considerably more often than the latter.

The applicant is the party that initially formulates plans that disturb the status quo. Thus, only the applicant gets to decide what to propose and when to propose it. The applicant chooses exactly what features to incorporate into its initial application, including any ways in which it will voluntarily offset externalities that the applicant acknowledges its development will produce or worsen. The applicant can also include features in its application that it knows the government is unlikely to approve, perhaps with the intention of abandoning these features later so that it appears to be reasonable.

Institutionally, only the applicant negotiates with the relevant government agencies during the preliminary stages of the approval process. Thus, if the government responds to the initial application by requesting concessions, the applicant gets to agree to some, reject others, and suggest counterproposals. This ongoing negotiation

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<sup>318</sup> The applicant owns the real estate in question, of course. But real estate developers tend to be highly leveraged, and it would not be surprising if the developer had insufficient equity in the property to satisfy a judgment for restitution in favor of the government.

is conducted by two parties—the applicant and the government body—with neighbors having little or no input. At the earliest stages of the process, neighbors may not even know that the landowner has applied. By the time the neighbors learn that the government is considering an application, the applicant and the permitting agency may have already cut a preliminary deal or at least established significant momentum in that direction.

The applicant is far more likely than the neighbors to be a repeat player. Those who develop real estate are often career real estate experts with far greater experience and familiarity with the permitting process than most of their neighbors. They probably have established alliances with others in the local business community and in local government. They are likely to be represented by counsel skilled in working with government agencies in the jurisdiction.<sup>319</sup>

Once the negotiations have proceeded to a significant degree, it is the applicant that ultimately makes the decision whether to accept any proposed conditions, negotiate further, or throw in the towel. Neighbors may have some input by this stage of the application process and occasionally can kill a proposal completely or influence the government body.<sup>320</sup> But with regard to those proposals that survive this process—however much they may have been modified along the way—it is the applicant alone that ultimately must either accede to the conditions or reject them. The dissatisfied applicant also gets to decide whether to bring an exaction claim.

Neighbors, by contrast, enjoy few of these advantages and can exercise them only much later in the administrative process. They are functioning in a reactive capacity, often learning of the developer's plans long after the applicant began to incubate and pursue them. The neighbors will likely have limited time to reflect on these plans and respond to them, which reduces their voice. Their only opportunity to express their concerns may arise at a public meeting held long after negotiations have been underway.

Neighbors are far less likely than developers to have experience and familiarity with the workings of the permitting system.<sup>321</sup> They often will need to find legal representation on short notice. This challenge is magnified by the fact that retaining counsel may entail going door to door to collect the necessary funds from a large number of people who may not yet be focusing on the issue and may not have the means to contribute. Neighbors may not be able to find capable lawyers willing to represent them, given that the most experienced and skilled land use lawyers in town may already work for the parties that provide ongoing business.

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<sup>319</sup> See Bell & Parchomovsky, *supra* note 218, at 595 (“Forcing interest groups to pay a fair charge for the benefits they receive is an effective way to curb minoritarian rent-seeking.”).

<sup>320</sup> See, e.g., *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994) (discussing community members delaying a zoning application).

<sup>321</sup> Of course, many neighborhoods have organized homeowners' associations that may have developed skill and experience in these settings. However, neighborhood opponents are less likely to have this type of experience than are applicants proposing new projects.

Moreover, while the collective loss to a group of neighbors may be large, the damage to each individual neighbor may not be. Some neighbors may decide—quite reasonably—that their particular losses are small enough that it is not worth the effort to put up a fight, while others may choose to free-ride on the fight that their neighbors will make (and pay for) on their behalf.<sup>322</sup> Different neighbors thus may contribute different amounts of time, energy, and money, reflecting their level of concern about the proposal, their resources, and their recognition that others will raise their arguments for them. The homeowners' association located nearest to the proposed project may be small, disorganized, and starved for leadership, while another better equipped homeowners' association may be located further away and thus be less concerned about the proposal.

This collective action problem should not be underestimated. The first time a group of neighbors learns of a new development project may be when a “variance” or “rezoning” sign is posted on the property. That posting typically occurs only a few weeks before a public hearing, long after the applicant and the permitting agency have reached a tentative resolution of their disagreements.<sup>323</sup> Even if the neighbors become aware of some clues earlier, perhaps by observing surveyors or contractors on the site, they are unlikely to know exactly what type of development is imminent, and they often do not understand how to gather the requisite information. Sophisticated neighbors may know which building official to call, but less experienced observers may simply live with the uneasy feeling that “something is up” without knowing exactly what that “something” is until it is nearly too late.

Once the neighbors ascertain that an applicant has submitted a proposal, they need to decide whether and how to act. Potential respondents will not know if their neighbors are aware of the proposal or if they all share the same objections. Someone will need to take the lead, notify neighbors, rally support, persuade people to speak at public meetings, and pass the hat if they need legal representation. They may have to undertake all of this activity within a brief two- or three-week period. Some developers time their applications to reduce the likelihood of objection, perhaps by seeking permits at times of year when they know the neighbors are likely to be preoccupied or away, such as during the summer or the Thanksgiving and Christmas seasons.

Because of these factors, some applicants may receive permits because they deserve to, while others may obtain the necessary approvals simply because potential objectors are unable to organize and respond in a timely fashion.<sup>324</sup> This is particularly true if the neighbors lack the education, legal sophistication, financial wherewithal, and access to government that increase the odds of their opposition

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<sup>322</sup> See Levinson, *supra* note 86, at 374–76.

<sup>323</sup> See, e.g., NASHVILLE & DAVIDSON CTY., TENN., MUN. CODE § 17.40.730(B) (2017) (“Public notice signs shall be installed on affected properties no less than twenty-one days prior to an established public hearing date” with regard to all zoning matters.).

<sup>324</sup> Cf. *River Park*, 23 F.3d at 165 (discussing stalling tactics by community members resulting in the zoning application expiring).

succeeding. Neighbors that fail to raise objections at the administrative level may be precluded from raising them later in court. Thus, even if courts follow the recommendations of this Article and recognize reverse exaction claims, it is likely that the number of exaction claims brought by applicants will remain much larger than the number of reverse exaction claims raised by diffuse collections of neighbors. Though it is reasonable and fair for courts to recognize reverse exaction claims, parties who bring those claims will face even more of an uphill battle than applicants who bring traditional exaction claims. There will be fewer reverse exaction claims, and those claims will be less likely to succeed.

Substantively, courts considering reverse exaction claims may be biased against them, at least as compared to traditional exaction claims. The plaintiff in a traditional exaction claim often believes its ability to use its property has been significantly impaired.<sup>325</sup> The Nollans could not replace their small house with a larger one;<sup>326</sup> the Dolans could not expand their plumbing supply store;<sup>327</sup> and Koontz could not commence construction on his unimproved land.<sup>328</sup> By contrast, neighbors bringing reverse exaction claims may each be suffering modest diminutions to the value of their property arising from annoyances, not prohibitions on the use or reuse of their land. While the collective impairment of their property rights may be huge, those losses are often spread unevenly across a large and diverse group of neighbors. Residents may suffer different losses than business owners. The closest neighbors may endure worse intrusions than those located further away.

Because the Court has applied a “diminution in value” test in other areas of regulatory takings law, lower courts may be tempted to analyze reverse exaction cases in a similar way. Courts taking this approach may conclude that, because each individual neighbor’s loss does not cross a particular threshold, no neighbor has a cognizable takings claim or each of them has a very weak claim. This approach would be entirely inappropriate, because the Court has stated very clearly that exaction cases are different from “diminution in value” claims raised under the *Pennsylvania Coal*<sup>329</sup> and *Penn Central*<sup>330</sup> tests.<sup>331</sup> However, many judges hear regulatory takings claims only rarely, and lawyers bringing reverse exaction claims will need to take great care to educate courts about the distinctions between exaction claims—including the reverse exaction claims described here—and other regulatory takings

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<sup>325</sup> See, e.g., *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 827–31 (1987).

<sup>326</sup> *Id.*

<sup>327</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 379–83 (1994).

<sup>328</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591–93 (2013).

<sup>329</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

<sup>330</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

<sup>331</sup> See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); see also *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 703 (1999) (noting, in a case that did not involve exactions, “We believe . . . that the rough-proportionality test of *Dolan* is inapposite to a case such as this one.”).

claims.<sup>332</sup> The Supreme Court has been quite clear that exaction cases raise due-process-like issues under which a claimant can prevail even if it suffers only a modest loss, and the same should hold true for reverse exaction claims. The diminution in value test simply is beside the point in an exaction case.

Another way in which reverse exaction claims differ from traditional exaction claims is that reverse exaction claims must address the threshold question of whether the plaintiff has lost a property interest.<sup>333</sup> In a traditional exaction claim, the applicant seeks a permit which is granted with conditions attached, and the sole question is whether those conditions are sufficiently linked to a problem the applicant will create.<sup>334</sup> Moreover, *Koontz* acknowledges a right of action even for claimants that have rejected the exaction and lost no property at all.<sup>335</sup> *Koontz* prevailed because the government “impermissibly burden[ed] the right not to have property taken without just compensation.”<sup>336</sup>

Reverse exaction claimants, by contrast, would need to suffer the loss of a constitutionally protected property interest. This asymmetry reflects the fact that a reverse exaction is a type of claim and not actually a type of exaction, as noted above, since the neighbors have not technically suffered an exaction. If anything, this distinction strengthens the argument that courts should recognize reverse exaction claims, given that these claimants must have lost an interest in property while claimants raising traditional exaction claims may not have. If the Takings Clause protects *Koontz*, who gave up no property,<sup>337</sup> it certainly should protect a property owner forced to become servient to an easement for floodwater runoff.

In the example in this Article’s Abstract, a developer that wishes to build a shopping center may find the government’s approval conditioned on its provision of a right-turn lane. If it provides the lane, it might later bring an exaction claim under *Nollan* and *Dolan*; if it rejects the exaction, it might bring a claim under *Koontz*. Suppose instead that the relevant agency grants the permit on condition that the developer installs a sign that reads, “Increased Congestion Ahead.” Neighbors

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<sup>332</sup> See Krier & Sterk, *supra* note 73, at 56 (“In many cases . . . landowners lose not because of questions about the scope of the per se rule, but because courts do not know or understand Supreme Court doctrine, or willfully ignore it or interpret it as having significant play in the joints.” (footnote omitted)).

<sup>333</sup> See U.S. CONST. amends. V, XIV; see also *Koontz*, 133 S. Ct. at 2597–98 (discussing possible state law claims).

<sup>334</sup> *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

<sup>335</sup> 133 S. Ct. at 2596.

<sup>336</sup> *Id.* This raises the question of whether an applicant that rejects a proposed exaction—regardless of whatever rights it might have under *Koontz*—suffers a Fifth Amendment taking at all. See John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047, 1087 (2000) (“If the validity of the government action is a precondition for a legitimate takings claim, then an erroneous government action precludes a finding of a taking.” (footnote omitted)).

<sup>337</sup> *Koontz*, 133 S. Ct. at 2596.



inconvenienced by this traffic may wish to bring a reverse exaction claim but would face the threshold question of whether they enjoy a property right in the lower level of traffic that existed before the applicant applied for a permit.<sup>338</sup> If they do not, then the Fifth Amendment is not implicated, though the neighbors still may be able to bring some other type of claim.

#### 6. Concerns Recognition of Reverse Exaction Claims Might Raise and Responses to Those Concerns

One argument against judicial recognition of reverse exaction claims is that it will increase the quantity of land use litigation, thereby adding to the burden facing courts already laboring under heavy caseloads. This is a trivial objection: if the Takings Clause protects neighbors against this type of government activity, then those neighbors are constitutionally entitled to a remedy, even if enforcing these rights consumes precious judicial time.<sup>339</sup> One might argue that expending judicial resources to protect rights of such modest value is foolhardy and that these claimants are squandering public funds tilting at windmills. Of course, the Court has not taken that position in past cases in which it protected the property rights of claimants: a lower court eventually awarded Jean Loretto one dollar,<sup>340</sup> while the First English Evangelical Church of Glendale received nothing at all in the end.<sup>341</sup> And there is no reason to reject reverse exaction claims that are worth significant amounts just because other reverse exaction claims may not be.

Moreover, this Article has argued that if the Court recognizes traditional exaction claims, then it has no choice but to recognize reverse exaction claims. The two types of cases are reflections of each other, and the property rights of neighbors are no less worthy of constitutional protection than the property rights of permit applicants. Exaction claims by their nature are cases in which adjacent land uses are incompatible with each other, and the question of which claim is the “traditional” one and which is its “reverse” indicates little more than which party opted to act first.<sup>342</sup> Had another business owner in Tigard, Oregon, applied for an expansion

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<sup>338</sup> See *supra* notes 292–95 and accompanying text.

<sup>339</sup> See generally U.S. CONST. amend. V.

<sup>340</sup> *A \$1 Cable Fee for TV Hookup Upheld by State*, N.Y. TIMES, May 9, 1983, at B3 (noting that the cable wiring actually increased the value of Loretto’s building).

<sup>341</sup> *First English Evangelical Church of Glendale v. County of Los Angeles*, 258 Cal. Rptr. 893 (Ct. App. 1989) (finding no taking on remand from Supreme Court and therefore awarding no compensation); see also *Babbitt v. Youpee*, 519 U.S. 234 (1997) (protecting certain interests against escheat even though they earned less than \$100 in the preceding year).

<sup>342</sup> See *Sun & Daniels*, *supra* note 84, at 334 (“Underlying social norms and existing legal rights can shape the way that we view attribution of externalities, but externality campaigns exploiting particular externalities can also shape who we view as wrongdoers in a particular situation—and, in turn, lay the groundwork for redefining underlying rights and responsibilities.” (footnote omitted)).

permit that the city granted, the Dolans easily could have been plaintiffs in a reverse exaction claim defending their property rights against encroachment by their aggressive and speedier neighbor.<sup>343</sup>

To the extent the proposals offered here do lead to an increase in the number of claims, that additional litigation is initiated by neighbors bringing suits that may have merit. It makes no more sense to reject reverse exaction claims because they lead to litigation than it makes to reject traditional exaction claims because they lead to litigation. The only difference between the two claims is the identity of the plaintiff. If critics worry that assessing the “essential nexus” and “rough proportionality” of a reverse exaction claim will be difficult, fact-intensive tasks, the fault lies not in this Article’s proposals but rather in the standards the Court created in *Nollan* and *Dolan*.<sup>344</sup>

Permit applicants and their lawyers may worry that judicial recognition of reverse exaction claims will deter land use agencies, fearing litigation, from granting permits they otherwise might have granted or will encourage them to exact more than they formerly would have. Government bodies and their lawyers may worry that those bodies will end up as defendants no matter what they decide, since they are now subject to claims from neighbors and not just from applicants.<sup>345</sup> Both of these fears may be warranted, but they also demonstrate that *Nollan* and *Dolan* favor one side without justification. This Article’s goal is not to praise or condemn the rules of those cases but rather to ensure that they are applied evenhandedly. If they have problematically led to too much litigation, the solution is to revisit those cases and not to strip an arbitrarily chosen half of the possible plaintiffs of their cause of action.<sup>346</sup>

Recall also that neighbors already enjoy the ability to bring nuisance claims against their neighbors, just as Boomer did.<sup>347</sup> Recognition of reverse exaction claims might lead to an increase in litigation, or it might simply mean that neighbors

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<sup>343</sup> In such a claim, the Dolans might have argued that the conditions the city attached to the other business owner’s permit were insufficient to offset the negative effects of that owner’s expansion on the Dolans’ property rights. As a result, the Dolans would argue, the city’s approval amounted to an unconstitutional reverse exaction of their own property rights, deserving of compensation. If a court agreed, the Dolans would receive compensation from the city, and the city would seek recompense from the other business, which effectively received something belonging to the public for nothing and is now being held to account. *See supra* Section III.B.1–4.

<sup>344</sup> An increase in lawsuits might also serve to reduce respect for administrative decisions. *See generally* Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENVTL. L. REV. 137, 141 (2016) (“[M]arginalizing administrative acts as regularly interfering with constitutionally protected property interests in the exactions context could have spillover effects . . .”).

<sup>345</sup> *See supra* Section III.B.1–2.

<sup>346</sup> If a single change in land use negatively affects multiple neighbors, as is likely to happen at least some of the time, then it is entirely possible that *more* than half of the potential plaintiffs will be those with reverse exaction claims.

<sup>347</sup> *See supra* notes 269–78 and accompanying text.

who bring nuisance claims against applicants will also bring reverse exaction claims against the government agency that allowed the applicant to proceed without sufficiently mitigating its externalities. Note, though, that judicial recognition of reverse exaction claims is designed in part to affect government agencies long before the project advances, by encouraging them to exact appropriately. The mere possibility that a neighbor might later bring a reverse exaction claim should push government bodies, and perhaps even applicants themselves, in a direction that makes such a claim less likely.

A larger concern is whether government bodies, particularly at the local level, will be whipsawed by this Article's proposals. Officials may fear that judicial recognition of reverse exactions claims will place local governments in a "damned if you do, damned if you don't" position. Lawsuits inevitably will arise every time the government body proposes an exaction rather than denying or approving the request unconditionally. Whichever way the final exaction tilts, the unhappier party will sue. It is even possible that both parties might bring claims, with each believing that it drew the short straw.

There are two responses to this concern. First, as noted earlier, there is not a unique, correct manner of addressing every possible externality that a proposed change in land use may create, and land use bodies will still enjoy wide latitude to respond to each request.<sup>348</sup> Only the most egregious under-exactions will lead to successful reverse exaction claims, just as only the most overreaching exactions result in compensation under *Nollan* and *Dolan*. There may be more claims, but this does not imply that there will be more successful claims.

Of course, it is costly to defend against claims even when those claims lack merit. But jurisdictions will become cognizant of this problem and will seek to propose exactions that are more balanced and thus less likely to encourage litigation by either side. Moreover, the knowledge that courts allow reverse exaction claims might lead to an increase in direct and early negotiations between the neighbors, who enjoy this newly recognized tool, and the applicant, which fears indirect liability if a reverse exaction claim later succeeds. Getting neighbors involved in the permitting process sooner would be a beneficial outcome rather than a problem and is a strong argument for recognizing reverse exaction claims.

Additionally, the fact that some exactions will lead to lawsuits by unhappy neighbors does not mean that all exactions will. Neighbors will enjoy a previously unrecognized cause of action, but they will not always prevail, and they usually will not bring claims. Land use litigation is a costly and unpleasant process, and plaintiffs have to acknowledge the overwhelming likelihood that they will not prevail in the end. These expenses and this unpleasantness act as a natural screening device, theoretically weeding out less worthy claims. Experienced and capable lawyers will quickly learn which claims are most likely to succeed and, one hopes, will discourage

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<sup>348</sup> See *supra* Section III.B.1–2.

neighbors whose claims are less viable. Moreover, as noted above, there are built-in reasons why there are likely to be fewer reverse exaction claims than exaction claims.<sup>349</sup> Trial courts will have to use their judgment, including at the motion stage of any litigation that results, just as they currently must whenever an unhappy applicant brings a claim under *Nollan* and *Dolan*. There may be a small increase in claims and an even smaller increase in successful claims, but that is the direct consequence of re-examining a rule that already encourages litigation and making it more balanced.

Critics of this Article's proposal may see its analysis of traditional exactions as naively overlooking government use of exactions as revenue-raising devices. In this view, governments that impose exactions may intentionally fail to act as even-handed mediators. Those who share this belief likely agree with the *Koontz* Court's view of government agencies as sometimes extorting funds from property owners who seek permits.<sup>350</sup> Even if this criticism is accurate, it has little impact on this Article's proposed judicial recognition of reverse exaction claims. The existing nexus and proportionality standards applicable to traditional exaction claims already address the problem of over-exactions,<sup>351</sup> and governments that attempt to exact still must either meet those standards or pay compensation to unhappy applicants willing to litigate.<sup>352</sup> Judicial recognition of reverse exactions would change none of that law; it simply would make it more reciprocal, thereby addressing cases in which government agencies go too far in the opposite direction. Recognition of reverse exactions will have no impact on the remedy available to applicants, nor will it reward neighbors in cases in which the government exacts too much. The sole function of a reverse exaction claim is to protect neighbors when the government does not exact enough.

The most significant and desirable impact of judicial recognition of reverse exaction claims is likely to be the effect it has on government agencies early in the permitting process. Government awareness of the remote possibility of a reverse exaction claim will inform its actions as it steers its way through negotiations with permit applicants and, possibly, decides to propose an exaction. The fear of litigation by neighbors, and not just by applicants, may lead to more equitable exactions. These more impartial exactions, in the end, are the ones that are least likely to result in a successful claim by any party. These are the outcomes government agencies should strive for, and if judicial recognition of reverse exaction claims leads to fairer government action, then that recognition has served its primary purpose and will prove to be a highly desirable development.

None of this is meant to suggest that there is only one correct approach to using exactions to mitigate the effects of a proposed change in the use of land. Government

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<sup>349</sup> See *supra* Section III.B.5.

<sup>350</sup> See *supra* notes 114–27 and accompanying text.

<sup>351</sup> See *supra* Part I.

<sup>352</sup> See *supra* Part I.

agencies need not guess at the single unique solution that a court will later find to be defensible against legal claims from any direction. There are countless ways a given land use agency could respond to a request from an applicant that might merit an exaction, including approving or denying the request unconditionally or imposing any number or combination of conditions, and there are numerous ways to internalize the externalities that an applicant's request creates. A reverse exaction claimant, like a more traditional claimant, will not win simply because the government did not select the option that claimant most prefers.

The government must enjoy considerable leeway in these fact-specific settings.<sup>353</sup> Existing exaction doctrine already provides that leeway in claims by applicants, and the reverse exaction standards proposed here mirror that case law and provide similar flexibility in claims raised by neighbors.<sup>354</sup> In Justice Holmes's words, "some play must be allowed to the joints if the machine is to work."<sup>355</sup> Courts must recognize that land use professionals enjoy—and need—the latitude to devise local solutions to local problems free of incessant meddling by courts. The goal of this Article's proposal is not to guarantee that governments are sued no matter what they do. Rather, the goal is to place neighbors on the same footing as permit applicants by requiring local land use bodies to treat their concerns and their property interests with equal concern and gravity.<sup>356</sup> And the government always retains the ability either to grant or to deny the permit unconditionally, at which point the law of exactions becomes irrelevant.

Note that it is possible, on a given set of facts, for a government entity to face claims from both the applicant and the neighbors. This is unlikely, given that these types of claims usually fail: it will be extremely rare for a single set of facts to persuade both parties that they have a chance of prevailing. It is even possible, though exceedingly unlikely, that both parties might succeed in their claims against the government, given that each has to prove only one of the two prongs of the exaction test.<sup>357</sup> Thus, an exaction claimant theoretically might be able to prove the lack of an essential nexus on the same facts on which a reverse exaction claimant shows a lack of rough proportionality. This possibility is remote, and if a government body

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<sup>353</sup> See Davidson, *supra* note 15, at 484–86 (discussing the importance of expectations of flexibility as well as expectations of stability).

<sup>354</sup> See *supra* Section III.B.1–2.

<sup>355</sup> Tyson & Bro.-United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting).

<sup>356</sup> Cf. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 848 (1987) (Brennan, J., dissenting) ("In this case . . . the State has sought to protect *public* expectations of access from disruption by private land use. The State's exercise of its police power for this purpose deserves no less deference than any other measure designed to further the welfare of state citizens."). Justice Brennan's dissent, of course, supports the argument of the defendant-respondent in *Nollan*, the California Coastal Commission. This Article, by contrast, views the dispute from the perspective of the members of the public whose interests that Commission was created to safeguard.

<sup>357</sup> See *supra* Part III.

proposes an exaction this flawed, then it deserves to lose both claims. If it accomplishes nothing else, judicial recognition of reverse exactions should at least induce government agencies to propose exactions that are better than this.

Another concern is that exactions might come to be viewed as a fee-for-services plan by which permit applicants can purchase the right to impose on their neighbors by paying a fee—in effect, privately condemning land. Moreover, the size of that fee is subject to judicial review. Justice Kagan seems to hint at this concern in her *Koontz* dissent, where she notes that, “[t]he Federal Constitution thus will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high. And the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly.”<sup>358</sup> To the extent this is a problem, though, it lies within the holdings in *Nollan* and *Dolan*, which import due-process standards into the takings inquiry.<sup>359</sup> This Article’s proposals merely seek to make that inquiry more reciprocal.

One last concern this Article’s proposals might raise is that, even if courts recognize reverse exaction claims, the deck will be stacked against the success of these claims to a much greater degree than it is for traditional exaction claimants. The traditional exaction claimant is a property owner that proposes a considerable change in its use of its land.<sup>360</sup> If that proposal is rejected or saddled with substantial exactions, that owner may lose significantly or, more likely, may be unable to recognize significant gains to which it believes it is entitled.<sup>361</sup> The claimant may prevail, as *Koontz* did, by persuading a court that compliance will be very costly, or at least too costly when considered in light of the possible damage the new development could create.<sup>362</sup>

By contrast, reverse exaction claimants will often be large and diverse collections of neighbors, each suffering only modest impairment of their property rights. Those collective losses may be huge and may even exceed the total gains the applicant will enjoy if it receives its requested permit. But each individual neighbor faces far smaller injuries. Courts could look at each of these neighbors and see those smaller individualized losses as being spread across the community and thus may reject these reverse exaction claims. The concern, then, is that a court might look at each neighbor’s relatively low loss and decide that each such loss is too trivial to merit any sort of constitutional protection, notwithstanding the large collective harm.

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<sup>358</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2607 (2013) (Kagan, J., dissenting).

<sup>359</sup> Cf. Richard M. Bird, *Why We Should but Don’t Pay the Right Prices for Urban Infrastructure* (Rotman Sch. of Mgmt., Working Paper No. 2909873, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2909873](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2909873) (arguing for a greater reliance on user fees).

<sup>360</sup> See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 379–83 (1994).

<sup>361</sup> *Id.*

<sup>362</sup> See *Koontz*, 133 S. Ct. at 2594–2603.

If a court treats reverse exaction claims as mirror images of standard exaction claims, as it should, then this concern is unwarranted. Unlike exaction claims, straightforward regulatory takings claims that courts analyze under the *Penn Central* standard focus, at least in part, on the magnitude of the loss that a claimant suffers.<sup>363</sup> Courts facing these claims are supposed to examine the diminution in the value of the plaintiff's property.<sup>364</sup> They are also required to decide whether the claimant's reasonable investment-backed expectations have been constitutionally impaired, an inquiry that examines what the owner thought it was acquiring, whether those beliefs were reasonable, and how significantly those property rights have been harmed.<sup>365</sup> Thus, traditional regulatory claims succeed, at least in part, based on how much value the claimant has lost.<sup>366</sup>

This is not true of exaction claims. The *Nollan* standard expressly asks due-process-like questions: Is there a legitimate state interest?<sup>367</sup> Does the government's proposal substantially advance that interest?<sup>368</sup> *Nollan*, then, focuses on rights and not on value, which means that a claimant with a small monetary loss can meet this standard and prevail.<sup>369</sup> If a court recognizes that reverse exaction claims raise only questions of nexus and proportionality, and if it applies those standards correctly, then reverse exaction claimants should be no better or worse off than traditional exaction claimants, and even neighbors with slight losses will sometimes be able to meet the reverse exaction standard. This is true even though each reverse exaction claimant's damages might be relatively small. In fact, *Koontz* prevailed in a direct exaction claim without evidently suffering any loss at all from the proposed exaction.<sup>370</sup> If courts are willing to rule in favor of direct exaction claimants who have suffered no apparent loss, then they should be willing to rule in favor of reverse exaction claimants who have suffered modest but measurable damages and should then award them compensation that is just.

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<sup>363</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978).

<sup>364</sup> *Id.*; see also *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>365</sup> *Penn Cent. Transp.*, 438 U.S. at 124–27.

<sup>366</sup> *Id.* at 124; see also *Pa. Coal Co.*, 260 U.S. at 413.

<sup>367</sup> *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831–37 (1987).

<sup>368</sup> See *id.*; see also *supra* notes 29–30, 174 and accompanying text.

<sup>369</sup> *Dolan*, to some degree, does raise questions of dollars and cents by asking whether an exaction is roughly proportional to the problem it has been formulated to solve. But the rough proportionality test, by its very nature, adjusts for size: if a proposal will cause huge externalities, then a huge exaction may be roughly proportional and thus constitutional, but for smaller externalities, the exaction must be reduced in scale, a point the *Dolan* Court stated expressly. 512 U.S. 374, 391 (1994). The same standard would apply to reverse exaction claims, and neighbors who suffer only modest losses from an applicant's project can be made constitutionally whole with correspondingly modest exactions. And, of course, a reverse exaction claimant can prevail by meeting just one of these two prongs. See *supra* notes 164–66 and accompanying text.

<sup>370</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596 (2013).

### 7. Should the Neighbors Be Entitled to Any of the Applicant's Increase in Value?

This Article will close by raising one last question that gets to the heart of the distinction between property and liability rules. A well-calculated exaction should internalize the additional costs that an applicant's proposal imposes on the community at large.<sup>371</sup> This Article began by suggesting that a developer that creates increases in traffic might be required to dedicate land to widen the frontage road. From an economic perspective, this example requires the applicant to internalize its costs, and *Dolan* ensures that it not be required to do any more than that.<sup>372</sup> But why should the government not be allowed to demand more?

If the applicant needs lumber to construct its project, it pays a market price for that lumber. Many parties profit by setting prices along the way, from the owner of the timber property, to the laborer who fells the tree, to the mill that turns it into lumber, to the trucker that hauls it to a retail store, to the retailer that sells it to the applicant. At each step, private parties negotiate a price that presumably rewards each party that helps to create the value of every two-by-four. If anyone along the way rejects a deal, then their counterparty must up their offer or negotiate with a competitor until they can strike a bargain. Surely we would not reward a developer that steals lumber from Home Depot by allowing an administrative agency or jury to establish a reasonable price that the developer must pay for the lumber. We would instead make the thief pay whatever the retailer charges for that product, even if that price is unreasonably high.

With respect to the exaction, though, we do let the agency or jury set the price. Unlike the supplier of lumber, which will turn down any sale price that does not include some profit, the community is required to cap its exactions at the rough proportionality standard.<sup>373</sup> Any higher price violates the Constitution, whether paid in property rights or dollars.<sup>374</sup> Thus, every party that the developer deals with voluntarily during the course of improving its property is entitled to share in the gain that the project will create, but the one party that is brought into the transaction involuntarily—the community that is harmed against its wishes—enjoys none of this profit.<sup>375</sup> If the neighbor is entitled to reverse exaction compensation, it is entitled

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<sup>371</sup> See, e.g., *APA Policy Guide on Impact Fees*, AM. PLANNING ASS'N (Apr. 1997), <https://www.planning.org/policy/guides/adopted/impactfees.htm> [<https://perma.cc/YZJ5-M5UC>] (“Impact fees should only be utilized when a connection can be made between the impact of new development and the need for new infrastructure to accommodate that development.”). The APA recommends several “Impact Fee Standards,” including, “[t]he imposition of a fee must be rationally linked (the ‘rational nexus’) to an impact created by a particular development and the demonstrated need for related capital improvements pursuant to a capital improvement plan and program.” *Id.*

<sup>372</sup> 512 U.S. at 391.

<sup>373</sup> *Id.*

<sup>374</sup> *Koontz*, 133 S. Ct. at 2598–99.

<sup>375</sup> See Bell & Parchomovsky, *supra* note 218, at 610 (“[E]xactions only cover the expenses the surrounding community might incur following certain givings, but not the opportunity cost to the community as a result of bestowing the benefit.”).



only to whatever amount a jury decides is just. All profit goes to the developer—and the developer would not proceed unless it expected to profit—while the neighbors are required to participate in a forced sale at a price they have no hand in setting and that restores them only to the status quo ante.

This is a classic illustration of courts applying a liability rule in a setting in which a property rule might be more appropriate, as the earlier discussion of the *Boomer* case highlighted.<sup>376</sup> This Article will leave for another day possible remedies that might treat the neighbors more fairly, or at least as fairly as everyone else who participates in the process of developing the applicant's property.<sup>377</sup> Some might view reverse exaction claims as treating neighbors more favorably than they deserve. The point to note here, though, is that even neighbors who prevail on reverse exaction claims have been restored only to the situation they enjoyed before an external party disturbed them. They break even rather than losing, and they do so after participating reluctantly in a slow, costly, and unpleasant process they did not initiate. They have nothing to gain by bringing a reverse exaction claim; they merely have less to lose.

#### CONCLUSION

This Article has argued that the property rights of the neighbors of permit applicants are as deserving of Fifth Amendment protection as the property rights of the applicants themselves. Exactions, which are intended to be equalizing devices, can be too intrusive, thereby harming the applicant, or not intrusive enough, thereby harming the community. Because exactions are a balancing device and the government's role is to strike the correct balance, members of the public, like permit applicants, should benefit from the Court's essential nexus and rough proportionality standards.

As a result, courts should recognize reverse exaction claims. Courts adopting this approach would allow neighbors of permit applicants to bring claims arguing that inadequate exactions imposed on those applicants have taken the property of the neighbors. Reverse exaction claims, like traditional exaction claims, would be subject to the *Nollan*<sup>378</sup> and *Dolan*<sup>379</sup> standards, and few neighbors would be likely to prevail. However, the knowledge by permitting bodies that neighbors might bring a claim would encourage them to reach more evenhanded decisions when considering applications for permits. This approach will restore needed fairness to permitting decisions and will address more equitably a process that currently favors applicants over their neighbors.

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<sup>376</sup> See *supra* notes 269–78 and accompanying text.

<sup>377</sup> See, e.g., Chen, *supra* note 255, at 33–38 (comparing Singapore's approach to recapturing some of the gain brought about when the government grants discretionary permits with that of the United States); *id.* at 36 (noting one lawmaker's view that "it is perfectly legitimate to require landowners to give back a portion of realizable gains to the State by way of development charge when they benefit from the positive externalities arising from government's planning actions.").

<sup>378</sup> 483 U.S. 825 (1987).

<sup>379</sup> 512 U.S. 374 (1994).