Takings and Mitigation

DETAILS

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TAKINGS AND MITIGATION

This report was prepared under NCHRP Project 20-06, Topic 21-03, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Timothy R. Wyatt, Conner Gwyn Schenck PLLC, Greensboro, North Carolina. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

The Problem and Its Solution

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report continues NCHRP's practice of keeping departments up-to-date on laws that will affect their operations.

Applications

State transportation departments encounter the mitigation process in two ways. The first occurs when they negotiate with natural resource agencies for mitigation of impacts to wetlands or protected species. The other occurs when land developers approach the transportation department for permission to build access to a state highway. In the latter situation, the transportation department often requires the donation of land for an acceleration or deceleration lane or for other improvements.

In *Koontz v. St. John's River Water Management District* (2013), the U.S. Supreme Court applied the *Nollan* and *Dolan* standards (rational nexus and "rough proportionality") for the latter scenario. The Court held that a taking can occur when a permit is denied because the permit applicant refused to abide by the mitigation obligations imposed by the permitting agency. The River Water District conditioned approval of the owner's building permit on the owner granting the district a conservation easement on the remainder of his property. In such case, the Court held that the permit conditions are governed by the rational nexus and rough proportionality standards.

Research was needed on the impact of the *Koontz* decision, particularly on the extent to which permitting agencies are able to advance public policy goals in the land-use permitting and project development processes, or at what point they are considered unconstitutional exactions. This digest provides updated legal research regarding the legal standard for exactions, including the impact of the 2013 *Koontz* decision on the ability of state transportation agencies and other permitting agencies to advance public policy goals (e.g., traffic flow management, public safety, and environmental mitigation) in the land-use permitting and project development processes. The digest is also intended to clarify for state transportation agencies and other permitting agencies, to the extent possible, the point at which such exactions become unconstitutional takings and the application of the essential nexus test to both on-site and off-site exactions, to address impacts to the highway system and environmental system impacts.

This digest should be useful to attorneys, agency officials, real estate developers, and others who are interested in determining that all parties are treated fairly and consistent with constitutional requirements.

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TAKINGS AND MITIGATION

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I. INTRODUCTION

When land developers approach a state transportation agency for permission to build access to a state highway, the state transportation agency may attempt to mitigate the development's impact to the highway system by exacting concessions from the developers. For example, state transportation agencies often require the donation of a portion of the developer's real property for an acceleration or deceleration lane near the entrance of the development, highway widening to support additional traffic generated by the development, or other improvements. Likewise, other permitting agencies, such as local governments and environmental and natural resource agencies, may be charged with exacting other concessions to mitigate the development's impact to the environment. For example, the U.S. Army Corps of Engineers (Corps) will often require a developer to create new wetlands on the property as a condition for granting the developer a permit to fill existing wetlands to support the proposed development.

Increasingly, permitting agencies, including state transportation agencies, attempt to exact off-site improvements (e.g., require the developer to fund or construct improvements to the state highway system) rather than on-site exactions such as dedications of a portion of the developer's real property. In 2013, in *Koontz v. St. Johns River Water Management District,*[1] the U.S. Supreme Court held that heightened judicial scrutiny (known as the "essential nexus" test) applies in cases of off-site exactions. The essential nexus test, articulated in the Court's earlier *Nollan*[2] and *Dolan*[3] opinions, was previously understood to apply to on-site exactions. The test requires the permit condition to have a close relationship or "nexus" to a legitimate governmental interest involving the proposed development, and for the burden on the developer to be roughly proportional to the anticipated adverse impact of the development on the public. A permit condition that fails to satisfy the essential nexus test is an unconstitutional taking.

Understanding the point at which an exaction becomes an unconstitutional taking is increasingly important for state transportation agencies. There is a growing perception that traditional government funding mechanisms will not satisfy highway funding requirements, and that alternative funding mechanisms must be pursued—including requiring developers to pay for the impacts of their developments:

> A federal commission has fixed the cost of maintaining and upgrading surface transportation at $225 billion a year for the next 50 years. …The severe infrastructure deficiency problem has forced state and local governments to examine and experiment with alternate ways to fund infrastructural needs. The primary mechanisms governments have used to assist in the funding and provision of public facilities generated by growth have been development land dedications, monetary exactions, impact fees, special assessments and homeowner dues.[4]

The purpose of this digest is to provide updated legal research regarding the legal standard for exactions, including the impact of the 2013 *Koontz* decision on the ability of state transportation agencies and other permitting agencies to advance public policy goals (e.g., traffic flow management, public safety, and environmental mitigation) in the land-use permitting and project development processes. The digest is also intended to clarify for state transportation agencies and other permitting agencies, to the extent possible, the point at which such exactions become unconstitutional takings. This digest examines the application of the essential nexus test to both on-site and off-site exactions to address impacts to the highway system and other environmental impacts.

As part of this study, the survey form included as Appendix A was sent to all 50 state transportation agencies. Responses were received from 27 state transportation agencies, for a 54 percent response rate. Survey responses are discussed throughout this digest.

The digest concludes that the *Koontz* decision will have a minimal impact on the current practices of

[1] 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013).

[2] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

[3] Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

[4] David L. Callies, Robert H. Freilich & Thomas E. Roberts, Cases and Materials on Land Use, at 234–35 (5th ed. 2008) (hereinafter referred to as "Callies").

most state transportation agencies, which already tend to apply reliable engineering methods to determine the impact of a development to the state highway system, allowing state transportation agencies to prescribe exactions (e.g., developer-funded improvements to the state highway system) that are tailored to mitigate the development's traffic impacts. Even if state transportation agencies transition to expanded use of impact fees and alternative transportation solutions, similar methods can be applied to quantify the impact of the development and determine the proportional share of the cost of a broad-based transportation solution that should be borne by the developer.

The *Koontz* decision is expected to have a more significant impact on environmental agencies and local land-use authorities, most of whom are accustomed to judicial deference when imposing environmental mitigation conditions, particularly when the mitigation does not involve the dedication of a portion of the developer's real property to public purposes. The *Koontz* decision clarified that the heightened judicial scrutiny of the essential nexus test applies to both on-site and off-site exactions, including monetary exactions such as impact fees. Local governments and environmental agencies will need to follow the lead of state transportation agencies in tailoring mitigation solutions to be roughly proportional to the actual impact of the development.

A. Background

It has long been recognized that exactions in the development permitting context can pose legal and constitutional dilemmas. In 1986, prior to the U.S. Supreme Court's formulation of the essential nexus test, a National Cooperative Highway Research Program (NCHRP) *Legal Research Digest* stated: "Exactions, or the compulsory dedication of private property for a public use without payment of compensation, strain at the boundaries and test the limits of the police power concept. They walk the thin dividing line between police power regulation and compensable taking of property."[5]

The 1986 NCHRP exactions digest noted that the tests used by various state courts to evaluate the constitutionality of exactions were "lacking in standards that are precise, easy to apply, and productive of uniform results. The tests in fact are contradictory."[6] The digest described two tests in prominent use, under which government exactions were scrutinized according to significantly different standards. First, the "specific and uniquely attributable" test used by some state courts required a "firm link" or "direct relationship" between the public burden imposed by the development and the public use for which a dedication of some portion of the developer's property was to be exacted.[7] Second, the "rational nexus" test used by other states required the government permitting agency only to "establish a reasonable basis for finding that the need for the acquisition [of some portion of the developer's property] was occasioned by the activity of the" developer.[8]

The "rational nexus" test was seen as a reaction to and rejection of the "specific and uniquely attributable" test, which some state courts viewed as "impos[ing] an unjustifiably heavy burden of proof on the municipality or local planning authority seeking to uphold the validity of a challenged exaction."[9] It is this controversy over the level of scrutiny to be applied to government exactions into which the U.S. Supreme Court ventured with its *Nollan* decision in 1987.

1. Nollan v. California Coastal Commission

The plaintiffs in *Nollan* were owners of a beachfront lot who sought to replace the existing 521-sq-ft rental property on the lot with a new 1,674-sq-ft residence.[10] In order to do so, they needed a coastal development permit from the California Coastal Commission.[11] The commission granted the permit on the condition that the plaintiffs grant a public easement across the lot, bordering the shoreline, to allow the public to traverse between the public beaches on either side of the property.[12] The California Court of Appeal upheld the condition, finding that the state legislature's enactment of the California Coastal Act required such a lateral access condition for any new construction that would be 10 percent larger than the structure it replaced.[13]

The U.S. Supreme Court disagreed in a 5–4 ruling and overturned the condition, holding that the commission lacked an "essential nexus" between its purpose for conditioning permit approval on a lateral

[5] JOHN C. VANCE, EXACTION OF RIGHT-OF-WAY BY EXERCISE OF POLICE POWER 3 (Research Results Digest No. 149, National Cooperative Highway Research Program, Transportation Research Board of the National Academies of Science, Engineering, and Medicine, 1986).

[6] *Id.*

[7] *Id.* at 7.

[8] *Id.* at 8 (quoting Jordan v. Vill. of Menomonee Falls, 137 N.W.2d 442, 447 (Wis. 1966)).

[9] *Id.*

[10] Nollan v. Cal. Coastal Comm'n, 177 Cal. App. 3d 719, 721, 223 Cal. Rptr. 28, 29 (Cal. Ct. App. 1986), *rev'd,* 483 U.S. 825 (1987).

[11] *Id.*

[12] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 829, 107 S. Ct. 3141, 3144, 97 L. Ed. 2d 677, 684 (1987).

[13] *Nollan*, 223 Cal. Rptr. at 31.

easement across the property and its purpose for denying a permit in the absence of the easement.[14] Writing for the majority, Justice Scalia said that the nexus requirement was not satisfied because "the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[15] The commission's supposed concern about the new residence was that it would obstruct access *to* the coast, but the easement exacted from the plaintiffs would not improve access to the coast but rather would improve access *between* public beaches for people *already* at the coast.[16] The Court articulated the nexus requirement as follows: "[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"[17]

The dissent, led by Justice Brennan, argued that the easement condition should have been upheld under the deferential scrutiny of the "rational nexus" test used in many jurisdictions, because the purpose of the easement (i.e., to increase lateral access *along* the coast) was reasonably related to the impact of the proposed development (i.e., a decrease in access *to* the coast).[18] The dissent argued that the majority employed heightened scrutiny (akin to the "specific and uniquely attributable" test used in some jurisdictions) by demanding "a precise match between the condition imposed and the specific type of burden on access created by appellants," thus setting "an unreasonably demanding standard for determining the rationality of state regulation."[19] The majority, however, argued that the commission's permit condition failed to satisfy even the deferential scrutiny of the "rational nexus" test—that the permit condition "does not meet even the most untailored standards" because of the complete lack of fit between the burden of new development (decreased access *to* the coast) and the condition imposed on new development (increased access *along* the coast).[20] The majority indicated, however, that it considered heightened scrutiny appropriate when real property is exacted as a condition for a development permit: "We are inclined to be particularly careful…where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."[21] The Court expressed particular concern that the lateral easement for the public constituted a "permanent physical invasion" of the plaintiffs' property, justifying heightened scrutiny.[22]

2. Dolan v. City of Tigard

Seven years later, the *Dolan* case gave the U.S. Supreme Court an opportunity to clarify and expand upon the "essential nexus" test announced in *Nollan*. The plaintiff in *Dolan* was the owner of a plumbing and electric supply store who sought to replace an existing 9,700-sq-ft store and gravel parking lot with a new 17,600-sq-ft store and paved parking lot and ultimately an additional structure on the lot to house complementary businesses.[23] A creek that was subject to flooding traversed one corner of the lot.[24] Because the proposed new development was adjacent to the floodplain, the plaintiff's permit application triggered standards in the city's development code, which required the dedication of land within and adjoining the floodplain for a public "greenway," to include a pedestrian and bicycle pathway.[25] The City, applying its development code standards, conditioned the building permit on the dedication of all land within the floodplain for drainage improvements and an additional 15-ft strip adjacent to the floodplain for the pedestrian and bicycle pathway, with the total

[14] *Nollan,* 483 U.S. at 837 ("[T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.").

[15] *Id.*

[16] *Id.* at 838.

[17] *Id.* at 837 (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14–15 (N.H. 1981)).

[18] *Id.* at 861 (Brennan, J., dissenting). *See also id.* at 865 (Blackmun, J., dissenting) ("The close nexus between benefits and burdens that the Court now imposes on permit conditions creates an anomaly in the ordinary requirement that a State's exercise of its police power need be no more than rationally based.").

[19] *Id.* at 848–49 (Brennan, J., dissenting).

[20] *Id.* at 838. The majority did not acknowledge the significant jurisdictional split regarding the level of scrutiny to be applied to exactions, stating that its essential nexus test was "consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." *Id.* at 839 (citing cases that employed the "rational nexus" test as well as cases that employed the "specific and uniquely attributable" test).

[21] *Id.* at 841.

[22] *Id.* at 831–32. The majority specifically rejected the dissent's argument that a public easement across the property is "a mere restriction on its use," in which case the condition might be subject to the lesser scrutiny of a regulatory taking. *Id.* at 831, 848 n.3 (Brennan, J., dissenting).

[23] Dolan v. City of Tigard, 512 U.S. 374, 379, 114 S. Ct. 2309, 2313, 129 L. Ed. 2d 304, 312–13 (1994).

[24] *Id.*

[25] *Id.* at 379–80.

dedication comprising 10 percent of the lot area.[26] The plaintiff requested a variance from this requirement, which was denied by the City.[27]

In another 5–4 ruling, however, the Court overturned the conditions. The Court distinguished this case from *Nollan*, specifically finding that "the reduction of traffic congestion" and "the prevention of flooding" are legitimate governmental interests, and that (unlike in *Nollan*) there was a nexus between those governmental purposes and the permit conditions.[28] The Court determined, however, that the City failed to show that "the degree of exactions demanded" by the City were appropriately tailored to the anticipated impact of the development.[29] As in *Nollan,* what triggered the Court's heightened scrutiny appeared to be the permanent physical occupation of the plaintiff's real property, requiring the plaintiff to surrender her right to exclude others from the portion of her property within and around the floodplain.[30] With respect to the floodplain dedication, it appeared that the Court might have accepted a development ban for the portion of the lot within the floodplain, but the Court suggested that requiring the plaintiff to also dedicate the floodplain to the public was disproportionate to the purpose of flood control.[31] With respect to the pedestrian and bicycle pathway, the Court overturned that requirement because the City had not demonstrated that it was tailored to offset the additional traffic demand that the expanded store was expected to generate.[32]

In announcing this "rough proportionality" requirement,[33] the Court acknowledged the heightened scrutiny of its essential nexus test and acknowledged a split among state courts as to the level of scrutiny to be applied to exactions. The Court purported to reject the strict "specific and uniquely attributable" test used by some jurisdictions as too "exacting," and also rejected the "lax" standard used by other jurisdictions, which accepted "very generalized statements as to the necessary connection between the required dedication and the proposed development."[34] The Court instead purported to adopt the "rational nexus" (or "reasonable relationship") test used by jurisdictions that require the government permitting authority to show a "reasonable relationship or nexus" between the required dedication and the impact of the proposed development, which the Court viewed as "intermediate" scrutiny.[35] The Court, however, rejected the "rational nexus" and "reasonable relationship" names adopted by some jurisdictions to describe this intermediate scrutiny test, to avoid any confusion among lower courts that "rational basis" or deferential scrutiny applies to exactions.[36] The government permitting agency's conditions are to be scrutinized to verify that the government made "some sort of individualized determination" in support of its finding that the imposed condition or exacted dedication is "related both in nature and extent" (i.e., roughly proportional) to the anticipated impact of the development.[37] With the pedestrian and bicycle pathway exaction, for example, the City needed to "make some effort to quantify its findings" that the pathway would actually offset the additional traffic demand generated by the expanded store.[38] The Court did not specifically conclude that the exactions demanded by the City were disproportionate to the impact of the development, just that the City failed to satisfy its burden of proving rough proportionality.[39]

As a result of *Nollan* and *Dolan*, it was established that when the government imposes an exaction on a developer as a condition of granting a development permit, the government bears the burden to show that:

1. There is a *nexus* between the anticipated impact of the development and a legitimate governmental interest (i.e., that the specific burden imposed on the public by the development is offset by a legitimate benefit conferred on the public by the exaction).

2. The exaction is *roughly proportional* to the anticipated impact of the development (i.e., that the government has quantified the anticipated impact of the development and limited its exaction accordingly).

[26] *Id.* at 380.

[27] *Id.* at 380–81.

[28] *Id.* at 387.

[29] *Id.* at 388, 395–96.

[30] *Id.* at 393.

[31] *Id.* ("The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.").

[32] *Id.* at 395–96 ("No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.").

[33] *Id.* at 391.

[34] *Id.* at 389–90.

[35] *Id.* at 390 (citing Simpson v. North Platte, 292 N.W.2d 297, 301 (Neb. 1980)).

[36] *Id.* at 391 ("[T]he term 'reasonable relationship' seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment.").

[37] *Id.*

[38] *Id.* at 395–96.

[39] *Id.*

This two-element test, and the heightened scrutiny (i.e., burden on the government) with which it is to be applied,[40] is referenced herein as the "essential nexus" test.

3. Koontz v. St. Johns River Water Management District

Although the *Nollan* and *Dolan* decisions established that exactions are to be viewed with heightened judicial scrutiny, a number of state courts over the subsequent years declined to apply the essential nexus test to all exactions, distinguishing cases from *Nollan* and *Dolan* and in the process carving out significant exceptions.[41] Notably, relying on other U.S. Supreme Court opinions in which the Court applied the more deferential test for regulatory takings in cases where development permits were outright denied under any circumstances rather than conditionally approved,[42] some lower courts concluded that the essential nexus test was inapplicable when development permits are denied because the developer rejects the conditions exacted by the permitting authority.[43] Likewise, noting the Court's concern in *Nollan* and *Dolan* about government occupation or physical invasion of the developer's real property, a number of lower courts concluded that the essential nexus test did not apply to exactions of money or other personal property,[44] or even to on-site environmental mitigation conditions that did not involve a public easement.[45] Finally, concluding that *Nollan* and *Dolan* involved case-specific, ad hoc, "adjudicative" decisions by permitting agencies, a number of courts concluded that the essential nexus test did not apply to generally applicable "legislative" exactions that do not involve the exercise of permitting agency discretion.[46] By distinguishing cases from the facts of *Nollan* and *Dolan*, and fitting cases into one of the categories of judicial "exceptions," courts could avoid applying the essential nexus test "to many, if not most, of the exactions commonly imposed by government."[47]

With the *Koontz* case in 2013, the Court eliminated a number of the exceptions in yet another 5–4 decision. The *Koontz* petitioner sought to develop 3.7 acres of a 14.9-acre tract that was primarily comprised of wetlands.[48] To mitigate the environmental impact of the proposal, the developer proposed to construct a retention pond to handle stormwater from the development and to deed a conservation easement to the local water management district over the remaining undeveloped 11 acres.[49] The district rejected the proposal, denying the developer a permit to fill the 3.7 acres necessary for the development.[50] The district then proposed two alternatives under which it would grant a permit: 1) to reduce the size of the development to 1 acre and deed a

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[40] *Id.* at 398 (Stevens, J., dissenting):

> In addition to showing a rational nexus to a public purpose that would justify an outright denial of the permit, the city must also demonstrate "rough proportionality" between the harm caused by the new land use and the benefit obtained by the condition. The Court also decides for the first time that the city has the burden of establishing the constitutionality of its conditions by making an "individualized determination" that the condition in question satisfies the proportionality requirement (internal citation omitted).

[41] Lynda L. Butler, *The Resilience of Property,* 55 ARIZ. L. REV. 847, 888 (2013) ("Judicial resistance to the rules-based approach of *Nollan* and *Dolan* has been widespread among lower courts…. This resistance may be due to the difficulty of applying any single or formulistic vision of constitutional property to the complex and variable situations involving ordinary property. Clear rules generally do not work well when a lot of variety exists" (internal citation omitted)); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go from Here,* 59 WASH. & LEE L. REV. 373, 375 (2002):

> [M]any [courts] have discovered exceptions to the essential nexus rule that preclude its application to many, if not most, of the exactions commonly imposed by government. In particular, there is great confusion over the applicability of the essential nexus to exactions that amount to a demand for money and to exactions that originate from a legislative act. Many courts have concluded that both types of land use conditions fall outside the scope of *Nollan* and *Dolan* (internal citation omitted).

[42] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 703, 119 S. Ct. 1624, 1635, 143 L. Ed. 2d 882, 901 (1999) (The essential nexus test "was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development.").

[43] *See generally* Richard J. Ansson, Jr., *Dolan v. Tigard's Rough Proportionality Standard: Why This Standard Should Not Be Applied to an Inverse Condemnation Claim Based upon Regulatory Denial,* 10 SETON HALL CONST. L.J. 417 (2000).

[44] *See* Breemer, *supra* note 41, at 387 nn.87–89 and accompanying text.

[45] *See, e.g.,* Henry v. Jefferson County Planning Comm'n, 148 F. Supp. 2d 698, 708–09 n.142 (N.D. W. Va. 2001) (concluding that the essential nexus test was inapplicable to conditions to ensure "environmentally sound" development where the conditions did not require portions of the land to be dedicated to public use), *rev'd on other grounds,* 34 F. App'x 92 (4th Cir. 2002), *cert. denied,* 538 U.S. 944 (2003).

[46] *See, e.g.,* Ehrlich v. City of Culver City, 911 P.2d 429, 458 (Cal. 1996), *cert. denied,* 519 U.S. 929 (1996).

[47] Breemer, *supra* note 41, at 375.

[48] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2591–92, 186 L. Ed. 2d 697, 703–05 (2013).

[49] *Id.* at 2592–93.

[50] *Id.* at 2593.

conservation easement over the remaining approximately 14 acres, or 2) to supplement the developer's original proposal to develop 3.7 acres with an agreement for the developer to fund improvements to approximately 50 acres of existing wetlands owned by the district and located several miles away from the developer's parcel.[51]

First, the Court concluded that the fact that the permit was denied did not entitle the district's actions to the more deferential scrutiny of a regulatory takings claim. Because the district was willing to approve the permit under certain conditions, those proposed conditions were subject to review under the essential nexus test.[52] Second, the Court held that the essential nexus test applied to both alternatives proposed by the district—its first option, which consisted entirely of a traditional on-site easement exaction, as well as its second option, which involved a requirement to construct or fund off-site improvements to government property.[53] In so holding, the Court concluded that monetary exactions or other off-site exactions "are functionally equivalent to other types of land use exactions," when such exactions are directly linked to the developer's interest in "a specific parcel of real property."[54] As in *Dolan*, the *Koontz* Court did not conclude that the district's proposed conditions failed to satisfy the rough proportionality requirement of the essential nexus test—the Court merely remanded the case for further proceedings (e.g., for the district to attempt to satisfy its burden of proving rough proportionality to a lower court employing heightened scrutiny).[55]

The *Koontz* decision settled a number of issues left unsettled after *Nollan* and *Dolan*, notably that the essential nexus test applies to monetary and other off-site exactions just as it applies to traditional on-site dedication requirements. Some issues, however, were not expressly settled by *Koontz*. The *Koontz* decision does not specifically address the distinction made by some state courts that the essential nexus test applies to only adjudicative decisions, not legislative exactions.[56] In addition, the Court has not provided substantive guidance or examples as to what degree of quantification (of the public burden anticipated from the development or of the public benefit conferred by the mitigation condition) would satisfy the rough proportionality requirement. The Court has limited its guidance on that issue to confirming that "permitting authorities [are allowed] to insist that applicants bear the full costs of their proposals,"[57] but the government cannot exact more from the developer than would be roughly proportional to the impact of the development. The remainder of this digest examines the status of exactions by state transportation agencies and other permitting agencies in the wake of *Koontz*.

B. Applicability of Essential Nexus Analysis

The U.S. Supreme Court has made it clear that the essential nexus test applies whenever concessions are exacted from a developer as a condition of a permitting agency granting a development permit, at least when the exaction is imposed as an exercise of discretion by the permitting agency. As a result of *Koontz*, it is clear that the essential nexus test covers a broader range of government exactions than was previously understood in many jurisdictions. To better understand when the essential nexus test applies, it is helpful first to look at the range of cases where it does not apply.

1. When the Essential Nexus Test Does Not Apply

a. Regulatory Takings Claims.—Mere restrictions on the use of real property, not imposed as a condition of approving a development permit, are evaluated under the more deferential test announced by the Court in *Penn Central Transportation Co. v. Mahon,*[58] under which land-use restrictions are typically upheld if they "are substantially related to the promotion of" a legitimate governmental interest and permit "reasonable beneficial use" of the property.[59] The *Penn Central* Court identified a number of factors to consider in making this "ad hoc, factual inquir[y]," including the economic impact of the restriction on the landowner, and whether the regulation is imposed through "some public program adjusting the benefits and burdens of economic life to promote the common good."[60] Although this concern with balancing benefits and burdens, on its face, appears similar to the nexus and rough proportionality requirements of the essential nexus test, the focus on whether the regulations permit "reasonable beneficial use" of the property is akin to

[51] *Id.*

[52] *Id.* at 2596 ("Even if respondent would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeit of his constitutional rights.").

[53] *Id.* at 2598.

[54] *Id.* at 2599–600.

[55] *Id.* at 2603.

[56] *Id.* at 2608 (Kagan, J., dissenting) ("The majority might, for example, approve the rule, adopted in several states, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable.").

[57] *Id.* at 2595.

[58] 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

[59] *Id.* at 138.

[60] *Id.* at 124.

low-level "rational basis" scrutiny, which is far more deferential to agency decisions than the essential nexus test.[61] Under this more deferential test, land-use restrictions are typically upheld unless they serve to deny the landowner all "economically viable use of his land."[62]

The *Penn Central* test for regulatory takings applies to land-use restrictions such as zoning ordinances,[63] and thus applies to cases in which development permits are denied because the proposed development is not a permitted use under the existing regulatory scheme.[64] The Court's application of the *Penn Central* test to cases of outright permit denials has led to a great deal of the confusion and contradictory opinions seen in exactions cases at the lower courts, in which courts have analyzed attempted exactions in permit denial cases according to the more deferential test for regulatory takings rather than the essential nexus test. *Koontz*, however, makes clear that where the permit is not denied outright, but rather denied because the developer refused to accept the condition proposed by the permitting agency, the stricter essential nexus test applies.[65]

b. Eminent Domain.—Where there is a "permanent physical invasion" of private property by the government,[66] abrogating the landowner's right to exclude others from the real property, a categorical taking has occurred and the essential nexus test does not apply. The state transportation agency or local government must always pay just compensation for the real property taken in that situation.[67] In the eminent domain context, however, courts are very deferential to the government with respect to whether the taking of the landowner's property substantially advances a legitimate governmental interest or public purpose,[68] as opposed to the heightened scrutiny of the essential nexus test, which is applied when that same property is "exacted" in exchange for development permits. The difference, of course, is whether the government acknowledges an obligation to pay just compensation for the property exacted. If it does not (instead treating the exacted property as mitigation in exchange for the developer's adverse impacts), then the heightened scrutiny of the essential nexus test applies.[69]

c. Environmental Mitigation of Government Construction Projects.—Government actions, such as highway construction projects by state transportation agencies, are often subject to requirements to mitigate the adverse environmental impact of the project.[70] Often, such requirements in state and federal law require the government actor to provide environmental mitigation that *exceeds* the adverse impact of the project.[71] If such mitigation

[61] Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence,* 114 YALE L.J. 203, 206 (2004) ("The Supreme Court's *Penn Central* balancing test, which, as a matter of practice, results in deference to the state courts, recognizes the institutional advantages state courts enjoy in constraining regulatory abuse.").

[62] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016, 112 S. Ct. 2886, 2894, 120 L. Ed. 2d 798, 813 (1992) (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

[63] Penn Central Transp. Co., 438 U.S. at 125 ("Zoning laws are, of course, the classic example….").

[64] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720–21, 119 S. Ct. 1624, 1644, 143 L. Ed. 2d 882, 913 (1999) (considering whether a "city's decision to reject a particular development plan bore a *reasonable relationship* to its proffered justifications" (emphasis supplied)).

[65] *See supra* note 52 and accompanying text.

[66] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439, 102 S. Ct. 3164, 3178, 73 L. Ed. 2d 868, 884 (1982).

[67] *See, e.g.,* Dohany v. Rogers, 281 U.S. 362, 366–67, 50 S. Ct. 299, 301, 74 L. Ed. 2d 904, 911 (1930).

[68] Kelo v. City of New London, Conn., 545 U.S. 469, 480, 125 S. Ct. 2665, 2663, 162 L. Ed. 2d 439, 452 (2005) ("Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.").

[69] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841–42, 107 S. Ct. 3141, 3151, 97 L. Ed. 2d 677, 692 (1987) ("California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' see U.S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it.").

[70] *See, e.g.,* Sierra Club v. Fed. Highway Admin., 715 F. Supp. 2d 721, 737 (S.D. Tex. 2010) (describing mitigation requirements in Texas DOT project); North Idaho Cmty. Action Network v. U.S. Dep't of Transp., 545 F.3d 1147, 1152 (9th Cir. 2008) (describing mitigation requirements in Idaho DOT project).

[71] For example, before permitting construction in wetlands, the Corps is required to ensure that mitigation is provided that exceeds the adverse impact of the project on the wetlands. 33 C.F.R. § 320.4(b)(1) (2014) ("No permit will be granted…unless the [Corps] concludes…that the benefits of the proposed alteration outweigh the damage to the wetlands resource."); Protection of Wetlands, 42 Fed. Reg. 26,961 (May 24, 1977) (requiring a finding "that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use."); Beurè-Co. v. United States, 16 Cl. Ct. 42, 44 (1988) ("[U]nder this standard, if the Corps concludes that the benefits of wetland development equal the detriments, the permit application must be denied."). *See also* 49 U.S.C. 303 (requiring a finding that a transportation project "includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use"); 49 U.S.C. § 47106(c)(1)(B) (2014) (requiring a finding that "every reasonable step has been taken to minimize the adverse effect" of an airport development project).

requirements were imposed on a private developer, they would be viewed with heightened scrutiny under the essential nexus test, and there would be legitimate constitutional concerns about mitigation requirements that are disproportionate to the anticipated impact of the development.[72] These concerns are significantly lessened in the typical government construction project, where the improvement is made to public property rather than private property, and thus there is no "takings" concern. The dispute between a state transportation agency and an environmental agency over the appropriate level of environmental mitigation may be just as contentious as a similar dispute between a landowner and a permitting agency. Whereas the essential nexus test applies in the latter case to direct heightened scrutiny to mitigation demands by the permitting agency, a state transportation agency must work collaboratively with environmental agencies to negotiate mitigation requirements and obtain necessary permits.[73] When the disagreement is between government agencies, substantial deference is owed to the mitigation requirements imposed by the agency charged with protecting the natural resource.[74]

2. The Essential Nexus Test Applies to Land-Use Exactions as Conditions of Private Development Permit

The essential nexus test applies heightened judicial scrutiny to conditions imposed by the government on a landowner, as a result of the government approving a development permit or otherwise lifting an existing land-use restriction, in which the landowner is not otherwise compensated by the government for the imposition of the new condition.[75] This test has fairly broad application in a modern regulatory regime, where developers often must obtain permits and approvals from multiple federal, state, and local authorities.[76]

a. Local Government Exactions for Development Permits.—Most exactions jurisprudence involves permitting decisions or other land-use regulation by local governments, such as municipalities and counties. Since at least 1926, when the U.S. Department of Commerce proposed a model State Zoning Enabling Act for state legislatures to authorize land-use regulation by local government, local governments have been at the forefront of development permitting.[77] As a result, local governments have broad authority to consider a wide range of potential adverse impacts of a development—traffic, environmental, and aesthetic impacts—and to impose conditions to mitigate such impacts.[78] In addition, local governments are more likely than other agencies to be statutorily authorized to impose impact fees.[79]

Almost any significant improvement to real property requires a building permit from the municipality or county. Most municipalities and counties will also typically have adopted zoning ordinances that prescribe certain land uses that are allowed or not allowed on a given parcel, as well as other land uses that may be allowed with a special or conditional use permit. Proposed developments will often require either a special or conditional-use permit, a variance from the zoning ordinance, or even a

[72] *See, e.g.,* Clark Cnty. v. Rosemere Neighborhood Ass'n, 170 Wash. App. 859, 873, 290 P.3d 142, 152 (2012) (describing county stormwater permitting approach modified to satisfy constitutional scrutiny, so that "a developer must mitigate only the increased storm water flow caused by its own development," then the county "assumes the obligation to mitigate to the historical level as required by" the Clean Water Act).

[73] *See, e.g.,* Fla. Keys Citizens Coal., Inc. v. U.S. Army Corps of Eng'rs, 374 F. Supp. 2d 1116, 1132–33 (S.D. Fla. 2005) (describing negotiation process between Corps and Florida DOT over required level of wetlands mitigation for highway project).

[74] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 356, 109 S. Ct. 1835, 1849, 104 L. Ed. 2d 351, 374 (1989) (applying "substantial deference" to regulatory agency's analysis of environmental impacts and mitigation measures); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865, 104 S. Ct. 2778, 2793, 81 L. Ed. 2d 694, 716–17 (1984) (Regulatory interpretations made by "those with great expertise and charged with responsibility for administering the provision" are "entitled to deference [where] the regulatory scheme is technical and complex.").

[75] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841, 107 S. Ct. 3141, 3151, 97 L. Ed. 2d 677, 692 (1987) ("We are inclined to be particularly careful…where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."). The "compensation requirement" is not satisfied merely by the government granting the permit. *Id.* at 833 n.2 (1987) ("[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'").

[76] *See, e.g.,* Good v. United States, 39 Fed. Cl. 81, 86–93 (1997) (describing multiple federal, state, and local permits and approvals required for a development).

[77] CALLIES, *supra* note 4, at 33.

[78] *See* Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences for Clarity,* 92 CAL. L. REV. 609, 623 (2004) (describing the manifold circumstances under which landowners must secure permits from local governments before altering land use).

[79] At least 28 states have enacted legislation authorizing local governments to impose impact fees. Michael Castle Miller, *The New Per Se Takings Rule: Koontz's Implicit Revolution of the Regulatory State*, 63 AM. U. L. REV. 919, 929 (2014).

modification of the zoning map in order for the developer's proposed use to be permitted. All of these permitting decisions are subject to the essential nexus test, where permits are approved based on the developer satisfying certain conditions. Most permit approvals will come with standard, generally applicable conditions that are narrowly tailored to a legitimate governmental interest and are not controversial—for example, to construct according to the local building code, to comply with locally adopted appearance criteria, and other best practices. More controversial (and more likely to be challenged in court) are case-specific conditions intended to ameliorate the impact of the development on the local community, sometimes imposed in response to community resistance to the development. These are the situations in which the local government must take precautions to ensure that the conditions are not unconstitutionally disproportionate to the actual adverse impact of the development.

Local government permit approvals will also typically be conditioned on the developer obtaining all necessary permits from applicable regional, state, and federal agencies, such as a highway access permit from the state transportation agency or a wetlands fill permit from the Corps. These situations are addressed briefly in the following section and in detail in the remainder of this digest.

b. State Transportation Agency Exactions as Conditions of Highway Access Permits.—When the developer requires access to a state highway from the development, there is almost always a requirement to obtain a permit from the state transportation agency, often called a driveway permit, access permit, or highway occupancy permit (referenced collectively herein as "highway access permits"). The state transportation agency will typically have generally applicable construction standards for roads accessing the state highway, and these standards are typically not controversial. More controversial will be requirements for the developer to dedicate a portion of the development parcel (e.g., for public access through the development, street widening adjacent to the development, or turn lanes or acceleration and deceleration lanes at the development entrance) or to otherwise mitigate the anticipated impact of the development on the state highway system.

It is readily apparent that such highway access permit conditions are subject to the essential nexus test. In cases in which developers challenge state transportation agency permit conditions, however, the courts historically have almost never expressly applied the essential nexus test, instead focusing more specifically on whether the state transportation agency has the statutory authority to impose the condition.[80] This focus on the state transportation agency's statutory authority is related to the first element of the essential nexus test—for example, determining whether there is a close nexus between the permit condition and a legitimate interest of the state transportation agency, such as its discretionary and statutory authority "to protect the safety of the traveling public."[81] Under this inquiry, mitigation measures exacted by state transportation agencies will generally be limited to addressing concerns that the legislature has entrusted with the state transportation agency, such as traffic impacts.[82] More wide-ranging environmental mitigation measures typically must be left to local government land-use authorities or environmental agencies charged with the protection of specific natural resources.[83]

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[80] *See, e.g.,* High Rock Lake Partners, LLC v. N.C. Dep't of Transp., 366 N.C. 315, 319, 735 S.E.2d 300, 304 (2012) (overturning off-site construction requirement imposed by state transportation agency as not authorized "under the Driveway Permit Statute"); Popple v. Com., Dep't of Transp., 133 Pa. Commw. 375, 380, 575 A.2d 973, 976 (Pa. Commonw. Ct. 1990) (upholding permit condition requiring the developer to install a traffic signal as a "reasonable exercise" of the state transportation agency's "regulatory power under…the State Highway Law"); Nardo v. Com., Dep't of Transp., 123 Pa. Commw. 41, 552 A.2d 718 (1988) (upholding state transportation agency's permit requirements including access location and curbing as a reasonable exercise of the state transportation agency's statutory authority "to control the flow of traffic on all state highways [including t]he ingress and egress from the tract to the state highway").

[81] High Rock Lake Partners, LLC v. N.C. Dep't of Transp., 20 S.E.2d 706, 711 (N.C. Ct. App. 2011), *rev'd,* High Rock Lake Partners, LLC v. N.C. Dep't of Transp., 735 S.E.2d 300 (N.C. 2012).

[82] Marilyn Newman, *The "New" Curb-Cut Permits: Highway Access and Environmental Regulation,* 35 Boston B.J. 25, 26 (Mar./Apr. 1991) ("[A]n access permit condition must serve the same state interest that underlies the overall regulatory program, that is, the highway agency's legitimate interests in preserving the physical integrity, safety and through-traffic capacity of the highway system.").

[83] *Id.* at 27 ("[T]he legitimate purpose of…curb-cut controls [for state transportation agencies] is to facilitate traffic flow for various land uses, consistent with the safety and travel needs of the public at large." General environmental concerns, "although worthwhile public regulatory objectives, are best dealt with through conventional local land-use controls."). *See also* Wis. Builders Ass'n v. Wis. Dep't of Transp., 285 Wis. 2d 472, 493, 702 N.W.2d 433, 443 (2005) (concluding that Wisconsin DOT did not have comprehensive authority to regulate land abutting state highways); Ice v. Cross Roads Borough, 694 A.2d 401, 405 (Pa. Commonw. Ct. 1997) (holding that Pennsylvania DOT's authority to grant highway access permit does not abrogate local government's ability to impose additional conditions on highway access).

Because most of the cases involving highway access permits only address whether the state transportation agency has the statutory authority to impose the condition, the cases rarely consider the rough proportionality element of the essential nexus test. This may be because statutes authorizing state transportation agency exactions, and state transportation agency policies and regulations implementing those statutes, typically limit the state transportation agency to exacting no more than the impact of the development[84] (i.e., rough proportionality is often built into the state transportation agency's enabling statute and practices).

Section II.A discusses on-site exactions to mitigate the traffic impacts of a development, such as requirements to dedicate a portion of the developer's parcel for state highway improvements. Section III.A discusses off-site exactions to mitigate traffic impacts, such as requirements to fund improvements to the state highway system away from the development site.

c. Conditions Imposed Under Permits Granted by Environmental Regulatory Agencies.—Where development proposals will impact a protected natural resource, the developer will often have to obtain a permit from the agency charged with protecting that natural resource.[85] Although *Nollan* and *Dolan* both dealt, to one degree or another, with requirements to perform on-site mitigation of adverse environmental impacts, a number of courts following *Nollan* and *Dolan* tended to apply the more deferential *Penn Central* test for regulatory takings to such environmental mitigation conditions, rather than the stricter essential nexus test enunciated in *Nollan* and *Dolan*, particularly when the required mitigation was off-site or the environmental agency denied the permit.[86] The *Koontz* decision, however, makes it clear that the essential nexus test applies in such cases, to ensure that the environmental mitigation requirement imposed on the developer is roughly proportional to the adverse impacts of the development.

An interesting question moving forward will be whether, in practice, the essential nexus test substantively limits mitigation requirements imposed by environmental agencies, which are accustomed to judicial deference. Certainly, with respect to government construction such as state transportation agency projects, environmental agencies are accustomed to imposing mitigation requirements that may exceed the adverse environmental impact of the project.[87] The implication of *Koontz*, however, is that mitigation requirements imposed on private developers may not exceed the anticipated impact of the development.[88]

Section II.B discusses on-site exactions to mitigate the environmental impacts of a development, such as requirements to dedicate a conservation easement over a portion of the developer's parcel. Section III.B discusses off-site exactions to mitigate environmental impacts, such as requirements to fund stormwater improvements or wetlands improvements on government property away from the developer's parcel.

3. Questionable Applicability to Legislative Exactions

There is a split in authority, not expressly resolved by *Koontz*, as to whether the essential nexus test applies only to "adjudicative exactions," in which conditions are imposed on a specific development permit by a permitting agency exercising discretion, or also to "legislative exactions," which are uniform, standard, generally applicable conditions that are automatically applied to all similarly situated permit applications. This is addressed in detail in Section III.C.2.

II. On-Site Exactions

When permission is sought to develop land, government permitting authorities have traditionally used the permitting process to exact concessions from the developer regarding the parcel that is to be developed—either dedications of specific portions of the real property to the public or conditions imposed

[84] *See, e.g.,* High Rock Lake Partners, LLC, 720 S.E.2d at 711 (N.C. Ct. App. 2011) (describing North Carolina DOT policy to "require the applicant to provide offsite roadway improvements on public facilities in order to mitigate any negative traffic impacts created by the proposed development"); Cobb v. Snohomish Cnty., 64 Wash. App. 451, 467, 829 P.2d 169, 178 (Wash. Ct. App. 1991) (describing state statute crafted to satisfy the essential nexus test, which authorizes county to impose impact fees that "mitigate a direct impact that has been identified as a consequence of a proposed development"). *See also* Newman, *supra* note 82, at 26 ("Project proponents are required to identify mitigation measures necessary to maintain the affected highway system at the same level of capacity and operation (typically expressed as an engineering 'level of service') and the same level of safety that it would have without the proposed development.").

[85] Justin R. Pidot, *Fees, Expenditures, and the Takings Clause,* 41 Ecology L.Q. 131, 137–38 (2014) ("Permitting regimes, including those under the Clean Air Act, the Clean Water Act, and the Endangered Species Act, require applicants to take substantial steps to reduce the effect of their activities on the environment.").

[86] *See supra* notes 41–47 and accompanying text.

[87] *See supra* note 71 and accompanying text.

[88] *See, e.g.,* Clark County v. Rosemere Neighborhood Ass'n, 170 Wash. App. 859, 875, 290 P.3d 142, 152 (Ct. App. Wash. 2012) (describing county stormwater permitting approach modified to satisfy constitutional scrutiny, so that "a developer must mitigate only the increased storm water flow caused by its own development," then the county "assumes the obligation to mitigate to the historical level as required by" the Clean Water Act).

on the landowner's use of specific portions of the real property.[89] Although such requirements imposed on the landowner outside of the development permitting context could be considered an unconstitutional taking of property without just compensation, such exactions in the permitting context have long been upheld as a fair exchange, requiring the developer to ameliorate the burdens that the development will impose on the public.[90]

The essential nexus test was formulated in *Nollan* and *Dolan* specifically in the context of such on-site exactions. Permitting agencies must demonstrate that the on-site exaction serves a legitimate governmental interest or public purpose within the agency's permitting authority, and that the on-site exaction is roughly proportional to the anticipated adverse impact of the proposed development. This section discusses on-site exactions to address traffic impacts (including on-site exactions in the state transportation agency highway access permitting process) and on-site exactions to mitigate other environmental impacts (e.g., conservation easements or on-site stormwater improvements). Although the essential nexus requirement was not satisfied for the on-site exactions in *Nollan* and *Dolan*, it will be seen that it is generally easier for permitting agencies to satisfy the essential nexus requirements for on-site exactions than it is for off-site exactions.[91]

A. On-Site Highway Exactions

Both state transportation agencies and local governments typically have some authority to exact on-site concessions from the permit applicant for the benefit of the local road system, such as construction of public roads over a portion of the developer's parcel. An earlier NCHRP *Legal Research Digest* on exactions that was published in 1986—1 year before the *Nollan* decision—concluded that on-site exactions to address traffic impacts, such as dedications of a portion of the parcel for highway right-of-way or construction standards for interior streets, are generally more likely to be judicially upheld than other types of exactions.[92] Certainly, on-site highway exactions prior to *Nollan* were regularly upheld by courts employing the less stringent "rational nexus" (or "reasonable relationship") test.[93] It is generally understood and accepted that new development generates new traffic, and that a reasonable exaction is appropriate in order to improve the transportation system to offset the traffic impact of the new development.[94] The exactions overturned in *Nollan* and *Dolan*, however, included easements allowing the public to travel over a portion of the developer's property, which is similar to the type of on-site dedication traditionally exacted to address highway traffic impacts. Following *Nollan*, several courts overturned on-site highway dedication requirements as not having a sufficient nexus to the permitting agency's legitimate interests in alleviating traffic congestion or public safety impacts.[95] As a general rule, however, on-site dedications for highway improvements remain among the most defensible development exactions.

The most common and defensible type of on-site highway exaction is a requirement that the developer construct on-site streets according to certain generally applicable construction standards, particularly where the developer expects the on-site streets to become incorporated into the state or local road system.[96] Disputes may arise between

[89] Miller, *supra* note 79, at 920 ("Traditional exactions take the form of physical dedications of real property, such as building roads within a subdivision or deeding the public an easement for a bike path or for the preservation of wetlands.").

[90] David Ackerly, *Exactions for Transportation Corridors After* Dolan v. City of Tigard, 29 Loy. L.A. L. Rev. 247, 255 (1995) (citing on-site exaction cases from the 1920s and 1930s).

[91] Callies, *supra* note 4, at 256. The essential nexus test

> is most easily undertaken for on-site exactions, such as subdivision fee requirements and land dedications. The goal of providing adequate public facilities to serve a new development is a recognized, valid public purpose, and if the exactions will mitigate development impacts proportionally caused by the developer upon whom the exaction is levied, the *Nollan*/*Dolan* requirements will be met.

[92] Vance, *supra* note 5, at 3, 11.

[93] *See, e.g.,* Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 38–39, 207 P.2d 1, 5–7 (Cal. 1949) (upholding numerous on-site exactions, including the dedication of right-of-way to expand adjacent public highways and the requirement to construct interior streets wider than proposed by the developer, as "reasonably related to the protection of the public health, safety and general welfare").

[94] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595, 186 L. Ed. 2d 697, 708 (2013) ("Where a building proposal would substantially increase traffic congestion, for example, officials might condition permit approval on the owner's agreement to deed over the land needed to widen a public road."); Dolan v. City of Tigard, 512 U.S. 374, 395, 114 S. Ct. 2309, 2321, 129 L. Ed. 2d 304, 322–23 (1994) ("Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use.").

[95] Newman, *supra* note 82, at 26 n.19 (citing Paradyne Corp. v. State, Dep't of Transp., 528 So. 2d 921 (Fla. Dist. Ct. App. 1988); Unlimited v. Kitsap County, 50 Wash. App. 723, 750 P.2d 651 (1988); Dep't of Transp. *ex rel.* People v. Amoco Oil Co., 174 Ill. App .3d 479, 528 N.E.2d 1018 (1988)).

[96] *See, e.g.,* Va. Dep't of Transp., *Access Management Design Standards for Entrances and Intersections,* VDOT Road Design Manual, App. F, at F 121 (rev. Jan. 2014) ("VDOT will accept as a part of the appropriate highway system, those service roads constructed by others in accordance with above criteria.").

the developer and the permitting agency over the construction standards (and expense) required, as the developer may consider the permitting agency's requirements for street width, grade, curvature, pavement thickness, pavement drainage, sightlines, and setbacks to be excessive. Although such standards for on-site road construction as a condition for development permits are subject to the essential nexus test, they are regularly upheld.[97] Developers typically propose to construct on-site roads without being required to do so by the permitting agency (in order to provide tenants access between the proposed development and the public roads), so there is reduced concern in these situations about the government permitting agency physically appropriating that portion of the developer's real property for the highway system.[98] Furthermore, in the straightforward application of generally applicable highway construction standards to a given development proposal, there is reduced concern about disproportionate extortion from an individual developer. Establishing generally applicable highway standards is commonly understood to relate to legitimate governmental interests regarding traffic congestion and public safety. As long as the generally applicable standards are directly related to such legitimate governmental interests, courts will defer to the permitting agency's expertise as to what the generally applicable conditions should be.[99] Application of generally applicable standards to a given development proposal will generally satisfy the "individualized determination" requirement, and application of the standards to on-site streets (i.e., those that primarily benefit the development) will generally satisfy the "rough proportionality" requirement.[100] When the developer's proposed change in land use is very minor, however, a permit requirement to upgrade all preexisting roads on the site to modern standards can be overturned as disproportionate to the anticipated impact of the developer's activities.[101]

Exactions of a portion of the developer's parcel that are not volunteered by the developer (e.g., required dedications for improvements to the adjacent highway system that are not solely for the benefit of the development) will be viewed by the courts with somewhat more concern.[102] To satisfy the essential nexus test, the government permitting agency must demonstrate that the exaction is roughly proportional to the impact of the development.[103] For example, when a proposed development would block an existing access route, the developer can be required to grant an easement across another portion of the property to replace lost access—such a condition is directly proportional to the impact of the

[97] *See, e.g.,* Mira Mar Dev. Corp. v. City of Coppell, Tex., 421 S.W.3d 74 (Tex. Ct. App. 2013) (upholding an on-site street-width requirement as a valid condition on subdivision approval); City of Annapolis v. Waterman, 357 Md. 484, 745 A.2d 1000 (2000) (recognizing that on-site road construction standards including street widening, paving, and reconfiguring are commonly upheld).

[98] Because applying highway construction standards to roads proposed by the developers does not involve physical appropriations of real property by the government, some courts have evaluated these conditions under the less restrictive *Penn Central* test for regulatory takings. However, the Supreme Court has not limited the essential nexus test to physical appropriations of real property, but instead has applied it to conditions imposed in exchange for permits to develop real property. The better view seems to be that the essential nexus text applies to on-site highway construction standards that are conditions of permit approval.

[99] *See, e.g.,* Mira Mar Development Corp. v. City of Coppell, Tex., 421 S.W.3d 74, 86 (Tex. Ct. App. 2013) ("[T]he street-width requirement the City imposed on appellant bore 'an essential nexus to the advancement of' the legitimate government interest of public safety.").

[100] *See, e.g., id.*

> The record conclusively shows the City made an individualized determination that the proposed streets…were too narrow.… The street-width requirement was limited to the streets in the subdivision and did not require the improvement of any property outside the subdivision. Thus, the requirement was roughly proportional to the projected "impact" of the development.

[101] *See, e.g.,* Cheatham v. City of Hartselle, No. CV 14 J 397 NE, 2015 U.S. Dist. LEXIS 25360, at *5 (N.D. Ala. Mar. 3, 2015) (overturning a requirement to dedicate additional highway right-of-way as a condition of subdividing a parcel in order to address traffic impacts of a trailer park on the parcel, where the trailer park was a permitted, existing use that predated the subdivision request).

[102] It is uniformly recognized that such exactions of real property, whether in fee simple or easement, are subject to the essential nexus test. Miller, *supra* note 79, at 933:

> [C]ourts must first decide whether a Fifth Amendment taking would have occurred if the government, instead of asking for the thing it wanted (such as an easement or money) in exchange for permit approval, simply took the thing outright by force, regardless of whether the government granted (or the landowner sought) a permit in return.… Forcing a property owner to provide an easement is a per se taking.

[103] *See, e.g.,* Cheatham v. City of Hartselle, No. CV 14 J 397 E, 2015 U.S. Dist. LEXIS 25360, at *3 (N.D. Ala. Mar. 3, 2015) (stating that there is no dispute that essential nexus applies to right-of-way exaction imposed as a condition of subdivision permit approval); Kottschade v. City of Rochester, 760 N.W.2d 342, 345–46 n.2 (Minn. Ct. App. 2009) (recognizing that a permit condition requiring the developer to dedicate a 50-ft right-of-way for the improvement of an adjacent public roadway is to be evaluated under the essential nexus test).

development.[104] If an easement across the property is demanded not because of loss of access caused by the development, however, but merely to further the government's general interest in improving access, then the condition will fail the essential nexus test.[105]

In the more typical dedication requirement, when real property adjacent to an existing highway is exacted from the developer to support improvements to the existing highway, it is the responsibility of the government permitting agency demanding the dedication to demonstrate that the exaction is not disproportionate to the traffic impact of the proposed development.[106] Although the essential nexus test puts the burden on permitting agencies such as state transportation agencies to show that exactions for highway improvement are roughly proportional to the traffic impacts of the permitted development, this does not generally present a significant obstacle. Before requiring a dedication of real property, state transportation agencies typically require a traffic impact study,[107] in which reliable engineering principles and methods are used to assess and quantify the additional trips generated by a proposed development, as well as the increase in highway capacity resulting from proposed highway improvements (e.g., new roads or additional travel lanes for existing roads, or intersection improvements such as turn lanes). The traffic impact study thus allows a state transportation agency or local government to demonstrate that an exaction will mitigate congestion in rough proportion to the traffic impact of the development, which should satisfy the essential nexus requirement.[108]

Difficulties may arise, however, if transportation agencies seek to use on-site exactions to develop alternative transportation options, such as greenways

[104] Dolan v. City of Tigard, 512 U.S. 374, 394, 114 S. Ct. 2309, 2321, 129 L. Ed. 2d 304, 322 (1994) ("If petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere."); Ocean Harbor House Homeowners Ass'n v. Cal. Coastal Comm'n, 163 Cal. App. 4th 215, 232, 77 Cal. Rptr. 3d 432, 445 (2008) (requiring homeowners to provide "alternate" lateral access across property when construction of a seawall would cause existing public access to erode away). *But see* Burton v. Clark County, 91 Wash. App. 505, 958 P.2d 343 (Wash. App. 1998) (overturning condition requiring developer to extend an existing public road across its property, because the extended road would not connect to any other roads and thus would not improve access).

[105] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841–42, 107 S. Ct. 3141, 3151, 97 L. Ed. 2d 677, 692 (1987) ("California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' …but if it wants an easement across the Nollans' property, it must pay for it."); Paradyne Corp. v. State, Dep't. of Transp., 528 So. 2d 921, 927 (Fla. Dist. Ct. App. 1988) (overturning a permit condition requiring an easement across the property for the benefit of an adjacent landowner, when the new development did not create the adjacent landowner's access problem).

[106] *See, e.g.,* Hillcrest Prop., LLP v. Pasco Cnty., 939 F. Supp. 2d 1240, 1258 (M.D. Fla. 2013) (holding that requiring the landowner to prove the absence of "rough proportionality"—rather than the government bearing the burden to prove "rough proportionality"—fails to satisfy the essential nexus test); Goss v. City of Little Rock, Ark., 151 F.3d 861, 863 (8th Cir. 1998) (overturning condition requiring developer to dedicate 22 percent of its property to the expansion of an adjacent highway because the City failed to perform an individualized determination of the traffic impacts of the proposed development and demonstrate rough proportionality), *cert. denied,* 526 U.S. 1050 (1999); B.A.M. Dev., L.L.C. v. Salt Lake Cnty., 2006 UT 2, 128 P.3d 1161, 1171 (2006) (holding that essential nexus test applies to condition requiring developer to dedicate right-of-way for highway widening); Amoco Oil Co. v. Vill. of Schaumburg, 277 Ill. App. 3d 926, 943, 661 N.E.2d 380, 391 (1995) (Town's "exaction of over twenty percent (20%) of Amoco's property on the basis of a de minimis increase in street traffic—-four-tenths of one percent (0.4%)—does not correspond with the slightest notions of rough proportionality."). *But see* Vaughn v. City of N. Branch, 00-2370 MJD/JGL (D. Minn. Oct. 30, 2001) (placing burden on developer to show that there were limitations to City's authority to impose 66-ft road easement as condition for development permit).

[107] *See, e.g.,* Colorado Dep't of Transp., *Traffic Impact Studies,* State Highway Access Code, 2 Colo. Code Regs. § 601 1, § 2.3(5) (2002); Georgia Dept. of Transp., *Traffic Impact Studies,* Regulations for Driveway and Encroachment Control, at 2–8 (2009); Minnesota Dep't of Transp., Traffic Impact Study Guidance, MN/DOT Access Management Manual, ch. 5 (2008); Oregon Dep't of Transp., *Traffic Impact Studies,* Development Review Guidelines, § 3.3 (2005); Wyoming Dep't of Transp., *Traffic Impact Studies,* Traffic Program Access Manual, c. V (2014).

[108] *See, e.g.,* Jada View, LLC v. Bd. of Sup'rs of Unity Twp., 2084 C.D. 2011, 2013 Pa. Commw. Unpub. LEXIS 319, at *8, 65 A.3d 477 (Apr. 18, 2013) (upholding on-site exactions for road improvements based on traffic impact study showing that the road improvements were required to address the anticipated traffic impacts of the development); McClure v. City of Springfield, 175 Or. App. 425, 28 P.3d 1222 (2001) (upholding exaction for highway right-of-way based on City's detailed calculation of additional roadway area needed to accommodate trips that development was anticipated to generate); Sparks v. Douglas Cnty., 127 Wash. 2d 901, 913, 904 P.2d 738, 745–46 (1995) (upholding exactions for highway right-of-way based on county's calculation that development would approximately double traffic in the area). In *Dolan*, the pedestrian/bicycle easement condition was overturned because, although the City of Tigard quantified the anticipated traffic impact of the proposed development, it failed to quantify the traffic demand that would be offset by the pedestrian/bicycle path. Dolan v. City of Tigard, 512 U.S. 374, 395–96, 114 S. Ct. 2309, 2322, 129 L. Ed. 2d 304, 323 (1994).

across the developer's property.[109] Like the pedestrian and bicycle easement in *Dolan,* it can be difficult to reliably quantify the reduction in highway demand attributable to alternative transportation strategies.[110] Therefore, on-site exactions to address the traffic impacts of development are most likely to satisfy the essential nexus test if the on-site exactions are for improvements to the highway system, rather than alternative transportation strategies.[111]

In the survey of state transportation agencies conducted for this digest, a slight majority of survey respondents (15 out of 27) indicated that they do *not* regularly exact dedications of a portion of the developer's parcel as a condition of granting highway access permits. Many of the state transportation agencies who *do* exact dedications from the developer's real property indicated in the survey that it is an infrequent occurrence. The most typical purposes for the on-site exactions are that the traffic impact study or other standard methods employed by the state transportation agency indicate that additional lanes (e.g., turn lanes, acceleration or deceleration lanes, or additional travel lanes) are warranted to support the additional traffic generated by the development, and that the existing highway right-of-way is insufficient to construct the additional lanes.[112] These exactions generally will satisfy the essential nexus test, as they are individually determined (tailored) to address the quantified impact of the development.

A handful of survey respondents indicated that dedications such as strip easements for future highway widening are exacted as standard conditions for approving permits within specific highway corridors, where the state transportation agency expects to need to acquire right-of-way in the future.[113] These exactions are more problematic from a legal standpoint, because the need for right-of-way had been identified prior to the permit application, so it is unlikely that the proposed development created the need.[114] Where the planned highway expansion is speculative or in the distant future, it is even less likely that the purpose of the easement requirement is to mitigate the impact of the proposed development.[115] Courts employing the heightened scrutiny of the essential nexus test may be expected to overturn

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[109] Newman, *supra* note 82, at 25 (Mar./Apr. 1991) ("[A]lternative transportation strategies should only be imposed if such measures are potentially superior to simple, acceptable, environmentally sound highway improvements which adequately address the new development traffic….").

[110] *Dolan,* 512 U.S. at 395–96 (1994) ("No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."). However, requirements to provide sidewalks adjacent to on-site roads are likely to be upheld as generally applicable road construction standards, based on the public safety aspect of the sidewalks rather than due to any reduction in highway demand resulting from the added pedestrian capacity.

[111] But see David Ackerly, *Exactions for Transportation Corridors After* Dolan v. City of Tigard, 29 Loy. L.A. L. Rev. 247 (1995):

> The Supreme Court should relax its new rough proportionality test to allow intermodal transportation solutions. If a municipality shows that a new development will increase traffic congestion, then the Court should allow flexibility in exactions that will encourage city planners to explore all possible solutions, not merely more roads and more highways.

[112] *See, e.g.,* Georgia Dep't of Transp., *Right of Way Requirements*, Regulations for Driveway and Encroachment Control, at 4–27 (2009) ("If sufficient right of way exists, improvements to the State Highway will be permitted without the requirement of additional right of way. …If additional right of way is required in order to construct the required improvements, the applicant must dedicate the right of way."); Minnesota Dep't of Transp., *Development and Permit Review,* Mn/DOT Access Management Manual, ch. 4, at 18 (2008) ("Dedication of right-of-way for improvements directly related to the proposed public street connection may be a condition of approval for a Mn/DOT public street connection permit.").

[113] Although some state transportation agencies volunteered in their survey responses that they exact easements for future expansion as a condition of highway access permits, other state transportation agencies expressly forbid such exactions for general expansion. *See, e.g.,* Minnesota Dep't of Transp., *Development and Permit Review,* Mn/DOT Access Management Manual, ch. 4, at 18 (2008) ("Dedication of right-of-way for general corridor expansion or access control is not a condition of approval for a Mn/DOT public street connection permit.").

[114] Sparks v. Douglas Cnty., 127 Wash. 2d 901, 914, 904 P.2d 738, 745 (1995) ("It is not clear whether, under Dolan, municipalities may take into account future developments and their anticipated cumulative impacts."). S*ee also id.* at 747–48 (Alexander, J., dissenting):

> Douglas County had previously made a formal announcement of its commitment to make certain improvements to Empire Way. Once these planned improvements are factored into the equation, the exaction of land from the developer for right-of-way cannot be said to be related in any extent, let alone proportionally related, to the traffic impacts arising from the development.

[115] Burton v. Clark Cnty., 91 Wash. App. 505, 525–26, 958 P.2d 343, 356 (1998) (overturning requirement for developer to dedicate easement across property to improve highway connectivity when it was speculative when or if county would ever construct connecting road); Unlimited v. Kitsap Cnty., 750 P.2d 651, 654 (Ct. App. Wash. 1988) (overturning requirement for developer to dedicate right-of-way for highway extension when it was speculative when or if county would ever construct extension).

such general dedication requirements,[116] as they are similar to the "comprehensive program" of extorting easements in exchange for development permits that was considered an uncompensated taking in *Nollan*.[117]

B. On-Site Environmental Exactions

The essential nexus test applies when permitting agencies impose environmental mitigation conditions or restrictions on use of the land as a condition for approving a development permit. This includes situations in which a portion of the developer's property is required to be dedicated to public purposes, such as permanent conservation easements over a portion of the property in exchange for being permitted to fill wetlands on another portion of the property,[118] or on-site drainage features to mitigate additional stormwater generated by the development,[119] or on-site public overlooks to mitigate the loss of visual access to natural resources.[120] Mitigation of such adverse environmental impacts of development has long been understood to be a legitimate public purpose, and it is thus typically within the authority of local government land-use authorities and federal and state environmental agencies to impose on-site mitigation conditions.[121] For example, when a development will impact a specific natural resource, an agency authorized by statute to protect that natural resource typically has the authority to impose conditions to mitigate the adverse impact. The more difficult question under the essential nexus test is whether the conditions imposed are roughly proportional to the anticipated impact.[122]

This can be one of the most misunderstood aspects of legal challenges to permit conditions, because the conditions imposed to mitigate the environmental impacts of development are often similar to general land-use controls imposed for environmental reasons outside of the permitting context. Restrictions on land use outside of the permitting context are generally upheld as a legitimate application of the government's police powers. The same goes for restrictions on development, in which a proposed development is not permitted (i.e., denied outright) because of its potential adverse environmental impacts.[123] In those cases, the land-use restrictions are evaluated not according to the essential nexus standard, but rather under the deferential scrutiny of the *Penn Central* test for regulatory takings.[124] Under the *Penn Central* test, land-use restrictions are likely to be upheld as a legitimate use of the government's police powers.[125] The U.S. Supreme Court has confirmed that outright *denials* of development permits based on environmental concerns, when development would not be permitted under any circumstances, are not *exactions* and are to be evaluated under the *Penn Central* test for regulatory takings rather

[116] *See, e.g.,* Hillcrest Prop., LLP v. Pasco Cnty., 939 F. Supp. 2d 1240, 1265 (M.D. Fla. 2013) (holding unconstitutional a blanket requirement to dedicate right-of-way within a planned transportation corridor in exchange for a development permit); Dep't of Transp. *ex rel.* People v. Amoco Oil Co., 174 Ill. App. 3d 479, 489, 528 N.E.2d 1018, 1023 (1988) (overturning blanket highway access permit condition that would limit the amount paid by the state transportation agency for the developer's property in future eminent domain condemnation).

[117] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841–42, 107 S. Ct. 3141, 3152, 97 L. Ed. 2d 626, 692 (1987).

[118] *E.g.,* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2593, 186 L. Ed. 2d 697, 706 (2013).

[119] *E.g.,* Dolan v. City of Tigard, 512 U.S. 374, 380, 114 S. Ct. 2309, 2314, 129 L. Ed. 2d 304, 313 (1994).

[120] *E.g., Nollan*, 483 U.S. at 836 ("[T]he condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new home would interfere.").

[121] Callies, *supra* note 4, at 257 ("Under *Nollan's* standards these exactions will come under greater scrutiny, although no doubt exists that their purposes are valid police-power objectives.").

[122] *Id.* ("The problem with imposing exactions for such purposes lies in the difficulty of quantifying adverse development impacts. Nevertheless, to satisfy the *Nollan* remoteness test, government agencies must document the relationship between development and the need for mitigating conditions….").

[123] The essential nexus test does not require a permitting agency to disregard substantive environmental law enacted to protect natural resources. When the adverse environmental impacts of a proposed development cannot be adequately mitigated at a reasonable cost to the developer, the agency should consider simply denying the permit rather than granting the permit with conditions that might seem so disproportionate as to constitute a taking under the essential nexus test. *See, e.g.,* McAllister v. Cal. Coastal Comm'n, 169 Cal. App. 4th 912, 942, 87 Cal. Rptr. 3d 365, 388 (Cal. Ct. App. 2008) (remanding for agency to reconsider its issuance of a development permit, when the agency had "excused nonconformance with the resource-dependent-use restriction to avoid an unconstitutional taking").

[124] *See supra* notes 58–63 and accompanying text.

[125] A 2003 study found that landowners prevail against the government in less than 10 percent of cases in which the *Penn Central* test is applied (including 13.4 percent of cases that reached the merits stage). F. Patrick Hubbard, Shawn Deery, Sally Peace & John Fougerousse, *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of* Penn Central Transportation Company?, 14 Duke Env. L. & Pol'y F. 121, 141–42 (2003).

than the heightened scrutiny of the essential nexus test.[126]

There is a large body of pre-*Koontz* case law in which both state and federal courts have routinely rejected application of the essential nexus test to on-site environmental mitigation conditions, opting instead for the reduced scrutiny of the *Penn Central* test.[127] The logic in these cases seems to be that, if development could be *denied* outright due to legitimate environmental concerns, and such denial would be evaluated under the regulatory takings test, then it is illogical to apply stricter scrutiny to *granting* a development permit subject to certain conditions to protect the same environmental concerns.[128] However logical this argument appears, it was specifically rejected in *Nollan*, in which the U.S. Supreme Court applied the essential nexus test to on-site mitigation conditions even though an unconditional permit denial would have been evaluated according to the test for regulatory takings.[129] Nevertheless, there remains a large body of post-*Nollan*, pre-*Koontz* case law rejecting the essential nexus test for on-site environmental conditions, and many of the cases have not been formally overturned, although they appear to be in conflict with the Court's exactions jurisprudence. Caution should be exercised when relying on pre-*Koontz* case law to support challenged on-site environmental mitigation conditions.

One representative, and influential, case in which federal courts rejected the application of the essential nexus test to on-site environmental permit conditions is *Norman v. United States*.[130] In *Norman*, developers unsuccessfully challenged a permit granted by the Corps under the Clean Water Act that would allow the developers to fill approximately 60 acres of wetlands, conditioned upon the developers creating or restoring approximately 195 acres of wetlands and maintaining approximately 220 acres of wetlands in perpetuity.[131] To satisfy the Corps requirement to maintain the wetlands in perpetuity, the developers transferred title to the wetlands portion of the property to a nonprofit property owners association controlled by the developers.[132] Citing cases in which *denials* of wetland development permits were upheld under deferential scrutiny,[133] both the U.S. Court of Federal Claims and, on appeal, the U.S. Court of Appeals for the Federal Circuit openly doubted whether the essential nexus test even applied in that situation,[134] in which a wetlands development permit was *not denied* but rather *conditioned* upon the creation and preservation of

[126] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702–03, 119 S. Ct. 1624, 1635 (1999).

[127] *See, e.g.,* McClung v. Sumner, 548 F.3d 1219, 1225 (9th Cir. 2008) (rejecting essential nexus test in favor of *Penn Central* test for on-site stormwater conditions placed on development permit), abrogated by Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2594, 186 L. Ed. 2d 697, 708 (2013); Walcek v. United States, 49 Fed. Cl. 248, 254, 272 (2001) (employing *Penn Central* test to uphold wetlands mitigation conditions imposed on development permit). *See also supra* notes 41–43 and accompanying text.

[128] *See, e.g.,* Sierra Club v. Strock, 495 F. Supp. 2d 1188, 1226 n.148 (S.D. Fla. 2007) ("This Court notes that it is somewhat unusual that private purchasers of wetlands might succeed with a takings claim when the regulatory prohibitions on destruction of wetlands clearly have been established for at least two decades.").

[129] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 844–46, 107 S. Ct. 3141, 3153, 97 L. Ed. 2d 626, 694 (1987)

> The Coastal Commission, if it had so chosen, could have denied the Nollans' request for a development permit, since the property would have remained economically viable without the requested new development. Instead, the State sought to accommodate the Nollans' desire for new development, on the condition that the development not diminish the overall amount of public access to the coastline. …The Court finds fault with this measure because it regards the condition as insufficiently tailored to address the precise type of reduction in access produced by the new development.
>
> (Brennan, J., dissenting).

[130] 63 Fed. Cl. 231 (2004), *aff'd*, 429 F.3d 1081 (Fed. Cir. 2005), *cert. denied,* 547 U.S. 1147 (2006).

[131] Norman v. United States, 429 F.3d 1081, 1086–87 (Fed. Cir. 2005); Norman v. United States, 63 Fed. Cl. 231, 240 (2004). One troubling aspect of this case is the fact that the Corps had originally concluded that there were only 28 acres of wetlands on the property, but, after public opposition to the development proposal became manifest, the Corps later concluded that there were 230 acres of wetlands on the property. Norman v. United States, 429 F.3d 1081, 1085 (Fed. Cir. 2005); Norman v. United States, 63 Fed. Cl. 231, 237 (2004).

[132] Norman v. United States, 429 F.3d 1081, 1087 (Fed. Cir. 2005); Norman v. United States, 63 Fed. Cl. 231, 237 (2004).

[133] Norman v. United States, 429 F.3d 1081, 1088 (Fed. Cir. 2005) (citing Forest Props., Inc. v. United States, 177 F.3d 1360, 1364 (Fed. Cir. 1999) (upholding the Corps' denial of a wetlands dredge-and-fill permit under the less stringent test for regulatory takings)); Norman v. United States, 63 Fed. Cl. 231, 248 (2004) (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 324 (2002) (upholding a temporary moratorium on development while a regional water quality plan could be developed to comply with Clean Water Act requirements)).

[134] Norman v. United States, 429 F.3d 1081, 1090 (Fed. Cir. 2005) ("Even if the nexus requirement of the *Nollan* and *Dolan* line of exaction cases were applicable here—and we think it clear that it is not—we would agree with the trial court's conclusion that an appropriate nexus exists between the set-aside of the 220.85 acres and the regulatory purpose."); Norman v. United States, 63 Fed. Cl. 231, 251 (2004) ("It is clear that the situation at bar is not a physical taking as enunciated by *Nollan*, but rather, fits within the framework of allegations which might support a classic regulatory taking.").

additional wetlands. Both courts supported their conclusion that the essential nexus test probably did not apply based on the fact that there was no "permanent physical invasion" of the property—transferring ownership of the wetlands to the developer-controlled property owners association appeared less onerous than the government taking title to, or an easement over, the wetlands.[135] Nevertheless, both courts concluded that, even if the essential nexus test applied, it was satisfied because the requirement to create and preserve wetlands bore a nexus to the opportunity to fill and dredge other wetlands on the property.[136] Neither *Norman* court considered the rough proportionality prong of the essential nexus test—i.e., whether the 195 acres of wetlands that were required to be created or restored, and the requirement to preserve 220 acres of wetlands in perpetuity, were roughly proportional to the 60 acres of wetlands that would be lost due to the proposed development. Both *Norman* courts proceeded to evaluate and uphold the permit conditions under the more deferential test for regulatory takings.[137]

In light of the U.S. Supreme Court in *Koontz* applying the essential nexus test to wetland mitigation conditions, it seems clear that the *Norman* courts erred. A "permanent physical invasion" is not a prerequisite to application of the essential nexus test, although it does weigh heavily in favor of finding that the condition is disproportionate to the anticipated impact of the development. The mere fact that wetland mitigation requirements were imposed as conditions for granting the development permit means that the *Norman* courts should have applied the essential nexus test, and thus should have considered whether the requirements were roughly proportional to the impact of the development on existing wetlands. The wetland mitigation requirements imposed in *Norman* were not mere restrictions on use of the land, but affirmative requirements to create, restore, and maintain wetlands in perpetuity—conditions that probably could not have been imposed on the property owner under the guise of environmental regulation in the absence of new development.

Nevertheless, the *Norman* decisions, particularly the long analysis by the Court of Federal Claims weighing the *Penn Central* factors,[138] illustrate how even very substantial affirmative mitigation requirements are likely to be upheld if the permitting agency can have the requirements scrutinized under the *Penn Central* test for regulatory takings, rather than under the essential nexus test. To invite less judicial scrutiny, permitting agencies should consider whether their desired outcome can be accomplished by regulatory action, outside the permitting process, rather than by permit conditions.[139] As an alternative, permitting agencies may consider simply denying the permit until the developer proposes appropriate mitigation measures, rather than the agency proposing mitigation conditions (which would subject the conditions to evaluation under the essential nexus test). For example, in the long-running case of *Lost Tree Village Corp. v. United States,*[140] in which the Corps outright denied a wetlands development permit despite wetland mitigation proposals by the developer, both the Court of Federal Claims and the Federal Circuit have repeatedly (and probably correctly) analyzed the permit denial under the less stringent test for regulatory takings, because the Corps has not proposed conditions under which a permit would be granted.[141]

State court decisions subsequent to *Koontz* illustrate the heightened scrutiny under which on-site environmental conditions are to be analyzed.[142] A few months after the *Koontz* decision, the Texas Court of

[135] Norman v. United States, 429 F.3d 1081, 1089 (Fed. Cir. 2005); Norman v. United States, 63 Fed. Cl. 231, 248 (2004).

[136] Norman v. United States, 429 F.3d 1081, 1090 (Fed. Cir. 2005); Norman v. United States, 63 Fed. Cl. 231, 251 (2004) ("The public interest served by requiring the preservation of wetlands in exchange for the filling and dredging of other lands relates directly to the condition imposed.").

[137] Norman v. United States, 429 F.3d 1081, 1092–94 (Fed. Cir. 2005); Norman v. United States, 63 Fed. Cl. 231, 237 (2004).

[138] Norman v. United States, 63 Fed. Cl. 231, 261–87 (2004).

[139] *See, e.g.,* Horne v. Dep't of Agric., 135 S. Ct. 2419, 2428, 192 L. Ed. 2d 388, 399 (2015) (recognizing that regulatory action subject to deferential review under the *Penn Central* test may be able to accomplish the same ends as a physical taking subject to heightened scrutiny, but the U.S. Constitution "is concerned with means as well as ends").

[140] 115 Fed. Cl. 219 (2014) (concluding that the Corps' permit denial constituted a regulatory taking by depriving the developer of all economically beneficial use of the land, because the land's residual value as undeveloped wetlands was not *economic* value), *aff'd,* 787 F.3d 1111, 1119 (Fed. Cir. 2015).

[141] *See, e.g.,* Lost Tree Vill. Corp. v. United States, 787 F.3d 1111, 1114 (Fed. Cir. 2015) ("[T]he Army Corps of Engineers denied Lost Tree's § 404 fill permit because the Corps determined that Lost Tree could have pursued less environmentally damaging alternatives and because Lost Tree had adequately realized its development purpose through the development of the John's Island community.").

[142] *See, e.g.,* Lynch v. Cal. Coastal Comm'n, 229 Cal. App. 4th 658, 686, 177 Cal. Rptr. 3d 654, 675 (2014) (overturning conditions imposed on seawall construction as lacking nexus or rough proportionality to adverse impacts of seawall), *review granted,* 339 P.3d 328 (2014).

Appeals scrutinized a number of conditions imposed by a municipality on a residential development permit,[143] including a number of on-site drainage improvements required by the municipality. For example, a requirement to add stormwater drainage inlets to prevent flooding of lots within the subdivision was upheld under the essential nexus standard.[144] First, the nexus element was satisfied for the on-site drainage inlet condition, because "[p]revention of flooding is a legitimate government interest."[145] Second, "the condition was roughly proportionate to the projected impact of the development," where the additional on-site drainage inlets "affect only the subdivision and not any other property and were required because of the subdivision's design."[146] The requirement for additional drainage inlets resulted from "an individualized determination based on the unique conditions of the development."[147]

Other on-site conditions imposed by the City, however, were overturned using the essential nexus test. For example, the developer proposed to route water collected in the additional stormwater inlets to a floodplain behind the residential lots that the inlets were intended to protect from flooding.[148] The City, however, required the developer to extend the drainage pipe an additional 120 ft, to an outlet in a nearby creek.[149] "[T]he City did not conclusively establish that the extension of the drainage pipe to the creek bed was an essential nexus of a legitimate government interest and that the extension was roughly proportionate to the impact of the project," and thus the drainage pipe extension was a compensable exaction.[150] In addition, the City required that some retaining walls proposed by the developer be made steeper—4-to-1 batter as opposed to the 3-to-1 batter proposed by the developer—in order to "further erosion control and improve drainage."[151] The court concluded that the additional expense of constructing steeper walls was a compensable exaction, in which the City "presented no evidence that the four-to-one slope requirement was roughly proportional to the projected impact of the subdivision."[152]

Unlike the broad authority of state transportation agencies to regulate traffic impacts of development, state transportation agencies typically do not have broad statutory authority to regulate general environmental impacts of development. Most state transportation agencies responding to the survey conducted for this digest indicate that they do not impose on-site conditions to mitigate environmental impacts aside from traffic impacts. Twelve of the 27 state transportation agencies responding to the survey (44 percent) did indicate, however, that they regularly require some sort of on-site drainage mitigation, such as stormwater retention ponds, to mitigate the stormwater impact of the proposed development on the state highway system.[153] State transportation agencies typically have the authority to impose on-site drainage conditions in order to prevent a net increase in stormwater released to the highway system. Under the essential nexus test, the state transportation agency must show that its on-site drainage requirement is roughly proportional to the anticipated stormwater impact of the development. This can be accomplished with drainage impact studies, which (like traffic impact studies) can assess and quantify the impact of the proposed development on the state highway system, as well as the improvement in conditions that can be anticipated from the proposed on-site drainage features.[154] Other permitting agencies, including environmental agencies charged with protection of natural resources, often have similar requirements (sometimes imposed by statute) to quantify adverse

[143] Mira Mar Dev. Corp. v. City of Coppell, Tex., 421 S.W.3d 74, 85 (Tex. App. 2013) ("To resolve these issues, we must first determine whether each requirement was an exaction and, if so, whether the City established (1) an essential nexus to the substantial advancement of a legitimate government interest and (2) the rough proportionality to the projected impact of the development.").

[144] *Id.* at 86–87.

[145] *Id.* at 87.

[146] *Id.*

[147] *Id.*

[148] *Id.* at 88.

[149] *Id.*

[150] *Id.* at 89.

[151] *Id.* at 91–92.

[152] *Id.* at 92.

[153] *See, e.g.,* Georgia Dep't Of Transp., *Drainage Design,* Regulations for Driveway and Encroachment Control, at 6 2 (2009).

> When the rate of discharge from the proposed development to the State Highway System is less than the rate at which runoff was discharged prior to the development, then detention is not required. Any discharge that exceeds the amount of water by 1 cubic foot per second at post development detention must be provided on the development site.

Minnesota Dept. of Transp., *Development and Permit Review,* Mn/DOT Access Management Manual, ch. 4, at 22 (2008) ("Any proposed access should perpetuate the existing drainage patterns and maintain the stability of the highway infrastructure. The size and type of any necessary drainage appurtenances (e.g., culverts, end treatments, ditch widths, etc.) will be a condition of an access permit.").

[154] *See, e.g.,* Pennsylvania Dep't of Transp., *Drainage Impact Report,* Highway Occupancy Permit Guidelines, at 57–58 (2004).

impacts via standardized formulas and tailor on-site mitigation conditions accordingly.[155] Such standardized approaches employing reliable engineering methods and principles to tailor on-site exactions to mitigate the actual impact of development will generally satisfy the essential nexus test.

III. Off-Site Exactions

Frequently, it is not possible to fully mitigate the impact of a proposed development merely by on-site exactions (e.g., requiring the developer to dedicate a portion of the development parcel to public purposes). Particularly with regard to infrastructure such as roads, water distribution, and sewer systems, developers recognize that improvements will often be required, on property that the developer does not own, in order to adequately service the new development. In these cases, the permitting agency may seek to condition permits on the developer actually constructing improvements to off-site public utilities or other public property, or otherwise on the developer funding, at least in part, the government's cost of constructing the improvements.[156] Perhaps more controversially, when a development will have adverse environmental impacts that cannot be fully mitigated on site, the government may condition permit approval on the developer's agreement to fund environmental improvements elsewhere, such as the off-site wetlands mitigation condition in *Koontz*, in order to minimize the developer's net environmental impact.

Prior to *Koontz*, a "bare majority" of courts held that the essential nexus test was inapplicable to off-site exactions and monetary demands.[157] In *Koontz*, however, the U.S. Supreme Court clearly resolved the authority split in favor of applying the essential nexus test to such requirements to improve public property imposed as a condition of approving development permits. This section discusses off-site exactions, such as requirements for developers to construct improvements to public infrastructure (e.g., the state highway system) and to fund environmental improvements away from the development site. This section also examines how permitting agencies such as state transportation agencies can ensure that such off-site permit conditions withstand constitutional scrutiny.

A. Off-Site Highway and Infrastructure Improvements

There is growing and widespread recognition that off-site transportation improvements, both highway improvements and consideration of other transportation modes, must be funded at least in part by the developers whose developments will significantly impact the transportation system.[158] Even before *Nollan* and *Dolan*, a 1986 NCHRP legal research study on exactions concluded that it was more difficult for off-site highway exactions than on-site road requirements to withstand judicial challenge.[159] As a result of *Koontz*, it is now clearly understood that the essential nexus test applies when developers are required to construct improvements to public infrastructure, such as improvements to highway intersections or arterial streets. The constitutional concern with such a requirement is that the public infrastructure may be used by others, not just the tenants of the new development, so the permitting agency bears the burden (under the essential nexus test) of demonstrating that the developer is not forced to bear a disproportionate share of the expense of benefits enjoyed by the broader public.

At the time of the *Nollan* and *Dolan* decisions, local governments and state transportation agencies were already beginning to condition development permits on the construction of off-site transportation improvements to mitigate the impacts of

[155] *See, e.g.,* FLA. ADMIN. CODE ANN. r. 62-345.100 (2013) (seeking to establish "a standardized procedure for assessing the functions provided by wetlands and other surface waters, the amount that those functions are reduced by a proposed impact, and the amount of mitigation necessary to offset that loss" in order to execute FLA. STAT. § 373.414(18) (2012)).

[156] Molly Cohen & Rachel Proctor May, *Revolutionary or Routine? Koontz v. St. Johns River Water Management District,* 38 HARV. ENVTL. L. REV. 245, 254 (2014) ("These fees often pay for direct and easily quantifiable infrastructure needs, such as widening a roadway to accommodate traffic generated by the residents of a new subdivision, or laying new water and wastewater pipes to serve new homes.")

[157] Breemer, *supra* note 41, at 382.

[158] David Levinson, *Paying for the Fixed Costs of Roads,* 39 J. TRANSPORT ECON. & POL'Y 279, 287 (2005) ("[M]ost jurisdictions in the United States at present do not exact conditions from developers that at all compensate for the development's impact on infrastructure."). *See also* Ackerly, *supra* note 90, at 294:

> The Supreme Court should relax its new rough proportionality test to allow intermodal transportation solutions. If a municipality shows that a new development will increase traffic congestion, then the Court should allow flexibility in exactions that will encourage city planners to explore all possible solutions, not merely more roads and more highways.

[159] VANCE, *supra* note 5, at 3, 11 ("Exactions for the improvement of off-site roads have met…with mixed results. Generally speaking, it is necessary to establish a clear connection between traffic conditions on such exterior roads and the [development] in order to sustain the validity of such exactions.").

development.[160] In *Nollan* and *Dolan*, the U.S. Supreme Court appeared to expressly authorize permit conditions that would require developers to construct off-site transportation improvements to mitigate traffic impacts of the development.[161] In part because such conditions do not encroach on the developer's real property, however, a number of jurisdictions in the years immediately following *Dolan* concluded that the essential nexus test did not apply to off-site exactions, such as requirements to fund improvements to the transportation system.[162] Over the years leading up to *Koontz*, a handful of jurisdictions gradually came to the conclusion that the distinction between on-site and off-site exactions was artificial, and that the essential nexus test should apply to requirements to improve the transportation infrastructure.[163]

Although the *Koontz* decision makes it clear that the essential nexus test applies to any such off-site exaction, pre-*Koontz* courts rarely expressly applied the essential nexus test when evaluating off-site highway exactions, typically focusing instead on whether the state transportation agency or other permitting agency had the authority to impose off-site exactions.[164] Certainly, as a preliminary matter, the question of statutory authority to impose the condition should be evaluated as part of the first element of the essential nexus test, to determine whether the permit condition serves a legitimate governmental interest. By focusing on statutory authority and failing to consider rough proportionality, however, pre-*Koontz* courts could tend to be overly deferential to permit conditions, which was not in the spirit of the essential nexus test.

For example, in *Vaughn v. City of North Branch,*[165] a developer challenged conditions imposed by a municipality that would require the developer to improve parts of the public road system surrounding the proposed development before construction of the proposed development could begin.[166] Rather than strictly scrutinize the City's conditions under the essential nexus test, the U.S. District Court for the District of Minnesota instead dismissed the developer's challenge after shifting the burden to the developer to "show that by state statute or regulation, the City was substantially limited with respect to its ability to approve development plans."[167] The court (probably incorrectly) failed to consider whether the conditions were roughly proportional to the impact of the development. Likewise, in *High Rock Lake Partners, LLC v. North Carolina Department of Transportation*,[168] a developer challenged a condition imposed by the state transportation agency requiring the developer to improve a railroad crossing located approximately one-quarter mile from the proposed entrance to the development. Applying logic similar to the essential

[160] Newman, *supra* note 82, at 25:

> The regulatory focus, at least in many urbanized states, has substantially shifted to the broad impacts of a property's traffic generation on the functioning of the highway system as a whole. The permit process now seeks affirmatively to address major development traffic impacts by conditioning "access" to state highways on, for example, developer provision of major highway improvements, "off-site" mitigation well beyond the site driveway, and traffic limits and traffic reduction programs.

[161] Dolan v. City of Tigard, 512 U.S. 374, 394, 114 S. Ct. 2309, 2321, 129 L. Ed. 2d 304, 322 (1994) ("If petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property *or elsewhere*" (emphasis supplied)) (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 (1987)).

[162] *See, e.g.,* B & C Investments of Ark., Inc. v. City of Fort Smith, Ark., No. 06 2002, 2007 U.S. Dist. LEXIS 5574, at *6 (W.D. Ark. Jan. 25, 2007) (holding that the essential nexus test is inapplicable to road improvement assessment imposed as a condition of granting building permit); McCarthy v. Leawood, 257 Kan. 566, 894 P.2d 836 (1995) (holding *Dolan* inapplicable to traffic impact fee); Blue Jeans Equities West v. San Francisco, 3 Cal. App. 4th 164, 4 Cal. Rptr. 2d 114 (1992) (holding *Nollan* inapplicable to transit impact development fee).

[163] *See, e.g.,* Town of Flower Mound v. Stafford Estates Ltd., 71 S.W.3d 18 (Tex. App. 2002) (applying essential nexus test to road improvement exaction, where developer would be required to replace existing street); Home Builders Ass'n of Dayton v. Beavercreek, 89 Ohio St. 3d 121, 729 N.E.2d 349 (Ohio 2000) (applying essential nexus test to development fee to fund new roads, and requiring the new roads to benefit the development); N. Ill. Home Builders Ass'n v. DuPage County, 165 Ill. 2d 25, 649 N.E.2d 384 (1995) (applying essential nexus test to traffic impact fee).

[164] CALLIES, *supra* note 4, at 235:

> [L]ocal governments may require land or money from the developer to help meet needs for schools, parks, off-site highway improvements, and water and sewer service. These exactions of land or fees in lieu of land dedication, impact fees and assessments have been the target of a significant amount of litigation. The usual challenges focus on the statutory authority to impose the exaction and the constitutional propriety of the methodology for apportioning the cost based on due process, taking, and equal protection grounds.

[165] No. CIV.00–2370 MJD/JGL (D. Minn. Oct. 30, 2001), *aff'd,* 103 F. App'x 73 (8th Cir. 2004), *cert. denied,* 543 U.S. 1065 (2005).

[166] *Id.* at *2 ("[N]o development could occur until Eaglewood Avenue was improved to City standards.… [The developer] alleges that this condition would have required him to pay the costs to improve the street that would benefit adjoining property owners, some of which were council members.").

[167] *Id.* at *4.

[168] 217 N.C. App. 442, 720 S.E.2d 706 (N.C. Ct. App. 2011), rev'd, 735 S.E.2d 300 (N.C. 2012).

nexus test, the North Carolina Department of Transportation (NCDOT) Driveway Permit Appeals Committee initially upheld the condition because "the increase in traffic at the crossing is caused solely by the development, and widening of the crossing is necessary to protect the safety of the traveling public."[169] Like the District of Minnesota in *Vaughn*, the North Carolina Court of Appeals (probably incorrectly) shifted the burden to the developer to show that NCDOT did not have statutory authority to impose the off-site construction condition.[170] Because the relevant statute only described NCDOT's authority to impose conditions at the driveway itself (e.g., "acceleration or deceleration lanes, traffic storage lanes, or medians"), the North Carolina Court of Appeals concluded that the developer failed to meet its burden[171] and upheld the condition without applying the essential nexus test. On appeal, however, the North Carolina Supreme Court overturned the condition, not based on the essential nexus test but rather by concluding that NCDOT did *not* have statutory authority to condition driveway permits on off-site improvements.[172]

As noted above, a handful of state courts prior to *Koontz* did apply the essential nexus test to off-site highway improvement conditions.[173] Notably, in *Town of Flower Mound v. Stafford Estates Ltd. Partnership,*[174] the Texas state courts applied the essential nexus test to overturn a town's condition that the developer reconstruct (with a rigid concrete surface) an existing asphalt-surface road outside the development in exchange for a development permit. Although agreeing that the "safety" and "durability" of the road were legitimate governmental interests, the Town was still required to show that its requirement that the road "be demolished and repaved with concrete" *substantially* advanced those legitimate governmental interests.[175] With respect to the second element of the essential nexus test, it is not sufficient for the permitting agency to merely assert that a generally applicable requirement "to improve abutting roadways is roughly proportional to the impact of all developments on all roadways."[176] The permitting agency must make an "individualized determination" that the specific off-site highway improvements are "roughly proportional to the projected impact" of the development.[177] In *Flower Mound,* the off-site construction condition failed to satisfy the rough proportionality prong because "[t]he road was in good shape at the time, and…the development would increase traffic only about 18%."[178]

Now that *Koontz* has made it clear that off-site construction exactions are subject to the essential nexus test, the question is how can state transportation agencies and local governments ensure that such exactions withstand constitutional scrutiny. This is of tremendous importance to state transportation agencies, as off-site highway exactions are the preferred method of mitigating traffic impacts—a vast majority of the state transportation agencies responding to the survey conducted for this digest (23 out of 27, or 85 percent) reported that they regularly require developers to construct or fund off-site improvements to the highway system, and two other state transportation agencies reported that they occasionally impose such requirements. Survey respondents provided a long list of typical improvements that they will require private developers to make to the state highway system:

- Turn lanes and associated widening.
- Acceleration or deceleration lanes.
- Travel lane widening or additional travel lanes.
- Traffic signal modifications and additions.
- Installation of median islands.
- Installation of sidewalk, curb, and gutter.
- Pavement resurfacing.
- Pavement restriping or upgraded pavement markings.

[169] *Id.* at 711. The committee relied on NCDOT's *Policy for Street and Driveway Access to North Carolina Highways,* which provided, "The NCDOT may require the applicant to provide offsite roadway improvements on public facilities in order to mitigate any negative traffic impacts created by the proposed development." *Id.*

[170] *Id.* at 712–13.

[171] *Id.* ("N.C.G.S. § 136–18(29) does not address improvements away from a driveway connection. . . .Because we hold N.C.G.S. § 136–18(29) does not address the improvements, petitioners' argument is overruled.").

[172] High Rock Lake Partners, LLC v. N.C. Dep't of Transp., 366 N.C. 315, 321, 735 S.E.2d 300, 304 (2012) ("The conditions imposed by DOT in this case are not permitted under the Driveway Permit Statute. The statute authorizes no requirement to make improvements away from the applicant's property.").

[173] *See also* Sefzik v. City of McKinney, 198 S.W.3d 884 (Tex. Ct. App. 2006) (holding that essential nexus test applies to permit condition requiring developer to construct or fund construction of off-site roads); Benchmark Land Co. v. City of Battle Ground, 103 Wash. App. 721, 14 P.3d 172 (2002) (overturning condition requiring improvement of adjoining public street for failing to satisfy the essential nexus test) (declining to apply essential nexus test); J.C. Reeves Corp. v. Clackamas County, 131 Or. App. 615, 623, 887 P.2d 360, 364–65 (1994) (remanding for county to consider whether its requirement for developer to make off-site improvements to roads outside the development satisfied essential nexus test).

[174] 71 S.W.3d 18 (Tex. Ct. App. 2002).

[175] Town of Flower Mound v. Stafford Estates Ltd. Partnership, 135 S.W.3d 620, 643–44 (Tex. 2004).

[176] *Id.* at 644.

[177] *Id.*

[178] *Id.*

- Grade or sight-line improvements.
- Improved highway lighting.
- Improved road signage.

Most survey respondents indicated that the developers are required to construct the improvements themselves (e.g., through a general contractor licensed in the highway classification), rather than fund the state transportation agency to construct the improvements.

As a threshold matter, the state transportation agency or local government must have the specific authority to impose off-site exactions.[179] The specific authority will vary from one state transportation agency to the next. As seen in the *High Rock Lake* case previously discussed, the North Carolina Supreme Court concluded that NCDOT did not have such authority to impose off-site highway conditions.[180] The Massachusetts Department of Transportation (MassDOT), however, has broader statutory authority, when a development will "generate a substantial increase in or impact on traffic," to require the developer "to install and pay for… standard traffic control devices, pavement markings, channelization, or other highway improvements to facilitate safe and efficient traffic flow."[181]

Assuming the state transportation agency or local government has the authority to require off-site improvements, the requirement imposed must satisfy the essential nexus test by showing that it is closely related to the legitimate government purpose (e.g., that it will actually facilitate safe and efficient traffic flow) and that it is roughly proportional to the anticipated impact of the development. To satisfy this test, an individualized determination must be made:

> Where exactions are meant to fund off-site facilities called for by development projects, both the remoteness and proportionality tests must be satisfied by studies (1) showing the future scope of growth, (2) defining the needed facilities, (3) defining facility costs allocated to new growth, and (4) specifying service units and service areas.[182]

At minimum, the studies must quantify both the anticipated impact of the proposed development (on traffic or other infrastructure) and the anticipated mitigation of the proposed improvement. Although an individualized determination is required, for the purpose of traffic impacts or other infrastructure impacts, these can typically be calculated by standardized, generally applicable formulas.[183] As noted previously, prior to imposing an exaction, state transportation agencies typically require a traffic impact study,[184] in which engineers apply reliable principles and methods to assess and quantify the additional trips generated by a proposed development, as well as the increase in highway capacity resulting from proposed highway improvements (e.g., new roads or additional travel lanes for existing roads, or intersection improvements such as turn lanes).[185] State transportation agencies also typically have standardized methods for calculating when such off-site improvements as turn lanes and signal improvements are warranted, based on the traffic anticipated by the development. The traffic impact study and related warrant calculations thus allow the state transportation agency to demonstrate that the required off-site highway improvements are roughly proportional to the development's traffic impact, satisfying the essential nexus test.[186]

B. Off-Site Environmental Improvements

In *Koontz*, the U.S. Supreme Court expressly applied the essential nexus test to the requirement to construct new wetlands on public land as a condition for developing wetlands on private land. As was the case with off-site highway exactions, courts prior to *Koontz* often concluded that the essential nexus test did not apply to off-site environmental exactions, i.e., requirements to perform environmental mitigation elsewhere (typically on government

[179] CALLIES, *supra* note 4, at 259 ("When exactions falter it is usually for the reason that express statutory authority is lacking.").

[180] High Rock Lake Partners, LLC v. N.C. Dep't of Transp., 735 S.E.2d 300, 304 (N.C. 2012).

[181] MASS. GEN. LAWS ANN. ch. 81, § 21 (2008).

[182] CALLIES, *supra* note 4, at 256.

[183] Cohen & May, *supra* note 156, at 256 ("[M]any kinds of fees, such as fees to fund wastewater pipes or mitigate traffic impacts, are fairly easy to quantify using standardized methodologies: a residential unit requires X inches of wastewater pipe; commercial space generates Y vehicle trips per square foot.").

[184] *See supra* note 107 and accompanying text.

[185] It is typical for traffic impact studies to calculate trip generation "using the techniques of the most recent Institute of Transportation Engineers Trip Generation Manual." 720 MASS. CODE REGS. 13.02 (2015). *See also* N. Ill. Home Builders Ass'n, Inc. v. County of Du Page, 251 Ill. App. 3d 494, 502, 621 N.E.2d 1012, 1020 (1993) (upholding county's assessment of traffic impact fees under the rational nexus test based on county's use of detailed mathematical travel modeling as well as "trip-generation data collected by the Institute for Transportation Engineering.").

[186] Newman, supra note 82, at 26–27:

> To the extent that the traffic-analysis methodology…approximately equates the scope of the required improvements with the extent of the project's own traffic congestion impacts, the impact-nexus standard should be satisfied. Properly used and documented, this type of analysis should prevent imposition of otherwise desirable traffic improvements unrelated to the traffic needs of the project under study.

property) to offset the negative environmental impacts of a development. A representative example is *Speights v. City of Oceanside,*[187] in which a developer challenged development permit conditions that in general required him to provide whatever stormwater drainage the City ultimately deemed necessary.[188] The City's drainage requirements expanded as the project proceeded, and ultimately the City required the developer (as a condition for granting a certificate of occupancy) to improve stormwater facilities under nearby public roads, as well as on adjacent property owned by the public school system.[189] In doing so, the City apparently acknowledged the existing inadequacy of storm drainage in the area and did not specifically limit the stormwater conditions to mitigating the impacts of the development.[190] Nevertheless, the California Court of Appeal upheld the conditions, concluding that the essential nexus test did not apply, because (unlike *Dolan*) the developer was required to construct the stormwater improvements on government property and was not required to dedicate a portion of his own parcel for stormwater improvements.[191] The court concluded (probably incorrectly) that the essential nexus test did not apply to off-site exactions, and therefore it did not consider whether the requirement was disproportionate to the impact of the development.

As a result of *Koontz*, it is clear that the essential nexus test is to be applied to permit conditions requiring the developer to fund environmental improvements (e.g., wetlands improvements, drainage improvements, reforestation) to public property away from the development site. This necessarily includes banking programs, in which developers can perform off-site environmental mitigation to earn credits that allow remotely located development projects to have adverse environmental impacts.[192] With respect to the first element of the essential nexus test, the close nexus requirement or what some courts refer to as the "remoteness test,"[193] it remains to be seen whether this can be satisfied by off-site environmental mitigation that is too far removed from the development site.[194] With respect to the rough proportionality requirement, as with traffic mitigation conditions, the implication of the essential nexus test is that the imposed environmental mitigation condition must be supported by studies quantifying the anticipated adverse environmental impact of the development and the improvement that can be achieved by the proposed mitigation measure.

An interesting question moving forward will be whether, in practice, the essential nexus test results in any substantial restrictions on environmental mitigation conditions imposed by environmental agencies, which are accustomed to judicial deference with respect to the natural resources they are authorized to protect.[195] Numerous environmental and natural resource statutes suggest that when a natural resource is impacted, the mitigation is required to exceed the adverse impact.[196] Certainly, with respect to government construction such as state transportation agency projects, environmental agencies are accustomed to imposing mitigation requirements that may exceed the adverse impact of the project.[197] Such a requirement imposed on private developers would appear to constitute a taking under the essential nexus test, to the extent that the condition imposed exceeds the adverse impact of the development. The effect of this on the practice of state transportation agencies, however, is likely to be minimal. Of the state transportation agencies that responded to the survey conducted for this

[187] 2009 Cal. App. Unpub. LEXIS 4941 (Ct. App. Cal. Jun. 18, 2009), *cert. denied,* 555 U.S. 937 (2010).

[188] *Id.* at *1 (One condition "required storm drain systems to be designed and installed to the city engineer's satisfaction.").

[189] *Id*. at *2–3.

[190] *Id*. at *3.

[191] *Id*. at *15 ("City's imposition of a requirement that [the developer] increase the size of an existing drain and otherwise construct a drainage system *on the District property* can in no way be characterized as a per se physical taking of his own property.").

[192] *See, e.g.,* Save our Peninsula Comm. v. Monterey Cnty. Bd. of Supervisors, 87 Cal. App. 4th 99, 142, 104 Cal. Rptr. 2d 326, 358 (2001) (requiring county to show that there is a nexus between permitting increased groundwater pumping on one site and a mitigation condition requiring the developer to reduce groundwater pumping at a remote location).

[193] Batch v. Town of Chapel Hill, 92 N.C. App. 601, 611, 376 S.E.2d 22, 29 (N.C. Ct. App. 1989).

[194] *See, e.g.,* Pidot, *supra* note 85, at 138 n.24 (expressing concern that lower courts could "seize" on the *Koontz* court's reference to "offsite mitigation," and begin holding off-site mitigation conditions to a different judicial standard than traditional on-site mitigation conditions).

[195] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865, 104 S. Ct. 2778, 2793, 81 L. Ed. 2d 694, 716 (1984) (Regulatory interpretations made by "those with great expertise and charged with responsibility for administering the provision" are "entitled to deference [where] the regulatory scheme is technical and complex.").

[196] *See supra* note 71 and accompanying text.

[197] *See, e.g.,* 49 U.S.C. 303 (requiring a finding that a transportation project "includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use"); 49 U.S.C. § 47106(c)(1)(B) (2014) (requiring a finding that "every reasonable step has been taken to minimize the adverse effect" of an airport development project).

digest, almost all of them reported that they do *not* impose off-site environmental mitigation conditions as a requirement for highway access permits.

C. Special Considerations with Impact Fee Programs

A special category of off-site exaction is what is commonly referred to as an impact fee, when, in lieu of having the developer construct improvements to public property, the developer contributes to a fund for improvements. If developers are going to be required to expend resources to make improvements to public property, government agencies would often prefer to direct those resources toward more comprehensive capital improvements designed to improve the level of service, rather than to merely maintain an existing level of service. This makes impact fee programs attractive.[198] In *Koontz*, however, the U.S. Supreme Court expressly applied the essential nexus test to monetary exactions, such as impact fees. This means that the individual developer cannot be forced to fund an improved level of service in its entirety, because such a requirement would exceed the impact of the development. As long as the developer is only required to fund a share that is proportionate to the impact of the development, however, the rough proportionality requirement should be satisfied. Such a generally applicable impact fee program would allow the cost of needed public improvements to be distributed over multiple private developments that collectively contribute to the need for the improvements.[199]

The applicability of the essential nexus test to monetary exactions has other important implications for impact fee programs.[200] Under the first element of the essential nexus test, the impact fees must be dedicated to mitigating the adverse impacts caused by the development. Under the second element of the essential nexus test, there must be an individualized determination quantifying the anticipated impact of the new development. Although impact fees (for traffic or environmental mitigation) may be more justifiable than off-site construction requirements, they can still be overturned for being disproportionate.[201]

Some academics have proposed that the constitutionality of an impact fee program under the essential nexus test may be analyzed by considering the following factors:[202]

1. Spatial—The distance between the development paying the impact fee and the facilities constructed with the impact fees paid.
2. Temporal—The length of time elapsing between collection of the impact fee and construction of the facilities.
3. Amount—The amount of the impact fee in relation to the actual costs of the facilities.
4. Need—The relationship between the burden created by the development and the increased facility needs.
5. Benefit—The ability of the constructed facilities to satisfy the facility needs resulting from the development; and
6. Earmarking—An assurance that the impact fees collected from the development are restricted solely for the provision of capital facilities of the type for which the fees were collected and for facilities serving the new development.

These factors certainly provide a framework for evaluating the nexus and rough proportionality elements. It largely remains to be seen, however, how courts will approach the task of subjecting impact fees to the essential nexus test.[203] The remainder of this section addresses some special considerations related to impact fees, which may influence the legal analysis in a given situation.

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[198] Newman, *supra* note 82, at 28 ("Financing mechanisms such as betterment assessments or corridor-specific impact fees could enhance the regulatory system by making possible developer contribution to more comprehensive transportation improvements and joint mitigation approaches, thus sharing costs among existing traffic generators, multiple new developments, and the public.").

[199] CALLIES, *supra* note 4, at 256 (Where capital improvements "are hard to allocate to individual developments that yield incremental impacts…, municipalities should use impact fees, which distribute costs for such improvements over many developments.").

[200] Applying the essential nexus test to impact fees

> requires a court to determine (1) whether there is a reasonable connection between the need for additional capital facilities and the growth in population generated by the subdivision; and (2) if a reasonable connection exists, whether there is a reasonable connection between the expenditure of the funds collected through the imposition of an impact fee, and the benefits accruing to the subdivision.

Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek, 729 N.E.2d 349, 354–55 (Ohio 2000).

[201] CALLIES, *supra* note 4, at 256 ("Of course, use of such impact fees does not absolve government agencies from *Dolan's* 'rough proportionality' standard.").

[202] *Id.* at 271.

[203] Some state courts have already begun carving out judicial exceptions to *Koontz*, by finding that impact fee programs are actually land-use regulations not subject to the essential nexus test. *See, e.g.,* Cal. Bldg. Indus. Ass'n v. City of San Jose, 61 Cal. 4th 435, 351 P.3d 974 (Cal. 2015) (holding that an ordinance requiring residential project developers to either construct affordable housing off site, dedicate on-site property for affordable housing, or pay an impact fee in lieu of construction or dedication, is a land-use regulation akin to a price control, not subject to the essential nexus test).

1. State Enabling Legislation

Permitting agencies typically must be authorized by their state legislature to impose impact fees in lieu of physical exactions. At least 28 states have enacted legislation specifically authorizing local governments to charge impact fees.[204] Case law involving legal challenges to impact fees will undoubtedly expand as more local governments and permitting agencies gain authority to impose impact fees.

For the most part, state transportation agencies have not been specifically authorized to impose impact fees. Six of the 27 state transportation agencies that responded to the survey conducted for this digest, however, described some experience with monetary exactions, including impact fees, "escrow" fees, or mitigation funds (for both transportation and environmental impacts). Some of the survey respondents indicated that when local government bodies other than state transportation agencies have the statutory authority to impose impact fees, those fees collected by local governments can generally be used to fund improvements to the state highway system.

The existence of a statute authorizing an agency to impose impact fees for specific purposes is persuasive evidence that the impact fee program serves a legitimate governmental purpose, the first element of the essential nexus test. Furthermore, almost all of the 28 statutes authorizing impact fees specifically limit the amount of the impact fee for a given development to the proportionate share of the public burden that is reasonably attributable to the impact of the proposed development,[205] i.e., the rough proportionality element of the essential nexus test. Thus, where the imposed impact fee conforms to the enabling statute, it should generally comply with the essential nexus test. Of course, the constitutionality of a given impact fee program will depend in large part on the specific details of programs created by local governments pursuant to the enabling statute and how the programs are administered.

2. Legislative Exactions Versus Adjudicative Exactions

By expressly applying the essential nexus test to monetary exactions, and also to cases in which development permits are denied because the developer refuses the condition proposed by the permitting agency, *Koontz* effectively closed two potential loopholes that some permitting agencies may have tried to use to effectively circumvent the stricter scrutiny of the essential nexus test. In retrospect, it seems clear that these loopholes had to be closed in order to give any effect to the *Nollan* and *Dolan* decisions. Otherwise, permitting agencies seeking to avoid the stricter scrutiny of the essential nexus test could merely transform their demands for real property to demands for money, or could simply deny permits until the developer accepted the conditions proposed by the permitting agency.

Koontz, however, did not specifically address a much broader potential loophole: the distinction between adjudicative and legislative exactions. Numerous courts following *Nollan* and *Dolan* have concluded that the heightened scrutiny of the essential nexus test only applies to individualized, discretionary administrative decisions affecting a particular parcel of real property, not to generally applicable assessments that are applied automatically or ministerially to all similarly situated permit applications.[206] In one of the earliest and most influential of these cases, *Ehrlich v. City of Culver City,*[207] the Supreme Court of California concluded that the essential nexus test applied to ad hoc monetary exactions but not to legislatively imposed impact fees.[208] A concurring opinion explained the rationale behind the decision:

> Although development fees are not physical takings of property, …both physical and monetary exactions require developers to directly contribute valuable assets to the public weal in exchange for permission to develop their property. In both cases, there is a potential for the

[204] Miller, *supra* note 79, at 929.

[205] Cohen & May, *supra* note 156, at 254. *See, e.g.*, ARK. CODE. ANN. § 14–56–103 (authorizing local governments to impose impact fees, but limiting such fees to costs for new public facilities reasonably attributable to development). *See also* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2602, 186 L. Ed. 2d 697, 717 (2013) ("[S]tate law normally provides an independent check on excessive land use permitting fees.").

[206] *See, e.g.,* Norcal Inv. Partners, L.P. v. City of Redding, No. C061070, 2010 Cal. App. Unpub. LEXIS 1157, at *10–11 (Cal. Ct. App. Feb. 18, 2010) (concluding that heightened scrutiny of essential nexus test is inapplicable to highway improvement impact fee legislation); Rogers Machinery, Inc. v. Washington County, 181 Or. App. 369, 45 P.3d 966 (Ct. App. Or. 2002) (concluding that heightened scrutiny of essential nexus test is inapplicable to a transportation improvement fee that is calculated based on a legislative formula); Homebuilders Ass'n of Metro. Agencia La Esperanza Corp., Inc. v. Orange Cnty. Bd. of Sup'rs, No. G027288, 4th Appellate Division, California (Cal. Ct. App. Apr. 24, 2002) (declining to impose heightened scrutiny on traffic impact fees that were calculated based on the square footage of the proposed development project at the time of permitting).

[207] 12 Cal. 4th 854, 911 P.2d 429 (Cal. 1996).

[208] The court concluded that the essential nexus test applied to an ad hoc "recreational fee" specifically imposed on the developer in lieu of the developer constructing public recreational facilities as requested by the city. *Id.* at 449. However, the court concluded that the essential nexus test did not apply to a generally applicable "art fee" that applied to all development permits and was calculated as 1 percent of the proposed building value. *Id.* at 450.

> government to engage in extortionate behavior. This risk diminishes when the fee is formulated according to pre-existing statutes or ordinances which purport to rationally allocate the costs of development among a general class of developers or property owners. …But when the fee is ad hoc, enacted at the time the development application was approved, there is a greater likelihood that it is motivated by the desire to extract the maximum revenue from the property owner seeking the development permit, rather than on a legislative policy of mitigating the public impacts of development or of otherwise reasonably distributing the burdens of achieving legitimate government objectives.[209]

Although most may agree with the *Ehrlich* court that there is a greater likelihood of extortion in an adjudicative exaction than a legislative exaction, of course, this does not mean that legislative exactions are not required to conform to the essential nexus test.[210] Legislative exactions, by their generally applicable nature, are less likely to be extortionate simply because they apply to everyone who submits a development permit—it is harder for the permitting agency to ignore the complaints of everyone rather than the few, so generally applicable conditions will naturally tend to be less onerous. In addition, the public process by which legislation and implementing regulations are enacted will tend to temper legislative formulas for calculating generally applicable impact fees, as there will be political pressure to limit the fees to the burden imposed by the development.[211] It is still possible, however, for overreaching legislation to be enacted, and there is nothing in the U.S. Supreme Court's exactions jurisprudence that specifically limits the essential nexus test to adjudicative exactions.[212] In fact, both *Nollan* and *Dolan*, to some degree, involved the fairly straightforward application of generally applicable legislation or policy, and in both cases the Court determined that the essential nexus test applied.[213] The distinction between legislative and adjudicative exactions is often unclear, and an exception to the essential nexus test for legislative exactions could result in the type of confusion and contradictory outcomes that characterized pre-*Koontz* case law involving off-site and monetary exactions, as the outcome of a given case would depend on whether the court finds that a given exaction is legislative or adjudicative.[214] Numerous courts therefore disagree with the *Ehrlich* line of cases and apply the essential nexus test to both legislative and adjudicative exactions.

Because impact fees are typically calculated based on a generally applicable formula, perhaps prescribed by the enabling legislation itself or within its implementing regulations, an exemption from the essential nexus test for legislative exactions could effectively render impact fee programs immune from heightened judicial scrutiny. Therefore, some academics have concluded that the real impact of the *Koontz* decision depends on whether the essential nexus test is ultimately deemed to apply to legislative, as well as adjucative, exactions:

> If lower courts interpret legislatively imposed impact fees as similar to user fees, and thus outside of *Koontz*' broad application of *Nollan*/*Dolan*, the decision's impact will likely be relatively contained. If courts instead apply *Koontz* to all impact fees, erasing the longstanding legislative/ad hoc distinction recognized by many states, the on-the-ground effect will likely be considerable. An across-the-board application of *Koontz* to all monetary exactions would force state and local governments to make individualized determinations of property owners' impacts without room for the local variation that courts in many states have been careful to preserve, and would indeed work a revolution on the traditionally local area of land use planning and regulation.[215]

The U.S. Supreme Court, however, in *Horne v. Department of Agriculture,*[216] may have recently

[209] *Id.* at 459–60 (J. Mosk, concurring).

[210] *See, e.g.,* Parking Ass'n of Ga. Inc. v. City of Atlanta, 515 U.S. 1116, 1117–18, 115 S. Ct. 2268, 132 L. Ed. 2d 273–74 (1995) (Thomas, J., dissenting from a denial of the petition for a writ of certiorari) ("It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis.").

[211] *See, e.g.,* Curtis v. Town of S. Thomaston, 1998 Me. 63, 708 A.2d 657, 660 (1998) ("[A] legislative rule…represents a carefully crafted determination of need tempered by the political and legislative processes rather than a 'plan of extortion' directed at a particular land owner.").

[212] Breemer, *supra* note 41, at 405 ("Because the risk of government extortion is present in the legislative setting, the essential nexus test cannot reasonably be limited to exactions imposed pursuant to an adjudicative process.").

[213] Dolan v. City of Tigard, 512 U.S. 374, 380, 114 S. Ct. 2309, 2314, 129 L. Ed. 2d 304, 313 (1994) (overturning open space and greenway requirements required under community development code); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 830, 107 S. Ct. 3141, 3145, 97 L. Ed. 2d 677, 685 (1987) (overturning condition required by State Coastal Act requiring that access condition be imposed if new house is 10 percent larger than the house it is replacing).

[214] *See, e.g.,* Wolf Ranch, LLC v. City of Colorado Springs, 220 P.3d 559, 568–69 (Colo. 2009) (Eid, J., dissenting) ("In my view, the drainage fee schedule lost its character as a 'legislatively formulated assessment' once Colorado Springs considered, on an individualized basis, whether it should impose the drainage fees on Wolf Ranch or exempt the property…."); B.A.M. Dev., L.L.C. v. Salt Lake Cnty., 2006 Utah 2, 128 P.3d 1161, 1170 (2006) ("Some land-use decisions fall neatly within the legislative/adjudicative categorical framework. Most do not.").

[215] Cohen & May, *supra* note 156, at 257.

[216] 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015).

sent a strong signal that the stricter scrutiny of the essential nexus test applies to legislatively imposed impact fees as well as adjudicative exactions. Although the case did not involve exactions in exchange for development permits, the U.S. Court of Appeals for the Ninth Circuit nevertheless purported to apply the essential nexus test to uphold monetary penalties assessed to landowners for failing to comply with agricultural regulations.[217] The Ninth Circuit, however, clearly evaluated the penalties in a deferential manner as opposed to the strict scrutiny required by the essential nexus test, concluding that the "individualized determination" requirement of the essential nexus test is only applicable to adjudicative decisions, not to generally applicable legislative requirements.[218] The Ninth Circuit also stated that its decision to uphold the monetary penalties was "informed by the Supreme Court's acknowledgment that governmental regulation of personal property"—such as agricultural goods or money—is "less intrusive, than is the taking of real property."[219] The Supreme Court overturned the Ninth Circuit, rejecting the idea that a different level of constitutional scrutiny applies when the government exacts personal property rather than real property.[220] The Court then summarily concluded that the penalty was "a clear physical taking,"[221] without specifically analyzing the penalty according to the essential nexus test in any significant detail. The implication is that legislatively imposed monetary fees, when tied to a particular parcel of real property, are subject to the heightened judicial scrutiny of the essential nexus test.

IV. Conclusions

In some ways, the legal environment regarding exactions has not changed much since a 1986 NCHRP *Legal Research Digest* concluded that state court decisions were "contradictory" and "lacking in standards that are precise, easy to apply, and productive of uniform results." Despite two intervening U.S. Supreme Court decisions that imposed heightened judicial scrutiny to exactions, numerous jurisdictions found exceptions to the Court's essential nexus test in a broad variety of situations, including environmental regulations that did not amount to physical dedications of real property, requirements to construct off-site improvements, monetary fees, and generally applicable legislative impositions. In 2013, the Court appeared to foreclose most of these exceptions with its *Koontz* decision, making it clear that heightened scrutiny applies in almost all cases in which a government agency imposes conditions as a result of approving a land-use permit.

The *Koontz* decision is not expected to have a significant impact on current state transportation agency practice. When state transportation agencies exact conditions in exchange for highway access permits, such as improvements to the state highway system or dedications of a portion of the developer's real property to mitigate impacts to the state highway system, the conditions typically satisfy the essential nexus test. The conditions tend to have a nexus to the state transportation agency's legitimate interests in regulating traffic and protecting public safety and, through the application of reliable engineering methods such as traffic impact studies, tend to be limited to the anticipated impact of the development.

Where the *Koontz* decision may have wider impact is in the context of environmental mitigation. To satisfy the rough proportionality element of the essential nexus test, environmental agencies cannot impose conditions on developers that would exceed the anticipated adverse impact of the development. Environmental permitting agencies will be required to perform studies and make individualized determinations, quantifying both the adverse environmental impact of the development and the anticipated mitigation effects of the permit conditions.

In addition, the *Koontz* decision may have a significant influence on the growing use of impact fees, including impact fee programs designed to mitigate the adverse traffic and environmental impacts of development. If the Court follows its recent trend and expressly applies the essential nexus test to generally applicable legislative exactions such as impact fees, this could impact the financial mechanisms to fund improvements to the state highway system in the future. Impact fees will need to be imposed in such a way that government permitting authorities, such as state transportation agencies and environmental agencies, can demonstrate quantitatively that the fee imposed on an individual developer is roughly proportional to the development's burden on public infrastructure and the environment, and that the receipts are actually allocated to that purpose.

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[217] Horne v. U.S. Dep't of Agric., 750 F.3d 1128 (9th Cir. 2014), *rev'd,* 135 S. Ct. 2419 (2015).

[218] *Id.* at 1144 ("Individualized review makes sense in the land use context because the development of each parcel is considered on a case-by-case basis. But here, the use restriction is imposed evenly across the industry; all producers must contribute an equal percentage of their overall crop to the reserve pool.").

[219] *Id.*

[220] *Horne,* 135 S. Ct. at 2425.

[221] *Id.* at 2428.

APPENDIX A

NATIONAL ACADEMY OF SCIENCES
TRANSPORTATION RESEARCH BOARD
NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM
(NCHRP) PROJECT 20-6, STUDY TOPIC 21-03: Takings and Mitigation

The Transportation Research Board has retained a consultant to explore the impact of a recent Supreme Court decision on the ability of State DOTs to advance public policy goals in the highway access permitting process (*e.g.*, driveway permits, highway occupancy permits).

The purpose of this survey is to elicit information from State DOTs, to develop a nationwide perspective on the current state of highway access permitting. Individual survey responses will be kept confidential. Your participation will help us to prepare guidance to ensure that State DOT access permitting programs will satisfy judicial scrutiny.

Please have this survey completed by the individual in your State DOT who is primarily responsible for highway access permitting. Contact information to return completed surveys is at the end of the document. Thank you in advance for your cooperation with this survey.

Please mail, email, or fax completed surveys no later than **June 30, 2015** to the attention of:

Timothy R. Wyatt
Conner Gwyn Schenck PLLC
P.O. Box 20744
Greensboro, NC 27420

Fax: (336) 691-9259

Email: twyatt@cgspllc.com

I. BACKGROUND

A. Please provide the name and address of your organization.

_____
_____
_____

B. Please provide the name, telephone number, and email address of an appropriate contact person who is primarily responsible for highway access permits at your organization.

_____
_____
_____

II. DEDICATIONS TO THE STATE HIGHWAY SYSTEM

A. Does your organization regularly require developers to dedicate a portion of their real property (including easements) to the State DOT as a condition for granting a highway access permit? ○ Yes ○ No

B. If so, is the real property typically dedicated only to mitigate anticipated traffic impacts of the proposed development, for future improvements to the highway system, or both?

○ Proposed Development ○ Future Improvements ○ Both

C. Please describe the State DOT's typical purposes for real property dedicated by developers:

_____
_____
_____

D. Does your organization regularly require developers to construct or fund improvements to the State highway system as a condition for a highway access permit?

○ Yes ○ No

E. If so, please describe typical improvements to the highway system that the State DOT will require the developer to make. (If the developer is required to contribute fees to a general highway fund rather than to fund specific improvements, please say so.)

_____
_____
_____

III. DEDICATIONS FOR ENVIRONMENTAL PURPOSES

A. Does your organization regularly require developers to dedicate a portion of their real property to other environmental mitigation purposes?
○ Yes ○ No

B. If so, please describe the typical environmental mitigation measures required by the State DOT on the developer's land:

_____
_____
_____

C. Does your organization regularly require developers to construct or fund offsite environmental mitigation in exchange for a highway access permit? ○ Yes ○ No

D. If so, please describe typical offsite environmental mitigation measures that the State DOT will require the developer to make. (If the developer is required to contribute fees to a general environmental mitigation fund rather than to fund specific improvements, please say so.)

_____
_____
_____

IV. GUIDELINES

A. Does your organization have a standard process or method for determining (please check all that apply):

- When to exact real property from the developer for the State highway system, and the extent of real property required for the State highway system? ○ Yes ○ No
- When to require the developer to fund improvements to the State highway system, and the extent of the improvement required based on traffic impacts of the development? ○Yes ○No
- When to require the developer to dedicate real property to environmental mitigation, and the extent of mitigation measures required for the development? ○ Yes ○ No
- When to require the developer to fund offsite environmental mitigation, and the extent of mitigation required based on the environmental impact of the development? ○ Yes ○ No
- When to require the developer to pay impact fees in lieu of providing real property or improvements, and how to calculate the fee based on impact of the development? ○Yes ○No

B. If any of the above apply, please describe the standard process or method used by your organization, or provide a reference to published guidelines used by your organization:

_____
_____
_____
_____

ACKNOWLEDGMENTS

This study was performed under the overall guidance of the NCHRP Project Committee SP 20-6. The Committee is chaired by MICHAEL E. TARDIF, Friemund, Jackson and Tardif, LLC. Members are RICHARD A. CHRISTOPHER, HDR Engineering; TONI H. CLITHERO, Vermont Agency of Transportation; JOANN GEORGALLIS, California Department of Transportation; JAMES H. ISONHOOD, Mississippi Office of the Attorney General; THOMAS G. REEVES, Consultant, Maine; MARCELLE SATTIEWHITE JONES, Jacob, Carter and Burgess, Inc.; ROBERT J. SHEA, Pennsylvania Department of Transportation; JAY L. SMITH, Missouri Department of Transportation; and JOHN W. STRAHAN, Consultant, Kansas.

MEGHAN P. JONES provided liaison with the Federal Highway Administration, and GWEN CHISHOLM SMITH represents the NCHRP staff.

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