HANDOUTS FOR

“Land Use & Economic Development”

August 20, 10:15—11:15 a.m.

with Robert Brown
Partner, Brown & Hofmeister, LLP
Presented by:
Robert Brown
Brown & Hofmeister, L.L.P.

**Land Use/Community and Economic Development (plus post-Koontz exactions)**

**84th Legislative Session**

**HB 1277 (2015) – Annexation**

By Rep. Trent Ashby (Lufkin)
Effective Date – June 17, 2015

A general-law municipality may annex an area in which 50% or more of the area is primarily used for a commercial or industrial purpose only if the municipality:
- is otherwise authorized to be annexed; and
- obtains the written consent of a majority of the property owners.

**HB 40 (2015) – Fracking Bill**

By Rep. Drew Darby (San Angelo)
Effective Date – May 18, 2015

- Prohibits cities from banning fracking.
- Adds Section 81.0523 to the Texas Natural Resources Code.
- A city or other political subdivision may not enact or enforce an order or ordinance that bans, limits, or otherwise regulates an oil and gas operation within the boundaries or ETJ of city or political subdivision.
HB 40 (2015) – Fracking Bill (cont’d)

- **Exceptions:** The city may enact, amend or enforce an ordinance or other measure that:
  - regulates only above ground activity related to an oil and gas operation;
  - is commercially reasonable;
  - does not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator; and
  - is not otherwise preempted by state or federal law.

HB 40 (2015) – Fracking Bill (cont’d)

- An ordinance or other measure is considered prima facie to be commercially reasonable if the ordinance or other measure has been in effect for at least five years and has allowed the oil and gas operations at issue to continue during that period.

SB 1593 (2015) – Fireworks Ordinance

By Sen. Eddie Lucio, Jr. (Brownsville)
Date Effective - September 1, 2015

- Amends Section 217.042 of the Texas Local Government Code.
- The City may not define and prohibit as a nuisance the sale of fireworks within 5000 feet nuisance zone but outside the city limits.
HB 2772 (2015) – Type A/Type B Sales Tax
By Rep. Mando Martinez (Weslaco)
Effective Date – June 17, 2015
- Section 501.106 applies to corporations within 25 miles of international border.
- Amends definition of project to include promotion of new or expanded business enterprises to include transportation facilities, including airports, hangars, railports, rail switching facilities, cargo facilities, and related infrastructure located on or near an airport or railport facility.
- Amends Section 501.160 to authorize the owning of a project authorized by Section 501.106.

SB 1812 (2015) – Eminent Domain Authority Reporting
By Sen. Lois Kolkhorst (Brenham)
Effective Date – June 19, 2015
- Adds Subchapter D to Chapter 2206 of Texas Government Code (§§ 2206.151 to 2206.157).
- Applies to public and private entities with eminent domain powers. § 2206.151.
- Comptroller is required to create a database on its Internet website.
- Website is required to contain information including the following:
  - Name of the entity;
  - Address and contact information;
  - Type of entity;
  - Each provision of law that grants the entity eminent domain authority;
  - Earliest date on which the entity exercised the power of eminent domain;
  - Entity’s taxpayer identification number;
SB 1812 (2015) – Eminent Domain Authority Reporting (cont’d)

- Comptroller is required to annually update website;
- Not later than February 1 of each year shall submit to the Comptroller a report containing records and other information. § 2206.154.
- First report by February 1, 2016.
- Penalty for noncompliance – $1,000 penalty after notice from Comptroller’s office. After notice have 30 days to report or owe $1,000 civil penalty. § 2206.155.
- The reporting, reporting late, or failing to report does not affect an entity’s power of eminent domain. § 2206.156.

HB 157 (2015) – Sales Taxes

By Rep. Lyle Larson (San Antonio)
Effective Date – September 1, 2015

- Makes universal changes to several statutes concerning sales tax rates
- Combined rate cannot exceed 2%
- Applies to general municipal sales tax, Type A/B sales tax, sports venue sales tax, crime control sales tax, and street maintenance sales tax.
- Amends the statutes to authorize ballot wording in increments of 1/8 of one percent provided combined rate does not exceed 2%.

HB 2853 (2015) – Street Maintenance Sales Tax

By Rep. Rodney Anderson (Austin)
Effective Date – June 10, 2015

- Amends Chapter 327 of the Texas Tax Code.
- For cities with a population greater than 150,000 or more and is intersected by two interstate highways, and 66% or more of the voters voted in favor of the adoption or reauthorization of the tax, the expiration date for the tax is 8 years. (Normally 4 years expiration on sales tax).
- Authorizes the use of the street maintenance sales tax for sidewalks existing on the date of the election to adopt the tax.
**POST-KOONTZ EXACTIONS**

Presented by:
Robert F. Brown
Brown & Hofmeister, L.L.P.

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- Whether Nollan/Dolan exactions requirements must be satisfied when a government demands property from a land-use permit applicant when (1) the permit is denied and, hence, no property is taken through an exaction, or (2) money is demanded as a condition of development approval, rather than a requirement to dedicate real property.
- Court answered both questions in the affirmative.

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**Foundational Principles**

- “[N]or shall private property be taken for public use, without just compensation.” U.S. Const. amend. V (the Federal Takings Clause).
- “No person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person....” Tex. Const. art. I, § 17.
Overview of Takings Claims

There are three basic categories of takings claims recognized by the U.S. Supreme Court and the Texas Supreme Court:

1. Physical occupations;
2. Compelled dedications or exactions; and
3. Regulatory takings.

Physical Occupations

- The United States Supreme Court has determined that the first category, a physical invasion or a regulatory activity that produces a physical invasion, will support a takings claim without regard to the public interest advanced by the regulation or the economic impact upon the landowner.
- Categorical rule.

Compelled Dedications - Exactions

- The second category of takings claims is found where an exaction, such as a required dedication of land, is made a condition of development approval.
- Non-categorical rules.
- Involves measurements of means and ends, *i.e.*, “essential nexus” and “rough proportionality.”
Regulatory Takings

- The third category of takings claims—regulatory takings—encompass the majority of takings cases and involve the most complex analysis.
- Typically involve use restrictions.
- Have categorical and non-categorical rules.

Nollan/Dolan Exactions

- Two United States Supreme Court cases articulate the current tests for determining whether conditions constitute a taking under the Fifth Amendment.
- The first, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), requires a court to evaluate the nexus between (1) what the municipality seeks to exact from the developer by way of imposing a condition that takes land and (2) the projected impact of the proposed development.

Nollan/Dolan Exactions

- The second case, Dolan v. City of Tigard, 512 U.S. 374 (1994), clarified Nollan by adopting the “rough proportionality” test as the means for determining the degree of nexus required between a real property exaction imposed by a municipality and the projected impact of a proposed development.
**Flower Mound v. Stafford**

- First reported Texas appellate decision to apply *Nollan* and *Dolan*.
- Supreme Court held that the Town’s plat approval condition (that Stafford reconstruct and improve an abutting substandard street from which the subdivision development would take access) was a taking under *Dolan*.

**Flower Mound v. Stafford**

- Court addressed whether *Nollan/Dolan* applies to nonpossessory exactions.
- Same question addressed 10 years later in *Koontz*.

**Flower Mound v. Stafford**

- The land dedication only limitation recognized by other courts is rejected.
- “For purposes of determining whether an exaction as a condition of government approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved.”
**Flower Mound v. Stafford**

- The Texas Supreme Court addressed the argument whether a permit approval with conditions, as compared to a permit denial because of the failure to consent to conditions, would be reviewed differently under Nollan/Dolan, predating the issue raised in Koontz by 10 years.
- “The government cannot sidestep constitutional protections merely by rephrasing its decision from ‘only if’ to ‘not unless.’ The constitutional guaranty against uncompensated takings is ‘more than a pleading requirement, and compliance with it (is) more than an exercise in cleverness and imagination.’”

**Koontz**

- Application to develop 3.4 acres of wetlands and permanently restrict remaining 11 acres.
- Application was non-compliant because District required 10 acres be preserved for every one acre of wetland destroyed.
- Rather than just deny the application, the District suggested mitigation measures.

**Koontz**

- Suggested Koontz provide off-site improvements to other wetlands in the watershed by replacing culverts on one parcel, or filling ditches in another parcel.
- Koontz refused to modify application and was denied a permit.
- District won in lower courts, including Florida Supreme Court.
Koontz

Lower courts held that in Koontz’s case, unlike Nollan or Dolan, the District did not approve Koontz’s application on the condition that he accede to the District’s demands; instead, the District denied his application because he refused to make concessions.

Second, the courts drew a distinction between a demand for an interest in real property (what happened in Nollan and Dolan) and a demand for money.

Koontz

U.S. Supreme Court reversed the Florida Supreme Court.

Rejected argument that a denial of a permit for failure to comply with conditions should be viewed differently under Nollan/Dolan than the granting of a permit that imposes conditions.

The “unconstitutional conditions doctrine” vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up, and that Nollan/Dolan represent a special application of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits.

Koontz

“Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.”
Koontz

- The Court addressed the argument that Nollan/Dolan standards are not implicated because the District "asked him to spend money rather than give up an easement on his land."
- The Court distinguished its prior 1998 decision in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), where five justices concluded that the Takings Clause did not apply to government-imposed financial obligations that "do[ ] not operate upon or alter an identified property interest."

Koontz

- The Court held that its Eastern Enterprises holding did not control in this case, where the demand for money did burden the ownership of a specific parcel of land. Because of the direct link between the government’s demand and a specific parcel of real property, the Court held that the Koontz matter implicated the central concern of Nollan/Dolan: the risk that the government may deploy its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed use of the property at issue.

Development Negotiations Post-Koontz: Can a City Safely Negotiate Anymore?

- Koontz did not attempt to craft a test, or to provide guidelines, to help either the public or private sector determine what types of negotiations will be seen as a demand subject to Koontz.
- When does a suggestion turn into a demand?
- Does it depend on the timing?
Development Negotiations Post-Koontz: Can a City Safely Negotiate Anymore?

- Does it depend on who presents it?
- Does it matter whether the suggestion is oral or in writing?
- Is the determination a fact question for the jury, or is it a legal matter for the court to decide?
- These questions and more are left open by Koontz.

Options for Cities – Just Say No!

- By not offering feedback that a developer can assert was a required approval condition, you can avoid a Nollan/Dolan review. If the decision (without conditions) is challenged as a taking, the developer must show that the decision violated Penn Central or Sheffield.

Options for Cities – Just Say No!

- The "avoid negotiation" option was noted by Justice Kagan in the Koontz dissent: "If every suggestion could become the subject of a lawsuit under Nollan and Dolan, the lawyer can give but one recommendation: Deny the permits, without giving [the developer] any advice—even if he asks for guidance."
Options for Cities - Listen, but don’t offer advice.

- Negotiate, but only in the sense that City staff will tell the applicant that a proposal doesn’t meet standards (such as traffic mitigation), but not offer any proposals as to what the applicant can do to meet the standards.
- The developer can keep offering proposals until the city says “yes, that might work.”

Options for Cities - Empower the Stakeholders

- City staff can encourage that the developer negotiate directly with stakeholders to see if compromise positions can be reached.
- If so, those compromise conditions can be integrated into the development application and become part of the approval conditions.
- As long as city staff does not participate in the negotiations, any conditions to development approval should not be considered as a demand by the city, thus triggering Koontz, but rather voluntarily-offered concessions by the developer to gain stakeholder support and, hopefully, city approval.

Options for Cities - Negotiate and Enter Into a Development Agreement

- Ask for exactions to mitigate the development’s impacts.
- Use a development agreement, with appropriate consents and waivers.
Land Use/Community and Economic Development (plus post-Koontz exactions)

84th Legislative Session

Presented by:
Robert Brown
Brown & Hofmeister, L.L.P.
TEXAS MUNICIPAL CLERKS ASSOCIATION
Certification Program
Legislative Update for the 84th Legislative Session
San Marcos, Texas
August 20, 2015

LAND USE/COMMUNITY AND
ECONOMIC DEVELOPMENT
(plus post-Koontz exactions)

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LEGISLATIVE UPDATE

The following summaries are reprinted with permission from the Texas Municipal League and are from TML’s Legislative Update publication dated June 5, 2015.

H.B. 1277 (Ashby/Bettencourt) – Annexation: provides that: (1) a general law city may annex an area in which 50 percent or more of the property in the area to be annexed is primarily used for a commercial or industrial purpose only if the city: (a) is otherwise authorized to annex the area and complies with the requirements prescribed under that authority; and (b) obtains the written consent of the owners of a majority of the property in the area to be annexed; and (2) the consent required (1)(b), above, must be signed by the owners of the property and must include a description of the area to be annexed. (Effective immediately.)

H.B. 40 (Darby/Fraser) – Oil and Gas Operations: makes various findings related to the benefits of oil and gas operations in the state and provides that:

1. An “oil and gas operation” means an activity associated with the exploration, development, production, processing, and transportation of oil and gas, including drilling, hydraulic fracture stimulation, completion, maintenance, reworking, recompletion, disposal, plugging and abandonment, secondary and tertiary recovery, and remediation activities.

2. An oil and gas operation is subject to the exclusive jurisdiction of this state.

3. Except as provided by (4), below, a city may not enact or enforce an ordinance or other measure, or an amendment or revision of an ordinance or other measure, that bans, limits, or otherwise regulates an oil and gas operation within the boundaries or extraterritorial jurisdiction of the city.

4. The authority of a city to regulate an oil and gas operation is expressly preempted, except that a city may enact, amend, or enforce an ordinance or other measure that: (a) regulates only aboveground activity related to an oil and gas operation that occurs at or above the surface of the ground, including a regulation governing fire and emergency response, traffic, lights, or noise, or imposing notice or reasonable setback requirements; (b) is commercially reasonable; (c) does not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator; and (d) is not otherwise preempted by state or federal law.

5. “Commercially reasonable” for purposes of (4)(b), above, means a condition that would allow a reasonably prudent operator to fully, effectively, and economically exploit, develop, produce, process, and transport oil and gas, as determined based on the objective standard of a reasonably prudent operator and not on an individualized assessment of an actual operator's capacity to act.
6. An ordinance or other measure is considered prima facie to be commercially reasonable if the ordinance or other measure has been in effect for at least five years and has allowed the oil and gas operations at issue to continue during that period. (Effective immediately.)

S.B. 1593 (Lucio/Lucio) – Sale of Fireworks: provides that a home rule city may not define and prohibit as a nuisance the sale of fireworks or similar materials within the 5,000 foot nuisance zone outside the city limits. (Effective September 1, 2015.)

H.B. 2772 (Martinez/Lucio) – Economic Development Corporations: provides that an authorized project for a Type A or Type B economic development corporation in certain border cities includes the promotion of new or expanded business enterprises through transportation facilities including airports, hangars, rail ports, rail switching facilities, maintenance and repair facilities, cargo facilities, marine ports, inland ports, mass commuting facilities, parking facilities, and related infrastructure located on or adjacent to an airport or rail port facility. (Effective immediately.)

S.B. 1812 (Kolkhorst/Geren) – Eminent Domain Reporting: provides that:

1. The comptroller shall create and make accessible on a website an eminent domain database;

2. The eminent domain database must include with respect to each public and private entity authorized by law to exercise the power of eminent domain: (a) the name of the entity; (b) the entity’s address and public contact information; (c) the name of the appropriate officer or other person representing the entity and that person’s contact information; (d) the type of entity; (e) each provision of law that grants the entity eminent domain authority; (f) the focus or scope of the eminent domain authority granted to the entity; (g) the earliest date on which the entity had the authority to exercise the power of eminent domain; (h) the entity’s taxpayer identification number, if any; (i) whether the entity exercised eminent domain authority in the preceding calendar year by the filing of a condemnation petition; and (j) the entity’s website address or, if the entity does not operate an website, contact information to enable a member of the public to obtain information from the entity;

3. The comptroller may consult with the appropriate officer of, or other person representing, each entity to obtain the information necessary to maintain the eminent domain database;

4. To the extent information required in the eminent domain database is otherwise collected or maintained by a state agency or political subdivision, the comptroller may request and the state agency or political subdivision shall provide that information and any update to the information as necessary for inclusion in the eminent domain database;

5. At least annually, the comptroller shall update information in the eminent domain database for each entity, as appropriate;
6. To the extent possible, the comptroller shall present information in the eminent domain database in a manner that is searchable and intuitive to users, and may enhance and organize the presentation of the information through the use of graphical representations;

7. Not later than February 1 of each year, an entity shall submit to the comptroller a report containing records and other information specified by the bill for the purpose of providing the comptroller with information to maintain the eminent domain database;

8. An entity that has been recently created has certain deadline concessions;

9. An entity shall report to the comptroller any changes to the entity’s eminent domain authority information reported under the bill not later than the 90th day after the date on which the change occurred;

10. If an entity does not timely submit a report under the bill, the comptroller shall provide written notice to the entity informing the entity of the violation and notifying the entity that the entity will be subject to a penalty of $1,000 if the entity does not report the required information on or before the 30th day after the date the notice is provided;

11. Not later than the 30th day after the date the comptroller provides notice to an entity, the entity must report the required information;

12. If an entity does not report the required information: (a) the entity is liable to the state for a civil penalty of $1,000; and (b) the comptroller shall provide written notice to the entity informing the entity of the entity’s liability for the penalty and notifying the entity that it could be subject to an additional $1,000 penalty and have its noncompliance reflected in the database;

13. The reporting, failure to report, or late submission of a report by a public or private entity, including a common carrier, under the bill does not affect the entity’s authority to exercise the power of eminent domain; and

14. The comptroller may adopt rules and establish policies and procedures to implement the bill.

(Note: TML staff has already communicated with the comptroller’s office regarding the logistics of this bill, and will be closely involved in its implementation.) (Effective immediately, with the posting of the database mandated for January 1, 2016.)

**S.B. 1574 (Uresti/Martinez) – Infection Control:** this bill, among other things: (1) requires each entity with first responders, including a city, to designate an infection control officer and an alternate infection control officer; (2) requires each infection control officer to: (a) receive notification of potential exposures to infectious diseases; (b) notify appropriate health care providers and first responders about potential exposures; (c) act as liaison between the potentially exposed first
responders and the city; (d) investigate and evaluate exposure incidents; and (e) monitor follow-up
treatment of affected first responders; (3) requires hospitals to inform designated infection control
officers of possible infectious disease exposures; and (4) allows an emergency response employee or
volunteer to request and receive information related to possible infectious disease exposures from
individuals whose bodily fluids come into contact with the employee or volunteer. (Effective
September 1, 2015.)

H.B. 2853 (R. Anderson/West) – Street Maintenance Sales Tax: provides, among other things,
that street maintenance sales tax revenue may be used to maintain city sidewalks. (Effective
immediately.)
POST-KOONTZ EXACTIONS

I.

INTRODUCTION

In the Summer of 2013, the U.S. Supreme Court issued a 6-3 decision in its long-awaited decision on the scope of the federal constitution’s heightened exactions scrutiny tests in **Koontz v. St. Johns River Water Management District**, 570 U.S. ____ , 133 S. Ct. 2586 (2013), which tests the Court had previously established in its 1987 decision in **Nollan v. California Coastal Comm’n**, 483 U.S. 825, 836 (1987), and its 1994 decision in **Dolan v. City of Tigard**, 512 U.S. 374, 391 (1994). At issue in **Koonz** was whether **Nollan/Dolan** exactions requirements must be satisfied when a government demands property from a land-use permit applicant when (1) the permit is denied and, hence, no property is taken through an exaction, or (2) money is demanded as a condition of development approval, rather than a requirement to dedicate real property. The Court answered both questions in the affirmative. **Koontz**, 133 S. Ct. at 2603 (“We hold that the government’s demand for property from a land-use permit applicant must satisfy the requirements of **Nollan** and **Dolan** even when the government denies the permit and even when its demand is for money.”).

Almost ten years prior to **Koontz**, the Texas Supreme Court issued its ground-breaking development exactions opinion in **Town of Flower Mound, Texas v. Stafford Estates Limited Partnership**, 135 S.W.3d 620 (Tex. 2004). In that case, the Court held, among other matters, that both the Texas Constitution and U.S. Constitution required the application of the **Nollan/Dolan** tests to a requirement that a developer spend money, and not just to a requirement that real property be dedicated. **Stafford** at 639-40 (“For purposes of determining whether an exaction as a condition of government approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved. The **Dolan** standard should apply to both.”).

The **Stafford** Court also noted, albeit in dicta, that permit approvals with conditions, as well as permit denials for a failure to agree to conditions, would implicate the **Nollan/Dolan** tests. **Stafford**, 135 S.W.3d at 638 (“When the practical effect is exaction, conditional approval and denial are both measured by the **Dolan** taking standard.”).

Given that **Stafford** correctly predicted how the U.S. Supreme Court would resolve the two questions presented in **Koontz**, what practical impact will **Koontz** have on development exactions practices in Texas? This paper offers some thoughts on that question, as well as providing some practical suggestions for governmental entities on how they can walk the very fine line between negotiating with developers over matters of consequence without falling into a **Koontz/Stafford** “denial with conditions” taking.
II.

EXACTIONS AS A TAKING – A BRIEF OVERVIEW

Article I, Section 17 of the Texas Constitution provides that “[n]o person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person….” Tex. Const. art. I, § 17. The federal Takings Clause is substantially similar. See U.S. Const. amend. V (“[N]or shall private property be taken for public use, without just compensation”). As a result, the Texas Supreme Court relies upon interpretations of the federal Takings Clause in construing the Texas takings provision and analyzes Texas takings claims under the more familiar federal standards. See, e.g., City of Austin v. Travis County Landfill Co., L.L.C., 73 S.W.3d 234, 239 (Tex. 2002) (considering aircraft overflights takings claim, asserted under Texas Constitution, by reference to federal standard established in United States v. Causby, 328 U.S. 256 (1946)); City of Corpus Christi v. Pub. Util. Comm’n of Texas, 51 S.W.3d 231, 242 (Tex. 2001) (examining federal precedent to decide the framework for determining whether utility charges constitute a taking); Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 932 (Tex. 1998) (“[W]e assume, without deciding, that the state and federal guarantees in respect to land-use constitutional claims are coextensive, and we will analyze the Mayhews’ claims under the more familiar federal standards.”).

Both the Texas and Federal Constitutions recognize a claim for a taking of property. Mayhew, 964 S.W.2d at 933; Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). There are three general categories of takings claims: (1) physical occupation, (2) exactions and (3) regulatory takings. Stafford, 135 S.W.3d at 630; Sheffield Development Company, Inc. v. City of Glenn Heights, Texas, 140 S.W.3d 660, 671-72 (Tex. 2004); Mayhew, 964 S.W.2d at 933.

The U.S. Supreme Court has determined that the first category, a physical invasion or a regulatory activity that produces a physical invasion, will support a takings claim without regard to the public interest advanced by the regulation or the economic impact upon the landowner. See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 330 (2002); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-440 (1982). See also Mayhew, 964 S.W.2d at 933 (recognizing physical takings as takings category).

The second category of takings claims is found where an exaction, such as the required dedication of land, is made a condition of development approval. See City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704 (1999); Dolan, 512 U.S. at 391; Nollan, 483 U.S. at 836.

The third category of takings claims -- regulatory takings -- encompasses the majority of takings cases and involves the most complex analysis. See Mayhew, 964 S.W.2d at 933 (recognizing regulatory takings as category of takings claim); Sheffield, 140 S.W.3d at 670-73 (holding that factors relevant to determine whether a regulatory taking has occurred include, but are not limited to, those factors identified by the U.S. Supreme Court in Penn Central Transp. Co. v. City of New York,
438 U.S. 104 (1978), which are (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action).

This paper addresses the second category – commonly referred to as exactions claims.

A. **Nollan and Dolan**

The modern concept of a taking through an exaction stems from two U.S. Supreme Court cases. The first, *Nollan*, requires a court to evaluate the nexus between (1) what the municipality seeks to exact from the developer by way of imposing a condition that takes land and (2) the projected impact of the proposed development. In *Nollan*, the Court required in a case that involved a development requirement that land be dedicated, that there be an “essential nexus” between the title condition imposed and the stated police power objective of requiring development to meet the needs created by the development. *Id.*, 483 U.S. at 837. Under this test, the dedication must serve the same governmental purpose as the regulation. The Court employed a heightened level of scrutiny, differentiating the ad hoc, factual inquiry balancing test of an economic take as enunciated in *Penn Central*.

Following *Nollan*, there was uncertainty regarding the degree of nexus that a municipality was required to establish in order for a land dedication condition to pass constitutional muster. In *Dolan*, the Supreme Court clarified *Nollan* by adopting the “rough proportionality” test as the means for determining the degree of nexus required between a real property exaction imposed by a municipality and the projected impact of a proposed development. In *Dolan*, the Court addressed the question of a second nexus required between the city’s conditions of title transfer and the projected impact caused by the proposed development. *Id.*, 512 U.S. at 388.

To evaluate this question, the *Dolan* Court articulated a two-pronged test. First, as determined in *Nollan*, there must exist an essential nexus between legitimate state interests and the permit conditions. *Id.* at 386. Second, the exaction required by the permit condition must be roughly proportional to the projected impact of the proposed development. *Id.* at 391. Under this prong, the government bears the burden of proof and must show that the dedication or exaction is roughly proportional to the impact of the project. *Id.* The Court intended this two-prong test to function as a higher standard of review. The Court noted, however, that traditional land use planning tools such as dedications for streets, sidewalks and other public ways will generally be considered reasonable exactions. *Id.* at 395.

Factually, *Nollan* involved the California Coastal Commission’s requirement that the Nollans give the public an easement across their beachfront property as a condition to granting the Nollans a permit to build a house. The Commission recited the usual “health, safety and welfare” justifications which have traditionally supported land use regulation, and declared that the easement was necessary because the new building “would increase blockage of the view of the ocean” from the street; might reduce the public’s perception that a public beach existed in the other side of the house; and would
“burden the public’s ability to traverse to and along the shorefront.” *Id.* The Commission refused the permit to build unless the couple granted an easement across the shorefront part of their land for public use.

The United States Supreme Court recognized the general police power of the Commission, but found that there was no “essential nexus” between the exaction (a public easement across the beach front of the Nollan’s land) and the state impact created or exacerbated by the construction of a new house (ability to see the beach, assisting the public in overcoming the “psychological barrier” to using the beach created by a developed shorefront, and preventing congestion on the public beaches). *Nollan*, 483 U.S. at 835. The Court held that the absence of any “nexus” between the exaction and the state interest asserted by the Commission resulted in taking without just compensation in violation of the U.S. Constitution. *Id.*

This “essential nexus” requirement of *Nollan* was refined by the Court in *Dolan*. Mrs. Dolan operated a store which had a gravel parking lot. A creek traversed part of her property. Mrs. Dolan applied for a permit to increase the size of her store and pave the parking lot. The city conditioned the permit upon a dedication by Mrs. Dolan of a portion of her land for use as a flood control area and upon the dedication of an additional 15-foot strip of land adjacent to the creek as a bicycle path. *Dolan*, 512 U.S. at 385-86. The city claimed that the creek land was necessary to control flooding and the bicycle path might alleviate congestion on the streets and was necessary for the health, welfare and safety of the public. Mrs. Dolan complained on appeal that the city had not identified any “special quantifiable burdens” created by her new parking lot or building that would justify the particular exactions from her.

After concluding that there was a “nexus” between the exactions and the claimed state interest, the United States Supreme Court framed the following additional question: “What is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.” *Id.*, 512 U.S. at 375. The Court answered as follows:

"We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."

*Id.*, 512 U.S. at 391 (emphasis added).

The exactions were stricken because less invasive measures than taking Mrs. Dolan’s land would have accomplished the same stated goals. Read together, *Nollan* and *Dolan* appear to inquire first whether the government imposition of the exaction would constitute a taking if done without the corresponding application for a permit by the landowner. If the question is answered affirmatively, the Court then applies the two part “rough proportionality” test which asks whether the exaction demanded is roughly proportional both in nature (nexus) and extent (proportionality) to the impact of
the proposed development. *Dolan* appears to place the burden of proof squarely upon the governmental entity to show compliance with the rough proportionality test. *Dolan*, 512 U.S. at 391.

### B. Stafford

Since the U.S. Supreme Court issued its decision in *Dolan* in 1994, there had not been a reported decision in Texas addressing how *Dolan* would be applied in Texas until the 2004 decision in *Stafford*. *Stafford* is a regulatory takings case challenging the constitutionality of a plat approval condition under the two-prong test articulated in *Dolan*. In a bifurcated trial, the trial court held, based upon a stipulated record, that the Town’s plat approval condition (that Stafford reconstruct and improve an abutting substandard street from which the subdivision development would take access) was a taking under the Texas and United States Constitutions. After a trial on damages, the court awarded Stafford damages, as well as attorney’s fees, expert fees and costs.

On appeal, the Fort Worth Court of Appeals affirmed that the plat approval condition was a taking under the Texas Constitution and upheld the damage award; but reversed and rendered the award of attorney’s fees, expert fees and costs. *Stafford*, 71 S.W.3d 18 (Tex.App.-Fort Worth, 2002), aff’d, 135 S.W.3d 620 (Tex. 2004). The Texas Supreme Court upheld the appellate court in its application of the nexus test of *Nollan*, and the rough proportionality test of *Dolan*, to all types of development “exactions,” which the appellate court defined broadly to include “any requirement that a developer provide or do something as a condition to receiving municipal approval …” *Stafford*, 71 S.W.3d at 30 n. 7.

#### 1. Factual Background

Between 1994 and 1997, Stafford developed a 247 single-family lot subdivision (“Subdivision”), in three phases, on 90 acres located at the intersection of McKamy Creek Road and Simmons Road (“Simmons”) in the Town. Phases II and III of the planned Subdivision proposed two street intersections with Simmons, which at that time was a two-lane asphalt road abutting the Subdivision. Pursuant to the Town’s subdivision regulations, which required that all proposed developments take access to and from concrete streets, the Town required Stafford, as a condition of plat approval, to improve Simmons, at Stafford’s cost, to the Town’s minimum standards as a concrete road. The required improvements to Simmons were located entirely within existing Town right-of-way, no part of which was required to be dedicated by Stafford.

While Stafford objected to bearing the total road improvement costs in various letters to the Town, and unsuccessfully sought to obtain from the Town an exception to be relieved of 50% of the costs, Stafford did not file suit seeking to have the road improvement condition found unlawful until after Stafford had received the benefits of plat approval and Simmons had been rebuilt, thereby irreparably changing the status quo so that the Town’s only recourse, in the event of a *Dolan* violation, would be the payment of damages.
In October, 1994, the Town adopted roadway impact fees pursuant to Chapter 395 of the Texas Local Government Code. The Town’s impact fee ordinance established a maximum road impact fee per service unit based on the total cost of capital improvements necessitated by and attributable to new development. For the service area in which the Subdivision is located (Service Area No. 2), the maximum impact fee was $1,249 per service unit. The number of service units for a single-family dwelling was 2.85, making the maximum allowable impact fee approximately $3,559 per single-family dwelling for Service Area No. 2.

At that time, roadway impact fees were assessed at the maximum impact fee per service unit for each service area at the time of plat approval for most developments. The Town’s impact fee ordinance heavily discounted impact fees for single-family dwellings. The ordinance thus establishes a fee to be collected of $1,140 per single-family dwelling unit, roughly 32% of the maximum allowable fee. As a result, although Stafford was assessed impact fees in the amount of $3,559 per single-family dwelling unit at the time of final approval for each phase of the Subdivision, Stafford was only required by pay impact fees in the amount of $1,140 per single-family dwelling unit.

After the lawsuit was filed, the Town retained an expert to perform a rough proportionality analysis. That expert concluded that the Town’s requirement that Stafford improve Simmons was roughly proportional and, at trial, he testified that the Town’s regulatory objective of providing an adequate roadway network concurrent with new development was implemented through road impact fees, paid for by builders, in conjunction with mandatory right-of-way dedication and road construction requirements for perimeter roads that provide access to new development. Road impact fees were used to finance major arterial roads within the Town and were established by the impact fee ordinance. In Service Area No. 2, which included Stafford Estates, the fee was roughly 32% of the impact of the development’s traffic. Pursuant to the Town’s regulatory strategies for providing roads, developers must dedicate right-of-way and construct perimeter roads, including access points, as established by the Town’s subdivision ordinance. Developers were required to construct two of four lanes for major collectors or arterials, and two lanes for rural collectors. No developer, however, was ever required to build more than two lanes.

The Town’s expert further testified that only the costs for major roads can be financed with impact fees. An impact fee shortfall (maximum fee allowed less actually fee charged) must be taken into account in evaluating the impact on roads created by new development. As applied to the Subdivision, the maximum impact fees were $3,560 per dwelling unit. Stafford paid $1,140 per unit, which created a shortfall of about $600,000. This shortfall was roughly proportional to the total cost of the improving Simmons. Based upon this analysis, the Town contended that the Simmons improvements were roughly proportional and did not violate Dolan.

The Town also presented testimony that the Simmons improvements were roughly proportional given the safety considerations involved in the Simmons improvements. The Town’s subdivision regulations prescribed minimum safety design features where perimeter roads must be upgraded. Those features included sight distance, safe access, interface of old and new road
segments, increased road shoulders, and long-term durability by utilizing concrete over asphalt. Additionally, the size of the subdivision and the length of frontage along Simmons necessitated that a second point of access be taken from Simmons for the Subdivision. The Simmons improvements supplied safety features benefiting residents of the Town traveling on the adjacent segment of Simmons, in addition to the Subdivision’s residents, by upgrading the road to community standards.

The Town presented evidence that the improved Simmons was a safer road that would benefit the Subdivision’s residents because of better sight distances, which would allow both traffic turning into and exiting the Subdivision on Simmons to have more time to see approaching vehicles. Testimony established that the wider shoulders added to Simmons provided an additional degree of safety that would be of benefit to the Subdivision’s residents, and that the Simmons improvements, being made of concrete rather than asphalt, would extend the life expectancy of Simmons and reduce the necessity for repairs on Simmons, which repairs would be an obvious detriment to traffic flowing in and out of the Subdivision from Simmons.

2. A Threshold Defense

As a threshold matter, the Court declined to accept the Town’s argument that the developer had waived, or was estopped from asserting, a takings claim because the developer took the benefits of plat approval without first seeking to challenge any conditions attached to the approval that the developer contended were unlawful. Cases from other jurisdictions that have addressed this issue have required permits holders to file suit seeking to invalidate conditions before accepting the benefits of permit approval. See, e.g., Weatherly v. Town Plan and Zoning Commission of Town of Fairfield, 579 A.2d 94, 97 (Conn.App.1990) (“One who seeks to avail himself of the benefits of a zoning regulation is precluded from raising the question of that regulation’s constitutionality; or of that regulation’s validity; in the same proceeding.”) (citations omitted); Crystal Green v. City of Crystal, 421 N.W.2d 393, 394-95 (Minn. Ct. App. 1988) (“Developers must challenge dedications prior to final plat approval and registration in order to assure finality of dedication, give municipalities an opportunity to change their requirements if their requirements are unreasonable, and prevent municipalities from being sued by developers when the only remedy available to a losing municipality is payment.”); Salton Bay Marina, Inc. v. Imperial Irrigation Dist., 172 Cal. App. 3d. 914, 941 (Cal. App. 1985) (“[M]eaningful governmental fiscal planning would be impossible and legislative control over appropriations emasculated if persons were permitted to simply stand by in the face of administrative action claimed to be unlawful and injurious and years later assert substantial monetary damages.”); County of Imperial v. McDougal, 564 P.2d 14, 17 (Cal. 1977) (landowner who accepts and complies with the conditions of a building permit cannot later sue the issuing public entity for inverse condemnation for the costs of compliance); Pfeiffer v. City of La Mesa, 69 Cal. App. 3d 74, 78 (Cal. Ct. App. 1977) (“It is fundamental that a landowner who accepts a building permit and complies with its conditions waives the right to assert the invalidity of the conditions and sue the issuing public entity for the costs of complying with them.”)

The Stafford Court, however, was not persuaded. In fact, while recognizing the Town’s argument that “[i]t is in the public interest … for the government to have the opportunity to withdraw
a condition of approval that is found to constitute a taking and thereby avoid the expense to taxpayers of money damages” (Stafford at 628), the Court found that the countervailing public policy of protecting developer interests more convincing. Id. (“The Town does not address the obvious concern that such a standard would pressure landowners to accept the government’s conditions rather than suffer the delay in a development plan that litigation would necessitate.”).

3. The Dedications Only Limitation is Rejected

The Town had urged the Court to find that the Fort Worth Court of Appeals had erred by extending the land dedication tests from Nollan and Dolan to the Town’s concrete road requirement. Nollan and Dolan involved, and as a result were particularly concerned with, forced dedications of land. See Nollan, 483 U.S. at 841 (“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.”); Dolan, 512 U.S. at 385 (distinguishing permit conditions from “a requirement that [Mrs. Dolan] deed portions of the property to the city.”).

Thus, the Town urged the Court to recognize the limitation found by other courts in limiting Dolan to land dedication cases. See, e.g., Texas Manufactured Hous. Ass’n v. Nederland, 101 F.3d 1095, 1105 (5th Cir. 1996) (holding that Nollan and Dolan do not apply because “the Nederland Ordinance does not ‘extract benefits’ from [the plaintiff] in the Nollan sense of requiring some dedication of property . . .”); Harris v. City of Wichita, 862 F. Supp. 287, 294 (D. Kan. 1994), aff’d, 74 F.3d 1249 (10th Cir. 1996) (“The Supreme Court’s decision in Dolan was based on the facts of that case, namely that the City had required a dedication of property as a condition for granting a redevelopment permit.”); Clajon Prods. Corp. v. Petera, 70 F.3d 1566, 1578-79 & n. 21 (10th Cir. 1995) (“[W]e believe that the ‘essential nexus’ and ‘rough proportionality’ tests are properly limited to the contexts of development exactions where there is a physical taking or its equivalent.”); Southeast Cass Water Resource Dist. v. City of Burlington, 527 N.W.2d 884, 896 (N.D. 1995) (holding that Dolan is not applicable to a duty to pay for culvert improvements); GST Tucson Lightwave, Inc., v. City of Tucson, 949 P.2d 971, 978-79 (Ariz. Ct. App. 1997) (holding that Nollan and Dolan do not apply because “this case does not involve the City forcing Lightwave ‘to dedicate a portion of its public property to public use’”); Sprenger, Grubb & Assocs. v. City of Hailey, 903 P.2d 741, 747 (Idaho 1995) (Dolan is limited to real property exactions); Waters Landing Ltd. Partnership v. Montgomery County, 650 A.2d 712, 724 (Md. Ct. App. 1994) (impact tax “does not require landowners to deed portions of their property to the County”).

The Court rejected this distinction, however, noting that “[f]or purposes of determining whether an exaction as a condition of government approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved. The Dolan standard should apply to both.” Stafford at 639-40. In 2013, the U.S. Supreme Court in Koontz similarly held that Nollan/Dolan applied to monetary exactions. Koontz, 133 S. Ct. at 2603.
4. **The Legislative/Adjudicative Distinction is Rejected**

In *Dolan*, the Supreme Court expressly distinguished its holding from traditional zoning, exaction and development regulations that did not require the dedication of land from a property owner in an adjudicative manner.

The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

*Dolan*, 512 U.S. at 385.

As a result, many courts have limited the reach of *Dolan* to adjudicative decisions and found *Dolan* inapplicable to the application of legislatively created standards. See *Home Builders Ass’n v. City of Scottsdale*, 930 P.2d 993, 1000, cert. denied, 521 U.S. 1120 (1997); *Ehrlich v. City of Culver City*, 911 P.2d 429, 439 (1996), cert. denied 519 U.S. 929 (1996); *San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87, 105 (2002); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695 (Colo.2001) (“Application of the *Nollan/Dolan* test has been limited to the narrow set of cases where a permitting authority, through a specific, discretionary adjudicative determination, conditions continued development on the exaction of private property for public use.”); *Parking Ass’n of Ga., Inc. v. City of Atlanta*, 450 S.E.2d 200, 203 n. 3 (1994) (*Dolan* test did not apply to city’s legislative determination), cert. denied, 515 U.S. 1116 (1995) (Thomas, J., joined by O’Connor, J., dissenting from the denial of certiorari, noting conflict in lower courts on whether test from *Dolan* or *Agins* applied when a taking is alleged based on a legislative act); *Southeast Cass Water Res. Dist. v. Burlington Northern R. Co.*, 527 N.W.2d 884, 896 (N.D.1995) (stating that *Nollan* and *Dolan* do not “change the constitutional analysis for legislated police-power regulation”).

The Texas Supreme Court, however, was not persuaded.

While we recognize that an ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could “gang up” on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others. Nor are we convinced that a workable distinction can always be drawn between actions denominated adjudicative and legislative . . . . We think that the Town’s argument, and the few courts that have accepted it, make too much of the Supreme Court’s distinction in *Dolan*.

*Stafford* at 641.
5. **A Denial can be an Exaction**

Pre-dating the decision in *Koontz* by almost 10 years, the Texas Supreme Court addressed the argument of whether a permit approval with conditions, as compared to a permit denial because of the failure to consent to conditions, would be reviewed differently under *Nollan/Dolan*. While a permit denial for want of conditions was not factually before it, the *Stafford* Court left little doubt that it would view both permit approval with unconstitutional conditions, as well as permit denial for failure to submit to unconstitutional conditions, as the same for an exactions takings analysis.

The Town argues that no practical difference exists between approval on condition and denial for want of the condition, and if the former is going to be judged by the *Dolan* standard and the latter by the more lenient *Penn Central* factors, the government will choose simply to deny permission to develop at all, thereby hampering development even further than Stafford complains of here. One premise of the argument is undoubtedly true—there is no practical difference between the two government actions. But the other is not. When the practical effect is exaction, conditional approval and denial are both measured by the *Dolan* taking standard.

* * *

The government cannot sidestep constitutional protections merely by rephrasing its decision from “only if” to “not unless”. The constitutional guaranty against uncompensated takings is “more than a pleading requirement, and compliance with it [is] more than an exercise in cleverness and imagination.”

*Stafford*, 135 S.W.3d at 638-39 (quoting *Nollan*, 438 U.S. at 841).

6. **The Taking is Upheld, but the Attorneys’ Fees are Not**

Having determined that *Dolan* applied fully to the street improvement requirement at issue, the Court held that Stafford’s development, which would only account for 18% of the increased traffic on the road in question, could not be charged for 100% of the costs to improve the road. *Stafford* at 645 (“Conditioning development on rebuilding Simmons Road with concrete and making other changes was simply a way for the Town to extract from Stafford a benefit to which the Town was not entitled.”).

Importantly, the Court held, in contrast to the holdings of most other courts on this issue, that the government did not have to make an advance determination of rough proportionality, but could perform its studies “after the fact” to be used to justify the condition at trial. *Stafford* at 644 (“Stafford argues that the Town was required to make [the rough proportionality] determination before imposing the condition on development, but we agree with the court of appeals that while the determination usually should be made before a condition is imposed, *Dolan* does not preclude the government from making the determination after the fact.”) (emphasis in original). Additionally, the
Court upheld the court of appeals’ determination that Stafford could not recover attorneys’ fees and expert witness fees because its federal takings claim, which was the only claim for which such fees could be awarded, as a matter of law could not become ripe once Stafford had obtained compensation under the Texas Constitution. *Stafford* at 645-46.

C. A Legislative Response: Section 212.904 of the Local Government Code

In 2005, the Texas Legislature expanded the reach of *Stafford* in its enactment of Section 212.904 of the Local Government Code. Section 212.904 provides as follows:

**Sec. 212.904. APPORTIONMENT OF MUNICIPAL INFRASTRUCTURE COSTS.**

(a) If a municipality requires as a condition of approval for a property development project that the developer bear a portion of the costs of municipal infrastructure improvements by the making of dedications, the payment of fees, or the payment of construction costs, the developer’s portion of the costs may not exceed the amount required for infrastructure improvements that are roughly proportionate to the proposed development as approved by a professional engineer who holds a license issued under Chapter 1001, Occupations Code, and is retained by the municipality.

(b) A developer who disputes the determination made under Subsection (a) may appeal to the governing body of the municipality. At the appeal, the developer may present evidence and testimony under procedures adopted by the governing body. After hearing any testimony and reviewing the evidence, the governing body shall make the applicable determination within 30 days following the final submission of any testimony or evidence by the developer.

(c) A developer may appeal the determination of the governing body to a county or district court of the county in which the development project is located within 30 days of the final determination by the governing body.

(d) A municipality may not require a developer to waive the right of appeal authorized by this section as a condition of approval for a development project.

(e) A developer who prevails in an appeal under this section is entitled to applicable costs and to reasonable attorney’s fees, including expert witness fees.

(f) This section does not diminish the authority or modify the procedures specified by Chapter 395.

This new law provides developers with the attorneys’ fees and expert fees denied the developer in Stafford should they prevail in an appeal under the statute. Among the many unanswered questions presented by Section 212.904 are the following:

1. Does the “roughly proportionate” study requirement apply if the city requires the developer to bear the entire cost of the exaction versus only a portion of the cost?

2. What are the standards for a “roughly proportionate” exaction?

3. Is the legislatively-imposed “roughly proportionate” standard the same as the constitutionally-imposed “rough proportionality” standard discussed in Dolan and Stafford?

4. What criteria does the professional engineer that the city is required to retain to do the “roughly proportionate” utilize?

5. While Section 212.904 requires that the city retain the engineer for the study, can the city shift the costs of the study in whole or in part to the developer?

6. While a city cannot require a developer to waive its rights to appeal under Section 212.904, can a city and a developer enter into a development agreement wherein both parties agree that the exaction is “roughly proportionate” without the preparation of the required study?

III.

KOONTZ

The Court’s introductory paragraph sets the tone for decision that follows:

Our decisions in Nollan v. California Coastal Comm’n, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), provide important protection against the misuse of the power of land-use regulation. In those cases, we held that a unit of government may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a “nexus” and “rough proportionality” between the government’s demand and the effects of the proposed land use. In this case, the St. Johns River Water Management District (District) believes that it circumvented Nollan and Dolan because of the way in which it structured its handling of a permit application submitted by Coy Koontz, Sr., whose estate is represented in this Court by Coy Koontz, Jr. The District did not approve his application on the condition that he surrender an interest in his land. Instead, the District, after suggesting that he could obtain approval by signing over such an interest, denied his application because he refused to yield. The Florida Supreme Court blessed this maneuver and thus effectively interred those important decisions. Because we conclude that Nollan and
Dolan cannot be evaded in this way, the Florida Supreme Court’s decision must be reversed.

Koontz, 133 S. Ct. at 2591.

Factually, the case involved the submission of an application by Koontz to the St. Johns River Water Management District to develop 3.4 acres of wetlands and to permanently restrict the 11 remaining acres of his parcel. His proposal, however, did not comply with District’s regulations that required that 10 acres be preserved for every one acre of wetlands destroyed. In negotiations with Koontz, the District suggested that he either resubmit a compliant application to develop only one acre in exchange for 11 acres of protected land, or mitigate the harm of the noncompliant, three-acre request with his choice of off-site improvements to other wetlands in the watershed by either replacing culverts on one parcel, or filling ditches in another parcel. Id. at 2592-93. After Koontz refused to alter his plan or engage in any of the proffered off-site mitigation options, the District denied the application. Koontz sued the District alleging, among other things, that the proposed off-site improvements were unconstitutional exactions violating the essential nexus and rough proportionality requirements of Nollan and Dolan. Koontz, 133 S. Ct. at 2593.

While Koontz was successful in the lower courts, the Florida Supreme Court ruled against him. That court distinguished Nollan and Dolan on two grounds. First, the court thought it significant that in Koontz’s case, unlike Nollan or Dolan, the District did not approve Koontz’s application on the condition that he accede to the District’s demands; instead, the District denied his application because he refused to make concessions. Second, the court drew a distinction between a demand for an interest in real property (what happened in Nollan and Dolan) and a demand for money. Koontz, 133 S. Ct. at 2593-94. The U.S. Supreme Court granted certiorari and reversed the Florida Supreme Court ruling in favor of Mr. Koontz.

First, the Court addressed the argument that a denial of a permit for failure to comply with conditions should be viewed differently under Nollan/Dolan than the granting of a permit that imposes conditions. Koontz, 133 S. Ct. at 2594-98. The Court noted that the “unconstitutional conditions doctrine” vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up, and that Nollan/Dolan represent a special application of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits. The Court discussed that the Nollan/Dolan standard reflects the danger of governmental coercion in this context, while at the same time accommodating the government’s legitimate need to offset the public costs of development through land use exactions. Koontz, 133 S. Ct. at 2594-95. As noted by the Court, “[u]nder Nollan and Dolan the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.”
The Court articulated that the principles that undergird Nollan/Dolan do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so, recognizing such a distinction would enable the government to evade the Nollan/Dolan limitations simply by phrasing its demands for property as conditions precedent to permit approval. Koontz, 133 S. Ct. at 2595-96. The fact that no property was actually taken in this case did not change the Court’s analysis.

Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.

Id. at 2596.

Second, the Court addressed the argument that Nollan/Dolan standards are not implicated because the District “asked him to spend money rather than give up an easement on his land.” Id. at 2598. The Court distinguished its prior 1998 decision in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), where five Justices concluded that the Takings Clause did not apply to government-imposed financial obligations that “d[o] not operate upon or alter an identified property interest.” Id. at 540. The Court held that its Eastern Enterprises holding did not control in this case, where the demand for money did burden the ownership of a specific parcel of land. Because of the direct link between the government’s demand and a specific parcel of real property, the Court held that the Koontz matter implicated the central concern of Nollan/Dolan: the risk that the government may deploy its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed use of the property at issue. Koontz, 133 S. Ct. at 2598-601.

The District argued that subjecting monetary exactions to Nollan/ Dolan scrutiny would result in there being no principled way of distinguishing impermissible land-use exactions from property taxes. The Court, however, felt that the District’s argument exaggerated both the extent to which that problem is unique to the land-use permitting context and the practical difficulty of distinguishing between the power to tax and the power to take by eminent domain, noting that it is beyond dispute that “[t]axes and user fees ... are not ‘ takings.’ ” Koontz, 133 S. Ct. at 2600-601 (quoting Brown v. Legal Foundation of Wash., 538 U.S. 216, 243, n. 2 (2003)).

The Court further rejected the argument proffered by the dissent that the decision would create barriers for local governments to charge legitimate permit fees.

Finally, we disagree with the dissent’s forecast that our decision will work a revolution in land use law by depriving local governments of the ability to charge reasonable permitting fees. Numerous courts—including courts in many of our
Nation’s most populous States—have confronted constitutional challenges to monetary exactions over the last two decades and applied the standard from Nollan and Dolan or something like it. Yet the “significant practical harm” the dissent predicts has not come to pass. That is hardly surprising, for the dissent is correct that state law normally provides an independent check on excessive land use permitting fees. * * * * We have repeatedly rejected the dissent’s contention that other constitutional doctrines leave no room for the nexus and rough proportionality requirements of Nollan and Dolan. Mindful of the special vulnerability of land use permit applicants to extortionate demands for money, we do so again today.

Koontz, 133 S. Ct. at 2602-603 (citations omitted).

IV.

DEVELOPMENT NEGOTIATIONS POST-KOONTZ: CAN A CITY SAFELY NEGOTIATE ANYMORE?

Koontz’s determination that a governmental demand that a developer spend money could invite Nollan/Dolan scrutiny should come as no surprise to Texas practitioners given that the Texas Supreme Court in Stafford decided that very question in favor of developers 10 years ago. The other holding in Koontz -- that a permit denial for failure to comply with conditions, as well as a permit approval with conditions, must meet the heightened scrutiny of Nollan/Dolan -- was discussed only in passing in Stafford and is arguably simply dicta from the Texas Supreme Court.

This second issue, now firmly decided in Koontz, raises pragmatic concerns for governments that seek to negotiate development approvals with developers in order to address legitimate mitigation concerns. Remember, in Koontz, the Court ruled that the District’s two suggestions made prior to the permit denial were unconstitutional conditions that were required to satisfy the nexus and rough proportionality tests of Nollan and Dolan. This holding should raise concerns for Texas cities as to when a discussion on possible mitigation measures crosses the undefined line of negotiation to a “demand” that triggers heightened exactions scrutiny.

The prospect of measuring free-flowing mitigation ideas, which are fairly typical in most development negotiations, to the measurable requirements of Nollan and Dolan, is daunting. Many times, the “give and take” between a city and a developer occurs early on in the process when much of the information required for a final recommendation or decision has not been fully developed or shared. If a city just conceptually suggests a qualitative development condition, like the District did in Koontz when it suggested off-site mitigation measures without quantifying exactly how much off-site mitigation would be required, it potentially creates a situation that is very hard to fit into the rigors of a Nollan/Dolan analysis given the imprecise parameters of a quantitate suggestion. This could create a chilling effect on a city from offering meaningful and practical suggestions, especially at the early stages of negotiations, for fear of a Koontz-type claim. The value of sharing information must now be weighed against an unconstitutional conditions allegation.
Koontz did not attempt to craft a test, or to provide guidelines, to help either the public or private sector determine what types of negotiations will be seen as a demand subject to Koontz. When does a suggestion turn into a demand? Does it depend on the timing? Does it depend on who presents it? Does it matter whether the suggestion is oral or in writing? Is the determination a fact question for the jury, or is it a legal matter for the court to decide? These questions and more are left open by Koontz.

So, how should a city (and its recommending boards and staff) proceed when faced with a noncompliant application or development request? Should it just deny, without explanation, the application rather than risk providing any type of meaningful feedback that might be construed by the developer or applicant as a “demand?” Will alternatives proffered be viewed as demands? The options available include, but are certainly not limited to, the following:

1. **Just Say No!** Cities are not required to negotiate and can simply require strict compliance with legislatively-adopted development standards. If a submission is noncompliant, the decision-makers can simply vote to deny without offering any type of suggestions on what might allow the submission to become complaint or to obtain discretionary approval. By not offering feedback that a developer can assert was a required approval condition, you can avoid a Nollan/Dolan review. If the decision (without conditions) is challenged as a taking, the developer must show that the decision violated Penn Central or Sheffield. Indeed, the “avoid negotiation” option was noted by Justice Kagan in the Koontz dissent: “If every suggestion could become the subject of a lawsuit under Nollan and Dolan, the lawyer can give but one recommendation: Deny the permits, without giving [the developer] any advice—even if he asks for guidance.” Koontz, 133 S. Ct. at 2611 (Kagan, J., dissenting).

Of course, this option will not lead to better development, which typically occurs when there are free-flowing negotiations between the sides. Creativity and a true exchange of ideas will suffer under this model.

2. **Empower the Stakeholders.** Many times the concerns that hinder development approval come from the public and, in particular, those who feel that they are stakeholders in the community. City staff can encourage that the developer negotiate directly with stakeholders to see if compromise positions can be reached. If so, those compromise conditions can be integrated into the development application and become part of the approval conditions. As long as City staff does not participate in the negotiations, any conditions to development approval should not be considered as a demand by the city, thus triggering Koontz, but rather voluntarily-offered concessions by the developer to gain stakeholder support and, hopefully, city approval.

3. **Listen, but don’t offer Advice.** Given the fear of advice being seen as a demand triggering Koontz, a city board, council or commission might agree to negotiate, but only in the sense that they will tell the applicant that a proposal doesn’t meet standards (such as traffic mitigation), but not offer any proposals as to what the applicant can do to meet the standards. The developer can keep offering proposals until the city says “yes, that might work.” Of course, the city still runs the risk of
the developer claiming that the city is simply obtaining through the back door what Koontz says that they cannot ask for through the front door. Plus, the process is not efficient and will in many cases waste both time and money for all involved in the process.

4. **Negotiate and Enter into a Development Agreement.** If a city is willing to run the Koontz gauntlet and engage in good faith negotiations to address the city’s and community’s concerns, and ask for exactions to mitigate the development’s impacts, I strongly recommend that the negotiated results be memorialized in a development agreement. A development agreement, with appropriate consents and waivers, will demonstrate that acceptance by the developer of the benefits of project approval, as well as the agreed-upon burdens of project approval, are fair, even-handed and constitutional.

V.

**CONCLUSION**

Legally speaking, the U.S. Supreme Court in Koontz does not really add any more obstacles to government-developer negotiations than were most likely imposed by the Texas Supreme Court in Stafford. As a practical matter, however, I would expect that the attention brought about by Koontz will make both the development community and the public sector more aware of the limitations imposed by Stafford and Koontz and, hence, create the potential for the chilling effects on negotiations that this paper describes. Only time and real-life results will tell us just how much, if any, impact that Koontz will have on development exactions practices in Texas.